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As a young Boy Scout, I was always taught to be prepared. However, as a practicing lawyer, it is not easy to consider all the potential hazards that might unexpectedly arise to disrupt or destroy a law practice. This lesson was driven home, as it has been done so often in the past, by the recent hurricanes that devastated parts of the United States and many Caribbean islands. There are many stories of heroism and heartache from the storms and their aftermath. While perhaps not as newsworthy as videos depicting victims being rescued from the rooftops of flooded buildings, the legal community, as always, played and continues to play a key role in the return to normalcy for businesses and individuals, including many lawyers, who were impacted by these storms.

The Kansas Bar is part of the Southern Conference of Bars which includes the bar associations of Florida, Texas and the U.S. Virgin Islands. Many members of those bar associations, as well as the judiciary and the members of the public who rely on the services provided by the legal community, saw major interruptions during and following the storms. The legal community has been quick to respond. Shortly after Hurricane Harvey hit the Houston area, the Texas Supreme Court issued an order temporarily allowing lawyers without a Texas license to provide pro bono advice to victims of the storm. Bar associations and foundations from the affected and surrounding states activated disaster plans created in the aftermath of Hurricane Katrina which devastated New Orleans back in 2005. Bar associations and their members from each of the other states constituting the Southern Conference—including Kansas—offered aid and assistance to those affected by these most recent natural disasters.

It is important as lawyers that we are prepared for disasters, natural or manmade, which can disrupt our practice of law. Each lawyer, each firm, each legal department, each courthouse should have its own disaster plan. There are many events which can cause significant and sometimes devastating disruption to a legal practice. Natural disasters such as fire (think...
the entire Northwestern region of the U.S.), earthquake, hurricane, flood or tornado can have a wide geographic impact on the legal system as a whole. Man-made disasters such as a data breach or computer virus can have a similar impact. On a smaller scale, the death or illness of a lawyer can cause an unanticipated disruption. When hurricane Sandy hit the East coast several years ago, I was involved in a case as local counsel for a law firm whose physical office was destroyed. Original documents and computer files were all lost. Fortunately, in that case, files were able to be recreated from records maintained off-site to include our office. Opposing counsel and the court were also considerate of the situation as it related to deadlines, while the New York counsel went about the difficult task of recreating his office and his files.

Given the potentially devastating impact of an unanticipated disruption to a legal practice or the court system, it is critical that steps are taken to make sure any disruption is minimized to the greatest extent possible. The Kansas Bar Association and the Kansas Bar Foundation both have key roles to play in such preparation. The Kansas Bar Foundation maintains a Disaster Relief Fund which it can use in the event a natural disaster such as a tornado or fire occurs in Kansas. The Kansas Bar Association, through its Law Office Management Assistance Program, can assist lawyers and firms to prepare disaster plans and provide advice on ways to minimize potential problems such as file back-up and business insurance. It can also offer guidance on other resources available to assist in a time of need.

Countless lawyers have already given time and resources to assist those in need. Lawyers have provided pro bono services to assist victims of natural disasters deal with legal issues that relate to claims for services and have assisted them in replacing legal documents lost as a result of such disasters. This type of service is critical to the recovery effort and to return help these people and businesses get back to normal as quickly and efficiently as possible. I hope that no disaster plan put into place by a Kansas lawyer or court ever requires use, but I also hope we are wise enough to be prepared.

About the Author

Gregory P. Goheen is a shareholder at McAnany, Van Cleave & Phillips, P.A., where he has practiced since graduating from Southern Methodist University’s Dedman School of Law in 1993. He received his bachelor’s degree in 1990 from the University of Kansas. Greg is past President of the Kansas Association of School Attorneys and Fellow and past Trustee of the Kansas Bar Foundation.
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October 12, 2017 • (Noon-1:00 PM)

**Internet for Lawyers Webinar:**  
The 10 Keys to Building a Hyper-Streamlined Law Firm  
October 18, 2017 • (Noon-1:00 PM)

**Mesa CLE Webinar:**  
A Nightmare on Ethics Street: Don’t Fall Asleep on Your Ethical Obligations  
October 31, 2017 • (1:00-2:00 PM)
The Year Ahead

Expectations can be a bad thing in our personal and professional lives when the outcomes do not match what we had envisioned they would be. When setting goals for an organization, expectations should be a driving force that keep the organization on a sound trajectory. The 2017-2018 KBA YLS board is chock-full of passion for the profession and has a true desire to make a difference in the lives of young Kansas lawyers. My hope is that we can channel these passions into achievable goals and not leave ourselves disappointed come July 1 when our year is up.

So what can you expect from your YLS board? What will we be doing for the next 8-10 months? Here is a brief overview.

Our board has spent much time defining our mission, purpose and goals. We do not want to waste our time and the KBA members’ money going through the motions for a year. Our board desires to be an asset to the young lawyers across the state through mentorship, professional support, and relevant continuing education and above all, we want to show the value of professional involvement through the KBA and other bar associations. To that end, we will partner with local bar associations for joint events to promote both organizations. For being a relatively small state, Kansas has many successful local bar associations.

In all decisions that our board makes, we are always mindful of the service element of our profession. I encourage all of us practitioners to never forget that we are in a service profession. It is our privilege to provide a service to our clients, and the YLS board wants to keep this idea front and center.

We have a tremendous high school mock trial program in the state of Kansas. It is the KBA, Kansas Bar Foundation, the YLS and practitioners that all help to organize an impactful experience for the high school students (as evidenced in the September 2017 bar journal article by a mock trial participant) and those that choose to serve. Isn’t it that always how service goes? We think we are helping someone else when in the end we are changing ourselves as well. Please do not hesitate to contact me on how you can help with such an outstanding mock trial program.

In an effort to build personal relationships with new attorneys, the YLS board will make personal contact with all new admitees, host or co-host social and educational activities around the state, and publish a newsletter that will go out to all young lawyers in the state. We will also visit both KU and Washburn law schools this year and host a panel of young lawyers as an effort to reach out to law students. Our board will also continue to promote judicial externship opportunities for law students to be able to work with district judges around the state.

I believe the YLS board has set manageable, achievable goals and I anticipate writing an article ten months from now reporting back on all the accomplishments of this board.

About the Author

Clayton Kerbs currently practices in his hometown of Dodge City, with his father, Glenn. Clayton’s practice consists of domestic and municipal law cases. He attended Creighton University and Washburn University School of Law. Prior to practicing law, Clayton worked for U.S. Senator Jerry Moran. Clayton is married to Leah; they have two sons, Porter and Chandler.

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As I wrote this, the floodwaters in Houston were receding just as hurricane Irma built up incredible power in the Atlantic and threatened our Southern coast. These large-scale disasters underscore the value of smartphones and apps to disaster preparedness and response. Immediate access to reference information and news, communication with first responders and family, and coordination of recovery are all necessary in disaster response and there are apps available for virtually every need.

The following apps have been recommended for years by various emergency preparedness groups and individuals but have rarely been seen on display as readily as they were during hurricanes Harvey and Irma. No longer hypothetically helpful, this toolkit has shown its value in actual disaster. All apps are available for both Android and iOS and are free unless noted otherwise.

**Disaster Alert:** Provides monitoring of multiple hazards from hurricane to wildfires compiled from verified and authoritative sources. Provides push notification for specific events and areas and supplies automatic updating every five minutes. Base app is free with in-app subscription for some monitoring options.

**Weather Underground:** Weather disasters are most pressing for Kansans and Weather Underground is a one-stop-app for all weather monitoring. Weather alert push notifications warn of storms and situations you select and the app provides comprehensive forecasting information and satellite functions. Some locations even provide access to live webcam views.

**FEMA:** Preparing for disaster can feel overwhelming but putting up supplies and making preparations is straight-
forward with FEMA’s checklists. During an event, the app can also push information about alerts, shelter locations, and emergency assistance. Users can even communicate information directly to emergency managers.

**ICE Standard ER 911:** All your emergency health information and emergency medical contacts can be stored on your phone available to first responders with the press of a button — no need to unlock your phone. The app assesses the information you supply and provides red or yellow alerts based on severity and importance of the condition to emergency treatment.

**First Aid by American Red Cross:** Quick access tabs to a specific condition or situation with simple step-by-step instructions for treatment. Videos and animations clarify some procedures and interactive quizzes test knowledge as part of pre-disaster preparations. All content is local so data connections are not necessary but a 911 button is always available to summon emergency help.

**Maps.me:** Most GPS and mapping apps assume a data connection but disasters often leave networks in tatters. Maps.me provides fast access to pre-downloaded maps with incredible detail and turn-by-turn navigation.

**Bugle:** Before heading out, enter trip details, choose emergency contacts, and set a check-in time. If all goes well and you return as planned, nothing happens. If you miss your check-in time, then your emergency contacts are automatically notified by email and text that you might need help. (An online service at Kitestring.io provides the same service and works on any cell phone with SMS texting capability. No smartphone needed.)

**Life360 Find my Family:** This subscription service and app provides real-time location sharing of family and friends. Automatic notifications can provide push alerts when members arrive at home, work, or school safely. Pop up the map to view each person on a map to coordinate rendezvous and estimate arrival times. Subscription rates start at $2.99 per month.

**SafeTrek:** Press and hold the button on your smartphone’s screen whenever a situation seems dicey. As long as you hold the button, nothing happens. The moment you let go of the button for any reason, 911 is called and provided your location information. (You do have a moment to type in a 4-digit PIN to disable the call for help.) There is a subscription fee of $2.99 per month to provide access to 24/7 dispatch.

**Red Panic Button:** Plug in the email and phone numbers of a list of contacts and a press of the big, red panic button on your smartphone screen will send a plea for help to those contacts complete with your GPS coordinates. In-app purchases can enable additional message features including a panic video message.

**Zello:** Turns your smartphone into a walkie-talkie to speak to an individual or a group. The Cajun Navy, an ad-hoc group of volunteer water rescuers, used the app as a dispatch tool in Houston to coordinate rescues after the 911 systems were overloaded.

**ReUnite:** The U.S. National Library of Medicine runs a People Locator site at https://pl.nlm.nih.gov to assist in post-disaster location of people and pets. ReUnite is an app portal to that database allowing users to upload images of missing family (or pets) following a disaster. It also provides a place for people to check in and confirm they are OK and their whereabouts.

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**About the Author**

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

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Valuing Growth

How do you respond to failure? What is it that makes one person look at failure as a defining moment that can never be overcome and another person look at failure as a temporary setback; as something to learn from?

