Social Media and the Ability of Kansas School Districts to Discipline Students

by Donna Whiteman

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By Donna Whiteman

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The Journal of the Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.
Hope to see you June 8th at...

KBA Awards & Installation Luncheon

11:30 a.m. - 1 p.m.

Hilton Garden Inn & Manhattan Conference Center
The judicial portion of the state budget is less than 1% of the total state budget. Yet, the third branch of government is struggling to pay its staff and perform its key functions. In fiscal year 2008, state general fund revenues provided 92% of judicial branch funding. In 2016, it was 78%. Despite an increased reliance on fee funding from 7% in 2008 to 21% in 2016, the judiciary is not able to meet its current funding needs. The third branch of government in Kansas brings in more than it spends. However, the majority of these funds do not stay with the judiciary and are returned to state and local governments and directed to various law enforcement-related training funds.

The judiciary has made cuts over the years; however, without more resources, the critical services provided in your courthouse cannot keep up. Improved efficiencies come from investing in improved technology and in people. The judiciary is struggling to keep its technological improvements going. Ninety-five percent of the judicial branch budget is for salaries. The Kansas court system has great staff and judges. However, Kansas judges rank last in salary. Kansas judges have not had a raise in eight years. Some judicial staff are taking second jobs to make ends meet. Non-competitive salaries mean Kansas is training—and then losing—quality staff members to federal and local governments and the private sector which pay more.

Funding for the judicial branch is at a critical point. Absent increased funding, the judiciary’s core mission of providing access to quality courts for all Kansans will continue to suffer, and the long term costs of repair will mount. What states do Kansans aspire to be ahead of in most rankings? Mississippi, Alabama? Both rank ahead of Kansas. Justice requires free, fair and functional courts. Give the judiciary a hand and advocate for a fully funded judicial branch.

The ABA and the KBA have partnered up to save you money! KBA members will receive a 15% discount on most all ABA books!

To get your savings code or for more information visit: http://www.ksbar.org/booksforbars

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.

ssix@ksbar.org
A
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t its heart, the Kansas Bar Association is a member
s
ervice organization. If you look at our products and

ervices, the way our committees, board and staff are
organized, and how the money flows in and out of the associa-
tion, it’s pretty clear—we’re here to serve you, our members.

This month, I’d like to pull the curtain back on how your dues
make the magic happen.

Membership dues account for 54% of the KBA’s operating
costs. The rest is earned through the products and services we
provide to you, to non-member attorneys, and to the public.
But your dues don’t support all kinds of KBA costs; the KBA
Bookstore, the Lawyer Referral Service, and the Kansas Bar
Foundation management services we provide are all covered
by income earned through those activities. The standard dues
of $265 paid by a member in our “regular attorney” category—an attorney in private practice who has been licensed for
more than three years—are distributed across the KBA like this:

<table>
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<th>Service</th>
<th>% of your KBA Dues</th>
<th>Amount of your KBA Dues</th>
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<tr>
<td>Administration Services</td>
<td>32.00%</td>
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Administration Services include costs associated with the
KBA’s 23 committees, the KBA’s officers and the board of
governors, our ABA delegates, and the staff devoted to the
financial and operational oversight of the KBA.

Membership dues help keep the Annual Meeting costs low
for you and assure you get a break on every CLE program you
take with the KBA. This year’s annual meeting, in Manhat-
tan, June 7 – 9, has a great keynote, on-point CLE hours,
and some fun social and networking events. And there’s golf!
Check out all the KBA’s CLE offerings here: http://www.ksbar.
org/events/event_list.asp?show=&group=&cstart=3%2F2
%2F2017&end=&view=&cid= (click on “Month View” to
see a calendar listing).

A portion of your dues supports the KBA’s law office man-
agement consulting service. Answers and assistance with any
question you have about the business of running a law firm,
about a transition in your practice, about technology, about
specific skills, about changes in the profession itself are avail-
able to you through the Law Practice Management service.
It’s a confidential service, provided by a licensed Kansas at-
torney, available only to KBA members, at no additional cost.
See more LPM information here: http://www.ksbar.org/page/
lomap.

The KBA has long been an advocate for the profession and
for good law. We work with the legislature to advance the
interests of the profession according to the legislative agen-
da you help us establish. We also work to support our judi-
cicial system and ensure the public has access to justice in the
courts. Each week KBA members receive The Advocate—a
report about legislative happenings and our efforts on behalf
of the profession. Read back-issues here: http://www.ksbar.
org/blogpost/985560/KBA-Advocate.

The entire KBA staff is just a phone call, e-message, or email
away. If you have a question about your membership benefits,
KBA resources, KBA policies or activities, Sections, commit-
tees, the board…anything related to the KBA or the bar in
Kansas, your dues ensure that you can get an answer. Your
dues also support a wide array of member benefits including
Casemaker—a suite of online legal research tools available
exclusively to KBA members. Need a job? Need to hire an
attorney? The KBA Career Center is devoted to the Kansas
legal employment market (http://www.ks.bar.associationcareer-
network.com/Common/HomePage.aspx). As of this writing,
there are 44 legal jobs posted! And, the KBA negotiates special
rates, benefits, and discounts on law office management tools,
insurance, office supplies, retirement planning, student loan
restructuring, and a whole bunch of other stuff just for you.
All the member benefits available to you can be found here:

A small portion of your dues also supports public education
and outreach by the KBA. The most visible of these efforts are
our Law Day, mock trial, and pro bono activities. The KBA
also publishes booklets and pamphlets about legal topics and
issues often encountered by the public. These pamphlets are
available online and in hard copy for free to KBA members -

As a “regular attorney” KBA member, you can choose to
join one of the KBA’s 26 sections at no extra charge. And, you
can join more sections for just $20 each. By affiliating with
other KBA members in a section, you get instant access to a
network of lawyers practicing in your field, or in a field of law
that interests you. Sections also provide newsletters, network-
ing opportunities and area-specific CLEs at a discount for sec-
tion members.

Your dues also support the publication of The Journal. The
Journal is a professionally edited, attorney-driven magazine
(10 issues/year) that contains substantive articles about the
law in Kansas, monthly features, appellate court updates, and
news about fellow KBA members. You also get weekly email
updates and Facebook and Twitter notices about bar events,
legislative actions (or lack thereof), new CLE offerings, and
other important news.

If you took advantage of all the KBA has to offer, and tallied
it up, the value of the benefits of being a KBA member could
amount to as much as $5,600.

See Infograph on Pg. 8
If you took advantage of all the KBA has to offer...the benefits of being a KBA member could amount to as much as $5,600.

– Jordan Yochim

About the Executive Director

Jordan Yochim studied anthropology (B.A.) and business (MBA) at the University of Kansas. He worked as a research administrator for a large state university before joining the KBA. In his spare time he serves as a member of the Douglas County Citizen Review Board and of a local nonprofit children’s organization.

jeyochim@ksbar.org

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Michael T. Crabb

I have lived most of my life in Johnson County. I am an alumnus of Blue Valley High School, Kansas State University, and the University of Kansas School of Law. I lived for short stints in Seattle, WA, Kansas City, MO, and Washington, DC, but always called Kansas home.

I am now a civil litigator with Kuckelman Torline Kirkland in Overland Park. I began my law practice in the general litigation department at Husch Blackwell. I focus on plaintiffs’ litigation, including commercial cases, catastrophic injuries, and insurance coverage / bad faith disputes. What I enjoy most is the personal connection with our clients, from the first meeting to discuss their worrisome legal challenge, all the way through to the celebration of a positive resolution.

My wife and I live in Overland Park with our three children, ages 11, 8, and 6, and a hamster called Nibbles. Our kids attend Blue Valley public schools. In my free time, I enjoy doing projects around the house and working on my vintage motorcycle.

My first interaction with the Kansas Bar Association was during law school as the inaugural recipient of the Case, Moses & Zimmerman scholarship by the Kansas Bar Foundation. Part of the criteria for that scholarship was demonstration of a bona fide intent to practice law in the state of Kansas. I was and I remain steadfastly committed to serve our state and its residents.

I am interested in serving on the Board of Governors because I want to help strengthen the public perception of our profession in a time when it appears to be in decline. As an example, for the first time in Kansas history, there is not one single licensed attorney serving in the Kansas Senate. This follows a national trend where the proportion of lawyer-lawmakers in state legislatures is at historic lows. One interpretation of this phenomenon is that lawyers are increasingly disinterested in serving as legislators. Another interpretation is that voters are increasingly distrustful of lawyers.

Regardless, perhaps now more than ever, our legal community needs strong advocates. There are sure to be many proposals in the coming legislative sessions that will directly impact the interests of the legal profession and its clients. Because we have fewer advocates inside the Statehouse, the KBA’s role will be especially important.

It would be an honor to serve you on the Board of Governors and I ask for your vote.

Diana C. Toman

Since September 2016, I have had the opportunity to serve as the District 1 Governor following Mira Mdivani’s election as Secretary-Treasurer. I was able to see firsthand the contributions the Board of Governors (“BOG”) makes to our legal community and the value my diverse legal, professional and personal experiences could bring to the BOG. I have very much enjoyed my service over the last several months and believe that I can build upon my initial contributions to the BOG and our legal community as your District 1 Governor. I humbly ask for your support of my candidacy for the position of District 1 Governor to continue the great work of the Kansas Bar Association in furtherance of our legal community.

Since November 2015, I have served as Senior Vice President, General Counsel and Corporate Secretary at Compass Minerals, a publicly traded essential minerals company. Beyond leading the legal function, I am also the executive sponsor for the Company’s Diversity and Inclusion Initiative and Sustainability Initiative. Prior to joining Compass Minerals, I held several senior level legal management positions at General Cable Corporation, a Fortune 500 global wire and cable manufacturing company, most recently as Vice President, Strategy and General Counsel, Asia Pacific and Africa, based in Thailand. My experience also includes multiple legal management roles, including corporate counsel and corporate secretary positions at Gardner Denver, Inc. and Waddell & Reed Financial, Inc. I began my career as an attorney with the law firm of Levy & Craig, P.C.

I am a graduate of the University of Kansas School of Law with a Master of Business Arts and Bachelor of Arts in political science and English from the University of Missouri-Kansas City.

I am a member of the Kansas, Missouri, Johnson County and American Bar Associations; the Society of Corporate Secretaries and Governance Professionals; the Association of Corporate Counsel; Association of Women Lawyers of Kansas City; The Central Exchange; National Association of Corporate Directors; and the National Association of Stock Plan Professionals. I have also been involved in the local community, including the Kansas City Repertory Theater’s Gala Committee (2016-present); Aubrey Bend Middle School PTO (Secretary, 2016-present); The Children’s Theater of Cincinnati (Board Member: 2012-2016); and Greater Cincinnati Green Business Council (Company Representative: 2011-2014), among others. In the last year, I have also had several speaking engagements, including continuing legal education events hosted by the Kansas Bar Association, American Bar Association, and ALM (Women, Influence and Power in Law Conference). In 2017, I have agreed to speak at events hosted by the Johnson County Bar Association and Georgetown Law School.
Outstanding Speakers
Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from January through March 2017.
Your commitment and invaluable contribution are truly appreciated.

Andrea G. Baran, Equal Employment Opportunity Commission, St. Louis, MO
Diane L. Bellquist, Joseph Hollander & Craft, LLC, Topeka
Greg Benefiel, Kansas Attorney General’s Office, Topeka
David E. Bengtson, Stinson Leonard Street LLP, Wichita
Dave Berson, Berson Law Group LLP, Overland Park
Susan Berson, Berson Law Group LLP, Overland Park
Stacia G. Boden, Wichita State University, Wichita
Daniel Buller, Foulston Siefkin LLP, Wichita
Anne E. Burke, Burke McClasky Stevens, Overland Park
Joshua Decker, Coffman, DeFries & Nothern, P.A., Topeka
Diana G. Edmiston, Edmiston Law Office LLC, Wichita
Burke W. Griggs, Washburn University School of Law, Topeka
Hon. Larry D. Hendricks, Shawnee County District Court Division 6, Topeka
Deborah L. Hughes, Office of the Disciplinary Administrator, Topeka
Anthony T. Hunter, Attorney at Law, Wichita
Deb James, Hampton & Royce, L.C., Salina
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Gordon Kirsten II, Foulston Siefkin LLP, Wichita
Daniel E. Lawrence, Fleeson, Gooing, Coulson & Kitch, LLC, Wichita
Anne McDonald, Kansas Lawyers Assistance Program, Topeka
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Penny Moylan, Office of the Disciplinary Administrator, Topeka
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Shea Stevens, Burke McClasky Stevens, Overland Park
Kelli J. Stevens, Kansas Board of Healing Arts, Topeka
Judith A. Taylor, Kansas Racing and Gaming Commission, Topeka
Terri Thomas, Kansas Bankers Association, Topeka
Michele L. Tunnell, Office of Administrative Hearings, Topeka
Tyler K. Turner, The Jeter Law Firm LLP, Hays
Hon. Teresa Watson, Shawnee County District Court Division 3, Topeka
Cheryl Whelan, Office of the Attorney General, Topeka
Publications
2016 Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise authoring or editing a 2016 published handbook. Your commitment and invaluable contribution are truly appreciated.

Public Company Mergers: Shareholder Litigation in Kansas, 1st Edition
Kelly Stohs, Kansas City

Practitioner’s Guide to Kansas Family Law, 2016 Supplement

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2016 Annual Survey of Law

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Individuals who gave so generously of their time and expertise authoring or editing a 2016 published handbook.

The Kansas Bar Association would like to extend a special thank you to and recognition of the following:

Your commitment and invaluable contribution are truly appreciated.

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It is interesting how the mind organizes, packages, and recalls memories with varying degrees of clarity. When looking back, I see that college shaped my career—and life—in many ways that now seem quite clear. I remember checking the election results early in the fall to find I had been elected one of the freshmen representatives on Student Senate. This was fortuitous for many reasons, though most important was serving with the woman who would one day be my wife.

Another memory that I have called upon often took root during an independent study entitled, “Political Ideologies.” I decided before my junior year to add political science as a second major and needed the philosophy course to complete my degree. The class was unavailable, but one of my professors, Dr. Bret Billet, was kind enough to teach the content in a one-on-one format. Though demanding, the discussions forced me to prepare a daily defense for what I knew. It was rigorous and invaluable.

We discussed a wide variety of political systems and spent a great deal of time on Plato’s Republic and other Socratic dialogues. Plato’s writings shaped not only my thinking on governance but also my approach to learning, participation in meetings, and even mere conversation. The memory of unpacking the text remains just as clear as seeing my first election results in writing.

There was a sequence between Socrates and his companions that I remembered as jovial banter. The culminating point occurred after Socrates summarized an idea, and his friend chided him with a response along the lines of “that’s so like you, Socrates. Listen in silence and then summarize everything as if it were your own idea.” This idea of listening well and synthesizing struck me as the ideal approach in many settings—particularly law school.

While my memory from college served me well as sound advice, it unfortunately belied the actual text from The Republic. As I prepared to cite the text, I could not find the sequence in my books. I subsequently sought the advice of an expert.

Dr. Ruby Blondell, Professor of Classics at the University of Washington, focuses on Greek intellectual history, and she steered me to the following passage in Plato’s Republic:

Thrasy machus: Here you have the wisdom of Socrates, to refuse himself to teach, but go about and learn from others and not even pay thanks therefor.

Socrates: That I learn from others, you said truly, Thrasy machus. But in saying that I do not pay thanks you are mistaken. I pay as much as I am able. And I am able only to bestow praise. For money I lack. But that I praise right willingly those who appear to speak well you will well know forthwith as soon as you have given your answer. For I think that you will speak well.

Thrasy machus: Hearken and hear then. I affirm that the just is nothing else than the advantage of the stronger. Well, why don’t you applaud? Nay, you’ll do anything but that.

Dr. Blondell added: “The general point you are arguing—the importance of listening carefully and exchanging ideas thoughtfully—is highly Socratic/Platonic, and in fact is the foundation of the Socratic Method. But I don’t think that’s the point of your specific passage.” And so the clarity of my memory proved hazier than I recalled.

But my error perhaps illustrates my original objective better than my memory of Plato’s writing. The conclusions of a singular mind are far inferior to the results when multiple minds can endeavor together. Whether early in one’s career or advanced, another perspective can yield great benefit when used to refine one’s work.

The need for collaboration is important in the workplace, but it is even more essential when establishing policy. There are many reasons why so many words flow from mouth and paper on the topic of government. First, the subject is important because it affects so many. Second, the answers are seldom clear. Even Israel once decided on a monarchy with the explanation: “God, you’ve been a pretty solid king, but we have a better idea to really make this country hum.” Evaluating how a single law—even a simple one—will work in practice is a great unknown with imprecise indicators of cause and effect. It follows that hearty debate will accompany any proposals on changing our laws.
Upcoming CLE Schedule

Live:

Lunch and Learn:
You Are What You Write!
Ethical Implications of Everyday Legal Writing
April 6, 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

2017 Midwest Intellectual Property Institute
May 5, 2017
Sprint Corporation, Overland Park

2017 Health Law CLE
May 12, 2017
Hyatt Place Kansas City, Lenexa

2017 Appellate Law CLE
May 19, 2017
Kansas Law Center, Topeka

2017 Solo and Small Firm Conference
May 26-27, 2017
DoubleTree by Hilton, Lawrence

Webinar:

KBA Webinar:
Kansas Unemployment Law
April 4, 2017 (Noon-12:50 PM)

KBA Webinar:
Non-Profits: How to Start and
Maintain a Tax Exempt Organization
April 5, 2017 (Noon-12:50 PM)

KBA Webinar:
What’s Next for ERISA and the ACA?
April 11, 2017 (Noon-12:50 PM)

KBA Webinar:
Title VII Updates: So What’s New?
April 12, 2017 (Noon-12:50 PM)

Mesa CLE Webinar:
Don’t Be an Outlaw:
The Ethical Imperative to Follow the Law
April 19, 2017 (Noon-1:00 PM)

Mesa CLE Webinar:
Loose Lips Sink Partnerships (and Clients Too):
The Ethical Way to Honor Client Confidentiality
April 25, 2017 (Noon-1:00 PM)

Mesa CLE Webinar:
The 2017 Ethy Awards
April 29, 2017 (10:00 AM-12:00 PM)

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LITIGATION CLE

April 28, 2017
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Yet this is where my memory of Plato’s Republic is so important. Before the debate occurs, we must all listen. Not listening for a chance to lecture on a pre-conceived belief but listening to hear. As Stravinsky observed, even a duck can hear; “to listen is an effort.”4 I am passionate about policy and politics, but despite working hard to know the subject, I lean on another more common misquote of Socrates in that “I know that I know nothing.”5

This knowledge makes it far easier to lean on the wisdom of others with humility and openness. There are many fingerprints on this column from others who helped shape the end result. In addition to Dr. Blondell, my wife, Tara, and my sister, Anne Summers, both offered their feedback and edits. The KBA staff took my words and continued refining. And this all stacks on top of a foundation provided by my parents, teachers, and countless colleagues along the way. Perhaps if I continue in my effort to listen well, I might someday retain an actual quote from Socrates and find that maybe I know just a bit beyond nothing.

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

1. Thank you to Dr. Blondell for lending time and expertise during my treasure hunt. I greatly appreciate the help.
3. 1 Samuel 8 (paraphrased).
Economics of Law Practice in Kansas

The 2012 survey set a participation record with approximately 1,400 usable questionnaires returned. That participation rate more than doubled the participation in the prior studies from 1997 and 2005, giving us a statistically valid sample size. In addition, more detailed and timely questions were asked, allowing the data accumulated to be more relevant as planning tools.

We need your participation again. To maximize the value of the data accumulated, we need to meet or exceed the participation rate in 2012. Getting usable responses from at least 1,500 lawyers this month will not only provide insight into the practice of law in Kansas in 2017, it will provide a second data point with 2012 to give us the start of a trendline – how is the practice changing?

The data obtained in 2012 that will be sought again in 2017 includes:

Demographics

“The typical private practitioner [in Kansas] is 49 years of age and the typical non-private practitioner is 48 years old. Females represent 32% of private practice respondents while representing 49% of all non-private practitioners. About 89% of private practitioners work full-time, compared with 95% of all non-private practitioners. Private practitioners have been in practice for 20 years and non-private practitioners, 19 years.”

“Half of all respondents work as solos or in two-person firms. About 41% of non-private practitioners work in organizations with 6 or more attorneys.”

“Private practitioners are generally more active in community affairs than non-private practitioners.”

Economic Indicators

“The median taxable income reported for all private practice respondents (part- and full-time) is $90,000.”

“The median taxable income reported for all non-private practice respondents (part- and full-time) is $77,000.”

“The 2012 reported median hourly billing rate is $200.”

“Both median and mean values for total compensable work time is 37 hours per week and 50 hours for total professional hours worked per week, inclusive of marketing, office administration, etc.”

Job-Related Stress

The single largest stress factor for private practice respondents in 2012 was the cost of health insurance with 78% citing it as contributing “very much” or “some-what” to job-related stress (compared to 85% of non-private practitioners). The largest stress factor for non-private practitioners was office politics where 96% of respondents indicated as “very much” or “some-what” a factor in their stress. Comparing responses overall, non-private practitioners appeared to report considerably higher levels of stress over a broader variety of concerns than did private practitioners.

Technology

The 2012 survey indicates that 48.2% of all respondents used electronic filing for court pleadings always or usually. (At the time, the only mandatory electronic filing courts were federal.)

Several tools that regularly appear as “must haves” for lawyers in national legal publications still had not taken hold among Kansas private practitioners, according to the survey. Only 10% of respondents were using eDiscovery software and just 13% were using trial presentation software. Accounting, time and billing, and electronic calendaring had finally reached 60% or better use by respondents and WordPerfect was still hanging on with 41% of lawyers surveyed compared to Microsoft Word at 89% (meaning many lawyers are probably duel-wielding word processing tools). Document assembly tools were in use with just 25% of respondents.

Marketing

Kansas lawyering is still a hands-on business with the most used marketing tool being networking among other lawyers. It is followed closely, however, by a firm website. Social media like Facebook and LinkedIn reached 38% use which put it a few paces behind actual socializing or client entertainment at 45%.

The Pitch

The 2017 survey will be hitting email inboxes within days and we need you to complete the anonymous survey to help us improve the data available to Kansas lawyers. The survey is rather detailed but most respondents in 2012 reported it took them less than 30 minutes to complete. Once you have completed your survey, please check in with your colleagues and peers – KBA members or not – to encourage them to do the same. The broader the base of respondents, the more statistically accurate the resulting picture about the economics of law practice in Kansas. Urban and rural, solo and big firm, part-time and full-time, public and private lawyers are all asked to participate.

Lawyers who participated in the 2012 survey were provided the full report free of charge regardless of whether they were KBA members – a $100 value. (KBA members can still download the report free at ksbar.org/page/economics_report.)

The same deal holds for this effort. Lawyers willing to assist with approximately 30 minutes of their time answering the survey contribute to a valuable data-gathering effort and get a full copy of the report free of charge.

Your participation can ensure that all Kansas lawyers have access to the best possible data on practice in our state.

About the Author

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

kslpm@larryzimmerman.com
Effectively Mentoring New Attorneys: Connecting Law School Experiences to Law Practice

All attorneys know legal education does not end upon graduation; law school provides only so much context for the actual practice of law. As mentors, peers, and colleagues, experienced practitioners play an important role in the transition from law school to law practice. Novice attorneys rely on more experienced attorneys to train them how to practice law. Therefore, it is important for experienced attorneys to know what law students learn in law school and how to mentor novice attorneys to ensure a speedy, efficient transition to law practice.

After years debating the nature of legal education, the ABA recently implemented new accreditation standards. The new ABA standards require law schools to prepare students “for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” In addition to teaching students substantive and procedural law, the ABA now requires law schools to implement learning outcomes that include a variety of legal skills. While the ABA requires law schools to evaluate learning outcomes, as it aptly points out, under the new standards law schools are not required to ensure that students accomplish the outcomes before graduation. As future employers of these law students, attorneys should be aware of the new standards so they can set suitable expectations and foster learning opportunities for new law graduates.

Experienced attorneys are well positioned to foster learning opportunities for novice attorneys transitioning to law practice. These learning opportunities are more effective and the transition is smoother when the experienced attorney directly connects the novice’s prior learning environment to the task at hand.

Connecting law school to law practice is the best way to do this for the novice attorney. The experienced attorney should explicitly draw these connections so the novice can more easily transfer knowledge learned in law school to law practice.

To understand how explicitly connecting law school experiences to law practice benefits the novice attorney, it is helpful to think of the brain like a computer. As we gather information it is “encoded” in our long-term memory. During the encoding process, the brain stores the information in schemata—much as we organize documents in folders on our computer. The schemata are tied to our learning environment. When we need the information in the future, our brain retrieves it from the schemata and applies it to the new situation. But, just as when we try to find documents on our computer, we have to remember where we stored the information. Helping novice attorneys locate the stored information can speed up the retrieval process and minimize the learning curve, which creates efficiency, increases productivity, and leads to automaticity. Unfortunately, novices have a difficult time remembering where they stored the information when faced with an unfamiliar task. Thankfully, experienced attorneys can facilitate retrieval.

Retrieving previously learned information is easier when there is a connection between the prior learning environment and the current task. For example, writing a summary judgment brief for the first time will take less effort when a novice connects the task to the law school learning environment. The task will be less overwhelming and foreign once the novice realizes the persuasive brief-writing skills learned writing an appellate brief for moot court are directly applicable to the current summary judgment brief. But drawing the connection between the prior learning environment—moot court—and the new task—summary judgment—is difficult for a novice. Experienced attorneys can facilitate this process by explicitly drawing connections between a novice’s law school experiences and the new setting of law practice. Surprisingly, simply telling the novice that the summary judgment brief is similar to the moot court brief will help transfer the brief-writing skills learned in law school to the new brief-writing task.

To do this, experienced attorneys need to know what law school experiences the novice has had. Law schools offer a wide-range of legal skills courses, clinics, externships, internships, and experiential learn-
ing opportunities. Many doctrinal courses now incorporate skills into their curriculum. Writing courses have greatly expanded the types of legal documents students write. Moot court programs have exploded. Transactional LawMeets provide competitions for transactional problem solving and document drafting. Law schools are adding clinics and externship opportunities. At KU, we have a new 6th Semester in D.C. program that provides externships with government agencies, think tanks, and nonprofit organizations. Law students are getting more real world experience than ever before.

With the new ABA standards requiring law schools to focus more on teaching legal skills, law schools will continue to create and expand legal skills, clinical, and experiential learning opportunities. This new focus on skills education will provide a wealth of learning environments for the novice attorney to draw upon after graduation. Experienced attorneys can foster learning opportunities and facilitate the transfer of these skills from law school to law practice by taking a few minutes to identify prior learning environments and deliberately draw connections to the legal task at hand. Connecting these experiences to the new tasks of law practice will minimize the time it takes your new associate to be a productive, independent member of your team. It is well worth the investment!

About the Author

Chelsi Hayden is Associate Clinical Professor at the KU School of Law. She graduated from KU Law in 2001, Order of the Coif, and was a member of the Kansas Law Review. Prior to joining the KU faculty, she served as chambers counsel to the Hon. Carlos Murguia, U.S. District Court for the District of Kansas, and practiced business litigation at Shook, Hardy & Bacon LLP.
Transforming the Culture

Do you smoke? Did you ever smoke? Do you know people who used to smoke and quit? Do you remember billboards with the Marlboro Man? Or the times when TV newscasters would smoke on camera? (Hint: Walter Cronkite announcing the death of JFK in 1963.) Lots of people I know, or knew, used to smoke, and they smoked anywhere and everywhere. Everyone had ashtrays, and cigarettes were under a dollar a pack.

What happened? Well, for one thing, the Surgeon General came out with a report that smoking was bad for you. January 11, 2017 was the 53rd anniversary of its release. Slowly, but very profoundly, society changed. Laws changed. Attitudes changed. Behaviors changed. 1

And now, a new Surgeon General has issued a new report on alcohol, drugs and health in which he declared a public health emergency,2 as outlined in the Forward to the Report by Kana Enomoto.3

Substance misuse is one of the critical public health problems of our time. The most recent data on substance use, misuse, and substance use disorders reveal that the problem is deepening and the consequences are becoming more deadly than ever. There is an urgent need to raise awareness about the issue. At the same time, we need to spread the word that substance misuse and addiction are solvable problems. We can, and must, inspire and catalyze action on this crisis—seventy-eight people die every day in the United States from an opioid overdose, and those numbers have nearly quadrupled since 1999—The addiction problem touches us all. We all need to play a part in solving it.

This report about the deep and widespread crisis in the general population is quite similar to the recent ABA/Hazelden-Betty Ford Report on the acute problems of substance abuse and mental illness in our own legal community.4 And so it seems as though many events are converging at the same time to bring a new perspective and focus to the legal profession. We seem to be starting to realize that lawyers experience a lot of stress, that they often either self-medicate with substances or sink into debilitating depression, that many do not seek treatment for what are very treatable conditions (often due to stigma), and that our current legal culture is not conducive to a healthy life style and self-care. There’s a long tradition of high expectations by firms, a certain machismo attitude that we are tougher than the average bear, and the "work hard, play hard" mindset. It’s a tradition that does not value taking positive action to maintain physical or psychological health and well-being.

And it costs us—money from lost productivity, health, satisfaction from our practice, and too often, even law licenses and lives. Some of us pay that price as individuals, but all of us pay it as colleagues and members of the legal community. So enough with the gloom and doom. I only set out these facts to establish that there is a troubling situation. But the real message is that we can change! We can make ourselves better, one lawyer at a time, and eventually transform the culture of the legal profession. We can change attitudes and behaviors, just like that old Surgeon General’s Report did 53 years ago.

We have already begun, right here in Kansas, to explore many ways to wellness, including mindfulness, awareness, and the benefits of those basic components of self-care called healthy diet and regular exercise. I see it at the national level, too. For example, the Lawyer Assistance Programs in most states now offer support and services for a broad array of debilitating conditions, and they do much more legal education on both the problems mentioned here and ways to prevent or treat them. The first week of February, the ABA at its Mid-Year Meeting approved a resolution recommending a change to the Model Rules regarding continuing legal education. The new rules include three specialty credits that state licensing agencies are urged to require. They would cover ethics, diversity and inclusion, and mental health and substance abuse (Resolution 106). The Model Rule would require one hour of CLE on those topics once every three years.

Speaking of the ABA, I am happy to tell you that the ABA Commission on Lawyer Assistance Programs is holding its Annual National Conference in Kansas City, October 17-19, 2017. I borrowed the title of this article from the theme for this year’s event: Transforming the Culture. Nothing less is needed to respond to the current health emergencies in the legal profession and the American public. There will be experts and nationally known speakers, (maybe even Jeena Cho, author of "The Anxious Lawyer"), so consider attending. These topics are not just for Lawyer Assistance Programs, they can inform and inspire each of us as we transform ourselves and our profession.

About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission at its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.

mcdonalda@kscourts.org

Building Cultural Bridges and Living in Peaceful Coexistence

I earned my undergraduate degree in Medinah, the second most sacred city for Muslims after Makkah. Some of the classes I took in my undergraduate studies included Islamic jurisprudence in several schools in Islam, principles of jurisprudence, Islamic law of inheritance, Islamic economics, contracts, judiciary in Islam, Islamic political law, and Islamic education. I earned my bachelor’s degree in 2008 with distinction and honor and then pursued my master’s in Islamic law and graduated in 2013 with distinction and honor. During my master’s degree studies, I focused on family law, the criminal code, and financial law. With this background, I now intend to pursue LL.M. and S.J.D. degrees in programs that focus on international trade and other kinds of law including: contract, tort, constitutional law, criminal law, civil procedure, jurisdiction, administrative law, property, and family law.

My interest in international trade and civil law stems from their significance to the individual as well as the whole society. Investigating these fields will allow me to gain more knowledge on the specific laws concerning the rights and obligations among people. Additionally, I would like to dig deeper into these fields because I already have solid background knowledge about them from an Islamic perspective. Now I would like to expand my horizons and explore other international laws and law in the United States.

To follow my dream and fulfill my goals, I decided to apply to the law school at KU which has a wonderful reputation and is replete with stories of people who have become successful in their careers. I still recall the first moments after I learned that I had been admitted to the KU School of Law; I was more than happy because my dream had come true.

The KU School of Law is the best place for me because of the sense of community the faculty and staff maintain with the students and the school’s dedication in supporting international students. I have found friendly people who are very kind and caring. They have greeted me and made me feel at home. Since classes began, I have "knocked myself out" acquiring more knowledge about the American justice system. I faced many challenges. One of them was reading cases. It was like pulling teeth getting myself to read so many pages in depth every day, to write an accurate and specific memorandum, and to cite from the Bluebook. Fortunately, I have had wonderful, competent professors and classmates who would give the shirt off their back to help me. As time went on, I overcame most of the difficulties I had at the beginning of the semester. I felt more comfortable participating in the class.

I have come to the United States to follow my dreams and to help build a bridge of knowledge, cultural awareness, civility, and respectful communication between the east and the west. When I was in Medinah, I often found myself dreaming of how we could live in peaceful coexistence despite a world full of conflicts between people. Since I have been living in Lawrence, I have had an excitement and curiosity in a new stage of my life. With these experiences, I believe, the answer is yes. With more education and justice, we could live together in harmony on this planet.

Finally, I would say my slogan in life is what Martin Luther King, Jr. once said, “Law and order exist for the purpose of establishing justice, and when they fail in this purpose, they become the dangerously structured dams that block the flow of social progress.” This powerful quote expresses my perspective on the significant influence of law over any given society. Personally, I strongly believe that law is a crucial pillar ensuring the continued existence of modern societies. In fact, law is the key to stability, prosperity, improvement, and—most importantly—peace. People across the world must remember to work together, with respect and love, to pursue this goal.

About the Author

Bander Almohammadi is an LL.M student at the University of Kansas School of Law. Upon graduation he plans to pursue the S.J.D. degree at KU Law. He was born and grew up in Medinah, Saudi Arabia, and moved to Lawrence with his wife and two children to pursue his legal education in the United States. He earned his bachelor and master’s degree from Islam University in Medinah, where he taught as a teaching assistant for several years. Following graduation, he plans to teach and practice in the areas of international trade or civil law.
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Social Media and the Authority of Kansas School Districts to Discipline Students

By Donna L. Whiteman
Assistant Executive Director of Legal Services
Kansas Association of School Boards
Sweeping changes in technology in the past 20 years including the internet, cell phones, smart phones, Snapchat, and digital social media have created new legal challenges for public school administrators and their authority to discipline students. In *Tinker v. Des Moines Independent Community School District*, a case concerning students who were disciplined for wearing black arm bands in protest of the Vietnam War, the U.S. Supreme Court acknowledged that students retain the constitutional right of free speech in the public school setting. While recognizing the need for school administrators to maintain a conducive learning environment, the Court limited restrictions on student speech to situations where school officials could demonstrate that the student’s speech resulted in substantial disruption of school activities or material interference with the rights of others.

While *Tinker’s* general rule of “substantial disruption” or “material interference with the rights of others” originally addressed student speech that occurred at school, several narrow exceptions have been carved out by succeeding cases. In *Bethel School District No. 403 v. Fraser*, the Supreme Court ruled school officials may limit student speech which is “lewd, vulgar, indecent and plainly offensive.” In this case, a student was suspended for delivering a sexually charged nominating speech for a fellow student at a school assembly. The Court recognized that the teaching of values is an important function of public schools, and the First Amendment rights of students are not the same as those of adults. The Court stated that schools “may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive conduct” and concluded it was “a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”

In the case of *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme Court recognized that schools may also regulate school-sponsored speech that a reasonable observer would view as the school’s own speech, on the basis of any legitimate pedagogical concern. *Hazelwood* involved controversial articles published in the school newspaper about other students who were single parents, and the Court broadened the right of school officials to reasonably regulate school-sponsored speech including “any expressive activity which students, parents and members of the public might reasonably perceive to bear the imprimatur of the school.” A school’s regulation of the style and content of student publications is permissible as long as the regulation is reasonably related to legitimate pedagogical concerns.

Finally, in *Morse v. Frederick*, the Supreme Court held that even in the absence of substantial and material disruption, schools may restrict student expression that they reasonably interpret as promoting illegal drug use. In *Morse*, a student alleged his First Amendment rights were violated when he was suspended for waiving a banner stating, “Bong Hits 4 Jesus” while students watched the Olympic Torch run through town at an off-campus, school activity. The Court noted the unique characteristics of the educational environment, coupled with the state’s interest in stopping drug abuse and recognized the school district’s authority to restrict student expression it reasonably believed promoted drug abuse.