In her book “Mindset: The New Psychology of Success,” Carol S. Dweck, Ph.D., discusses how her “research has shown that the view you adopt for yourself profoundly affects the way you lead your life. It can determine whether you become the person you want to be and whether you accomplish the things you value.”¹ Dweck argues there are two mindsets: the fixed mindset and the growth mindset. The fixed mindset believes a person’s qualities are fixed. “The growth mindset is based on the belief that your basic qualities are things you can cultivate through your efforts. Although people may differ in every which way—in their initial talent and aptitudes, interests, or temperaments—everyone can change and grow through application and experience.”²

The book discusses how an individual’s mindset affects all aspects of one’s life but especially how one views success and failure. In the fixed mindset, success comes not from effort but from natural ability. Individuals with a growth mindset believe success comes from believing we can always grow and learn more. This difference in mindset can be illustrated by looking at the reactions of two students who do poorly on an exam. The student in the fixed mindset will react by thinking he must not be naturally gifted and will study less for the next exam. The student in the growth mindset will react by thinking he must not have put in enough effort. He will evaluate what he did wrong and put in more effort for the next exam. The fixed mindset makes an individual less likely to take risks or to take on new challenges because he is worried about exposing his deficiencies. In contrast, “[p]eople in a growth mindset don’t just seek challenge, they thrive on it. The bigger the challenge, the more they stretch.”³

The growth mindset is extremely beneficial in overcoming the negative effects of stereotypes. In the book, Dweck tells a story about a girl who was extremely gifted in math and did well in her classes right up until she met a professor that didn’t believe girls could do math. Because of her fixed mindset, the girl succumbed to the negative stereotype and began to believe her ability was fixed by her gender.

“Success is not final, failure is not fatal: it is the courage to continue that counts.”

“Research by Claude Steele and Joshua Aronson shows that even checking a box to indicate your race or sex can trigger the stereotype in your mind and lower your test score . . . in many of their studies, blacks are equal to whites in their performance, and females are equal to males, when no stereotype is evoked…When stereotypes are evoked, they fill people’s minds with distracting thoughts—with secret worries about confirming the stereotype. People usually aren’t even aware of it, but they don’t have enough mental power left to do their best on the test.

This doesn’t happen to everybody, however. It mainly happens to people who are in a fixed mindset. It’s when people are thinking in terms of fixed traits that the stereotypes get to them. Negative stereotypes say: ‘You and your group are permanently inferior.’ Only people in the fixed mindset resonate to this message. ...

When people are in a growth mindset, the stereotype doesn’t disrupt their performance. The growth mindset takes the teeth out of the stereotype and makes people better able to fight back. They don’t believe in permanent inferiority. And if they are behind—well, then, they’ll work harder and try to catch up.”⁴

In the growth mindset, this same girl would have heard the negative stereotype but would have likely put in more effort to compensate for “not naturally being good at math.” We all should do everything we can to eliminate prejudices and stereotypes; however, understanding how a growth mindset can
help negate the effects of stereotypes can help children with
the growth mindset to “see prejudice for what it is—someone
else’s view of them—and to confront it with their confidence
and abilities intact.”

So if a growth mindset is so important, how does one go
about teaching it? Dweck has found “simply learning about
the growth mindset seems to mobilize people for meeting
challenges and persevering.” With children, in addition to
teaching them that they can always learn and get smarter, it is
important to send the right messages about success and fail-
ure. Dweck has found “praising children’s intelligence harms
their motivation, and it harms their performance” because if
success means they’re smart, as soon as they hit a challenge,
their confidence goes out the window right along with their
motivation. Rather than praise the child’s intelligence, par-
ents should praise the effort. Likewise, when a child fails at
something, to cultivate the growth mindset, the child needs
constructive, honest criticism that will help them improve for
next time.

These same techniques can be used in the workforce to cre-
ate an atmosphere that values growth, is more adaptable to
change and is better able to respond to failure. It’s important
to remember in our daily lives that success doesn’t come from
effortless perfection; it comes from believing that we can al-
ways grow, learn more, and get smarter.

1. Carol S. Dweck, Ph.D., Mindset The New Psychology of Success,
6, (Ballantine Books 2006).
2. Id. at 7.
3. Id. at 21.
4. Id. at 75-76.
5. Id. at 78.
6. Id. at 224.

About the Author

Amanda Stanley Amanda Stanley is a member of
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The Kansas legislature overwhelmingly passed SB 367 in 2016, and Governor Sam Brownback signed it into law without hesitation. The legislation reformed juvenile justice from top to bottom. I published a summary of SB 367 in the February 2017 issue of the Journal. While much of the legislation took effect January 1, 2017, the most drastic changes didn’t kick in until July 1, 2017. No law is perfect, and SB 367 is not an exception to this rule. A few months into full implementation, I’ve discovered a few flaws that, if fixed soon, will enable the purpose of the legislation to be satisfied, namely, to focus on rehabilitating juveniles as opposed to imposing punishment that arguably leads to more antisocial behavior.

Another promise of SB 367’s utilization of community-based programs to rehabilitate juveniles is that it will save Kansas $72,000,000.00 over five years. Moreover, the money saved by not incarcerating juveniles will fund the community-based resources that will replace county and state resources, such as juvenile detention facilities, so taxpayers will pay nothing to achieve better results. Less than one month into implementation of at least one aspect of the legislation, it appears that the costs incurred by local courts may be more under SB 367. It may also impair—not enhance—juveniles’ substantive due process rights.

In court, detention review hearings every 14 days have resulted in clogged dockets, denial of juveniles’ due process rights, and increased demands on court and sheriff department resources.

K.S.A. § 38-2343(i) mandates detention review hearings every 14 days for all cases except off-grid or nondrug severity level 1 through 4 person felonies. I didn’t appreciate the full impact of this provision until I reviewed my first case involving a probation violation sanction imposed before July 1, which means the case wasn’t subject to SB 367’s case and probation lengths, and jail time cap (45 days). Specifically, this juvenile was serving more than 90 days for a PV involving several violations. Under K.S.A. § 38-2343(i) this case will be reviewed every 14 days! Thus, a judge must review this and every other juvenile’s detention—those serving sanctions, those held pending disposition, any reason at all—every 14 days. This provision will require more court and jail personnel, and more county resources to implement. It will also require payment of juveniles’ legal fees as well as district or county attorney representation for each hearing.

I am concerned less about the increased docket size and more about the impact this will have on juveniles’ due process rights. While the purpose of this provision is to protect juveniles’ due process rights, the practical impact is the opposite. I practiced law for almost seventeen years before being appointed to the bench. My practice was regional.
I practiced criminal law, juvenile law, and family law in Sedgwick County and all surrounding counties. I discovered that Sedgwick County courts are relatively spoiled in comparison to others. We have many judges in the different departments and litigants get their trials in relatively short periods of time, if that’s what they want. Most rural counties aren’t as blessed due to the limited number of judges. In Sedgwick County, if a juvenile wanted a jury or bench trial before SB 367’s 14-day detention-review mandate, he would have to wait at least six weeks for a bench trial, and at least three months for a jury trial. This delay was much longer in rural counties. Less than a month into SB 367’s implementation and during my first juvenile offender docket week, I set 14-day reviews for at least six cases per day, and the number of cases impacted by this mandate will increase exponentially with each subsequent docket. The more cases I set for mandatory detention reviews, the longer it will take for juveniles to have their days in court for trials, evidential hearings, and motions. After all, juveniles are entitled to prosecution without “unnecessary delay.”

Case length limits invalidate the underlying purpose of juvenile justice reform—to equip kids to be successful adults—by closing cases before most “evidence-based programs” can be completed

I attended judicial training a few months ago that included a presentation on the impact of past trauma on juvenile offenders. The general principle is that until the offender receives therapy or treatment for the underlying trauma-induced behavior, he will continue to engage in anti-social/criminal behaviors. One aspect of SB 367 appears to accommodate this need. Although K.S.A. § 38-2391(g)(1) imposes probation limits for cases that aren’t off-grid or nondrug severity level 1 through 4 person felonies, § 38-2391(g)(2) allows the court to increase probation lengths to enable juveniles to complete “evidence-based programs,” which should include drug and alcohol therapy, mental health treatment, anger management, and ostensibly any therapy targeted at trauma-induced mental disorders. There is some ambiguity regarding what constitutes an “evidence-based program” and whether mental health treatment qualifies, but the intent is clear: to acknowledge that juveniles sometimes need more than jail time to prevent them from committing crimes in the future.

Unfortunately, K.S.A. § 38-2391(b) limits case length from 12 to 18 months, depending on the severity level of the offense, except for off-grid or nondrug severity level 1 through 4 person felonies. Moreover, the case length begins tolling from adjudication plus 15 days, with adjudication occurring at the plea hearing or finding of guilt following trial. In Sedgwick County, we are fortunate if we can sentence a juvenile six weeks after adjudication, so by then at least one month of the case length limit is consumed. This is a problem because many “evidence-based programs,” particularly those necessitated by juveniles’ trauma-induced deficiencies, require several weeks simply to determine the level of therapy or treatment needed, then another several months to complete the needed treatment. For lower-level misdemeanors in particular, all but a few months are burned just getting the pieces in place to begin therapy or counseling. While probation can be extended to complete these programs, once the 12-month limit is reached the case is closed, regardless of whether the necessary evidence-based program is completed, which leaves the troubled juvenile without monitoring to ensure an essential program is completed.

If the purpose of juvenile justice reform is to ensure that juvenile offenders receive the treatment and counseling necessary for them to become productive, law-abiding members of society as adults, case-length limits contravene this purpose.

From a practical side, I’ve had to change my policy on continuances, thanks to the case length limit issue. I no longer allow attorneys to continue sentencing hearings without their clients present, and even then, unless the probation office failed to provide a pre-sentence investigation report for the hearing, I do not allow continuing sentencing hearings since the case length is tolling. If a respondent isn’t present, regardless of whether the attorney appears, I warrant him. This is the only way to stop the tolling, so I don’t see any other option since we need as much of the case length time as possible to ensure juvenile offenders receive the services they need to be successful.

More juveniles are being prosecuted as adults, and prosecutors are charging them with more serious offenses

Off-grid and nondrug severity level 1 through 4 person felonies are exempt from the case and probation length limits. Since the court and prosecuting authorities have a greater ability to monitor juveniles convicted of higher level felonies, we will see more serious charges prosecuted in juvenile cases. Moreover, if a juvenile is 14 or older, the state can move the court to prosecute the juvenile as an adult. Before SB 367, these motions were rare. Indeed, one of our judges hadn’t had one go to hearing for several years. It was mostly a tool to encourage juveniles and their attorneys to work out pleas. I’ve had two of these hearings in the past three months. I’ve also seen the motion filed in several pending cases. Without ques-
tion, transferring juveniles from juvenile to adult court does not save money. Indeed, it likely costs much more and definitely carries with it far more serious long-term consequences for juveniles.

We’ll also probably see more off-grid and nondrug severity level 1 through 4 person felony cases proceed as Extended Jurisdiction Juvenile Prosecutions (EJJP), which have the same qualifiers as adult prosecution motions. With EJJP cases, all conditions of probation must be satisfied by the juvenile’s 23rd birthday for the case to close as a juvenile case. If just one condition is violated before then, the juvenile must serve the entire adult sentence without modification.