In Kansas, the Kansas Pupil Suspension and Expulsion Act gives Kansas school boards broad authority to define the types of conduct which the board considers grounds for suspension or expulsion from school. By statute a Kansas school district is authorized to suspend or expel a student for the following reasons:

a. Willful violation of any published regulation for student conduct adopted or approved by the board of education.

b. Conduct which substantially disrupts, impedes or interferes with the operation of the school.

c. Conduct which endangers the safety of others at school, on school property or at a school supervised activity or which substantially impedes
social media and disciplining students

- upon or invades the rights of others at school, on school property, or at a school-supervised activity.
- Conduct which would constitute the commission of a felony by an adult under state law.
- Conduct which would constitute the commission of a misdemeanor by an adult under state law, but only if such conduct occurs at school, on school property, or at a school-supervised activity.
- Disobedience of an order of a teacher, peace officer, school security officer, or other school authority when such disobedience can reasonably be anticipated to result in disorder, disruption or interference with the operation of the school or which substantially and materially impinges upon or invades the rights of others.

The statutory authority to suspend students for misdemeanors is limited by K.S.A. 72-8901(e) to “conduct at school, on school property, or at a school-supervised activity which, if the pupil is an adult, constitutes the commission of a misdemeanor or, if the pupil is a juvenile would constitute the commission of a misdemeanor if committed by an adult….” However, this limitation that the conduct occurs at school, on school property, or at a school-sponsored activity is not included under (d) which allows school districts to discipline students for “conduct which… constitutes the commission of a felony…”

A school district’s authority to adopt student conduct policies is broad but not unlimited. In Blaine v. Board of Education, the Kansas Supreme Court held that school regulations must not be arbitrary, oppressive, or unreasonable. To meet this “reasonable standard,” student discipline policies and regulations should further the educational purposes of the school, and the means adopted to accomplish the purpose must be appropriate to the district’s educational mission.

While courts are generally reluctant to second guess the decisions of professional educators in student discipline cases, Kansas law specifically addresses the student’s due process rights when a school district imposes a short-term suspension or a longer expulsion. School districts can impose a short-term suspension of up to 10 days for student misconduct. A student is entitled to oral or written notice of the charges, including the right to be informed of the basis for the charges. If the suspension is imposed immediately, the student has the following short-term suspension due process rights:

- The right to be present;
- The right to be informed of the charges;
- The right to be informed of the basis for the accusation; and
- The right to make statements in defense or mitigation of the charges or accusation.

In rare cases, a school district may impose a short-term suspension without a hearing if the student’s continued presence endangers other persons or property or is substantially disrupting or interfering with the operation of the school. If this occurs, the student must be provided with an opportunity for an informal hearing as soon as practicable. The hearing must occur not later than 72 hours after the suspension is imposed.

School districts are required to provide more formal procedures when they propose to suspend a student for an extended term (up to 90 days) or expel a student (up to 186 school days). The notice of the proposed extended-term suspension or expulsion must inform the student and his parents of the date, time and place where the hearing will be held. The hearing must be held not later than 10 days after the date of the notice.

At the expulsion or extended term suspension hearing, the school district hearing officer must ensure the student the following rights:

- The right to have counsel (or any other advisor) of the student’s choice present;
- The right to receive the advice of counsel;
- The right of the parents or guardians of the student to be present at the hearing;
- The right to hear or read a full report of testimony of witnesses against the student;
- The right to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;
- The right to present the student’s witnesses in person or the testimony by affidavit;
- The right to testify on the student’s own behalf and give reasons for the conduct in question;
- The right to have an orderly hearing; and
- The right to a fair and impartial decision based on substantial evidence.

The school district has the burden of proof to show there is good reason for the student’s suspension or expulsion. Written notice of the result of a hearing imposing an extended term suspension or expulsion must be provided to the student or his parents within 24 hours after the determination of the matter.

A student over the age of 18 or the parents may appeal the hearing officer’s decision to the board by filing a written notice of appeal not later than 10 calendar days after receiving the written notice of the result of the hearing. The appeal must be heard not later than 20 calendar days after the notice of appeal is filed. Notice of the time and place of the appeal hearing must be provided to the student and his or her parents at least five days prior to the hearing.

While Kansas law provides school districts with wide authority to discipline students for conduct that occurs at school, on school property and at school-sponsored events, sweeping changes in the use of technology by students have resulted in the expansion of Tinker’s “substantial disruption” or “material interference” being applied to students’ off-campus use of technology.

Attacks on School Personnel

The issue of disciplining a student for off-campus speech was addressed in the case of J.S. ex rel. Snyder v. Blue Mountain School District. J.S. was an eighth-grade honor student who had never been disciplined in school prior to February 2007, when she was suspended for ten days for creating a fake Myspace profile of her principal, Mark McGonigle. The profile was created at J.S.’s home, on a computer belonging to her parents. The profile did not identify Mr. McGonigle by name, school or location, though it did include his photograph from the school’s website.
J.S.'s profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family.\textsuperscript{20} J.S. testified the profile was intended as a joke, and the record indicated "that the profile was so outrageous that no one took its content seriously."\textsuperscript{21} Although the profile was initially available to anyone who knew the URL or found it by searching for a term it contained, J.S. designated the post as "private," which limited access to her Myspace friends.\textsuperscript{23} Internet filters prevented viewing Myspace on the school computers.\textsuperscript{24}

The school district asserted that "general rumblings" and discussions in class about the profile caused disruption at school.\textsuperscript{25} While one teacher testified he instructed his students three times to stop talking in math class, and he had to raise his voice before they stopped, he admitted he frequently had to tell his students to stop talking about various other topics in his class.\textsuperscript{26} The school claimed the incident had disrupted the school counselor's job activities, because she had to cancel counseling appointments to supervise student testing for another employee who was asked to sit in on meetings with McGonigle, J.S. and her parents.\textsuperscript{27}

The district court granted summary judgment to the school district and upheld the suspension of J.S. based on the Bethel School District v. Fraser "vulgar and offensive" standards.\textsuperscript{28} The court acknowledged that Tinker did not apply because the district had not demonstrated "substantial and material disruption" to school operations.\textsuperscript{29}

On appeal, the Third Circuit Court of Appeals noted school officials perform "important, delicate and highly discretionary functions and federal courts "generally exercise restraint when considering issues within the purview of public school officials."\textsuperscript{30} However, the court noted protection of constitutional rights "is nowhere more vital than in the community of American schools," and to prohibit the expression of an opinion, the court held that the school must demonstrate "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."\textsuperscript{31} Schools may not curtail speech merely "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."\textsuperscript{32}

The school district argued that it was justified in suspending J.S. for off-campus speech under Fraser, since J.S.'s speech was "lewd, vulgar, offensive and had an effect on the school and the educational mission of the District."\textsuperscript{33} The court rejected this argument, holding "Fraser does not apply to off-campus speech."\textsuperscript{34} Noting "neither the Supreme Court nor this court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school," the court reversed the summary judgment entered in favor of the school district and remanded the case to the district court to determine the appropriate relief.\textsuperscript{35}

In order for school districts to discipline students for off-campus speech, there must be more than a tenuous relationship between the speech and the school. In Layshock ex rel Layshock v. Hermitage School District, the Court found copying the principal's photo from the school website and accessing the fake profile on a school computer did not create a sufficient "nexus" to connect the speech to the school environment to allow the district to discipline the student.\textsuperscript{36} Layshock, a high school senior, was suspended for ten days and placed in an Alternative Education Program, banned from all extracurricular activities, and barred from participating in graduation after he created a parody profile of the school principal at his grandmother's house.\textsuperscript{37} No school resources were used except for a picture of the principal from the school's website.\textsuperscript{38} The profile gave bogus answers to fake interview questions that were sexually suggestive and indicated the principal drank excessively, used drugs and committed theft. Justin gave selected friends access to the page, and it reached most of the student body.\textsuperscript{39} Three other students also posted unflattering profiles of the principal that were more vulgar and offensive than Layshock's. Layshock used a computer in his Spanish classroom to access the Myspace profile, and he attempted to access the profile from school to delete it.\textsuperscript{40}

The district court entered summary judgment for Layshock on his claim that the school violated his First Amendment rights.\textsuperscript{41} On appeal, the third circuit noted the district court "found that the district could not establish a sufficient nexus between Layshock's speech and a substantial disruption of the school environment."\textsuperscript{42} The school district asserted that Layshock's use of an official school photo to support a vulgar and defamatory profile of the principal created a sufficient nexus to justify the punishment.\textsuperscript{43} Viewing the facts in light of the ruling in Thomas v. Board of Education,\textsuperscript{44} the third circuit concluded: "[W]e do not think that the First Amendment can tolerate the school district stretching its authority into Layshock's grandmother's home and reaching Layshock while he is sitting at her computer after school in order to punish him for expressive conduct that he engaged in there."\textsuperscript{45} The court held that Layshock's use of the district's website to obtain a photo of the principal did not create a sufficient nexus to punish his out of school expressive conduct under the circumstances.\textsuperscript{46}

In Barnett v. Tipton County Board of Education, three students were disciplined for creating fake internet profiles of a coach and an assistant principal.\textsuperscript{47} Discipline for the students ranged from two days out-of-school suspension, and two to eleven days of in-school suspension, to assignment to an alternative school for the remainder of the school year.\textsuperscript{48} The Myspace profile of the assistant principal included his photograph and biography from the Board of Education website as well as sexually suggestive comments about female students. Another profile contained similar information about a coach.\textsuperscript{49} The school received notice of the websites from a concerned parent and a local reporter who believed the assistant principal had authored the website and engaged in inappropriate conversations with students.\textsuperscript{50}

The students argued their websites were protected by the First Amendment as parodies.\textsuperscript{51} The court noted the First Amendment protects parodies that involve speech that cannot reasonably be understood as describing actual facts. Citing Hustler Magazine, Inc. v. Falwell, the court indicated parodies are not "reasonably believable,"\textsuperscript{52} but are clearly exaggerated to enhance the humor of the parody.\textsuperscript{53} Given that a newspaper reporter and parent both believed the websites to be authentic, the court found the plaintiffs did not offer evidence to
support their contention that visitors to the website would understand them to be parodies and dismissed their First Amendment claims.54

In  J. S. v. Bethlehem Area Sch. Dist., the Pennsylvania Supreme Court concluded a student’s website, entitled “Teacher Sux,” that contained threatening and derogatory comments about a teacher and a principal did not constitute a true threat.55 The website asked why the teacher should die, showed a picture of her morphing into Hitler with her head severed from her body and solicited funds for a hit man.56 Taken as a whole, the Court found the website was sophomoric, crude, highly offensive and perhaps a misguided attempt at humor or parody, but not a reflection of a serious intent to inflict harm. However, the student’s suspension was justified because of the disruption it caused to the school environment.57

In upholding the expulsion of the student for the website content, the Court concluded the use of lewd, vulgar and plainly offensive language, including personal attacks on a teacher and the principal, was speech that undermined the basic function of the school and caused actual and substantial disruption to the entire school community, including teachers, students and parents.58 The Court noted the student accessed the website at school, showed it to a fellow student, and informed other students how to access the school site. Faculty members and administrators also accessed the site at school.59 Additionally, the speech was aimed at a specific audience of students and others connected with the specific school.60 The targeted teacher was so emotionally distraught she was unable to return to teaching for the remainder of the year.61 The Court indicated her absence “unquestionably disrupted the delivery of instruction to students and adversely impacted the educational environment.” The Court also noted that while something more than mild distraction or curiosity is needed, complete chaos is not required for a school to punish student speech.62

The case did not end with the student discipline appeal. In an action brought by the teacher against the student’s parents, the teacher was awarded $500,000 in damages, prevailing on a claim of negligent supervision.

In contrast to the above off-campus speech cases, in Requa v. Kent School Dist. No. 415, a student was suspended for his involvement in creating and posting surreptitiously-taken video footage of a teacher in a classroom and sought a temporary restraining order enjoining enforcement of disciplinary penalties.63 Requa and his friends collaborated to take the video in class, and after it was edited, they added graphics and a musical soundtrack.64 The video was posted on YouTube.com and included a commentary on the teacher’s hygiene and organization habits. In the video, a student was shown standing behind the teacher making faces, putting two fingers up at the back of her head and making pelvic thrusts in her general direction.65 A section of the video was entitled “Caution Booty Ahead” and included several shots of the teacher’s buttocks as she walked away from the videographer and bent over.66

In this case, the court concluded Requa was not likely to succeed on the merits of his claim, that the suspension arose from his classroom speech, and that he had violated the school district’s acceptable use of technology policy by recording the teacher in class. The court rejected his claim that the video was protected speech.

Attacks on other students

In Kowalski v. Berkeley County Schools, Kowalski created a Myspace webpage dedicated to ridiculing a fellow student, Shay N., titling the page S.A.S.H., an acronym for “Students Against Shay’s Herpes.”67 She invited approximately 100 people to join the Myspace group.68 The first person to join the group did so from a school computer during an after-hours class at the school.69 The commentary posted on the website by other students focused mostly on Shay N. Comments were sexually explicit, referencing sex acts and sexually transmitted diseases and referring to Shay N. as a whore.70

Shay N.’s father complained to one of the students in the group, and Kowalski unsuccessfully attempted to delete the group and remove the photographs. She renamed the group “Students Against Angry People.” Shay N.’s parents filed a harassment complaint with school administrators.71 School administrators determined that Kowalski had created a “hate website” in violation of the school’s bullying policy, suspended her from school for 10 days, and from school social activities for 90 days.72

Kowalski sued the school district and its officers claiming the school had no authority to regulate private out-of-school speech. The district court granted summary judgment to the school district and school officials, concluding they were authorized to regulate speech “created for the purpose of inviting others to indulge in disruptive and hateful conduct” that caused disruption in the school.73

The fourth circuit affirmed the summary judgment awarded to the school district and its officials based on both Tinker standards of substantial disruption of the school environment and interference with the rights of other students to be secure and let alone. The court stated, “Conduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”74 It distinguished Kowalski’s speech from speech concerning political and social points of view as follows: “Far from being a situation where school authorities suppress speech on political and social issues based on disagreement with the viewpoint expressed, school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.”75

Responding to Kowalski’s argument that the conduct took place at home and should be immune from school disciplinary school action, the Court stated: “Kowalski indeed pushed her computer’s keys in her home, but she knew the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.”76

In S.J.W. ex rel. Wilson v. Lee’s Summit R-7 School Dist., the two Wilson brothers were suspended for 180 days, but allowed to attend classes in a different school, for creating a website called NorthPress.77 The site contained racist comments and sexually explicit and degrading content concerning specific female students, discussed fights at school and mocked black
The court held that the suspension was permissible under Tinker, as C.R.’s speech "interfered with the younger students’ rights to be secure and let alone."\(^{108}\)

Because of the proximity to the school, administrators "could reasonably expect the harassment’s effects to spill over into the school environment," as the victims may be distracted at school, and administrators could reasonably expect students to discuss the harassment at school and the harassment could also continue in school hallways or on school playgrounds.\(^{106}\)

The court noted that Tinker permits schools to discipline students for speech that either poses a threat of substantial or material interference with school activities or "collides with the rights of other students to be secure and to be let alone."\(^{107}\)

The court held that the suspension was permissible under Tinker, as C.R.’s speech "interfered with the younger students’ rights to be secure and let alone."\(^{108}\)

### Threats

Students’ off-campus statements which constitute threats, harassment and intimidation of students create tension between the First Amendment rights of students and the duty of the school to protect students and maintain discipline at school. True threats of physical violence are generally not protected by the First Amendment. In Virginia v. Black, the court noted that true threats encompass "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."\(^{109}\)

Courts have upheld the discipline of students when their off-campus speech has created a reasonably foreseeable threat of harm to other students and school staff.

In Bell v. Itawamba County School Bd., Bell was suspended for seven days and placed in an alternative education program for six weeks after he posted a rap recording containing threatening language against two high school teachers/coaches on the internet.\(^{110}\) The recording named teachers and specified violent acts to be carried out against them.\(^{111}\) Approximately 2,000 people contacted the principal about the recording in response to Facebook and YouTube postings.\(^{112}\)

On Bell’s claim that discipline arising out of the rap post violated his First Amendment free speech rights, the district
court granted summary judgment to the school, concluding the rap recording constituted “harassment and intimidation of teachers and possible threats against teachers.”113 The court also found the recording “in fact caused a material and/or substantial disruption at school and ... it was reasonably foreseeable to school officials the song would cause such a disruption.”114

On appeal, the Fifth Circuit determined that Tinker applied to the off-campus speech since “a school official reasonably could find Bell’s rap recording threatened, harassed, and intimidated the two teachers, and a substantial disruption reasonably could have been forecast as a matter of law.”115 The court noted that school officials must be free to act “quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community.”116 The court reasoned that when a student intentionally directs speech at the school community that is reasonably interpreted to threaten, harass or intimidate a teacher, Tinker applies, even if the speech originated off-campus.117 The court held that school officials were justified in disciplining Bell since they had reasonably forecast the likelihood of a substantial and material disruption at school, since Bell’s rap was threatening, harassing and intimidating toward teachers, and it was directed at the student body online.118

In Wisniewski v. Board of Education of Weedsport Central School Dist., Wisniewski was suspended for one semester for using AOL Instant Messaging software from his home computer to exchange messages in real time with approximately 15 other students.119 His AOL identifier icon was a drawing of a pistol firing a bullet at a person’s head.120 Red dots, symbolizing blood were placed above the head of his English teacher, Mr. VanderMolen and the words “Kill Mr. VanderMolen” were below the picture.121 This was viewed by Wisniewski’s friends for almost three weeks before it was viewed by a student who reported it to the school and the police.122 Mr. VanderMolen asked and was allowed to quit teaching the class in which Wisniewski was enrolled.123 The police and a psychologist determined Wisniewski’s icon was meant as a joke and posed no real threat.124 The hearing officer concluded Wisniewski’s actions threatened a teacher and caused disruption to the school community.125

The court noted school officials have broad authority to discipline student expression that can be reasonably understood as urging violent conduct under the Tinker substantial disruption standard.126 The court rejected arguments the icon should be assessed under the “true threat” standard, concluding that the sending of the icon posed a reasonably foreseeable risk the icon would come to the attention of school authorities and materially and substantially disrupt school discipline.127

In Wynar v. Douglas County School Dist., the court held that a school district did not have to wait for an actual disruption to materialize before taking action against an off-campus student threat.128 Wynar was suspended for 10 days and later expelled for 90 days for engaging in an instant messaging conversation with friends, bragging about his weapons and threatening to shoot specific classmates.129 He referenced the Virginia Tech massacre and stated a specific date for his own attack.130 His friends notified school authorities, who contacted police. Wynar claimed the messages were a joke.131

On appeal of summary judgment entered for the school district upholding the disciplinary measures, the Ninth Circuit stated, “When faced with an identifiable threat of school violence, a school may take disciplinary action in response to off-campus speech that meets the requirements of Tinker.”132

It is an understatement that the specter of a school shooting qualifies under either prong of Tinker. The nature of the threats here was alarming and explosive. Confronted with a challenge to the safety of its students, Douglas County did not need to wait for an actual disruption to materialize before taking action. Tinker does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances.133

Bullying and Harrassment

The Legislature’s passage of the Kansas anti-bullying statute, K.S.A. 72-8256, has given school districts additional impetus to be concerned about off-campus student speech that has an impact on or nexus to the school’s learning environment. Kansas law requires school districts to adopt policies and develop a plan to prevent bullying. K.S.A. 72-8236, defines “bullying” as: “Any intentional gesture or any intentional written, verbal, electronic or physical act or threat that is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student...” Cyberbullying is included in the definition of “bullying” and is defined as “...bullying by use of any electronic communication device through means including but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites.”134

Although the number of cases directly addressing this issue are few, the number of parental complaints brought to the attention of the school’s prohibitions on bullying and harassment via social media continues to rise.