When juveniles can’t complete evidence-based programs, prosecutors will file more child-in-need-of-care cases

To deal with the case length limit’s impact on completion of “evidence-based programs,” we will likely see prosecutors filing more CINC cases when juvenile offender cases close due to expiration of the case length limit, and the state believes those juveniles will personally be at risk of harm or put others at risk. This will force the Kansas Department of Children and Families (DCF) to pay for services that are no longer available pursuant to a juvenile’s criminal probation. Without the case length limit, the court could simply extend probation until the juvenile completes the program(s). Under such circumstances, cutting the programs off at the knees and then transferring even more costs to DCF won’t save the state any money. More lawyers, more state agencies and more court hearings always costs more.

Changes that could save SB 367 and the juveniles it’s intended to help

Juveniles are different than adults and some reform objectives are worthy. If using community-based resources instead of those in juvenile detention facilities addresses trauma-related factors in juvenile crime better, great. If only by addressing these underlying issues will we reduce juvenile crime rates even further, greater still. But since one of SB 367’s inherent deficiencies prevents this outcome, we should start improving it by eliminating case length limits. The limitations on extending probation for completion of evidence-based programs and for “good cause” are sufficient. Also, K.S.A. § 38-2302(h) is vague on whether mental health treatment and other trauma therapy are “evidence-based programs” that allow a judge to extend probation; thus, they should be included in the definition of “evidence-based programs.” These two tweaks will address the needs of juveniles as well as enhance the community safety purpose of the justice system. They seem small, but they will not only ensure that juveniles receive the services they need to be successful on probation, but will eliminate the need to file CINC cases to protect the public or to ensure that services are available for juveniles after the case length limit is reached.

The 14-day detention review mandate costs more and clogs dockets. There are other ways to force courts to monitor the length of juvenile detentions. How about replacing the 14-day detention reviews with mandatory detention reports prepared by court services or the KDOC for judicial review? Perhaps only require detention review hearings for pre-adjudicated cases? Such revisions would thin the courts’ dockets and ensure juveniles due process for more essential hearings. After all, under SB 367, judges detain juveniles for the reasons the legislation permits: to protect the juvenile or others from harm, to protect another’s property from harm, or in cases in which a juvenile’s behavior indicates an unwillingness to appear at the next hearing if released, so detaining a juvenile isn’t an arbitrary judicial decision lacking justification.

Juvenile justice reform is a worthy goal. The above tweaks will ensure that the underlying purpose of SB 367 is served. Without those changes, we could see the unintended consequences bring an end to reform before it ever gets a chance to be successful.

1. See SB 367, the bill enacted by the legislature and signed into law by Gov. Sam Brownback on April 12, 2016 (goo.gl/pjQY5w). Note that Internet web addresses are shortened via the Google URL Shortener throughout the endnotes for reader convenience. See also a summary of the changes on the Kansas Legislature’s website, goo.gl/7FDJ8n.
3. Dion Leffler, Kansas Juvenile Justice Reform Bill Advances to Governor’s Desk, Wichita Eagle, March 24, 2016 (goo.gl/TTb2Ih).
4. Jake Horowitz, Juvenile Justice Reforms in Kansas Show Early Signs of Success, Pew Charitable Trusts Research and Analysis, June 20, 2017 (goo.gl/uzS5Yo) (cites money saved from less incarceration being used for community based programs, and claims reduction in detention as “early signs of success” of Kansas juvenile justice reform).
5. But see K.S.A. 38-2387(a), stating that 38-2387 et. seq. applies to all cases “commenced on or after January 1, 2007,” which contradicts SB 367 provisions that take effect after July 1, 2017.
7. K.S.A. § 38-2391(a) & (i).
8. See generally K.S.A.38-2391.
10. Id. § (a)(2).
11. See K.S.A. § 38-2364.
12. See K.S.A. 38-2214 (county or district attorney has duty to file CINC petitions).

About the Author

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Awarding Damages for a Breach of Contract: Direct or Consequential?

By Colin Quinn and Brendan Quinn
INTRODUCTION

When awarding damages for a breach of contract, the intent is to place the non-breaching party in the position he or she would have been had the breach never occurred. While numerous types of damages can result from a breach, they are generally classified into two categories. The first category, direct damages, are those which flow directly from the breach itself. The second category, consequential damages, refer to the economic harm that is beyond the immediate scope of the contract. In other words, they are secondary losses arising from circumstances particular to the specific contract or parties involved. Kansas courts generally limit consequential damages to what was reasonably within the contemplation of both parties as the probable result of the breach. To be recoverable, therefore, consequential damages must have been foreseeable or contemplated by the parties at the time of entering into a contract.

While the definitions appear straightforward, it is often difficult to determine which category certain damages fall under, and courts considering this issue have not created a bright-line test to clearly distinguish the two categories. Appreciating the distinction between direct and consequential damages, however, can prove to be critical for several reasons. First and foremost, design and construction contracts often include a provision that waives consequential damages, giving the parties an opportunity to classify certain types of damages. However, the contracting parties may have different or conflicting ideas as to what constitutes a “consequential” damage. Whether a certain type of damage is contractually and properly waived may depend on how the damage is classified. Second, while consequential damages are within the contemplation of the parties at the time a contract is executed, the amount of the damages awarded can be quite significant. Indeed, consequential damages are often the largest damages in a dispute. Because they can involve such large sums of money, consequential damages are often the focal point of contention in settlement negotiations, mediation, arbitration, and litigation.

This article addresses the following key points to assist the practitioner’s understanding of consequential damages: (1) the prerequisites to a successful recovery; (2) recoverability of business expenses incurred indirectly from a breach; (4) the effect of contractual waivers of consequential damages; and (5) defenses and avoidances of incurring consequential damages.
Pre-Requisite to any Consequential Damages Recovery: Foreseeability and Reasonable Degree of Certainty

The concept of consequential damages dates all the way back to the mid-19th century from the watershed case of Hadley v. Baxendale, which came from the Exchequer Court of England. The facts of the case are simple. The plaintiffs, owners of a flour mill, were forced to temporarily shut down due to one of its components breaking down. Plaintiffs contracted with the defendants to transport the component to its original manufacturer so a replacement part could be crafted. Plaintiffs informed the defendants’ clerk that the mill was currently inoperable, and the replacement component needed to be sent immediately. The delivery of the component, however, was delayed “by some neglect” of the defendant, causing the mill to be shut down longer than anticipated. As a result, plaintiff sued to recover damages for both loss of business opportunity and loss of profits they would have earned had the component been delivered on time. Defendants contended that the damages were too remote to recover. The jury ultimately returned a verdict for the plaintiffs. The Exchequer Chamber reversed the jury’s decision, explaining that in a breach of contract action, an injured party may only recover those damages that are:

[F]airly and reasonably [] considered either arising naturally, i.e., according to the usual course of things…or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

On the basis of this decision, courts have set forth the foundation to distinguish between direct and consequential damages. Likewise, Kansas courts have long followed the Hadley rule that, regardless of the damages incurred by a party, those damages must have been reasonably foreseeable at the time the parties entered into the contract.4

While it may seem simple to argue that most, if not all, types of damages can be considered “foreseeable” at the time a contract is entered, that is not always the case. For instance, the case of MLK, Inc. v. University of Kansas,5 presents a typical, yet unsuccessful, claim by a contractor against an owner for recovery of certain consequential damages as a result of the owner’s breach of contract. In that case, the University of Kansas and MLK entered into a construction contract for the renovation of a scholarship hall on campus. The contract was a lump sum fee of $497,532 for the completion of the work. The contract stated “the date of beginning and the time for completion as specified in the Contract of the work to be done hereunder are ESSENTIAL CONDITIONS of this Contract.”6

During the course of the project, MLK requested extensions of the completion date due to weather-caused delays, which KU rejected. As a result, MLK was unable to meet the project completion date. KU terminated the contract on August 15, 1991 and withheld over $50,000 from MLK’s final payment application. MLK brought a claim for breach of contract against KU. In addition to direct damages, MLK made claims for loss of bonding capacity, loss of reputation, and lost profits. The total damages claimed by MLK was $3,587,816.81 (on a contract originally worth less than $500,000).

MLK claimed $431,000 annual lost profit damages from late 1991 through late 1994; $36,417 per month during that same time frame for costs necessary to restore its reputation; costs related to an IRS debt of $70,000 and a default on an SBA loan for $109,750, and reimbursement for any payments made to its surety. MLK’s damages expert estimated gross profits which far exceeded any profits earned by MLK in the preceding years. Additionally, the expert presented inconsistent methods as to how he came to his conclusions, a fact easily exploited by KU. The district court ruled that MLK’s claims for lost profits were too speculative and that the contractor had failed to meet its burden of proof.7 The appellate court affirmed this ruling.

Following the rule set forth in Restatement (Second) of Contracts § 351 (1979), the district court granted summary judgment denying MLK’s claim for loss of bonding capacity, primarily because the loss was not foreseeable. The court’s ruling was primarily based on MLK’s failure to present sufficient evidence showing that KU had any special knowledge regarding MLK’s bonding capabilities. In fact, the evidence showed that MLK had actually been sued and terminated by its surety for unrelated projects. As a result, the court found that MLK could not carry its burden to prove that its damages for alleged loss of bonding capacity flowed from its contract with KU.

The MLK case provides significant insight for attorneys cognizant of the difficulties associated with recovering consequential damages for a few reasons. First—and at the outset of any project—if a certain asset is particularly critical to the success of your client’s ongoing business (such as your client’s bonding capacity, business reputation, or dependent revenue stream from other projects), ensure that the fact is expressly set forth in the contract itself. This could prevent a significant headache in the future if the parties are forced to litigate the nature and amount of damages. In the event your client does end up litigating this issue, ensure that your expert witnesses are precise and consistent in their testimony. Be able to present a unified and logical theory as to why, specifically, your client’s damage claim is foreseeable, flows naturally from the defendant’s breach, and can be lent credibility by a discerning jury. That will bolster your argument that the consequential damages claimed were foreseeable by the opposing side at the time the contract was executed.
Loss of Energy, Financing and Administrative Costs—Business Expenses which should Not have been Incurred

Inevitably, a client will ask that you seek not only their direct contractual damages, but will want to know if they can recover for other expenses actually incurred which would not have otherwise incurred but for the breach of the opposing party. Examples include extended storage costs, extended on-site and office overhead, and extended general conditions. Given the proper facts, many of these categories of damages can be recovered in a construction defect claim.

In *State ex rel. Stovall v. Reliance Ins. Co.*, the state filed suit against its contractor, several subcontractors, and the contractor’s surety regarding apparent failures with an underground thermal piping system installed by the contractor for a prison in Butler County. The state’s mechanical contractor installed a direct-bury pipe with poured-in-place insulation. Shortly after the contractor completed its work, prison staff began to notice that heat was escaping from various points throughout the system. The state abandoned the earthen-trench system and, instead, installed a concrete trench system and attempted to place the entire cost onto the various defendants. For reasons immaterial to this article, the court held that the appropriate measure of damages was the cost to build the concrete trench system, not to exceed the cost to build an earthen trench system as of the defect discovery date.