The Kowalski case discussed previously in this article, is one of the cases where the student alleged her off-campus speech, which was harassing in nature, was entitled to First Amendment protection.135 In this case, the court recognized that the school’s prohibitions on bullying and harassment were not limited to behavior that originates in a school building or occurs during the school day, but could apply to any student behavior that disrupts the learning environment or interferes with the rights of another student.136

In Kowalski, the court also acknowledged the challenges school districts encounter due to off-campus use of technology by stating:

Rather than respond constructively to the school’s efforts to bring order and provide a lesson following the incident, Kowalski has rejected those efforts and sued school authorities for damages and other relief. Regrettably, she yet fails to see that such harassment and bullying is inappropriate and hurtful and that it must be taken seriously by school administrators to preserve an appropriate pedagogical environ-
ment. Indeed, school administrators are becoming increasingly alarmed by the phenomenon, and the events in this case are but one example of such bullying and school administrators’ efforts to contain it. Suffice it to hold here that where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators’ good faith efforts to address the problem.  

Advancements in technology and the development of newer and better ways to communicate, coupled with the increased use of technology by students, has resulted in school districts receiving increased numbers of complaints from students and parents concerning students’ off-campus social media speech that affects the school learning environment.

Since 1969, *Tinker* has provided the legal framework for analyzing student related speech that occurs on the school campus and in classrooms. When analyzing off-campus student speech cases, courts have looked to *Tinker* and applied the “material and substantial disruption” or “could reasonably have been forecast to substantially disrupt the operations of the school” tests. However, when it comes to students’ off-campus use of technology, the Supreme Court has yet to determine how far the school district’s authority to discipline extends. Court decisions in off-campus student speech cases are very fact intensive. In determining whether a school district can impose discipline for off-campus student speech, courts consistently inquire as to the specific nature and circumstances surrounding the student’s off-campus speech and its impact on the educational learning environment.

When school districts receive complaints from parents and students about off-campus student speech, school administrators must balance the public school students’ First Amendment rights with the school’s need to preserve a safe and conducive learning environment for all students. Due to the unsettled nature of First Amendment law as applied to students’ off-campus speech, school administrators must conduct a thorough investigation of the facts surrounding the off-campus speech and consider the following factors before determining whether to impose discipline:

- When was the speech created?
- Was the speech promulgated off-campus or on-campus?
- Is the speech directed towards a teacher, a student, or the school in general?
- Is the speech a threat to the school or an individual?
- Did the creator take efforts to keep the speech off-campus?
- Has the speech reached campus, and if so, who brought the speech onto campus?
- Does the speech advocate on-campus activity?
- Does the speech violate the district’s racial or sexual harassment, or bullying policies or discriminate against students with disabilities?

In the event the district does not find sufficient facts to discipline the student, the district may still, depending upon the facts, inform parents that the student’s off-campus speech may fall within the definition of Harassment by Telecommunication Device, K.S.A. 21-6206, and be reported to law enforcement.

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**About the Author**

Donna Whiteman has been an attorney and the Assistant Executive Director of Legal Services for the Kansas Association of School Boards since 1995. KASB provides legal services to Kansas school board members and school administrators on a wide variety of school law issues. Luke Sobba, staff attorney with KASB, and Cindy Kelly, in-house legal counsel with Topeka Public Schools, also assisted with this article.

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3. Id. at 683.
5. See K.S.A. 72-1504 et seq.
8. K.S.A. 72-8901(c).
13. K.S.A. 72-8902(c).
15. K.S.A. 72-8902(d).
17. K.S.A. 72-8904(b).
19. Id. at 920.
20. Id.
21. Id.
22. Id. at 921.
23. Id.
24. Id.
25. Id.
26. Id. at 923.
27. Id.
30. Id. at 926.
32. Id.
33. Id. at 932.
34. Id.
35. Id. at 933.
37. Id. at 207.
38. Id.
39. Id. at 208.
40. Id. at 209.
41. Id. at 211.
42. Id. at 214.
43. Id.
social media and disciplining students

45. Id. at 216.
46. Id. at 219.
48. Id. at 983.
49. Id.
50. Id.
51. Id. at 984.
53. Id.
54. Id.
56. Id. at 415-16, 421.
57. Id. at 421-22.
58. Id. at 421.
60. Id.
61. Id. at 869.
62. Id. at 868.
64. Id. at 1274.
65. Id.
66. Id.
68. Id.
69. Id. at 568.
70. Id.
71. Id.
72. Id. at 569.
73. Id. at 566.
74. Id. at 572 (citing Tinker, 393 U.S. at 513).
75. Id. (citing Morse v. Frederick, 551 U.S. 393, 423 (2007)).
76. Id. at 573.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id at 774.
83. Id.
84. Id. at 778 (citing Kowalski v. Berkeley County Schools, 652 F.3d 565, 573 (4th Cir. 2011)).
85. Id. at 778.
86. Id.
88. Id. at 1098.
89. Id.
90. Id.
91. Id. at 1099.
92. Id. at 1103-04 (citing Beavisink v. Woodland R-IV School District, 30 F. Supp. 3d 1175 (E.D. Mo. 1998) (disliking or being upset by student speech, in this case a website that contained derogatory comments about the school and its administrators, is not an acceptable justification for limiting student speech).
93. Id. at 1105.
94. Id. at 1107-08.
95. Id. at 1118.
96. Id.
97. Id.
98. Id. at 1123.
100. Id. at *1.
101. Id. at *2.
102. Id.
103. Id. at *3.
104. Id.
105. Id.
106. Id. at 6.
107. Id. (citing Wynar v. Douglas County Sch. Dist., 728 F. 3d 1062, 1070 (9th Cir. 2013) (quoting Tinker, 393 U.S. at 508)).
108. Id.
110. Bell v. Iwawamba County School Bd., 799 F. 3d 379,383 (5th Cir. 2015).
111. Id. at 387.
112. Id. at 385-386.
113. Id. at 388.
114. Id.
115. Id. at 391.
116. Id. at 393 (citing Morse, 551 U.S. at 425 (Alito, J., concurring) (“Due to special features of the school environment, school officials must have greater authority to intervene before speech leads to violence”).
117. Id. at 396.
118. Id. at 400.
119. Wisniewski v. Board of Education of Weedsport Central School Dist., 494 F. 3d 34, 36-37 (2d Cir. 2007).
120. Id. at 36.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id. at 36-37.
126. Id. at 38.
127. Id. at 38-39.
129. Id. at 1066.
130. Id. at 1065.
131. Id.
132. Id. at 1069.
133. Id. at 1070 (citing LaVine v. Blaine School Dist., 257 F. 3d 981, 989, (9th Cir. 2001)).
134. K.S.A. 72-8256 (a)(1)(A) and (C)(2). (emphasis added)
136. Id. at 573-74.
137. Id. at 577.
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changing positions

Kenneth J. Berra has become a partner in the law firm of Fisher, Patterson, Saylor and Smith, LLP. He practices in the firm’s Overland Park Office.

Christopher E. Biggs joined the law firm now known as Knopp and Biggs P.A., in Manhattan. Biggs brings more than 30 years of trial experience and public service, including four terms as Geary County attorney. He also teaches trial advocacy at Washburn Law School.

Nana Brammer is the new assistant county attorney of Barton County.

James M. Crow has been appointed to serve as the Shawnee County Counselor.

Jeffrey W. Gettler, previously a member of Emerg, Chubb & Gettler, LLC, in Independence, was elected as District Court Judge, Division 3, in the 14th Judicial District and was sworn in Jan. 9th.

Adam Hall has joined Thompson Rasmussen & Warner, P.A. in Lawrence. He brings his litigation practice emphasizing criminal defense and family law—two areas not previously offered by the firm.

J. Todd Hiatt has joined Harris and Hart, LLC, in Leawood, KS as Of Counsel. His practice focuses on medical malpractice, personal injury, and insurance defense. Hiatt previously was a prosecutor with the Shawnee Co. district attorney’s office.

Jess Hoeme was elected as a member of Joseph Holland & Craft LLC. A former Mitchell Co. attorney and assistant DA in Shawnee Co., Hoeme joined the firm in 2011 as a criminal defense attorney.

Lauren Laushman joined Fisher, Patterson, Saylor & Smith, LLP, as an associate in the firm’s Topeka office. Her practice focus is on civil litigation defense.

Eric L. Lomas has been promoted as associate attorney of Hampton & Royce LC, Salina.

Lee A. Legleiter has been promoted as associate attorney of Hampton & Royce LC, Salina.

Christopher W. Lyon has been sworn in as the Trego County Attorney, Hays. He served five years in the U.S. Army, including two tours in Iraq. He’ll work full time in Trego Co., and will continue as an assistant district attorney in Ellis Co.

Kelly (Elliott) Mahoney has been appointed as US Magistrate Judge for the Northern District of Iowa, seated in Sioux City. Previously, Mahoney served in the US Attorney’s Office for the Southern District in Des Moines, Jordan & Mahoney Law Firm P.C. in Boone, Iowa, and in the DA’s Office for the 18th Judicial District in Wichita.

Melissa Mangan became the 43rd attorney in the Hinkle Law Firm, joining as an associate in the firm’s corporate real estate group. Her emphasis is on business formations, mergers and acquisitions, securities and commercial real estate transactions.

Jacob E. Peterson has become shareholder of Clark, Mize & Linville, Chartered, Salina. His practice concentrates in the areas of litigation and health care law.

Christianna Pruden has been hired by Kennedy Berkley Yarnovich & Williamson to practice in its Hays office. Her practice will focus on domestic law, civil litigation and estate planning.

Shane A. Rosson has become a member at Tripplett, Woelfl & Garretson LLC, Wichita.

Jacquie Spradling, formerly of the Shawnee Co. district attorney’s office, has joined the staff of Allen County Attorney Jerry Hathaway. Spradling will handle misdemeanor, juvenile, traffic and forfeiture cases.

Matt Wiltanger has taken the position of general counsel of Unite Private Networks in Kansas City, Missouri.

changing locations

Mike O’Neal, former Speaker of the Kansas House and former CEO of the Kansas Chamber of Commerce, has opened O’Neal Consulting, LLC, at 800 SW Jackson St., Suite 818, Topeka, KS 66612. He will provide legal and governmental consulting. O’Neal spent 28 years in the Kansas House of Representatives while with Gilliland & Hayes, LLC in Hutchinson.

miscellaneous

Trent Byfoot of Foulston Siefkin in Wichita has announced his engagement to Ruby Garcia. The couple plans an April wedding.

Cherokee County has contracted with five area attorneys: Doug Steele and Kevin Cure of Galena and Tiana McElroy of Columbus will represent indigent defendants; Candace Gayoso of Baxter Springs will serve as guardian ad litem for minors; and former county commissioner Robert Myers will serve as a general contractor for processing delinquent real estate taxes.

Wyandotte County District Court Judge Daniel A. Duncan retired Jan. 9th after 28 years on the bench. Duncan had a private law practice before he was elected judge in 1989 and re-elected six times.

Don D. Gribble II & Scott M. Hill, Wichita, were elected to the executive committee for Fite Fanning & Honeymon LLP. Linda Parks continues as managing partner of the firm and serves as a member of the executive committee.

In a February profile in the Topeka Capital Journal, Shawnee Co. District Attorney Mike Kagay announced plans to crack down on the meth trade, create a mental health court and target sex traffickers. He also introduced his administrative staff including: Dan Dunbar, a prosecutor with the former DA, now chief deputy district attorney; Kevin Keatley, deputy district attorney for filing charges; Charles Kitt, former chief of prosecution under the previous DA, now chief of staff; and Jodi Litfin, deputy district attorney for appellate court filings.

Nathan Mattison of Neustrom and Associates in Salina volunteers weekly at the Salina Senior Center offering general legal information and responses to seniors’ legal questions. Mattison’s practice focuses on personal injury and civil litigation but he has experience in several areas of law.

Kyle J. Mead, vice president and chief examining attorney with Lawyers Title of Topeka, Inc., was presented a 2016 Award of Excellence as Chamber Diplomat of the Year by the Topeka Chamber of Commerce. Kyle has been with Lawyers Title since 2002.

Former general counsel for the Kansas Ethics Commission and the Kansas Association of Counties, retired attorney Judy Moler was named to the board of trustees for TARC, Inc.

Lauren J. Reylts, St. Francis, has purchased the James Milliken Law Office and will continue serving the clients of Mr. Milliken and Kari Gilliland, and will retain the Milliken name for the practice.

Ken Van Blaricum was honored by the Pratt City Commission upon his retirement after 10 years as City Attorney, 14 years as county attorney and four years as assistant county attorney.

Fifteen attorneys applied to fill the vacancy that will exist on the Johnson Co. District Court with the pending retirement of Judge Linda Trigg. KBA members who applied include: Jenifer Ashford, Marc Berry, Kevin Gunkel, Mary Ann Kancel, Christopher Koppeck, Alex McCauley, Karen Nations, Michael Richard-Tel Parrett, Robert Scott, Wayne Smith, Karen Snyder, Jessica Sokoloff, Sarah Stewart, John Sutherland and Ruth Landau Vano.

Judge John L. Weingart of the 22nd judicial district was tapped to sit with the Kansas Supreme Court to review a case that was on the court’s summary calendar. Weingart has been a district court judge since 2001. Before that, he had a private law practice in Hiawatha.
Robert Hopkins "Bob" Young

Robert Hopkins "Bob" Young, age 91 of Pleasanton, Kan., passed away Monday, Jan. 9, 2017. He was born on Nov. 16, 1925, in Wichita, Kan., the son of Arthur Ransom and Edna Hopkins Young. When he turned 17, he left high school and joined the United States Navy, serving his country in World War II. He then attended Wichita State University, acquiring a Bachelor’s Degree in Political Science. Bob went on to Washburn Law School and married Helen Arlene Glover on March 15, 1954, at Fort Scott, Kan. He finished his Juris Doctorate at the University of Missouri Kansas City. He was the founding juvenile judge in Johnson County, Kan. He later was in private law practice and served as Linn County attorney for several terms. He was a member of Rotary International, VFW and the Kansas Bar Association. He enjoyed golfing and fishing. He was preceded in death by his parents; a brother, Dean; and two sisters, Donna Young and Natala Robinson. Bob is survived by his wife Helen Arlene; three sons, Scott Ransom Young, Matthew Young and Kim, and Patrick Young and Kelley; two daughters, Lisa Godard and Joe, and Holly Madl and Mark; one brother, Dan Young; and nine grandchildren, Clara, Kim, Eric, Jennifer, Heather, Nick, Katie, Kelly and Emily; and nine great-grandchildren. Funeral service was Jan. 16, 2017, at the Schneider Funeral Home and Crematory, Pleasanton Chapel with burial in the Pleasanton Cemetery. The family suggests contributions to Olathe Hospice. Online condolences for the family can be left at www.schneiderfunerals.com.

Albert D. Keil

Albert D. Keil, 76, formerly of Meriden, died Feb. 1, 2017, in Lawrence. He was born in Hays and grew up in Otis and Great Bend. He graduated from Fort Hays State University and, after serving in the Army, earned his law degree from the University of Kansas. He practiced criminal law, beginning and ending his career with the KBI as Assistant Attorney General. In between, he pursued other positions and an eight-year sabbatical in Alaska. He is survived by his wife of 52 years, Carolyn; a daughter, Leslie Bruton; three grandchildren; and two sisters, Cheryl Wesley and Jody Morgan. A service was held at 11 a.m. Saturday, Feb. 11, at Trinity Lutheran Church, 1245 New Hampshire, Lawrence. A reception followed at 12:30 p.m. at Bella Sera in Lawrence. Memorials can be made to the Leukemia & Lymphoma Society or Trinity Lutheran Church.
Equal Pay and Opportunity Continue to Be Elusive for Women Lawyers in Private Practice: How Are We Going to Solve This Problem?

It comes as a shock to many to learn that a typical woman lawyer makes 74 per cent on a dollar compared to our male counterparts. According to the latest (2015) National Association of Women Lawyers Survey on Retention and Promotion of Women in Law Firms, women lawyers continue to face inequality in pay and opportunities.

• The report shows that the median hours reported for women lawyers was 2,224, while the median hours reported for the men lawyers was 2,198.
• Meanwhile, only 18% of equity partners in law firms are women. This number has increased by only 2% in the past ten years.
• Not only is there lack of significant progress in areas such as adding more women in equity partnership, there is a troubling downward trend in compensation for women equity partners.
• The 2015 survey shows that a typical woman equity partners made 80% of our male counterparts, and that this is 4% less than women equity partners made ten years ago.
• Women continue to be sparsely represented on the highest governance committees. The typical firm has two women and eight men on their highest governance committee.
• Women are under-represented on compensation committees. In the firms that reported having two or fewer women on the compensation committee, the typical female equity partner earns 77% of that earned by a typical male equity partner. In the firms that reported having three or more women on the compensation committee, the typical female partner earned 87% of that earned by a typical male equity partner.
• In other words, having just one more woman on a compensation committee results in a 10% increase in compensation for all women equity partners at law firms.