The state, as a part of its overall damages theory, claimed damages for (1) energy losses and expenses incurred during the time the dysfunctional system was operating; (2) additional financing, design, and administrative costs incurred to construct the new system; (3) costs incurred in attempting to first repair the faulty system; and (4) costs to repair damages to other utilities. These additional damages totaled $3,236,712. The question then became which damages were direct and subject to the cap on damages described above, and which were incidental or consequential and therefore recoverable beyond the cap.

The district court ruled that the first (energy loss) and fourth (cost of repair to other utilities) categories of damages defined above were actually direct damages, not to exceed the limit on direct damages. The Kansas Supreme Court noted that the purpose of recovering damages for breach of contract is to put the State in the same position without such breach, but not allowing the state to recover a windfall. Following this proposition, the court held that it was error for the district court to determine that the state’s additional finance, design, and administrative costs were direct damages and thus limited to the cap stated in the contract. The court explained that these damages were “separate and apart from the State’s direct costs to build the concrete trench system.”

Consequently, it is factually and legally inconsistent to subject these claims to the allowable maximum recovery for the costs to build the concrete trench system. The key takeaway from *Stovall* is that Kansas courts generally allow recovery of a broad range of business expenses, so long as the non-breaching party meets all of the other requirements to recover consequential damages. Accordingly, when a client asks about the potential recovery of other business expenses, it is critical to dig into the details of those claims as they could entail a substantial portion of the total recovery.

**Contractual Waivers of Consequential Damages**

Parties to construction contracts will often shift risk between the parties, waive certain claims, waive certain types of damages, alter the statutes of limitations, and place indemnification obligations on one party. Among the several risk-shifting provisions is a waiver of consequential damages, which has become commonplace in the construction industry. Indeed, several nationally-recognized associations have set forth industry-standard consequential waiver provisions. These clauses seek to limit to direct damages exclusively the entire possible pool of recovery.

Contractual limitation of liability clauses are routinely enforced as they are written. “Kansas courts will uphold a provision in a contract limiting a party’s liability if it is not unconscionable or contrary to public policy.” Of course, there are exceptions to the rule. Faced with a contractual provision limiting the ability to recover consequential damages, an attorney will need to employ creative arguments to avoid the consequences of the contract. Several equitable principles, identified below, may be utilized to this end.

**Unconscionability As a Defense to Waivers of Consequential Damages**

One principle that may be used, albeit rarely successfully, is establishing the unconscionability of the consequential damage waiver provision. The unconscionability defense is not
just a law professor’s pet topic to trip up first-year law students, but may be used as a valuable argument in cases where an unsophisticated client has signed a one-sided contract with an industry professional.

“[L]iability for consequential damages may be limited or excluded contractually unless under all the surrounding circumstances, the limitation or exclusion would be inequitable. Each case of this type must necessarily rest upon its own facts.”11 If a court finds a contractual provision to be unconscionable, then the court may disregard it. Courts analyze such provisions on a case-by-case basis and have identified several factors as a guide to determine whether a contract term is unconscionable. Those factors may include, for instance: (1) the use of skillfully drafted form or boilerplate contract provisions; (2) the significance of cost-price disparity; (3) a denial of basic rights and remedies to a consumer; (4) the inclusion of penalty clauses; (5) the circumstances surrounding the execution of the contract; (6) the hiding or inconspicuous placement of clauses; (7) phrasing clauses in a way that is confusing or incomprehensible to laymen; (8) the imbalance of obligations posed by each party; (9) the exposure or exploitation posed by unsophisticated parties; and (10) the inequality of the parties’ respective bargaining power.12

The burden of establishing that a contract is unconscionable, which is often difficult to meet, is on the party attacking it.13 This is particularly true when both parties to the contract are sophisticated entities—which is common in the construction industry—because to be successful, the defense requires a significant imbalance in bargaining power.14 Even so, a party looking to avoid the consequences of an unfavorable limitation of liability clause should not ignore that possibility.

**Fraud, Willful Misconduct, Gross Negligence, or Other Claims When Enforcement Would Result in Substantial Inequity**

Simply put, a party cannot contractually prohibit its own liability for fraud, willful misconduct, or gross negligence. “Generally, unless [it is] against public policy, a contract exempting liability will be enforced; however, it will be enforced very strictly. The law does not look with favor on provisions which relieve one from liability for his or her own fault or wrongs. It is well settled that the law will not sustain a covenant of immunity which protects against fraud or relieves one of a duty imposed by law for the public benefit.”15

Claims for fraud can play an important role in the litany of potential claims that may be brought against contractors and owners in construction-related claims. This is particularly true in the residential construction context. Fraud can be asserted to maneuver around several defendant-friendly doctrines, namely: (1) the economic loss rule;16 (2) privity of contract;17 and (3) limitations of liability in construction contracts.

Even if the facts and circumstances of your client’s case do not rise to the level of fraud, alleging gross negligence and other forms of misconduct may help avoid a consequential damages waiver. In *Butler Mfg. Co. v. Americold Corp.*,18 for instance, the court noted the long-held principle under Kansas common law that “such limitations are unenforceable where damages result from gross negligence or willful misconduct in performing a service for another for hire.”9 The Butler court stressed that it was “unable to find a single Kansas case in which a liability limitation provision limiting liability for gross negligence or willful or wanton conduct has been upheld.”20

**Look to the Language of the Actual Waiver**

**A. The Damages Claimed Are Not Consequential Damages**

This article demonstrates the confusion and difficulties courts have had in defining what exactly are considered “direct” and what are “consequential” damages. Some categories of damages (loss of use, loss of profit, etc.) typically thought to be consequential damages, can sometimes be seen as direct damages.21 Like the courts, even legal scholars disagree on the boundaries distinguishing between direct and consequential damages. The most highly respected legal scholars this country has to offer would not dare say aloud that they can accurately and precisely give a uniform definition for consequential damages that applies to any situation. Do not make the mistake of instantly assuming that damages traditionally thought of as consequential will be classified as such in all situations.
A provision waiving consequential damages is only enforceable to the extent such damages are defined as “consequential damages” under the law or in the contract. The issue of whether damages are consequential is a question of law.

Although not a “construction” case per se, Signature Marketing, Inc. v. New Frontier Armory, LLC, is instructive for parties trying to avoid or attack a consequential damages waiver. The Signature case involved the manufacture and sale of custom firearms components from Signature (plaintiff) to New Frontier (defendant). Signature alleged that New Frontier breached a contract by failing to timely pay the agreed rate for several manufactured components, while New Frontier counterclaimed for certain breaches of implied warranties. The parties memorialized their agreement in a written contract, which contained the following provision:

Neither party shall be liable to the other for any punitive, indirect or consequential damages sustained by the other (or its affiliate) in connection with the performance of the agreement including without limitation business interruptions, loss of profits, loss of revenue, loss of use of assets and loss of contracts.

Signature sought lost profit damages as a result of New Frontier’s breach of contract. New Frontier contended that lost profit damages were precluded by the parties’ agreement. The court, however, rejected New Frontier’s interpretation, which, on its face, appears to be a winning argument. The District Court of Kansas, relying heavily on Penncro Associates, Inc. v. Sprint Spectrum, L.P., held that an exculpatory provision in a contract limiting recovery for “lost profits” does not automatically bar an award of profits lost as a result of a defendant’s breach of contract. The Signature court stated that the issue had already been resolved in Kansas:

Clearly, the Circuit held that lost profits are recoverable under Kansas law as direct, benefit of the bargain damages. Stated another way, no reasonable argument can be made that lost profits are “always” considered consequential damages under Kansas law. Any lingering doubt over this question is completely resolved by the Kansas case cited by the Circuit in Penncro—Source Direct, Inc. v. Mantell, 870 P.2d 686 (Kan. Ct. App. 1994) (“A party who seeks to recover his expectation interest in the contract is asking to be given the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed. Expectation damages usually consist of lost profits plus any incidental or consequential losses caused by the breach. In Kansas, loss of profits resulting from a breach of contract may be recovered as damages when such profits are proved with reasonable certainty, and when they may reasonably be considered to have been within the contemplation of the parties.”)

The threshold question then becomes whether the lost profit damages are “direct lost profits” or damages which are “beyond direct economic loss or ordinary loss of bargain damages.” The difference between the two is whether the lost profit damages are damages resulting from the contract between the parties (representing direct lost profit damages), or whether the profits were lost from other contracts (representing the traditional notion of lost profit damages, i.e., consequential damages).

As a simple hypothetical, suppose your client, a general contractor for a construction project, terminated a contract with an owner after the owner has failed to pay your client for work completed on a project. Additionally, the owner caused various delays that prevented your client from timely completing its work. What damages should your client expect to recover against the owner?

The most forthright answer, of course, is to seek a recovery for the amounts owed for all unpaid work. Additionally, your client may want to seek an amount for lost profits it would have earned on other projects but for the delays caused by the owner. However, the construction contract includes a provision waiving consequential and lost profit damages. While that clause will not prevent recovery for your client’s lost profits on the current project, it will likely preclude a recovery for lost profits on other projects due to the owner-caused delays (absent owner fraud, willful misconduct, or gross negligence).

In the context of a construction contract, rather than classifying lost profit damages as direct or consequential, Kansas law primarily focuses on the foreseeability of such damages as contemplated by the parties at the time the contract is executed. Generally, recovery for lost profits is allowed when such damages are a “foreseeable consequence of a possible breach of the construction contract,” as opposed to being “remote, contingent, and speculative in nature.”
The quickest way to determine whether the parties contemplated potential damages for lost profits could be from a simple review of the contract itself. If the contract expressly permitted a party to pursue a claim for lost profits related to the project, that clause may end up precluding recovery of lost profits on other unrelated projects.29

Or, suppose that a construction contract between an owner and a prime contractor requires the parties to carry certain insurance policies. Often, owners will agree to provide property insurance and obtain all risk insurance to cover any losses resulting from its delay in the use of its property and the general contractor’s and its subcontractors’ lost profits on the project. Thus, lost profit damages in that case are not remote or speculative. Instead, they are recoverable as direct damages which were contemplated by both parties at the time of executing the agreement.30

B. Consequential Damage Waivers Arguably do not Apply to those Damages Arising in Tort

Contract- and tort-based claims have several independent components. Breach of contract and warranty claims are, of course, based on a material breach of a contractual provision. Tort claims, on the other hand, deal with a defendant’s performance acts and omissions. In other words, a tortious cause of action does not depend on contractual duties, but rather involves independent duties imposed by the law. On that basis, a contract provision waiving consequential damages certainly applies to breach of contract claims, but not necessarily to a tort claim. In fact, Kansas law has long recognized that a party to a contract may claim and pursue damages for an independent tort without reference to or reliance on the contract.31

Parties bringing construction defect and payment claims often additionally assert independent tort claims. As discussed above, to establish these independent claims, an experienced attorney should not only look to the contract, but also the acts, omissions, and conduct of the parties before the contract was signed and after the issues arose to hopefully answer the following questions: Did the contractor willfully disregard its warranty obligations? Did either party misrepresent their financial capabilities? Did the contractor or developer suppress information about the building to others or mislead them to their detriment? Any one of these fact patterns may be used to avoid a consequential damages waiver.

PIK 171.21 Cap on Damages—Application to Consequential Damages Recovery

The Kansas Patterned Jury Instruction (PIK) provides a cap on damage recovery for “damage to real estate.”32 PIK 171.21 states, “When damage to real estate is temporary and of such a character that the property can be restored to its original condition, the measure of damages is the reasonable cost of repair necessary to restore it to its original condition, [plus a reasonable amount to compensate for (loss of use) (loss of rental value) of the property while repairs are being made with reasonable diligence], but not to exceed its fair and reasonable market value before the injury.” In general terms, this instruction allows the jury to award “cost of repair” damages, together with sums for loss of use, with some apparent caveats.33 The question is, does the cap apply to both the cost of repair and the loss of use damages or only to the repair damages, leaving no cap on recovery for loss of use damages?

Loss of Use Damages should Not be Subject to any Cap

Loss of use damages should not be subjected to the instruction’s cap. Such losses are consequential damages and not directly related to the cost of repair.34 Additionally, case law supports the proposition that the cost of repair damages should be calculated first and subjected to “value” limitation but that loss of use damages can then be added. In Anderson v. Rexroad, the plaintiffs brought an action against a general contractor as a third-party beneficiary of the contract between the contractor and the City of Assaria, Kansas. The general contractor struck a gas pipeline causing a fire that completely destroyed plaintiffs’ home and all plaintiffs’ possessions inside. Plaintiffs sought damages for cost of repair and loss of use of the property.

At the conclusion of the trial, special questions were submitted to the jury and, among others, the following was returned and accepted by the court:

“Question 5: If you return a general verdict for the plaintiffs, then state how much you allowed therein, if anything, for:

(a) Loss of house? Answer: $3,800.
(b) Loss of furniture and contents of house? Answer: $1,000.
(c) Loss of use? Answer: $2,275.”36

The court entered judgment in favor of the plaintiffs for $7,075. The defendants attacked the instructions as to the proper measure of loss of use damages on appeal.37 The defendants argued that the district court erred by allowing the jury to award loss of use damages from the date of the injury up through the time of trial in addition to the replacement cost of the property. The Anderson court noted, “Generally speaking, there may be a recovery for the loss of use of property, providing the use is a lawful one and the damages are established with reasonable certainty, [citation omitted], and, where property is attached to [land], such as was plaintiffs’ dwelling, and it is damaged or destroyed, the owner is entitled to damages, which may not exceed the value of the property, for his loss of use or for loss of rental up to the time when, with ordinary diligence, it could have been restored, whether in fact it was restored or not.”38 One could read the Anderson case as saying that plaintiffs are still entitled to loss of use
damages to be capped at the full value of the property, in addition to their cost of repair or replacement damages.

The Stovall case is also instructive. If you recall, the Stovall court capped the state’s direct damages to the cost to build the concrete trench system, not to exceed the cost to build an earthen trench system. However, the state was able to recover substantial consequential damages in addition to the direct damage. The court clearly maintained that, in addition to the state’s direct damages, it was entitled to recovery of consequential damages related to the rebuilding of the new system. The court held “The balance of the state’s damage claims are separate and apart from the State’s direct costs to build the concrete trench system. Consequently, it is factually and legally inconsistent to subject these claims to the allowable maximum recovery for the costs to build the concrete trench system. We hold the state should be allowed to prove and, if proved, to recover these additional claims as will make the state whole.” The Stovall case provides significant support for the argument that consequential damages should be considered separate and distinct from direct damages, which are capped at the reasonable value of the property.

PIK 171.21 Arguably Does Not Even Apply to Construction Defect Claims

A sound argument can be made that PIK 171.21 is limited to cases involving partial or complete destruction of real property (and any accompanying improvements), usually by fire or some other natural means. The title of the instruction references “Real Estate.” And one is hard pressed to find the instruction used as the damage instruction for construction defects. Instead, “[g]enerally, in breach of contract actions where a contractor has not substantially performed a contract, the damages are measured by the reasonable cost of repairs to correct defects or omissions.”

In English Vill. Properties, Inc. v. Boettcher & Lieurance Const. Co., the court of appeals affirmed the use of the following “benefit of the bargain” instruction: “[I]f you find for the Plaintiff, you should then determine its recovery. The amount of such recovery should be whatever sums you find are necessary to restore the property to the condition that it would have been in had the contract been fully performed, plus a reasonable amount to compensate for loss of use of the property while repairs are being made with reasonable diligence. The total amount of Plaintiff’s damages may not exceed the sum of $135,058.78.”

CONCLUSION

Plaintiffs fight an uphill battle when attempting to recover consequential damages. Courts and juries are wary of consequential damages, fearing a financial windfall to plaintiffs through their use of the justice system. However, a coherent, credible argument supported by sufficient evidence can justify a party’s claim for consequential damages. Your ability to weave in and out of some of the typical challenges associated with consequential damages is essential to putting your client in the best position to maximize a recovery.

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3. Id. at 147.

4. Source Direct, Inc. v. Mantell, 19 Kan. App. 2d 399, 409, 870 P.2d 686, 693 (1994). “Courts will allow the recovery of such expenditures if the breach of the contract renders those expenditures valueless to the plaintiff, lost profits cannot be awarded because they appear speculative, and those expenses were foreseeable by the defaulting party at the time the contract was made.”


6. See MLK at 876. The project was supposed to be completed by August 10, 1991.

7. See MLK at 886. The district court utilized Restatement (Second) of Contracts § 351 (1979) to address the natural flow of damages. It provides:

   “Unforeseeability and Related Limitations on Damages: (1) damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made; (2) loss may be foreseeable as a probable result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know; (3) a court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.


9. Stovall, at 792.


12. Id. 758-59 549.


17. Griffith v. Byers Constr. Co. of Kansas, 212 Kan. 65, 70, 510 P.2d 198, 203 (1973). “Where a vendor has knowledge of a defect in property which is not within the fair and reasonable reach of the vendee and which he could not discover by the exercise of reasonable diligence, the silence and failure of the vendor to disclose the defect in the property constitutes actionable fraudulent concealment.”


19. Id. at 1282 (emphasis added).

20. Id. at 1283. See also Talley v. Skelly Oil Co., 199 Kan. 767, 772, 433 P.2d 425 (1967) (liability limitations do not apply when claim involves a willful breach of a legal duty).


Are you a quiet lawyer? Perhaps a closet introvert in a sea of extroverted advocates? Do you try to feign an extroverted persona when lawyering? Or secretly experience marked anxiety toward performance-oriented lawyer tasks like negotiating, taking depositions, or delivering oral arguments? Conversely, are you happy and calm when you can carve out the time and space to work solo, perhaps behind your closed office door or in a peaceful corner of the law library, digging into a pile of client documents to extract legally significant facts, poring through case law, thinking through legal conundrums, and crafting creative solutions to legal problems? For many of us in the legal profession, quiet thinking, reading, and writing about complex legal issues comes naturally. Extemporaneous or spontaneous banter doesn’t. From the beginning of our legal careers, as we stepped into that first Socratic law school classroom, then into the verbal volley in a law firm conference room or courtroom, the pressure to speak before we were ready gripped us like a vise. Nonetheless, we internalized the message that we must fit the lawyer stereotype—the eloquent orator with the gift of gab, chomping at the bit to debate. Some of us feel like imposters. We love researching and analyzing the law, figuring out client-based or societal solutions. But jumping into the fray of legal debate before we are ready, before we have fully vetted our legal theories? Not so much. Does this mean we are in the wrong profession? Absolutely not.

Quiet individuals—introverted, shy, or even socially anxious—bring tremendous gifts to the legal profession, such as active listening, deliberative thinking, careful analysis, thoughtful writing, creative problem-solving, and empathy. So why do we not value quietude in lawyering more? Instead, in law classrooms and law offices, we tend to promote the extrovert persona as better suited for the legal profession. This circumstance can cause quiet law students and lawyers to experience and manifest heightened levels of stress and anxiety in a profession already beset with mental health concerns. Fear toward law-related performance-oriented events increases. For many of us, we also are afraid to talk about our resistance toward speaking before we are ready, lest we be deemed weak or unfit.

Apprehensive law students and junior attorneys often hear extroverted or otherwise confident mentors advise, “Just face your fears and you’ll get over it! No pain, no gain!” And the cycle continues, with no self-awareness or growth. A naturally quiet lawyer who is highly gifted at legal research, writing, strategizing, and problem-solving can navigate years of practice under a cloud of unnecessary stress and feelings of inauthenticity. What if instead, as a profession, we looked at quiet thoughtfulness before speaking as a strength, and also provided anxious speakers with practical support to understand the real roots of law-related performance anxiety? Vulnerability and honesty about stressors in our chosen vocation can go a long way toward helping one another find our authentic advocacy voices and thrive.

For two decades, as a quiet and introverted litigator in the rough-and-tumble construction industry, I tried to “fake it till I made it.” I swallowed intense anxiety on a daily basis and tried to push through my trepidation as I edged into every negotiation, deposition, and court appearance. I pretended I was fine. I profoundly wasn’t. When immersed in legal research and brief-writing, reviewing documents, or even connecting with clients one-on-one, I flourished. When I felt the pressure to engage before I was intellectually, mentally, emotionally, and physically ready, I faltered. I thought there was something wrong with me.

Now, as a law professor, I notice numerous quiet 1L students reflecting similar emotional, mental, and physical manifestations of anxiety toward spontaneous discourse about the law. I see the pressure to fake confidence in the classroom taking its toll before these future members of our profession have even set foot in a boardroom or courtroom. Having studied
I met Heidi this past summer at a conference on "positive Lawyer-ing, Mindfulness and Humane Games." We bonded over being introverts in a small group of talky people.

Emily Grant
Chairperson
KBA Board of Editors

One tangible step to help our anxious law students and junior lawyers is to acknowledge that some lawyering tasks are scarier for certain advocates than others. This does not mean we quiet or verbally cautious folks are not cut out for the practice of law. On the contrary, we can be most impactful lawyers if, instead of pushing through apprehension, ignoring it, or pretending it doesn’t exist, we get to know it, ourselves, and our innate strengths. For some of us, by studying and understanding introversion—our natural tendency to process information and stimuli internally, deeply vetting our thoughts and ideas before sharing them aloud—we can understand why certain interactive scenarios can spark anxiety, and adopt mental and physical strategies for boosting performance in those moments. For others of us, by reflecting on negative, perhaps shame-based, internal messages that play on an automatic loop in our minds in anticipation of a stressful legal scenario, and the instinctively protective physical responses that impede optimal energy, oxygen, and blood flow, we can make conscious changes in approach.