I have asked several prominent women lawyers who are equity partners, managing partners, and general counsel, for their thoughts on the biggest challenges facing women lawyers, and how will we overcome them. Here are their insightful answers:

**Natalie Haag, Past President of the Kansas Bar Association**

Complacency: In my opinion, there is a perception that because women consistently make up more than fifty percent of the law school graduates, discrimination no longer exists. Statistically we know this is not true. Salaries, partnerships, and executive team/managing partner positions for female lawyers significantly lag behind their male peers. This false perception of equality leads to complacent acceptance of the status quo. Solutions: Just as women fought to get into law schools and join law firms, we now need to educate other lawyers about the existing disparities and join with allies, male and female, who are willing to work toward true equality in salary and professional position.

**Linda Park, Past President of the Kansas Bar Association**

I believe the biggest challenge is, and long has been, that women are the primary caretakers for families. Although there are exceptions, women still provide most of the parenting for children. And women also assume most of the responsibility to take care of elderly parents. Some change will result from the X-Generation and beyond, as their attitudes toward work and family evolve. But for the most part, it will take a change in law firm culture. Firms need to realize the value of keeping talented lawyers, over requiring that each and every year focus on the billable hour.

**Brianne Thomas, President, Association for Women Lawyers of Greater Kansas City**

I think the opportunities are there more than ever for women. Self-doubt, the need to do it all perfectly, fear of tak-
ing risks, worry that speaking our mind or asking for what is deserved will “make me look bad,” and the environment at home and work still holds us back from reaching our goals. We over-calculate, over-think, and over-analyze everything. Just do it. An understanding and shift in the roles of women at home and in the workplace must take place on an authentic, visceral level for every business, woman, man, leader out there. Encourage women, support women. From husbands and fathers to CEOs, everyone needs to embrace this mentality and raise their daughters and sons differently by SHOWING and DEMONSTRATING with actions (not just words) that women are not “just” mothers and wives.

Katie McClafflin,
President, Johnson County Bar Association

For me, the biggest challenge continues to be the exhausting pursuit of the ever-elusive “work-life balance.” I certainly don’t speak for all women lawyers, or even all women lawyers with kids at home. But the rise in technology means, among other things, having clients who expect us to be available 24/7. Clients expect us to respond to emails and phone calls on weekends, evenings and holidays. At the same time, kids (and spouses) also like to have our undivided attention and can be hurt if we are unable to focus on a conversation, a game or a meal because we are distracted by a demanding client. The constant pull from every direction—clients, kids, spouses, friends and family, can leave us feeling depleted, depressed and withdrawn. That isn’t what I envisioned when I became a lawyer, or a mom. This may describe some of what is happening with women in the law—perhaps women are pursuing fewer leadership positions because they already feel overwhelmed with their normal workload. There are things we can do individually to overcome this challenge, and there are things that must be done across all sectors of the profession. Individually, setting boundaries and realistic client expectations is crucial. Communicate clearly when you are available to clients and how you handle after-hours emails and phone calls. If you cover this clearly in your engagement agreement, clients will not feel you have abandoned them if you fail to respond over the weekend. Having time with your family and friends is only the first step. In order for this time to be restorative, rather than draining, you must be able to be present and attentive. That means shutting off the technology and focusing on your family and friends. Men must be given more leeway to make meaningful contributions to childrearing and home life. We don’t need firms to provide more part-time options for women. Although that’s great for those interested in part-time work, it will not put more women in positions of leadership or close the pay gap. All businesses in all industries need to encourage men to work a flexible schedule, take time off for sick kids, or leave at a reasonable hour most days, so that all parents, regardless of gender, can share in the demands of raising kids and maintaining families. Until men are given the permission (and freedom) to fully engage in meeting the demands of home, women will continue to sacrifice their careers and will continue to lag behind in pay, leadership roles and career satisfaction. When the demands are shared fairly at home, we are all happier at home and consequently better equipped to be more productive, creative and focused at work.

Gaye Tibbets, President
Kansas Women Lawyers Association

Losing talented young mothers because the traditional law practice does not work for them has drained talent from the legal profession for years. A huge challenge for young women attorneys is how difficult it is to raise a family and practice law when the hardest part of both of these tasks takes place at the same time in their lives. Ironically, as men have become more involved parents and have asked for concessions for that to happen, firms have become more family-friendly and flexible. This not a women’s issue, but a bar issue, because the talent drain must stop. KWAA makes best practices available to educate both firms and lawyers, advocates for policies that level the playing field, and raises discussion about these issues. Though the perception of women attorneys has come a long way, there is still implicit bias in the minds of clients, judges or other lawyers about what a lawyer should look and sound like, and because of long tradition, it is not female. Strong women lawyers are slowly chipping away at outdated norms. KWAA is committed to making the practice of law work for everyone. 

About the Author

Mira Mdivani is a member of the KBA Diversity Committee. She practices business immigration law at Mdivani Corporate Immigration Law Firm in Overland Park, KS.
The Law Related Education Committee oversees Law Wise, a free electronic publication designed for educators and students with general information about law-related matters, updates on events happening throughout the state (such as the KBA YLS High School Mock Trial program and iCivics), and lesson plans. Law Wise is published six times a year during the school year and is designed primarily for middle school and high school students and teachers.

The February 2017 issue of Law Wise—see a few screen shots on the facing page—focused on the Americans with Disabilities Act and Service/Therapy Dogs. The American Bar Association theme this year for Law Day is centered around the 14th Amendment, and the March Law Wise will follow this focus. The April and final issue of the school year will feature the Kansas CASA program and what it takes to be a CASA (Court Appointed Special Advocate), and how the Kansas CASA program is making a difference for Kansas families and the Court.

Please enjoy the February issue online and encourage others to sign-up to receive this free and informative publication.

You can receive Law Wise electronically, and view past issues by going to www.ksbar.org, select the For Educators tab, and then select Law Wise. To view past issues, click on Group pages in the top left corner and select Current School Year or Archive.

The LRE Committee invites you to submit topics you would like to see featured in Law Wise. Please contact Anne Woods at 785-861-8838 or awoods@ksbar.org with your ideas.

Members of the KBA Law Related Education Committee

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Meet Alex White and His Service Dog, Dondo

Alex White is a ninth grader at Bishop Seabury Academy in Lawrence. Alex has Dondo with him at school and in other activities. Dondo is a Golden Retriever trained as a service dog. Alex walks with canes and will eventually use a wheelchair. Dondo is trained to assist Alex with things like getting dressed, turning on lights, and helping Alex if he falls. Alex attended training to learn how to work with Dondo.

“I lived in a duplex in Washington, Kansas for two weeks. My mom and dad took turns staying with me. I learned the feeding routine and had to learn about 50 commands,” Alex explained. The duplex is on the campus of KSIDS Assistance Dogs, Inc., the only ADI (American Disability) accredited assistance dog school in the state of Kansas. They have a reputation for matching a dog to the recipient’s personality. “They spent a lot of time getting to know me, observing me at school and learning about the things I do and need,” Alex stated. The application process at KSIDS Assistance Dogs, Inc. includes a video and an interview component.

Part of the two week training is spent making sure that the recipient has control of the dog. “We rode the bus, went to Walmart, and spent a day at a school that was not my school so that they could see how Dondo and I do in a school setting,” said Alex. Dondo also eventually learned to attend choir practice, Boy Scouts and other events with Alex.

Dondo is working when he is on a harness and with Alex. There are times that Dondo can be off the harness and do things without Alex.

“At training they explained that Dondo and I may need some time to ourselves,” Alex said. “I joined a gaming group and that is time that I spend away from Dondo. When Dondo is off harness he can play like other dogs.”

Staff from KSIDS Assistance Dogs, Inc. and Alex’s parents, Ray and Mari White, worked with staff at Bishop Seabury to help them about having a service dog at school. “Basic commands were taught to teachers and the school bus driver. The school allowed us to introduce Alex and Dondo and talk about the dos and don’ts,” Mari said.

When asked what Alex would suggest that students learn about relating to Dondo, he stated “You can look at Dondo but don’t stare. Don’t talk in a high-pitched voice. All the students at my school understand that.”

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Mid-session legislative review

On February 23rd, the Kansas Legislature reached the midway point of the 2017 session known as Turnaround. Turnaround is the date upon which all legislation must pass out of its house of origin (the chamber in which the legislation was first introduced). If legislation is not approved by its house of origin, it will not be considered again in the current session.

As with every rule, there are exceptions, and the turnaround deadline is no different. For example, legislation not approved by its house of origin may survive if “blessed” by being referred to an exempt committee. Exempt committees include: House Appropriations, Senate Ways and Means, House and Senate Federal and State Affairs, and House Taxation. The House and Senate Judiciary Committees are not exempt committees; therefore, all legislation from either judiciary committee must be passed out ahead of the deadline to remain viable this session.

A significant number of proposals fell by the wayside in late February, allowing legislators to focus on the second half of the session which began on March 6th.

Taxes

HB 2178 Concerning income taxation, relating to determination of Kansas adjusted gross income, rates and itemized deductions

Before turnaround, both chambers passed a tax plan that would have created a third tier to the state income tax rate and would have closed the LLC loophole. The bill would have been retroactive to January 1, 2017. It would have increased revenue by an estimated $590 million in FY18 and $450 million in FY19. The difference between the fiscal year totals can be attributed to the bill being retroactive in FY 18.

The house passed HB 2178 on a vote of 76-48; the senate passed it 22-18. Governor Brownback vetoed it.

Brownback had been quite clear that he continued to prefer his own tax plan over the proposal passed by both chambers. The governor’s plan includes a one-time borrowing of funds, a 100% increase on alcohol taxes, a $1.00 increase on cigarette taxes, a 500% increase on business filings, and increased taxes on rents and royalties.

The Kansas House garnered 85 votes to override the governor’s veto but the senate fell short of the required 27 votes needed to override, failing by a 24-16 count. The voting margins were divided along conservatives vs. moderates/democrats. It is interesting to note that neither the senate president nor the speaker of the house voted to override the Governor’s veto. Moody’s Investors Service has already come out and declared the veto an economic negative.

It is expected that the governor’s tax proposal will be run later this session. Several legislators have already expressed concerns with the measure, and therefore, it has very little traction. The senate was expected to try to run a tax plan similar to the one vetoed by the governor but without the retroactivity clause. The Kansas House was looking to revise its plan by removing the new third tier tax bracket.

Many were optimistic that the LLC Loophole could be repealed, but that alone would not solve our fiscal dilemma. Increased revenue or additional cuts will be necessary to get us on fiscally solid ground. This was the known battle as the Kansas Legislature moved forward from the 2017 turnaround.

Medicaid Expansion

HB 2154 Expanding Medicaid

For several sessions, a vocal minority of legislators has proposed expanding Medicaid. They have met strong opposition, primarily from individuals opposed to Obamacare. Leadership has gone to great lengths to avoid a vote on this issue. However, with many pro-expansion candidates winning last November, the momentum to debate the issue increased.

While a floor debate was seen as inevitable, the House Health & Human Services committee tabled the issue. Many thought this was the end of expansion discussion for 2017, since the Health & Human Services committee is not an exempt committee. Therefore, some procedural maneuvering was required to get the issue to the house floor for debate. Once the issue was on the floor, and after nearly five hours of discussion, the Kansas House passed the proposal 81-44. As of this writing, the measure was on its way to the Senate.

KBA Proposals

HB 2126 ADR & Meditation in Trust instruments

This KBA proposal was passed out of the House Committee of the Whole on a 124-0 vote and was headed to the senate for consideration.

HB 2186 Enacting the uniform arbitration act of 2000

This KBA proposal was subject to an amendment from Rep. Stogsdill (D-Prairie Village) who offered to include a provision dealing with teacher’s due process rights. This amendment was germane to the underlying bill because HB 2186 would amend arbitration statutes, and teacher due process rights would be subject to these new laws. After more than two hours of debate, the amendment passed 68-57 along with the underlying bill.

HB 2125 Benefit corporations

HB 2125 was approved by the Kansas House on a 124-1 vote with the sole “no” vote being cast by Rep. Brenda Landwehr (R-Wichita).
HB 2245  Attorney licensure and information, supreme court nominating commission, judicial nominating commission. This bill failed to progress after the turnaround deadline.
http://kslegislature.org/li/b2017_18/measures/documents/hb2245_00_0000.pdf

Judicial Branch Budget
HB 2279  Disposition of Driver's License reinstatement fees and the judicial branch nonjudicial salary adjustments fund
http://kslegislature.org/li/b2017_18/measures/documents/hb2279_00_0000.pdf
HB 2279 was heard in House Appropriations, which is an exempt committee, so it was unaffected by the deadline. Under current law, the judicial branch receives 33% of reinstatement fees. If HB 2279 is not passed, these fees will divert to other agencies, and the judicial branch will be out around $950,000. These funds are included in the FY18 & FY19 judicial budget request. Should the bill fail to pass, the courts face a significant budget cut.

HB 2041  Extending the judicial branch surcharge fee, courts costs and fees
http://kslegislature.org/li/b2017_18/measures/hb2041/
HB 2041 was passed by the house committee of the whole, 122-0 and was referred to the Senate Judiciary Committee. The KBA continues to support this legislation.

HB 2365  Judicial branch budget FY18 & FY19
http://kslegislature.org/li/b2017_18/measures/documents/hb2365_00_0000.pdf
SB 190
Making appropriations for the FY18 and FY19 judicial branch
These two bills represent the judicial branch's stand-alone budgets for the next two fiscal years. The judicial budget has already been folded into the mega-appropriations bill, but should it be stripped out, the judiciary can fall back on these two measures.

Other Bills of Interest
SB 76  Professional occupations; restrictions on fees and licensing requirements
http://kslegislature.org/li/b2017_18/measures/documents/sb76_00_0000.pdf
SB 76 deals with professional licensing. As introduced, the bill would make it easier for individuals to become licensed to perform certain services. This bill was designed to support stylists, barbers, etc. There was some concern that the broad language of the bill may have implications for the practice of law in Kansas. The bill was not debated in committee, but it remained viable because it was introduced into an exempt committee.

HB 2101  Abolishing common law marriage
http://kslegislature.org/li/b2017_18/measures/documents/hb2101_00_0000.pdf
This bill failed to survive the turnaround deadline.

Schedule
The second half of the legislative session began on March 6th. Legislators were looking toward “first adjournment,” scheduled for April 7th. Legislators then recess until the veto session which begins May 1st. House and Senate Leadership project the 2017 session to last 100 days with the 2018 session lasting only 80 days, averaging out to 90 days per session. However, many anticipate the 2017 session will last much longer. As a reference point, May 14th, will be the 90th day of the session.

One highlight of the 2017 session is the ability to access some hearings via the internet. A good link to use is http://sg001-harmony.sliq.net/00287/Harmony/en/View/UpcomingEvents. This link provides the time and date of the committee meeting along with a very easy access port to hear—and in some cases see—the committee in action.

About the Author
Joseph N. Molina III serves as the director of legislative services for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority and served as assistant attorney general, acting as chief of the Kansas No-Call Act. Molina earned a B.A. in political science, philosophy, and economics from Eastern Oregon University and a J.D. from Washburn University School of Law.
jmolina@ksbar.org
Navigating the Change in Climate Change Regulation in Kansas and Beyond

Climate change regulation may be the clearest example of how policy in Washington will change under a Trump administration. The Obama administration introduced a wide-reaching regulatory system directed at climate change, with requirements impacting numerous industries. President Trump has expressed opposition to climate change regulation, vowing to cancel the Paris climate accord and dismantle the Clean Power Plan. It is clear that parties can expect a pause in any new federal requirements aimed at climate change. But it is likely the shift in policy will have even wider effects—potentially reversing existing rules. The timing and process for such an effort is unclear, creating regulatory uncertainty for numerous industries and businesses in Kansas and beyond. This article discusses some of the regulatory requirements initiated under the Obama administration to address climate change, existing regulatory programs in other nations, the likely changes in the regulatory landscape under a Trump presidency, and the likely impact of climate change legislation—or its reversal—upon the state of Kansas.

1. How Did Climate Change Become Such a Significant Issue?

In 2003, the EPA determined that it lacked authority under the Clean Air Act to regulate carbon dioxide and other gases collectively referred to as greenhouse gases. The state of Massachusetts alleged in its complaint in federal district court that the EPA’s failure to regulate these emissions would ultimately result in loss of its coastal lands due to increased global warming from the emissions. The Court of Appeals upheld the decision of the EPA in 2005 and the Supreme Court granted certiorari in June of 2006. Massachusets v. EPA pitted 12 states and several U.S. cities against the EPA to force the federal agency to regulate carbon dioxide and other greenhouse gases as pollutants. The primary issue was whether carbon dioxide is an “air pollutant” within the meaning of the Clean Air Act subject to regulation by the EPA. The Supreme Court held that carbon dioxide and the other greenhouse gases are air pollutants within the meaning of the Clean Air Act subject to EPA regulation.

On June 23, 2014, the U.S. Supreme Court issued its decision in Utility Air Regulatory Group v. EPA (UARG). In this case, the Court ruled that the EPA had narrowly exceeded its reach under the Clean Air Act in its permitting program to mitigate greenhouse gas emissions. This was the first review of the EPA’s efforts to control greenhouse gas emissions since Massachusetts v. EPA which gave the agency the fundamental authority to regulate greenhouse gases. The arguments in UARG revolved around whether the EPA’s greenhouse gas standards for vehicles necessarily trigger similar permitting requirements for large stationary sources under the Clean Air Act. The EPA argued that it must include carbon dioxide in a pre-construction permitting program. The court found that the EPA cannot require those permits based solely on greenhouse gas emissions, but that emission sources already in need of the permits for other pollutants should have to use the best available control technology to limit greenhouse gas emissions. This means that large stationary sources such as big power plants will have to control greenhouse gas emis-
tric acid, and iron and steel production facilities. For those trol technologies for electric generating units, large industrial/papers containing general information on best available con-
emissions of carbon dioxide? In 2010, the EPA released white
question: what is the best available technology for controlling emissions of carbon dioxide? In 2010, the EPA released white papers containing general information on best available control technologies for electric generating units, large industrial/commercial/institutional boilers, pulp and paper, cement, nitric acid, and iron and steel production facilities. For those seeking definitive answers and specific recommendations with respect to greenhouse gas best available control technologies, particularly with respect to coal-fired facilities, the EPA's guidance documents do not provide them.