As a profession, let’s create a space for the impactful quiet advocate to find his or her authentic voice. With empathy for one another and appreciation for the diverse gifts we offer as individuals, together we can change the legal profession.

About the Author

Heidi K. Brown is a graduate of The University of Virginia School of Law, a law professor at Brooklyn Law School, and a former litigator in the construction industry. Having struggled with extreme public speaking anxiety and the perceived pressure to force an extroverted persona throughout law school and nearly two decades of law practice, she finally embraced her introversion and quiet nature as a powerful asset in teaching and practicing law. She is the author of “The Mindful Legal Writer” and “The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy.”

Pro Bono Survey results will strengthen Kansas programs

Last Spring, KBA members were asked to participate in an American Bar Association study on pro bono activities and attitudes. Responses were received from 1,376 of you. This was a very high response rate and provided a large amount of information. Pro bono programs are just beginning to develop action plans based on this information, but some very strong messages emerged. As we mark the Celebrate Pro Bono 2017 effort, these findings can guide our future.

Finding 1: While Kansas lawyers, as a group, do provide pro bono legal services, older lawyers are significantly more likely to provide those services, than younger lawyers.

Whether this has to do with time or opportunity, practice setting or location, we appreciate the lead set by the members of the Bar who provide this help. Whether in response to professional duty or the satisfaction of helping someone else, older lawyers are setting the way for pro bono service.

Kansas Legal Services has found this even extends to lawyers who have a retired (or inactive) license. As the KLS Emeritus program has become more widely known, there are currently five retired lawyers who are providing service on a pro bono basis through this program. For more information about this program, you can go to http://bit.ly/2wWLf9c or contact Marilyn Harp at harpm@klsinc.org.

Still, to grow the level of pro bono involvement (and give us more to celebrate) we need to find ways to provide volunteer opportunities that meet the interests and availability of younger lawyers. We also need older lawyers to encourage younger lawyers to provide pro bono involvement. When firms make a commitment to count pro bono hours as equivalent to billable hours in evaluating associates, pro bono activities grow. Only about 20% of those surveyed indicated that they were able to provide pro bono work during office hours and using firm resources.

Finding 2: Those in private practice are more likely to provide pro bono services than those in a firm, in government or in non-profit employment.

This finding makes sense for two reasons. First, lawyers are most comfortable providing pro bono service in an area of law with which they are familiar. For lawyers in practice areas that don’t regularly meet the general public, the learning curve for pro bono work can be steeper. Programs that recruit volunteer lawyers must be committed to providing training for all volunteers.

Another barrier is the issue of current and future conflicts of interest that arise when a lawyer provides short term legal services in a clinic or courthouse setting. Kansas Legal Services, with support of the Kansas Bar Association, the Christian legal Society’s Legal Aid Program (Kansas) and the Kansas Chapter of the American Board of Trial Advocates, is seeking the adoption by the Supreme Court of ABA Model Rule 6.5. If adopted, this change will help ease that issue for some types of pro bono work. This solution has worked in 46 other states.

We have examples from across the state, where groups of lawyers have taken on a specific type of legal work or adopted a low income “block” and provided legal services. Shook, Hardy and Bacon was recognized by the Kansas Bar Association in 2014 for its program in finding stability for children in the Kansas City area through adoption or guardianship. In 2016, the Wichita Bar Association members created “Clean Slate Day,” to provide expungement services. Similar programs could be replicated across the state by firms or bar associations. These programs could include lawyers in a variety of
practice settings, providing training and other support where needed.

**Finding 3:** Based on data from 550 attorneys reporting pro bono activities in 2016, Kansas attorneys provided an average of 42 hours of pro bono service annually.

Kansas lawyers have been challenged to volunteer 50 hours of pro bono services on an annual basis to those unable to afford an attorney. This survey result indicates that, for those lawyers who include pro bono service as a regular part of their practice, this goal is attainable.

**Finding 4:** The majority of pro bono service was advice (70%), provided to someone known to the lawyer (60%), who the lawyer believed to be unable to pay for the service (55%) and in an area of law that the attorney had experience (79%).

These survey results are probably not surprising. When a lawyer is asked, by someone they are acquainted with and who they believe can’t hire an attorney, for advice in an area of law in which the lawyer is comfortable, those questions get answered. The challenge is, how often does this occur? It might be that person in need doesn’t know any lawyers, or the lawyer they know doesn’t have experience in the appropriate area of law. Those people get left out.

Pro bono programs seek to be the “match maker” in these situations. They do this by screening participants to verify they are low income, recruiting a broad group of attorneys to consider providing the needed legal service and, often, providing malpractice insurance for those attorneys who participate.

The KBA’s new “Free Legal Answers” program is a new program on this model. It currently has 30 Kansas attorney volunteers providing answers to civil legal questions to Kansans who qualify for the service. All communication is by email and can be handled at times convenient to the lawyer. Contact Pat Byers (pbyers@ksbar.org) if you want more information. https://kansas.freelegalanswers.org/

The “Elder Law Hotline,” managed by Kansas Legal Services, is another advice only program. Regular orientation calls get volunteer attorneys familiar with how the program operates. Contact Jan Wagner (wagnerj@klsinc.org) for more information.

KLS maintains a website (www.klsprobono.org) to recruit, match and support volunteer attorneys in reviewing clients in need of advice or representation. Check out this website for more information. KLS also schedules attorneys willing to provide advice on a regular basis in courthouse based help centers or specific court dockets.

As this report indicates, there is a lot to Celebrate about Pro Bono in Kansas. Using the valuable input, pro bono programs will be able to improve and provide more services to those in need in the future.

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1. The full survey is available from the Kansas Bar Association through the following link: https://go.ksbar.org/ProBonoSurveyReport2017

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**About the Author**

Marilyn Harp has been the Executive Director of Kansas Legal Services since Sept. 2006. Prior to becoming Executive Director, she worked in a variety of attorney and management roles with Kansas Legal Services since Sept. 1979. She is a graduate of the University of Kansas School of Law (May 1979) and has a BSW from the University of Kansas School of Social Welfare. She has been continuously licensed to practice law in Kansas since 1979.

harpm@klsinc.org
Passionate about Pro Bono at Washburn Law

As lawyers, we know that the legal profession is one of service. Students who participate in the Washburn Law Pro Bono Program demonstrate a commitment to serving the community and receive an enhanced practical legal experience. While lawyers must make a living, they should also use their unique legal skill set to better the communities in which they live. Attorneys achieve this by providing volunteer legal assistance to individuals of limited means. Washburn Law students who participate in pro bono projects learn the value of this service and discover firsthand the personal benefits that come from helping others. For students, pro bono work is a wonderful combination of gaining legal experience, interacting with legal professionals, and serving their communities.

Washburn Law Pro Bono Program

Since 2010, the Washburn Law Pro Bono Program has encouraged students to understand and embrace their future professional obligation to provide legal services to individuals of limited means. The Pro Bono Program promotes the value of law-related public service through the administration of several pro bono initiatives within the law school.

The mission of the Washburn University School of Law is to prepare students to be “effective lawyers with the knowledge, skills, and values necessary to serve their clients, our profession, and society at large.” In keeping with this mission, an emphasis on providing legal services to individuals of limited means has always been a priority at the school. Washburn Law has a rich tradition of clinical education, establishing one of the nation’s first in-house, live-client law clinics in 1970. Before opening the Washburn Law Clinic, Washburn Law students and faculty participated in pro bono projects by assisting patients at the Topeka V.A. Hospital, serving as juvenile probation officers for the local court, and working in the Topeka Bar Association’s legal aid program. Students, faculty and alumni were deeply involved with the initial Brown v. Board of Education litigation and worked on a pro bono basis when it was re-opened in the 1970’s to determine whether Topeka schools had been desegregated.

The current Washburn Law Pro Bono Program illustrates the law school’s continued commitment to law-related public service and includes Pro Bono Honors Recognition to students who satisfy the terms of the voluntary Pro Bono Honors Pledge. All students who complete at least 50 hours of Pro Bono Service are recognized in the Washburn Law graduation bulletin and receive a notation on their official transcripts. Students who complete 50 hours of Pro Bono Service receive “Pro Bono Honors”; those who complete 100 hours or more of Pro Bono Service receive “Distinguished Pro Bono Honors.”
Beginning with the class of 2010, students have volunteered over 9,300 hours and 76 students have received Pro Bono Certificates. We easily expect to exceed 10,000 total volunteer hours this year.

**Current Washburn Law Pro Bono Projects**

*Veterans Legal Assistance Clinic (VLAC)* - In 2014, the Washburn Law Clinic recognized that the needs of veterans in Northeast Kansas were not being fully met, and clinic faculty and students set out to right that wrong. Supervised by Law Clinic faculty, students assist qualifying veterans with expungements of past criminal convictions which can act as barriers to veterans’ access to housing and employment opportunities. Faculty and students also assist veterans with estate planning matters, including drafting wills and powers of attorney. Student volunteers provide client intake assistance, and students enrolled in the Law Clinic draft the necessary legal documents to aid veterans with their legal problems. VLAC is typically offered one Saturday each semester and advertised through local newspapers, radio, and television media.

*Volunteer Income Tax Assistance (VITA)* - For many years, Washburn Law students have helped low-income Topekans prepare and file their state and federal income tax returns. Every Saturday morning from early February through mid-April, dedicated students can be found at the law school providing this service. Organized by the Tax and Estate Planning Association and supervised by Professor Lori McMillan, countless Topekans have benefitted from the VITA program, and students have learned valuable skills with respect to client interviewing and client service.

*Servicemembers Civil Relief Act (SCRA) Judge’s Guide* - This semester, student members of the Veterans’ Legal Association of Washburn (VLAW) are excited to embark upon a brand new pro bono project. Congress enacted the SCRA in 2003 to provide temporary suspension of administrative and judicial proceedings when military service affects the ability of a servicemember to meet or attend to civil obligations. In conjunction with the Servicemembers Civil Relief Act Foundation, Inc., students will research and publish an overview of the SCRA to assist the judiciary and other members of Kansas’s legal community in understanding the SCRA and its protections for military personnel and their families. The resulting bench book will be provided to all Kansas judges. Second-year student and VLAW president Martin Tador states, “VLAW is extremely honored to assist with creating a Kansas SCRA Judge’s Guide. This opportunity is a significant way for our members to utilize their skills to further our mission of supporting both the military and legal communities in Kansas.”

*Other Projects* - In addition to the specific projects outlined above, many Washburn Law students regularly serve as volunteers with Kansas Legal Services; as victim rights advocates at the Johnson County District Attorneys’ Office; as legal advocates with Court Appointed Special Advocates (CASA) representing the best interests of children in abuse and neglect proceedings; and as student researchers updating “know your rights” pamphlets for the Kansas Bar Association, among other services.

**Washburn Law Students Want to Help You!**

Washburn Law students are eager to assist Kansas attorneys on pro bono matters. Third-year student Sarah Balderas, current president of the Washburn Pro Bono Society, states, “We hope to see our fellow classmates volunteering in the Topeka community so we can give back to the city where we received the opportunity to study law.” In addition to in-person assistance with cases in Topeka, students can provide remote research assistance to attorneys throughout the state.

If you need research or writing assistance with a pro bono case, please contact Tammy King, Director of Professional Development & Pro Bono, at 785.670.1703 or tammy.king1@washburn.edu.

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**About the Author**

Tammy King is Director of Professional Development and Pro Bono at Washburn University School of Law where she advises law students and alumni on career options, job search strategies, and making the transition to professional employment. Tammy also coordinates the Washburn Law Pro Bono Program.
**KU's Pro Bono Program: Doing Good**

Since 2009, National Pro Bono Week in October has been celebrated throughout the country with events for lawyers to provide legal assistance to those who cannot afford it. The week is also an opportune time to recognize lawyers performing pro bono service, and to call for more of us to fulfill this professional obligation. This October, I am pleased to report about the efforts the University of Kansas (KU) School of Law is making to encourage a lifelong commitment to serving those in need, and to recognize our students for their pro bono service. Last January, KU launched a new Pro Bono Program. Building on the law school’s rich tradition of commitment to the community, the Pro Bono Program links students with opportunities to do pro bono work and honors those who complete fifty hours during their law school tenure. In the Class of 2017, six graduates achieved this distinction, despite the program being only months old. Additionally, the annual Pro Bono Honor Roll recognizes students who complete fifteen hours of pro bono service during the academic year. Ten students achieved this designation last year, and with the start of this school year, a growing number of students are already reporting pro bono hours.

We designed KU’s Pro Bono Program with a few goals in mind. The primary goal is to encourage students’ commitment to pro bono service as part of their professional lives—starting in law school. Second, for law students, pro bono work enhances their legal education. Doing “hands-on” legal work provides students an opportunity to develop fundamental lawyering skills, as well as professional role identity, both of which are key to graduating practice-ready. Finally, the Pro Bono Program further fosters the law school’s culture of commitment to community; it is a way for our students to make meaningful strides in recognizing and addressing the need for access to justice.

These goals guided us to define “pro bono” as law-related work that benefits persons of limited means, not-for-profit organizations, individuals or groups seeking to promote access to justice, or a government entity. To qualify for recognition, students may not receive compensation or academic credit for their work, and they must be supervised by an attorney or other qualified individual. We adopted this fairly broad definition of pro bono in order to promote as much participation as possible, recognizing the value for both students and the public. This definition does, however, exclude non-law-related community service projects, as we want law students to recognize that they have a professional responsibility to use their specialized skills in serving those in need.

**Fulfilling Professional Responsibility**

The Rules of Professionalism reinforce that pro bono service is an expectation for lawyers. ABA Model Rule 6.1 states that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay” and that lawyers “should aspire” to perform 50 hours of pro bono service each year. In Kansas, Rule 6.1 states that lawyers should perform “public interest legal service,” but sets forth no mandatory or aspirational hours guideline. Although pro bono service is widely recognized as a core value of the legal profession, a discouragingly low percentage of practicing attorneys (15 to 18 percent) actually do pro bono work, and of those, only 10 to 20 percent assist low-income clients.1

Law schools have an obligation to teach—and to model—the responsibility to do pro bono work. In the past few decades, three seminal reports on legal education have called for law schools to teach students not only how to “think like a lawyer,” but also how to “act like a lawyer”—how to be a lawyer.2 Acting like a lawyer involves both a skills dimension (competence in lawyering skills) and a civic dimension (exemplifying professional values).3 KU has a long history of exemplifying this “civic dimension” of legal education through pro bono service. For example, two of the law school’s in-house clinics, the Paul E. Wilson Project for Innocence and the Legal Aid Clinic, have been seeking justice for low-income clients since 1966 and 1967, respectively. Students participating in these clinics see firsthand how access to legal counsel can impact a person’s livelihood. Beyond clinical opportunities, students have long engaged in law-school-based programs like the Volunteer Income Tax Assistance (VITA) program which, each year, assists hundreds of low-income taxpayers complete their tax returns and obtain tax refunds that may actually lift them out of poverty. Thus, pro bono service is by no means new to KU; the Pro Bono Program just reinforces this professional responsibility and honors students who embody it.

**Enhancing Legal Education**

In addition to teaching students the values of the profession, pro bono service complements KU’s clinic and field
placement opportunities as another way students can gain critical, hands-on legal experience. The previously mentioned reports on legal education all concluded that law students need more training in lawyering skills in order to graduate practice-ready. Experiential learning allows students to learn and develop skills such as counseling, negotiating, and problem solving, while feeling the weight and reward of working with actual clients.

Pro bono service has another benefit for legal education: it can inspire and reinvigorate students who feel detached from the original reason they came to law school. More than 60 percent of students enter law school due to a “desire to help individuals” or to “change or improve society.”4 But the traditional law school curriculum, which asks students to apply rules and use reasoning detached from emotion, can leave students feeling “disillusioned and disengaged.”5 Many of my third-year clinic students lament that clinic is the first time they feel like they are doing the work that compelled them to come to law school. The Pro Bono Program provides students an opportunity to connect with that purpose without waiting until they can enroll in a clinic or field placement. And, while students enhance their legal education through pro bono service, our communities reap the rewards.

Promoting Access to Justice

National Pro Bono Week serves as a sobering reminder that our profession still fails to live up to the core value of providing meaningful access to justice. The Legal Services Corporation (LSC) asserts that “low-income Americans receive inadequate or no professional legal help for 86 percent of the civil legal problems they face in a given year.”6 Coupled with constant threats to the budget for civil legal services—the president proposed eliminating all funding for LSC7—the need for attorneys to volunteer their services is as imperative as ever.

KU’s Pro Bono Program is one answer to this call. In addition to fostering in students a commitment to do pro bono work in practice, students’ service right now, in law school, helps meet unmet legal needs. Certainly in some pro bono placements, students are providing support for legal work that would be done whether students volunteer or not. But much of the pro bono work students are doing fills a need that otherwise would go unmet. For example, last February, KU organized an expungement clinic, which was a joint effort between students enrolled in the Legal Aid Clinic and law students performing pro bono work. Approximately fifteen students spent their Saturday meeting with clients in a church basement where the Lawrence Interdenominational Nutritional Kitchen (LINK) serves a free community meal several days a week. In just a few hours, the students conducted initial interviews of nearly fifty clients, and over the next few months, clinic students filed dozens of expungement petitions. As a result of this free legal assistance, many clients now have clean criminal records and will be able to access better paying jobs, safe and stable housing, and educational opportunities that were previously out of reach. Similarly, students who serve as court-appointed special advocates, who interview detainees seeking asylum, or who help victims navigate the court system, are all contributing to the access to justice mission.

As KU grows its Pro Bono Program, we look forward to supporting and developing other pro bono efforts. If you or your firm is interested in joining with law students on a pro bono project, feel free to reach out. This October—and year-round—we hope you join us as we continue our mission to do good.

2. The publications are commonly referred to as the “MacCrate Report,” the “Carnegie Report,” and “Best Practices.”
4. Id. at 91.

About the Author

Meredith Schnug is a clinical associate professor and the Associate Director of the KU Legal Aid Clinic. She also coordinates the law school’s Pro Bono Program.
Community

Weis Fire & Safety makes neighborhoods safer.

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New KBA Scholarship:
Thanks to Cindy Rogers and Late Husband, The Honorable Richard D. Rogers

Cindy Rogers’ voice still shakes with emotion when discussing her late husband’s passion for public service, for helping others, for being a mentor. She is determined that he be remembered for truly caring about others and for being a true model of public service -- through his military service, his legislative service, his 40 years on the bench and countless hours of community involvement and pro bono efforts.

Cindy stated, "I want Dick’s legacy to be an inspiration, to encourage others to give their time and money, to mentor and give back to the legal profession and to the community. Through this scholarship, we honor his service through the years and express gratitude for the many opportunities he gave to his family and all those with whom he came in contact.”

The scholarship will be used to promote the practice of law in the state of Kansas by annually awarding funds to a student attending the Washburn University School of Law to assist with the costs of tuition. The student must have been admitted to law school and must be a Kansas resident, preferably from a rural community. The student must have an expressed interest in practicing law in a rural community in Kansas.

Applicants must have a demonstrated financial need. Preference will be given to applicants who have displayed perseverance in the pursuit of a legal education, and who share the passion for the law with the late Judge Rogers, a passion as exemplified in community or pro bono service.

As Judge Rogers himself expressed when accepting the prestigious "Kansan of the Year" award in 1985, "...we have a duty to continue the work in progress. We need to emulate the actions of those who have gone before and to leave what legacy we can. Even if we cannot leave great financial contributions, we can...provide service, cooperation, planning and leadership that will carry over in future years. Kansans are duty bound by history to do no less.”

We all warm our hands over fires built by others.

-- The Honorable Richard D. Rogers

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From the KBF President

Got a motion "ripe" for attention? Some suggestions to spur judicial action!

Much as when I practiced law, the work that generally gets my judicial attention at a given moment is whatever task seems to be "on fire." Those things that need to be done, but are only "smoking," get put aside for when I can get to them. This is not always a logical process, although I'm always determined to improve my methods.

Unfortunately, I may not be aware of your project that is burning pretty hot. If you want to spur a judge to act on a decision you need, here are some suggestions:

1. Send the judge a letter (with copies to all parties, of course) that certifies your motion is ripe for decision. Our Shawnee County District Court Rule 3.202(c) addresses this practice. The practical effect is that it alerts the judge to the fact that your project needs to be moved to the list of matters that require action — and soon. I always have lists of motions filed, but my practice is that I wait until the motion is ripe for decision before I address the motion. That way I can read the motion, response, and reply at one sitting. Your "matter is ripe" letter is a great way to remind the judge of your motion in case it has slipped through a crack.

2. Consider also emailing the “matter is ripe” letter to the judge and attaching a proposed Order in Word format. Even if the ruling doesn’t go as you like, it will give the judge a head start on finishing a written ruling.

3. Send your pleadings in Word format, which will allow the judge to cut and paste if desired. You worked hard on your pleadings and I imagine you don’t care if the judge adopts your findings and conclusions.

4. Personally, I don’t mind a call to let me know that a matter is particularly time-sensitive. This could be the case if a decision is needed on where a child is to attend school and enrollment is coming up soon. You get the idea.

5. If you’re concerned about retaliation, consider calling to let the Chief Judge of the district know. I have had this happen, and I try to keep the matter anonymous when I visit with the assigned judge about it. No guarantees, but I promise to do my best.

6. If you’re still not getting a decision, consider asking for oral argument. Then you can again remind the judge that the matter is ripe.

7. Send the “matter is ripe” letter again, if needed.

8. If you still cannot get a ruling from the assigned judge, call the Chief Judge and ask that the matter be assigned to a different judge. I have received such a call in my capacity as Chief Judge, and I gave the assigned judge a deadline to make a decision or I would reassign the matter. A decision was made within the time I gave.