In accordance with the Supreme Court decision, on April 10, 2015, the D.C. Circuit issued an amended decision in Coalition for Responsible Regulation, Inc. v. EPA, which, among other things, vacated the PSD and Title V regulations under review in that case to the extent that they require a stationary source to obtain a PSD or Title V permit solely because the source emits or has the potential to emit greenhouse gases above the applicable major source thresholds. The D.C. Circuit also directed the EPA to consider whether any further revisions to its regulations are appropriate in light of UARG, and if so, to undertake to make such revisions. In response to the Supreme Court decision and the D.C. Circuit's amended judgment, the EPA has undertaken various actions to explain the next steps in greenhouse gas permitting and to also conduct rulemaking action to make the appropriate revisions to the PSD and operating permit rules.

On February 9, 2016, the U.S. Supreme Court voted 5-4 to issue an unprecedented grant of applications to stay the Clean Power Plan, President Obama's signature climate change rule. The rule is being challenged in the U.S. Court of Appeals for the District of Columbia, and the stay prevents the rule from becoming effective until that court issues a ruling on the merits and the Supreme Court takes final action on appeals from that ruling.

On September 27, 2016, an en banc court of 10 of the 11 active D.C. Circuit judges heard nearly seven hours of oral arguments on the Clean Power Plan, which will be discussed in greater detail below. These arguments played out against a backdrop of intense domestic political drama as well as enormous international pressure to tackle climate change. The most contentious questions focused on how the regulation set state-specific carbon levels for power plants. Rather than looking at what individual coal-fired power plants could do to limit greenhouse gas emissions, the EPA assumed the industry as a whole would move away from coal and toward cleaner natu-
ral gas and renewable power. Even though the case is under close scrutiny at home and abroad, a D.C. Circuit decision is still pending, and a final decision from the Supreme Court, should the eventual ruling be appealed, could take until 2018. Meanwhile, the rule could stay on hold under the Supreme Court order from February 2016.

II. Obama Administration's Clean Power Plan

As briefly noted above, on August 3, 2015, President Obama and the EPA announced the Clean Power Plan for reducing carbon pollution from power plants. The objective of the Clean Power Plan is to achieve cleaner American energy by implementing standards for power plants and setting customized goals for states to cut carbon pollution. The Clean Power Plan is intended to provide national consistency, accountability and a level playing field while reflecting each state's energy mix. The United States' endorsement of the Clean Power Plan also intended to convey to the world that the U.S. would lead global efforts to address climate change.

The plan, which is scheduled to go into effect in 2022, aims to reduce U.S. greenhouse gas emissions and impacts the roughly 1,000 fossil fuel-fired power plants in the U.S. When the Clean Power Plan is scheduled to be fully in place in 2030, carbon pollution from the power sector would be 32 percent below 2005 levels. The plan relies on three options to lock in and drive future reductions: improving the efficiency with which power plants burn coal; replacing coal with natural gas; and replacing electricity generated from burning fossil fuels with electricity generated from renewable resources, such as wind, water, sun and geothermal heat.

On May 6, 2016, Kansas Governor Sam Brownback signed SB 318 suspending “all state agency activities, studies and investigations that are in furtherance of the preparation” of plans that states are supposed to submit to the EPA as part of the Clean Power Plan. Under the Clean Power Plan, Kansas has the authority to create a customized implementation plan to meet the overall national goal of reducing carbon emissions 32 percent by 2030. The Kansas rate-based final goal is 1,293 lbs of carbon dioxide per Net MWh (compared to a 2012 rate of 2,319 lbs/Net MWh), and the Kansas mass-based final goal is 21,990,826 tons of carbon dioxide emissions (as compared to 2012 emissions of 34,353,105 tons). Kansas ranks second in the nation for wind potential, and in 2014, 21 percent of net electricity generation in Kansas came from wind energy, making wind the state’s second largest power provider after coal.

III. Reporting of Greenhouse Gas Emissions to the EPA

In response to the FY2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110-161), the EPA issued the Mandatory Reporting of Greenhouse Gases Rule, which requires reporting of greenhouse gas data and other relevant information from sources annually emitting 25,000 metric tons or more of greenhouse gases in the United States. The purpose of the rule is to collect accurate and timely greenhouse gas data to inform future policy decisions. In general, the rule is referred to as 40 CFR Part 98 (Part 98). Implementation of Part 98 is referred to as the Greenhouse Gas Reporting Pro-
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...gram (GHGRP), and these sources are required to submit annual reports to the EPA.

Categories subject to Part 98 began reporting their yearly emissions with the 2010 reporting year. Emissions from calendar year 2010 were reported to the EPA via the electronic greenhouse gas reporting tool (e-GGRT) in September 2011. Additional sources began reporting yearly emissions in September 2012, bringing the total to 41 source categories reporting.28 In January 2012, the EPA made the first year of the greenhouse gas reporting program data available to the public through its interactive Data Publication Tool, called Facility Level Information on Greenhouse gases Tool (FLIGHT). The EPA will continue to update the tool and release additional data each reporting year.29 For reporting year 2015, over 8,000 facilities reported to the greenhouse gas reporting program.30 Emissions reported under the regulation totaled 3.05 billion metric tons of carbon dioxide equivalent or about half of total U.S. greenhouse gas emissions.31

IV. United Nations Framework Convention on Climate Change

The Paris agreement was negotiated within the United Nations Framework Convention on Climate Change (UNFCCC) and addresses mitigation of greenhouse gas emissions starting in the year 2020. Negotiated by representatives of 197 parties at the 21st Conference of the Parties of the UNFCCC in Paris, and adopted by consensus on December 12, 2015, the agreement was opened for signature on April 22, 2016 (Earth Day), in a ceremony in New York City.32 As of December 11, 2016, 194 UNFCCC parties have signed the treaty, 116 of which have ratified it.33 After the European Union ratified the agreement in October 2016, enough countries that produce a decent share of the world’s greenhouse gases had ratified the agreement for it to enter into force.34 The agreement went into effect on November 4, 2016.35

The participants agreed to a long-term goal of keeping the increase in global average temperature to below 1.5°C over pre-industrial levels, based upon their finding that this would significantly reduce risks and the impacts of climate change.36 Moreover, the governments agreed to come together every five years to set more ambitious targets as prompted by data generated from scientific research, report to each other and the public on how well they are doing to implement their targets; and to track progress towards the long-term goal through a robust transparency and accountability system.37

In November 2016, the United States issued a document titled United States Mid-Century Strategy for Deep Decarbonization.38 Under the 2015 Paris climate pact, countries are to develop strategies that by mid-century will halt rising greenhouse gas emissions to meet the accord’s goal to keep global temperatures from rising no more than 2°C this century, compared to the pre-industrial era.39 The objective of the U.S. Strategy report was to have the United States build a low-emission economy in an effort to minimize climate change.40 The United States’ plans for decarbonization by mid-century were released at the November 2016 United Nations climate summit in Marrakesh and built upon the pledge the United States made in the run-up to the Paris deal to cut its emission levels by as much as 28 percent by 2025, from 2005 levels.41

Early on in his campaign, President Donald Trump vowed to withdraw from the United States’ carbon-reduction commitments in the Paris Agreement as quickly as possible; however, in late November, Trump backed away from that vow, suggesting that he was keeping an open mind.42 During his confirmation hearing, Secretary of State Rex Tillerson stated that it is important for the United States to maintain its seat at the table on conversations around how to address the threat of climate change.43 Tillerson also noted that there is little appetite for a cap-and-trade bill or other climate legislation in the Republican-led House and Senate, although climate advocates are hopeful a carbon tax might be put on the table in any broad tax reform package.44 At this stage, it is unclear how the current administration will proceed with regard to the Paris Agreement and the November 2016 Strategy report.

V. Reporting of Greenhouse Gas Emissions to the SEC

Current SEC rules and accounting standards, such as Reg S-K and FASB Statement No. 5, may already require some companies to make certain climate change-related disclosures in their SEC filings.45 Companies often encounter challenges in determining what information should be reported and what can legally and responsibly be omitted from reports. The question whether and when those existing standards require companies to make climate change-related disclosures is a complex issue which should be discussed with company advisors, including accountants and attorneys, and is outside the scope of this article.

In 2010, the SEC told companies how it expected them to address the risks posed by climate change in regular securities filings. Wall Street’s top regulator was not issuing a new rule. Rather, this was “interpretive guidance” on existing disclosure requirements.46 The SEC chairwoman at the time, Mary Schapiro, noted then that the SEC was “not opining on whether the world’s climate is changing, at what pace it might be changing, or due to what causes,” but asking companies to take stock of the risks to their businesses.47 Among the factors companies should address, the SEC said, were legislation and regulation related to climate change, international treaties on the issue, and the physical impacts of climate change, like flood or drought. In the two years after the interpretive guidance, the SEC issued 49 comment letters to companies addressing the adequacy of their climate change disclosures, but it issued only three such letters in 2012 and none in 2013. This trend clearly suggests that the impacts of climate change do not appear to be a high priority of the SEC.

Since the SEC issued its interpretive guidance, “incrementally” more companies have made disclosures related to climate change, yet many are vague generalizations that give investors little to work with. The SEC is now reviewing what it requires companies to disclose, and it could introduce new rules. In 2016, the SEC faced increasing criticism over “lax” enforcement and “inconsistent” reporting and pressure for greater enforcement and standardization. A January 2016 Government Accountability Office report found that the SEC’s Division of Enforcement “has not filed any actions concerning climate-related disclosure issues.”48 The report acknowledges that the SEC’s priorities in this area have evolved as cap-and-trade leg-
islation was never enacted and other matters, such as the 2010 Dodd-Frank Act, became priorities.49

As part of the public comments process, some groups have suggested that the SEC specify that companies address issues such as climate-related legal proceedings or so-called stranded assets—oil and gas reserves that may never be used. Exemplary of this scenario, in early November 2016, a proposed class of investors filed suit in Texas federal court against Exxon Mobil over whether the company knowingly concealed information about climate change, accusing the energy company of lying about its fuel reserves in order to obtain a $12 billion debt offering.50 The lawsuit alleges that Exxon Mobil took advantage of its AAA rating in early March 2016 to complete the debt offering to get capital the company knew it would need when it would later be forced to write down its improperly inflated reserves.51 The investors allege that Exxon Mobil had known for years that global temperatures were increasing, and that as the climate grew warmer, the company’s need for access to its oil reserves would be diminished.52

In another recent shift, SEC Chair Mary Jo White announced plans to step down before President Trump took office. (White’s term at the helm of the SEC was not scheduled to expire until June of 2019.) At the time this article was authored, Walter J. “Jay” Clayton, a partner with the law firm of Sullivan & Cromwell LLP, had been nominated by Trump to chair the SEC. Clayton has stated that he intends to work with key stakeholders in the financial system to ensure investors and companies have the confidence to invest together in America and will establish policy that encourages American companies to create jobs.53 What impact, if any, Clayton will have upon the SEC’s standards pertaining to climate change-related disclosures remains to be seen.

VI. Regulations Controlling Greenhouse Gas Emissions with a Kansas Connection

Regulated sources that have a direct connection to industrial activities in the state of Kansas include the aircraft industry, power plants, and the oil and gas sector. Each of these could be impacted by changes to existing and proposed greenhouse gas emission controls.

A. Aviation

Industry-leading aviation manufacturers in Kansas, including Spirit AeroSystems, Cessna Aircraft, Bombardier Aerospace and Hawker Beechcraft, employ in excess of 42,000 and contribute over $3.7 billion to the nation’s gross domestic product.54 Aircraft worldwide emit only a small fraction, about 2 percent, of all human-induced carbon dioxide emissions, producing about 781 million metric tons of carbon dioxide in 2015. The aviation industry emissions are, however, one of the fastest growing emission sources. Under “business as usual” scenarios, global aviation emissions are set to triple by 2050.55 In October 2016, the general assembly of the United Nation’s International Civil Aviation Organization adopted standards for new airplane designs that would begin to take effect in 2020.56 The standard will apply in three stages.57 From 2020, all new aircraft designs would have to comply with the new standards.58 From 2023 to 2028, all aircraft models currently being produced will have to meet a less stringent “in-production” standard if they undergo modifications requiring re-certification. From 2028, all new aircraft will have to meet the full standards.59 The carbon dioxide standard applies a complex formula based on fuel use during the “cruise” portion of a flight, adjusted for fuselage size.60 The next step is for federal authorities in each of the member states of the International Civil Aviation Organization to promulgate their own aviation-related regulations.

Examples of aircraft subject to the new standards include smaller jet aircraft, such as the Cessna Citation CJ3+ and the Embraer E170, up to and including the largest commercial jet aircraft – the Airbus A380 and the Boeing 747.61 Examples of covered turboprop aircraft include larger turboprop aircraft, such as the ATR 72 and the Bombardier Q400.62 The new energy-efficiency standards would result in an estimated 4 percent reduction in fuel consumption for new aircraft starting in 2028 compared with 2015 deliveries. Depending on the size of the aircraft, actual reductions would be from zero to 11 percent, with a bigger emphasis on larger commercial airplanes, according to analysts with the International Council on Clean Transportation.63

On July 25, 2016, the EPA issued an “endangerment finding” in connection with greenhouse gas emissions from commercial aircraft, a first step in regulation of such emissions, and the finding was published in the Federal Register on August 15, 2016.64 While the EPA is not proposing or finalizing aircraft-engine greenhouse gas emission standards at this time and has not set a schedule to do so, the endangerment finding triggers the EPA’s duty under the Clean Air Act to promulgate emission standards applicable to greenhouse gas emissions from the classes of aircraft engines included in the finding. The Trump administration may attempt to rescind the endangerment finding or simply delay enacting the aircraft standards. Recession and delay tactics would undoubtedly result in the filing of lawsuits from those promoting the continuation of climate change regulation.

Aviation companies are concerned about a precedent that would be set by a reversal of the United States’ commitment to reduce greenhouse gas emissions. Contrary to many other industries, aviation companies are seeking international greenhouse gas standards in order to remain competitive with the rest of the world.65 The standards would require a minimum level of fuel efficiency from all jet engines in new plane models. U.S. manufacturers such as Boeing and Lockheed Martin would feel the pain most acutely once the International Civil Aviation Organization standards become effective as these companies lack certainty as to whether they would still be able to sell their aircraft overseas to countries that adopted the international rules. Those countries may not accept aircraft made by Boeing or Lockheed Martin if there is not a federal agency that can certify that the planes meet international standards.

It is likely that regulations, should they be developed, will focus upon whole-aircraft carbon dioxide emissions, as carbon dioxide emissions are influenced by aerodynamics, weight and engine technology, such as new fuel burn reduction technologies that vary across aircraft of differing size and weight.66 According to the EPA, aircraft remain the single largest greenhouse gas emitting transportation source not yet subject to
greenhouse gas standards in the U.S., accounting for 12 percent of greenhouse gas emissions from the transportation sector in 2014, and three percent of total U.S. greenhouse gas emissions.67 The EPA's scientific finding applies to 89 percent of all U.S. aircraft carbon emissions with exemptions for military and small piston-engine planes often used for recreational purposes.68

B. Fossil Fuel-Fired Power Plants
On October 23, 2015, the EPA finalized one portion of rulemaking under the Clean Air Act that established new source performance standards for new, modified and reconstructed fossil fuel-fired power plants.69 The final rule imposes an emission limit of 1,400 lbs carbon dioxide/MWh for new coal-fired power plants that is based on partial carbon capture and sequestration.70 This is substantially less than the emissions from any currently operating commercial coal-fired power plant.

C. Oil and Gas Sector
On May 12, 2016, the EPA finalized new source performance standards to control methane and volatile organic compound (VOC) emissions from new and modified sources in the oil and gas sector.71 The goal of this regulation is to cut methane emissions from the oil and gas sector by 40 percent to 45 percent from 2012 levels by 2025.72 The EPA also issued for public comment an Information Collection Request that will require companies to provide extensive information for developing comprehensive regulations to reduce methane emissions from existing oil and gas sources.73 The methane reductions from the final New Source Performance Standards will build on the EPA's 2012 rules to curb VOC emissions from new, reconstructed and modified sources in the oil and gas industry.

The EPA's final rule would achieve more methane reductions than estimated at the time of rule proposal because of changes made in response to the more than 900,000 public comments the EPA received on the draft regulation.74 At natural gas well sites, for example, there are new requirements for detecting and repairing leaks and requirements to limit emissions from pneumatic pumps.75 The final rule requires owners/operators of hydraulically fractured oil wells to capture the natural gas that currently escapes into the air.76 Capturing the gas will both reduce methane and VOC emissions and maximize natural gas recovery from well completions. The rule requires that significant emissions reduction be accomplished primarily through the use of a process known as a “reduced emissions completion” or “green completion.” This process is estimated to reduce methane and VOC emissions by 95 percent.77

VII. Hitting “Pause” on Climate Change Regulation
On January 20, 2017, all U.S. regulatory action was frozen by a memorandum issued by White House Chief of Staff Reince Priebus.78 The memorandum is intended to give the administration time to review new or pending regulations and effectively halts any lingering policies from the Obama administration before they can be finalized. Federal regulations go through a multi-step process prior to taking full effect. The President cannot halt any regulations that have gone into effect already, but lays out steps for any that are not fully in action. For any regulations that have yet to be sent for publishing in the Federal Register, the memo asks the agency to not send any regulation to the Federal Register until reviewed by someone selected by the President.79 For those that have been sent but not published, the White House ordered the regulations withdrawn.80

On January 30, 2017, President Trump issued an executive order that applies to all significant regulatory actions by agencies. Executive departments and agencies are to comply with the order’s requirements by issuing two “deregulatory” actions for each new significant regulatory action that imposes costs.81 President Trump has capped the total incremental cost of all regulations that an agency enacts this fiscal year to zero.82 The order directly directs agencies to reallocate their internal resources away from developing new regulations and toward evaluating existing ones. According to White House guidance83 issued on February 2, 2017, agencies may proceed with significant regulatory actions that need to be finalized in order to comply with an imminent statutory or judicial deadline even if they are not able to identify offsetting regulatory actions by the time of issuance.

At the time of the writing of this article, President Trump is also expected to sign an executive action repealing President Obama's regulations on carbon dioxide emissions. It is expected that the executive order will direct the EPA to cease all efforts to enforce and implement the Clean Power Plan, and that the EPA will then extend all of the regulation's deadlines. However, until such action is taken, the actual effect is unknown.

Scott Pruitt’s confirmation as the Administrator of the EPA portends a significant change in direction on climate regulation. In lawsuits against the EPA, including one attempt to have the EPA’s carbon dioxide standards for power plants, known as the Clean Power Plan, heard in an Oklahoma District Court, Pruitt accused the Obama administration of creating ambiguity in order to expand its regulatory license of laws such as the Clean Air Act.84 It is possible that Pruitt may interpret how the Clean Air Act applies in a manner not consistent with the Obama administration and the Clean Power Plan. With the Clean Power Plan, the Obama EPA determined power plants could meet their obligations to curb carbon dioxide emissions by shifting generation from coal-fired units to those burning natural gas or investing in new renewable generation. Pruitt and others argued that forcing utilities to take steps to reduce their emissions that are beyond the fence line of the regulated power plants themselves is outside the authority of the law. Consistent with that position, Pruitt may envision revising the Clean Power Plan to focus on steps individual utilities could take to reduce their emissions by requiring them to install energy-efficient technology to slightly lower their emissions as a legally defensible interpretation of the Clean Air Act.

Republicans in the House and Senate could use a little-used law called the Congressional Review Act (CRA) to overturn some climate change regulations enacted under Obama.85 Any rule that was finished after late May 2016 could be subject to
disapproval by a simple majority vote in both the House and Senate. Rules vulnerable to CRA disapproval include emissions standards for landfills,\textsuperscript{86} methane standards for oil and gas drilling\textsuperscript{87} and a cornerstone of the Obama administration's Climate Action Plan: energy-efficiency standards for appliances including portable air conditioners, swimming pool pumps, walk-in coolers and freezers, commercial boilers and uninterruptible power supplies.\textsuperscript{88}

Arguing that the Obama climate regulations may have an adverse economic impact on the state, Kansas Attorney General Derek Schmidt has joined other state attorneys general in more than 20 states urging Trump's administration to immediately repeal new regulations dealing with climate change, claiming those regulations are illegal.\textsuperscript{89} At the time of writing of this article, no action has been taken on that request.

On January 23, 2017, President Trump instructed the EPA to stop issuing grants and contracts,\textsuperscript{90} throwing the Kansas Department of Health & Environment into a state of uncertainty as budgets and priorities were reviewed. The EPA awards more than $4 billion in funding for government grants and contracts each year.\textsuperscript{91} In an e-mail dated January 27, 2017, from the EPA's acting administrator, the freeze on grants and contracts ended. The e-mail informed staffers that officials had completed a review of the agency's extensive list of grants and that all grants are to proceed normally including revolting grants to states and Native American tribes.\textsuperscript{92}

\section{VIII. Conclusion}

The Obama administration initiatives introduced wide-ranging requirements aimed at addressing climate change through emissions reductions and restrictions across a broad range of industries and operations. Ongoing developments and challenges to those policies created uncertainty and shifting regulatory expectations over the last number of years.

With the announced shift in policy, it appears that we can expect continued change and uncertainty. The actual impact on operations, permits and regulated industry is not yet known. Impacted parties will be watching carefully to understand the scope and effect of the current regulatory direction.

\section*{About the Author}

Bob Lambrechts is a partner with Lathrop & Gage LLP in Overland Park, where he counsels a wide range of clients on intellectual property and environmental law issues. He formerly served with the U.S. EPA in the Region 7 Clean Air Division and as a special assistant to the Regional Administrator. In addition to his law degree from St. Louis University, He earned a Bachelor's and a Master's degree in Mechanical and Aerospace Engineering from the University of Missouri at Columbia and is a licensed professional engineer in Missouri. Bob is also licensed as an attorney to practice before the U.S. Patent and Trademark Office.

\section*{Endnotes}

4. See Clean Air Act, 42 U.S.C. § 7602(g). The Clean Air Act defines “air pollutant” as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”  
6. See Coal. for Responsible Regulation, Inc. v. E.P.A., 684 F.3d 102 (D.C. Cir. 2012). In the D.C. Circuit, the petitioners tried to strike at the link between the Tailpipe Rule and the regulation of stationary sources by challenging EPA's position that the Prevention of Significant Deterioration (PSD) could be triggered by emissions of any regulated air pollutant, and not just emissions of NAAQS pollutants. EPA argued that its expansive reading of what constitutes a “major source” is compelled by the Clean Air Act’s use of the term “any air pollutant” in its definition of “major emitting facility.” The industry challengers maintained that the Clean Air Act supports a more circumscribed definition of major source. They argued that the PSD program is intended to be geographically distinct, and so PSD only should apply to air pollutants with localized effects – which admittedly would not include GHGs. The D.C. Circuit rejected this argument based on the requirement in Section 165(a)(4) that best available control technology (“BACT”) is required for “each pollutant subject to regulation” under the Act. The court also rejected arguments that pointed to PSD provisions applicable to NAAQS pollutants, which the petitioners argued were an indication of Congressional intent to limit PSD to NAAQS. The Court ruled those provisions inapplicable, since EPA has not classified GHGs as NAAQS, and held that those provisions also did not alter its reading of the PSD permitting provisions in Section 165. Ultimately the D.C. Circuit agreed with EPA that its reading of “any air pollutant” to mean “any pollutant regulated under the Clean Air Act” was compelled by the language of the statute.


8. The Prevention of Significant Deterioration, or PSD, permit program was developed by the United States Congress to prevent significant environmental impacts on “attainment areas” from large industrial sources of air pollution. Attainment areas are regions of the United States where air quality meets standards established by the federal Clean Air Act. The regulations apply to new or modified air pollution sources that are classified as “major” relative to air pollution emissions potential, and that are proposing construction projects that may “significantly” increase their air pollutant emissions. The PSD program is complex, and obtaining a permit can be costly for both the applicant and the permitting authority. It has been estimated, for example, that permit applicants expend 866 hours of labor and $125,120 on the average PSD permit. The administrative cost to the permitting authority for the same permit is 301 hours of labor and $23,280. See, Allen, G. F., & Lewis, M. (2010). Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts v. EPA. University of Richmond Law Review, 44, 919-935.

9. Title V of the Clean Air Act requires major sources of air pollutants, and certain other sources, to obtain and operate in compliance with an operating permit. Sources with these “title V permits” are required by the Act to certify compliance with the applicable requirements of their permits at least annually.

10. Best Available Control Technology (BACT) is defined at 42 U.S.C. § 7479 as determining the emissions limitation that will achieve the maximum degree of emissions reductions through application of production processes and available methods, systems, and techniques, taking into consideration energy, environmental and economic impacts.

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13. The major source thresholds are 100 tons of an air pollutant for a Title V permit and a nonattainment new source review (NNSR) construction permit and 250 tons for a PSD construction permit. Carbon dioxide sources from millions of sources in the United States exceed these thresholds and would be captured by these complex construction permitting programs.
14. 81 FR 68110, October 3, 2016, Proposed rule titled Revisions to the Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Permitting Regulations and Establishment of a Significant Emissions Rate (SER) for GHG Emissions Under the PSD Program.

17. Id.
18. Id.
19. EPA Website, FACT SHEET: Clean Power Plan by the Numbers, https://www.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-numbers
20. Id.
21. Heat rate is one measure of the efficiency of a generator or power plant that converts a fuel into heat and into electricity. The heat rate is the amount of energy used by an electrical generator or power plant to generate one kilowatthour (kWh) of electricity. To express the efficiency of a generator or power plant as a percentage, divide the equivalent BTU content of a kWh of electricity (which is 3,412 BTU) by the heat rate. For example, if the heat rate is 10,500 BTU, the efficiency is 33 percent. If the heat rate is 7,500 BTU, the efficiency is 45 percent. See U.S. Energy Information Administration – FAQ – What is the efficiency of different types of power plants? https://www.eia.gov/tools/faqs/faq.cfm?id=107&t=3
22. National Renewable Energy Laboratory, U.S. Renewable Energy Technical Potentials: A GIS Based Analysis, July 2012, p. 14. The most recent estimates (2012) are that Kansas has a potential for 952 GW of wind power capacity yet has only about 1.2 GW installed. Kansas could generate 3,102 TWh of electricity each year, which represents over 75 percent of the electricity generated in the United States in 2011. This electricity could be worth $290 billion per year (at 9.35 cents per kW•h). http://www.nrel.gov/docs/fy12osti/51946.pdf
27. 74 FR 56260, October 30, 2009.
28. Forty-one source categories account for 85-90 percent of the U.S. greenhouse gas emissions and include, among others, electricity generation (Subpart D), municipal solid waste landfills (Subpart HH) and petroleum refineries (Subpart Y); U.S. EPA Fact Sheet – Greenhouse Gas Reporting Program Implementation, https://www.epa.gov/sites/production/files/2014-09/documents/ghgrp-overview-factsheet.pdf
31. Id.
34. World Resources Institute, http://www.wri.org/faqs-about-how-paris-agreement-enters-force
35. Id.
39. Id.
40. The mid-century strategy Benchmark scenario shows 92 percent of generation in 2050 coming from a diverse portfolio of clean sources, including significant contributions from solar, wind, nuclear, hydro, and carbon capture, utilization and storage (CCUS).
44. Id.
45. 47 CFR 229,101 to 229,915.
47. Id.
48. SEC’s Plans to Determine if Additional Action is Needed on Climate-Related Disclosure have Evolved; published January 6, 2016, Publicly Released Feb 8, 2016http://www.gao.gov/products/GAO-16-211
49. Id.
51. Id.
52. Id.
57. Center for Climate and Energy Solutions, International Civil Aviation Organization (ICAO) http://www.c2es.org/international/icao
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
64. 81 FR 54422, August 15, 2016. The findings became effective on September 14, 2016.
66. 81 FR 54430, August 15, 2016.
navigating change in climate change regulation

69. 80 FR 64509, October 23, 2015.
70. 80 FR 64513, Table 2, October 23, 2015.
71. 81 FR 35824, June 3, 2016.
73. Id.
74. Id.
77. Id.
79. Id.
80. Id.
82. Id.
86. 81 FR 59332, Aug. 29, 2016.
87. 81 FR 59332, Aug. 29, 2016.
88. 81 FR 35824, June 3, 2016.
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**Supreme Court**

### Attorney Discipline

**ORDER OF TEMPORARY SUSPENSION**

**IN RE UCHECHI OKECHUKWU NWAKANMA**

NO. 111,773 – JANUARY 27, 2017

**Facts:** Nwakanma is currently subject to pending disciplinary complaints. The complaints, which have not yet been fully adjudicated, include allegations that Nwakanma was taking fees without performing work and engaging in the unauthorized practice of law in Texas. For that reason, the hearing panel asked the disciplinary administrator to seek the temporary suspension of Nwakanma’s law license while the disciplinary case was pending. The disciplinary administrator filed the motion seeking temporary suspension in order to protect the public.

**COURT PROCEEDINGS:** The Kansas Supreme Court issued an order to show cause why Nwakanma’s license should not be temporarily suspended. A hearing was set for January 24, 2017. After business hours on the day before the hearing, Nwakanma alerted the court that he would not appear at the hearing. The disciplinary administrator did appear and argued for the suspension.

**HELD:** Rule 203(b) allows for a temporary suspension pending final disposition in order to protect clients from injury and to maintain the integrity of the legal profession. Based on the hearing panel’s findings and the disciplinary administrator’s presentation, plus Nwakanma’s failure to appear, the court ordered the temporary suspension of Nwakanma’s license.

### Civil

**ESTOPPEL—PLEADINGS—STANDING**

**STECKLINE COMMUNICATIONS V. JOURNAL BROADCAST GROUP OF KANSAS**

**SEDGWICK DISTRICT COURT—COURT OF APPEALS IS REVERSED, DISTRICT COURT IS REVERSED, CASE IS REMANDED**

NO. 111,651—JANUARY 27, 2017

**Facts:** Steckline is the founder of the Mid America Ag Network, a group dedicated to producing market reports and other radio broadcasts for those involved in the agriculture business. In 2003, Journal Broadcasting entered a settlement agreement with MAAN, establishing the parties’ business relationship for the next 15 years. In 2005, Steckline purchased assets from MAAN, including its tradenames and business contracts. Despite a contractual provision, Journal Broadcasting was not asked for and did not provide consent to assign the 2003 contract. Tensions arose between the parties, and in 2012 Journal Broadcasting stopped broadcasting MAAN content. Steckline sued Journal Broadcasting for breaching the 2003 contract. Journal Broadcasting countered that it had no business relationship with Steckline and did not know that Steckline acquired assets from MAAN. After discovery was complete, Journal Broadcasting filed a K.S.A. 60-212(b)(6) motion to dismiss on grounds that Steckline lacked standing to sue for breach of the agreement. Steckline countered that there was a genuine issue of fact as to whether Journal Broadcasting waived notice requirements in the assignment clause of the 2003 contract. The district court granted the motion to dismiss, finding a lack of standing. The Court of Appeals affirmed, finding that MAAN never obtained Journal Broadcasting’s consent to assign the contract. The Supreme Court granted Steckline’s petition for review.

**Issue:** Did Steckline allege sufficient facts to establish standing?

**Held:** Standing is a component of jurisdiction. Because Steckline was not a party to the 2003 contract, to have standing it would generally be required to show that MAAN assigned its interests to Steckline. A review of the record on appeal shows that Steckline asserted well-pled facts that Journal Broadcasting, by its silence at the time of assignment, induced Steckline into believing that Journal Broadcasting consented to the assignment of rights from MAAN to Steckline. This means that Steckline pled standing via equitable estoppel.

**Statute:** K.S.A. 2015 Supp. 60-212(b)(6)

**EMINENT DOMAIN—EVIDENCE—REAL PROPERTY**

**GARBER CONSTRUCTION V. KING**

**DOUGLAS DISTRICT COURT—AFFIRMED**

NO. 113,732—JANUARY 27, 2017

**Facts:** King, the Secretary of Transportation, initiated eminent domain proceedings against Garber Construction in order to facilitate construction of a portion of the South Lawrence Trafficway (SLT). The court-awarded appraiser valued Garber Construction’s land at $105,000. Garber Construction appealed, claiming the district court wrongly excluded the challenged evidence.

**issue:** Did the district court err by granting the motions in limine?

**Held:** In an eminent domain proceeding, a district court has broad discretion to admit or reject evidence. The Project Influence Rule, while challenging, is not controlling and must be balanced with the interests of the litigants. The Project Influence Rule’s purpose is to ensure that expert testimony is based on reliable methods and adheres to the standards and practices of the profession. The rule is not violated if the expert’s testimony is based on reliable methods, even if the expert’s testimony is not supported by consensus in the field. In this case, the expert’s testimony was not based on reliable methods and was therefore properly excluded.

**Statute:** K.S.A. 2015 Supp. 60-212(b)(6)
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Who are these intrepid presenters?
Stan Davis, Legal humorist, consultant and gadfly
Jim Griffin, Scharnhorst Ast Kennard Griffin, P.C.
Mark Hinderks, Stinson Leonard Street L.L.P.
Todd LaSala, Stinson Leonard Street L.L.P.
Hon. Steve Leben, Kansas Court of Appeals
Jacy Hurst Moneymaker, Swope Health Services
Todd Ruskamp, Shook, Hardy & Bacon L.L.P.
Hon. Melissa Standridge, Kansas Court of Appeals

Questions?
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Rule excludes certain factors from the fair market value calculation in an eminent domain proceeding. Specifically, the court does not consider the enhancement of value due to anticipated improvements because the eminent domain statutes require that fair market value be calculated at the time of the taking. That rule justified the district court’s exclusion of the expert testimony. The president of Garber Construction was allowed to testify about fair market value where that testimony was based on familiarity with property and values in the neighborhood. While testimony regarding comparable properties is allowed, the president’s testimony was flawed because it did not evaluate comparable property. Further, projected profits from business conducted on certain property are not compensable under eminent domain proceedings. The district court did not err by excluding the testimony.

STATUTE: K.S.A. 26-513, -513(b), -513(e)

CONSTITUTIONAL LAW—APPEAL AND ERROR—CRIMINAL PROCEDURE—DEATH PENALTY—JURY INSTRUCTIONS

STATE V. GLEASON
BARTON DISTRICT COURT—AFFIRMED
NO. 97,296—FEBRUARY 3, 2017

FACTS: Gleason was convicted of capital murder for killings of Wornkey and Martinez, as well as premeditated first-degree murder of Wornkey, aggravated kidnapping, aggravated robbery, and criminal possession of a firearm. Divided court affirmed the convictions but vacated the death sentence, holding Eighth Amendment required instructing jury that mitigating circumstances need not be proven beyond a reasonable doubt. U.S. Supreme Court reversed that holding and remanded for review of unresolved penalty-phase issues. State v. Gleason, 299 Kan. 1127 (2014), rev’d and remanded sub nom. Kansas v. Carr, 577 U.S. ___ (2016) (Gleason I). Gleason’s outstanding claims in the appeal are: (1) district court’s failure to instruct jury that mitigating circumstances need not be proven beyond a reasonable doubt was reversible error under state law; (2) death penalty was unconstitutionally disproportionate under §9 Kansas Constitution Bill of Rights as applied to a “non-triggerman” accomplice, and his death sentence was unconstitutionally disproportionate in comparison to accomplice’s hard-25 year sentence; (3) the death sentence was contrary to the Kansas aiding and abetting statute; (4) district court erred by giving jury an instruction that was later held unconstitutional in State v. Kleypas, 272 Kan. 894 (2001) (Kleypas I); (5) district court’s instruction about sentence Gleason would receive if jury did not impose death penalty was clear error; (6) penalty-phase verdict forms failed to protect his right to be free from double jeopardy; and (7) cumulative error denied him a fair trial.

ISSUES: (1) Jury instruction on mitigation, (2) §9 Kansas Constitution Bill of Rights and disproportionate sentence, (3) aiding and abetting statute, (4) Pre-Kleypas I instruction for weighing evidence, (5) advising jury of alternative sentences, (6) penalty-phase verdict forms, (7) cumulative error

HELD: K.S.A. 21-4624(e) provides greater protection to a death-eligible defendant than required by federal Constitution. Accordingly, a capital jury in Kansas must be instructed that mitigating circumstances need not be proven beyond a reasonable doubt. As determined in State v. Cheever, 304 Kan. 866 (2016) (Cheever II), such an instruction is legally and factually appropriate under state law. District court’s failure to do so in this case was error under state law. Because Gleason did not request the instruction, court reviewed record for clear error but found jury’s verdict would not have been different if it had been properly instructed.

Under §9 of Kansas Constitution Bill of Rights, challenges that assert a punishment is categorically disproportionate are limited to term-of-years sentences. A comparative proportionality review of a death sentence is not required under federal or Kansas constitutions or under state law. Also, under facts of case, Gleason does not belong to the broader class of non-triggerman accomplices.

Aiding and abetting argument lacks factual underpinnings and is meritless. Gleason’s capital murder conviction rests upon jury’s determination that he committed two related, intentional, premeditated murders, only one of which is predicated on an aiding-and-abetting theory.

Pre-Kleypas I, jury instruction given about weighing the evidence, consistent with K.S.A. 21-4624(e), was legally appropriate given U.S. Supreme Court’s holding in Kansas v. Marsh, 548 U.S. 163 (2006), that the statute was constitutional. A criminal defendant does not have a liberty interest in having a jury instructed in accord with an overruled interpretation of a provision of law.

Even if error is assumed in district court not giving a more accurate instruction informing jury about possible noncapital sentences, no reversal under federal or state law is required under facts in case.

Double Jeopardy argument based on penalty-phase verdict form was not ripe for review.

Cumulative effect of two instructional errors found and assumed in penalty phase had no reasonable probability of changing jury’s ultimate conclusion regarding the weight of aggravating and mitigating circumstances.

CONCURRENCE (Stegall, J.): Agreed with outcome but disagreed the mitigation instruction originally given was legally inappropriate. Criticizes Cheever II as finding an instructional rule mandate in state law rather than Eighth Amendment.

CONCURRENCE and DISSENT (Lukert, J., joined by Beier, J.): Writes separately to reassert her concurrence and dissent in Gleason I. Would not reverse Gleason’s capital sentence based solely on any of today’s issues, but still believes guilt-phase errors entitle Gleason to a new trial on the capital murder charge. Also believes the erroneous admission of accomplice testimony prejudiced Gleason’s right to a fair penalty-phase trial.

DISSENT (Johnson, J.): Agreed with J. Lukert that the capital murder conviction should have been reversed for new trial and that accomplice testimony prejudiced Gleason’s right to a fair penalty-phase trial. Criticized majority’s refusal to look at all alleged trial errors in the course of penalty-phase analyses in this ongoing case. Also disagreed with majority’s treatment of the mitigation instruction, and argues the clearly erroneous reversibility standard employed under K.S.A. 22-3414(3) has no place in reviewing jury instructions given to a death penalty jury. Also would permanently vacate death sentence, based on prohibition in Kansas Constitution against inflicting cruel and unusual punishment.

STATUTES: K.S.A. 2015 Supp. 21-6619, -6619(b), -6619(c); K.S.A. 21-3205, -3439(a)(6), -4624(e), -4625, 22-3414(3)
COURT OF APPEALS

CIVIL

STATUTORY CONSTRUCTION—WORKERS COMPENSATION
BYERS V. ACME FOUNDRY
WORKERS COMPENSATION BOARD—REVERSED AND REMANDED
NO. 115,023—JANUARY 27, 2017

FACTS: Byers’ arm was injured while he was working his early morning shift at the Foundry. After being transported to the hospital, medical personnel took a blood sample from Byers as part of the examination. The hospital lab was notified that a drug screen would be necessary. But when the lab called Acme to see what type of drug screen it wanted, Acme replied that it did not need a drug screen. After being released from the hospital and returning to work, Byers consented to a drug test even though there was no appearance of intoxication. Acme staff explained the parameters of the urine test, and Byers cooperated by delivering a sample. But the test was not effective because there was not enough volume to the sample, and Acme medical staff never attempted to test the sample. After workers compensation litigation was initiated, the ALJ concluded that Byers forfeited his workers compensation benefits by providing an inadequate urine sample for testing and the board upheld that ruling. Byers appealed.

ISSUE: Was it error to find that Byers refused to take the drug test

HELD: K.S.A. 2012 Supp. 44-501(b)(1)(E) fits within the statutory scheme designed to withhold workers compensation benefits from workers who are injured through some action or inaction they take. In this case, there was absolutely no evidence that Byers was impaired at the time he was injured. The term “refusal” carries with it an element of willfulness or intent, and there is no evidence of that intent here. Under the applicable statute, Byers did not refuse post-accident drug testing. The matter must be remanded for further proceedings and a determination of any applicable benefits.


NEGLIGENCE—SUMMARY JUDGMENT—TORT CLAIMS ACT
PATTERSON V. COWLEY COUNTY ET AL.
COWLEY DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, REMANDED
NO. 114,705, 114,707—JANUARY 27, 2017

FACTS: 322nd Road is a paved county road primarily maintained by Cowley County. There is a roughly quarter-mile stretch that is not paved that is located within Bolton Township. There is one sign, located 600 feet prior to the pavement’s end, which alerts drivers that the pavement ends. The County has never maintained the unpaved portion of the road. The Township, believing that the entire road belongs to the County, has likewise failed to maintain the road. 322nd Road ends where it comes to a dead end at the banks of the Arkansas River. That location is in the Kaw Wildlife Area, which is operated by the Kansas Department of Wildlife and leased from the United States Department of the Army. The Kaw Wildlife Area operates as a public place for recreation. In 2010, a vehicle occupied by Brewer and Patterson came to the end of 322nd Road and entered the Kaw Wildlife Area. The driver attempted to brake, but the tires went over the edge and the vehicle pitched into the river. Both Brewer and Patterson, who were intoxicated, drowned in the accident. Both Brewer’s and Patterson’s heirs filed wrongful death actions against the County, the Township, and the State alleging that all defendants were negligent for failing to provide adequate warnings, signs, or barriers indicating that 322nd Road ended in the river. All parties filed extensive motions for summary judgment. The district court granted partial summary judgment to the County and

Appellate Practice Reminders . . .

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2. Listing more than one attorney per party on the cover. Additional attorneys can go on the signature page, but only one can be on the cover. 6.07(b)(2)(F).
3. Failure to put the attorney’s e-mail address on the brief’s cover. 6.07(b)(2)(F).
4. Typos in the district court case number on the cover. We need the district court case number to be EXACTLY correct. 6.07(b)(2)(E).

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full summary judgment to the Township and the State. The Court of Appeals accepted applications for interlocutory appeal from both Patterson and the County. Neither application alleged error in the rulings involving the State.

ISSUES: (1) Was it error to find that the County did not have a duty to initiate an engineering study; (2) Was it error to find that the County was immune from liability under the discretionary judgment exception to the Kansas Tort Claims Act (KTCA); (3) Was it error to find that the Township has no duty to place signs on its portion of 322nd Road; (4) Was the County entitled to immunity for any failure to place a “Dead End” or “No Outlet” sign on its portion of 322nd Street.

HELD: The Manual on Uniform Traffic Control Devices (MUTCD) carries the force of law. Patterson’s complaint is that the County had a duty under the MUTCD to perform an engineering study to determine whether any additional warning traffic control devices were necessary. The County does not have a duty to conduct an engineering study on every road within its borders for purposes of considering a warning sign. Because there is no duty, there is no basis for the County’s liability. The district court granted the County immunity for its failure to place an advisory speed plaque at the end of its portion of 322nd Road, but refused to find immunity for the failure to place a “Dead End” and “No Outlet” sign. Kansas lacks a uniform standard for determining whether the KTCA’s discretionary function exception applies. Under a federal analytical framework, the first question is whether the decision involved an element of individual judgment of choice. There is no standard within the MUTCD regarding placement of any of the warning signs contemplated by the district court. In the absence of that standard, the County’s decision not to place the signs was discretionary. The second question is whether the County’s decision is a function susceptible to public policy analysis. Again, the facts of this case show that the County’s failure to place warning signs was a discretionary act grounded in policy. The County was not, however, entitled to immunity under the recreational use exception because 322nd Road is not an integral component of the Kaw Wildlife Area. Because a township is not a “local authority”, it lacks statutory power to place traffic control devices on township roads.

STATUTES: K.S.A. 2015 Supp. 8-2005, 75-6103(a), -6104(e), -6104(h), -6104(k), -6104(o), 68-101(c), -124, -526(a), -526(b), 80-101; K.S.A. 8-1432, -2003, -2004, 60-513(b), 68-515b, -516a, -516b

AFFIRMATIVE DEFENSE—STATUTE OF LIMITATIONS—TORTS
LCL, LLC V. FALEN
RICE DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, REMANDED
NO. 115,434—FEBRUARY 17, 2017

FACTS: LCL, LLC, filed this action against the Falens seeking to quiet title to mineral rights associated with farmland in Rice County. The Falens filed a counterclaim seeking the same determination in their favor. The Falens also filed suit against Rice County Abstract & Title Company, Inc. (RCAT) alleging negligence, breach of implied contract, and breach of fiduciary duty. The quiet title actions settled, but the claims against RCAT persisted until RCAT filed a motion for summary judgment based on the statute of limitations. The district court ruled in RCAT’s favor and this appeal followed.

ISSUE: Did the district court properly find that the statute of limitations was expired?

HELD: Any statute of limitations defense must be pled by a defendant as an affirmative defense. In Kansas, a tort action does not accrue until the act giving rise to the tort first causes substantial injury, even if there is some delay between the tort and the evidence of the injury. In this case, the damage did not cause injury did not occur until the Falens stopped receiving royalty payments. The district court erred by finding that the injury occurred with the recording of the deed. For similar reasons, the Falens are allowed to pursue their breach of fiduciary duty claim against RCAT. The case must be remanded for further findings of fact regarding the existence and duration of the fiduciary relationship.


ESTATES—TRUSTS IN RE ESTATE OF MOORE
COWLEY DISTRICT COURT—AFFIRMED
NO. 115,628—FEBRUARY 17, 2017

FACTS: Roxie Moore owned substantial farm property. After she entered a skilled nursing facility, she signed a general durable power of attorney naming her ex-daughter-in-law Maureen as attorney-in-fact. Later, at Roxie’s request, an attorney drafted a transfer on death (TOD) deed to Maureen, so that Maureen could hold Roxie’s farm land until Roxie’s grandsons were financially secure enough to own it themselves. When it came time to sign the TOD, Maureen refused and asked Maureen to sign it. Maureen did so, signing it as power of attorney. Roxie’s son, Harvey, learned of the TOD after Roxie’s death. Pursuant to Roxie’s wishes, Maureen conveyed the farm land to her sons. Harvey, who would have inherited under the laws of intestate succession, filed a petition for determination of descent of the property. The grandsons filed a separate petition to quiet title in their names. At trial, the district court found that a TOD deed may be signed by another if that other person is acting as a disinterested amanuensis. Under the totality of the evidence, the district court concluded that Maureen’s signature was valid. Harvey appeals.

ISSUES: (1) Evidence of Roxie’s instructions to Maureen; (2) The validity of the amanuensis rule in Kansas

HELD: The amanuensis rule allows one person to sign a document at the request of another party. Because Harvey was not a party to the TOD deed he is not entitled to any defense from the parol evidence rule. Roxie’s statements to Maureen were admissible as a verbal act and under an exception to the rule against allowing hearsay testimony. The amanuensis rule is valid in Kansas and does not violate public policy. Although it appeared that Maureen, as the sole beneficiary of the TOD deed, would have benefitted from the transfer, the district court used the proper standard in finding Maureen’s signature valid. Maureen met her burden to prove that Roxie’s direction to her to sign the deed was free from undue influence, and the evidence showed that Roxie was competent to direct the signature. Maureen’s signature on the TOD deed complied with Kansas transfer-on-death statutes.

CONCURRENCE: (Atcheson, J.) agrees with the outcome but would hold that the burden of proof on an interested amanuensis is to show by clear and convincing evidence that the signature was a robotic act done at the behest of the property owner.

STATE: K.S.A. 58-2205, 59-606, -3501, -3502, -3507, 60-401(d), -460

CONSTRUCTION; CONTRACTS
LINDSEY MASONRY CO. V. MURRAY & SONS CONSTRUCTION CO.
JOHNSON DISTRICT COURT—AFFIRMED
NO. 114,812—FEBRUARY 3, 2017

FACTS: Murray & Sons was chosen to act as general contractor for several projects for a school district. Murray & Sons asked Lindsey Masonry to submit bids for the labor portion of any masonry work, which it did. The pattern of business between the companies
was that for each project, Lindsey would submit a written proposal which included the names of the parties and the project identification, price, scope of work, and exclusions. Each proposal indicated that the parties would later sign an AIA form that covered dealings with general and sub-contractors. But although Lindsey sent Murray the signed form, Murray returned a completely different form. Consequently, the parties never had any material written agreement that was signed by both parties. As the projects progressed, Lindsey and Murray’s relationship soured to the point that Lindsey walked off the job before it was complete. Lindsey then filed a lawsuit against Murray, claiming that there was money still owing for each project and asserting alternative theories of recovery based on breach of contract, promissory estoppel, and quantum meruit. Murray denied liability and counterclaimed. The case was heard by the district court, which found that there was no evidence to show that there was ever an express contract between the parties. Instead, the court found, there was an implied-in-fact contract on each project which covered the scope of the work and the amount of compensation. Finding that Murray breached each of the implied-in-fact contracts, the district court awarded Lindsey the outstanding balances plus interest, costs, and attorney fees under the Kansas Fairness in Public Construction Contracts Act (KFPCA). Murray appealed.

ISSUES: (1) Did Lindsey accept Murray’s form contract by beginning work; (2) did the district court erroneously exclude evidence of agreements between the companies; (3) does the KFPCA apply to implied-in-fact contracts; (4) was the district court required to consider alternative equitable theories of recovery; (5) are the district court’s findings supported by substantial competent evidence?

HELD: Although contract acceptance may be accomplished by performance, that did not happen in this case. There is insufficient evidence that Lindsey accepted the terms of Murray’s contract. The district court properly excluded the introduction into evidence of contractual terms where there was no proof that Lindsey ever accepted the modified terms presented by Murray. The KFPCA does not distinguish between express contracts and implied-in-fact contracts; the parties’ failure to define payment terms does not change that fact. Once the district court found that an implied-in-fact contract existed, there was no need to explore equitable remedies. Substantial competent evidence supported district court’s rulings.

CONCURRENCE: (Atcheson, J.) Judge Atcheson concurs in the result, but believes that the project was governed by the contract put forth by Lindsey. Because there was an express contract, there was no need for the district court to create an implied-in-fact contract.

STATUTE: K.S.A. 16-1901(b), -1902(b), -1902(i), -1903(a), -1903(f), -1903(g), -1904

ACQUIESCENCE—CONSTITUTION—RELIGIOUS INSTITUTIONS
HEARTLAND PRESBYTERY V. THE PRESBYTERIAN CHURCH OF STANLEY
JOHNSON DISTRICT COURT—AFFIRMED NO. 114,404—FEBRUARY 17, 2017

FACTS: The Presbyterian Church of Stanley (Church) affiliated with the Presbyterian Church (U.S.A.), a hierarchical church body, in 1983. The Church is part of Heartland Presbytery, the governing arm of PCUSA and comprised of congregations in the Kansas City area. Over time, the Church’s relationship with PCUSA and Heartland deteriorated because of theological disagreements. Although it was not allowed by the rules of PCUSA, a majority of the congregation voted to withdraw from PCUSA. The vote has never been officially recognized by Heartland, but Heartland did file a declaratory judgment action seeking a ruling that all of the Church’s real and personal property was held in trust for the use and benefit of PCUSA. Heartland also sought to quiet title in the real estate in favor of the Church members who voted to remain with PCUSA. Following established case law which suggests that courts should defer to judgments made by the highest judicatory tribunal of a hierarchical church, the district court ruled in favor of the church members who voted to remain with PCUSA. This appeal followed.

ISSUES: (1) Did the leaving faction acquiesce to the district court’s judgment; (2) Was it appropriate to use the principle of hierarchical deference; (3) Should Kansas courts abandon the hierarchical deference approach when resolving property disputes?

HELD: Although it is a close call, the leaving faction did not acquiesce in the district court’s judgment by creating a new congregation that is affiliated with a different denomination. In cases involving disputes over the ownership or control of church property, civil courts take jurisdiction only to assure the regularity of business practices. In this case, it is undisputed that the Church had a longstanding affiliation with PCUSA, which is a hierarchical church body, and the district court properly relied on the principle of hierarchical deference in this case. In this case, the outcome is the same regardless of whether the hierarchical deference or the neutral-principles approach is applied.

STATUTES: None

CRIMINAL

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EVIDENCE
STATE V. CLEVERLEY
JOHNSON DISTRICT COURT—AFFIRMED NO. 113,678—FEBRUARY 3, 2017

FACTS: Cleverley was convicted of mistreatment of a dependent adult (McCool). On appeal she claimed district court erred by relying on affidavits submitted by records custodians to admit McCool’s credit card records without requiring the records custodian to testify in person at trial. She next claimed district court’s interpretation and application of K.S.A. 2015 Supp. 60-460(m) and K.S.A. 2015 60-245a unconstitutionally shifted burden from State by requiring her to produce custodians to challenge foundation of the business records, and denied her the right of confrontation. She also claimed insufficient evidence supported her conviction.

ISSUES: (1) Admission of credit card records, (2) constitutionality of the statutes, (3) sufficiency of the evidence

HELD: Business records exception to hearsay in K.S.A. 2015 Supp. 60-460(m) does not require the presence of a records custodian if the party seeking to admit the business records complies with K.S.A. 2015 Supp. 60-245a. District court properly admitted the credit card statements.

Provisions of K.S.A. 2015 Supp. 60-460(m) incorporating requirements of K.S.A. 2015 Supp. 60-245a do not impermissibly or unconstitutionally shift State’s burden of proof to a criminal defendant. Under K.S.A. 60-245a(c) a party can request issuance of a subpoena ducem tecum to require the personal attendance of a business records custodian, but Cleverley failed to so. Constitutional claim of being denied right of confrontation was not preserved for appellate review.

Under facts in case, Cleverley’s conviction was supported by sufficient evidence that she exercised undue influence over McCool and caused McCool a loss of at least $25,000.

STATUTE: K.S.A. 2015 Supp. 21-5417(a)(2), -5417(b)(2)(D), 60-245a, -245a(b)(2), -245a(b)(3), -245a(c), -460(m)
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