We all expect judges and attorneys to act professionally. If you file a motion, you are entitled to a ruling.

Please let me know if you have comments or other suggestions. My contact information is ewilson@shawneecourt.org or (785) 251-4369.

About the Author
Hon. Evelyn Wilson is Chief Judge of Kansas’ Third Judicial District (Shawnee County). Before taking the bench in 2004, she practiced law for 19 years—seven years in northwest Kansas and 12 years in Topeka. Judge Wilson graduated from Bethany College and Washburn Law School.
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Who Are these Intrepid Presenters?

Stan Davis, Ethics for Good Elder Statesman
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, Kutak Rock LLP
Todd Ruskamp, Shook, Hardy & Bacon L.L.P.
Hon. Melissa Standridge, Kansas Court of Appeals

Wednesday, June 27, 2018, 2:30 – 4:10 p.m.
The Nelson-Atkins Museum of Art, Atkins Auditorium
4525 Oak St.
Kansas City, Mo.
Parking: $8 museum non-member
parking fee; carpooling encouraged

Friday, June 29, 2018, 2:30 – 4:10 p.m.*
Polsky Theatre, JCCC Carl森 Center
12345 College Blvd. (College & Quivira)
Overland Park, Kan.
*Reception afterward sponsored by the JCCC Foundation

Questions?
Contact Deana Mead, KBA Associate Executive Director, at dmead@ksbar.org or at (785) 861-8839.
Members in the News

New Positions

Gregory L. Bauer of Great Bend, Stanley L. Defries of Topeka and Derrick L. Roberson of Manhattan have been appointed to four-year terms on the Kansas Board for Discipline of Attorneys. Chief Justice Lawton R. Nuss of the Kansas Supreme Court made the appointments, further designating John D. Gatz of Colby as chair of the board and Roberson as vice chair.

Brian Johnson was hired as the new Labette Co. Counselor, effective Sept. 18. Brian will succeed his father, Fred Johnson, a longtime county counselor who was appointed as a judge in the 11th Judicial District serving Labette Co. Fred and Brian have a law practice together in Oswego.

Fred W. Johnson, Oswego, will fill the vacancy resulting from the retirement of Judge Robert J. Fleming in the 11th Judicial District. Johnson earned his law degree from Washburn University. The 11th Judicial District encompasses Cherokee, Crawford and Labette Counties in Southeast Kansas.

Judge James R. Kepple has been selected by the 21st Judicial District Nominating Commission to fill a magistrate judge vacancy in Riley Co. The vacancy was created by the retirement of Judge Sheila Hochhauser. The 21st Judicial District includes Riley and Clay Counties.

Stephen McAllister was nominated by the President to serve as the top federal prosecutor in the state of Kansas. McAllister teaches constitutional law at KU and has served as solicitor general for the Kansas Attorney General’s Office for several years, representing the state in appeals before the state supreme court. McAllister’s nomination must be approved by the U.S. Senate.

Judge William R. Mott was appointed by the Chief Justice of the Kansas Supreme Court to serve as chief judge of the 30th Judicial District, completing the term of Judge Larry T. Solomon, who retired Aug. 31 of this year. Mott has been a district judge in the 30th Judicial District since 2007, presiding over cases primarily in Sumner Co.

James Wicks has joined Wichita’s Saint Francis Community Services as general counsel.

New Locations

Karen R. Miller has opened Miller Law Office, located at 410 E. Taylor St. in Caney, Kan. Karen earned her Juris Doctor from the University of Kansas School of Law. She holds a master's degree in communication from Wichita State University. She intends to concentrate on family law, also working CINC cases, simple estate planning and bankruptcy cases. Miller and husband Jarrod have four children.

DeVaughn James Injury Lawyers are opening a second location in Wichita at 7940 W. Kellogg. The new office is intended to make their services more accessible to clients. The firm employs 11 attorneys, led by partners Richard James, Dustin DeVaughn and Cody Claassen.

Notables

John J. Bukaty, Jr. has been selected to serve a four-year term on the Ethics Commission for the Unified Government of Wyandotte County/Kansas City, Kan. An unpaid position, a commissioner must be a Wyandotte Co. resident and be of good moral standing and reputation. The commission is to recommend ways to improve the Unified Government’s Ethics Code, to review and report Code of Ethics violations and offer advisory opinions on ethics questions, conflicts of interest and the applicability of the Code of Ethics. Also serving on the Commission is David K. Duckers from the Law Office of Horner & Duckers, Chtd., a graduate of Washburn Law School and 41 years of practice. Among those on the appointment panel were Chief Judge of the Wyandotte Co. District Court R. Wayne Lampson and Wyandotte Co. District Attorney Mark A. Dupree, Sr.

Foulston Siefkin announced that 21 lawyers in the firm were recognized for excellence in their field of practice by Cham-
members in the news

bers USA. Honored were: Stan Andeel, Jim Armstrong, Kevin Arnel, Gary Ayers, Don Berner, Boyd Byers, Jay Fowler, Chris Hurst, Jeff Hurt, Jeff Jordan, Andy Nolan, Jim Oliver, Forrest Rhodes, Tony Rupp, Teresa Shulda, Harvey Sorensen, Mikel Stout, Trisha Thelen, Trish Voth Blankenship, Darrell Warta and Bill Wood. Robert Smith was also named a recognized practitioner.

Ross Hollander and Michelle Moe Witte of Joseph, Hollander & Craft, have been ranked among the state’s top Labor & Employment lawyers by Chambers USA 2017.

Sal Intagliata, of Wichita’s Monnat & Spurrier, was honored for his work in Criminal Defense: General Practice and Criminal Defense: White Collar. His legal career includes 18 years as a private-practice criminal defense attorney and four years as a Sedgwick County Assistant District Attorney. He earned his J.D. from the University of Kansas School of Law in May 1995. He also is a graduate of the National Criminal Defense College in Macon, Georgia.

District Court Judge Jeffry L. Jack (with Kansas’ 11th Judicial District) was appointed to sit with the Kansas Supreme Court to hear oral arguments on a case heard Sept. 12th. A graduate of the University of Kansas School of Law, Jack was in private practice until being appointed a Labette County District Judge in 2005.

In other Kansas Board for Discipline of Attorneys news, (see Greg Bauer note in New Positions), leaving the board are Patricia Dengler—past board chair, Randall D. Grisel and Jack Scott McInteer. Other board members are: Kimberly K. Bonifas, Wichita; M. Jennifer Brunetti, Frontenac; Stephen W. Cavanaugh, Topeka; Jeffrey A. Chubb, Independence; Shaye L. Downing, Lawrence; John M. Duma, Olathe; Glenn I. Kerbs, Dodge City; John E. Larson, Shawnee; Kathryn J. Marsh, Leawood; Mira Mdivani, Overland Park; James P. Rankin, Topeka; Bethany J. Roberts, Lawrence; Lee M. Smithyman, Overland Park; Gaye Tibbets, Wichita; Sarah E. Warner, Lawrence; and Darcy D. Williamson, Topeka.

Allison D. Kuhns, Comanche Co. Attorney, received coverage for continuing her predecessor’s program of requiring diversion applicants to make a donation to a local charity. She also expressed her interest in expanding the list of organizations that can benefit from the donations.

Dan Monnat of Wichita’s Monnat & Spurrier, Chtd., has been named by International Who’s Who Legal as one of the world’s leading business crime defense attorneys for both corporations and individuals. The publication is a strategic research partner of the ABA’s Section of International Law. Dan Monnat has also been recognized by Best Lawyers in America – 2018 in the areas of Criminal Defense: General Practice; White Collar Criminal Defense; Bet-the-Company Litigation; and Appellate Defense. This is Monnat’s 30th consecutive year to be recognized by Best Lawyers in America!


Dave Mudrick, a partner in the Topeka law firm of Henson, Hutton, Mudrick & Gragson, LLP, was recognized in the 24th edition of The Best Lawyers in America in Employment Law-Management, Labor Law-Management and Litigation-Labor and Employment. He has been honored by his peers as the 2018 Topeka Employment Law-Management Lawyer of the Year. Dave is also president of the Employment Law section of the KBA.

Trevor Riddle was honored by Best Lawyers in America – 2018 in the Criminal Defense: General Practice sector. Riddle joined Monnat & Spurrier 10 years ago. He earned his J.D. from the University of Kansas School of Law. While in law school, Riddle clerked for the Douglas County Kansas District Attorney and, after law school, prosecuted and tried cases as an Assistant Butler County Attorney.

John Robb of Somers, Robb & Robb has been included in the 2018 edition of Best Lawyers in America in the field of education law.

Thomas J. Romig, dean of the Washburn University School of Law, announced his intent to step down from his position in June of next year. Following his service as a paratrooper with the U.S. Army, Romig earned is law degree at Santa Clara University School of Law and became an officer with the JAG Corps. He rose to become the 36th Judge Advocate General of the Army—the Army’s top military lawyer.
ELWIN F. CABBAGE, 87, of Hutchinson, died Tuesday, August 22, 2017, at Hospice House of Reno County. He was born February 28, 1930, on a farm near Plainville, in Rooks County, Kansas, to Owen and Hazel (Vanderlip) Cabbage.

Elwin attended a one-room country school, started high school in Webster, Kansas, and in 1947, graduated from Stockton High School. In 1952, Elwin graduated from Washburn University in Topeka, where he was a member of the Phi Delta Theta fraternity. In 1956, he earned his law degree from Washburn University School of Law.

Following law school, he became an associate of what is now Martindell Swearenger Shaffer Ridenour. Elwin later became a partner in the firm and practiced law for the remainder of his life, a total of 61 years. Elwin began his civic service with the Jaycees (Junior Chamber of Commerce). He was a charter member of the Hutchinson Civitan Club formed in 1957 and was a lifetime member. Through Civitan, Elwin was instrumental in establishing what came to be known as the Early Education Center. In 1970, he worked on the committee to form the Reno County Occupational Center, later known as TECH, where he also served on the board. In addition, Elwin served on the committee that established Reins of Hope Therapeutic Riding Program in 1994 and served on their board.

In 1966, Elwin helped organize the Reno County Association for Retarded Children, now known as The Arc. He served as president for the local organization and the Kansas ARC. While state president, he advocated for mandatory education for children with special needs and gifted children, which became state law. He was also a member of the National ARC board in the early 1970s, which included meetings with Senator Bob Dole.

From 1978 to 1984, Elwin served as chair of the Kansas Bar Association Legal Education and Admissions Committee and for many years on the Professional Economics and Tax Section. Elwin also assisted with legal work in developing the Cosmosphere and the Hutchinson Community Foundation. For 32 years, he served on the board for the Birger Sandzen Gallery in Lindsborg and also served on the board of the Kansas Area United Methodist Foundation. Elwin was an active member of Trinity United Methodist Church, Hutchinson, and belonged to the D.U.O. Sunday school class.

On April 11, 1953 Elwin married Margaret Jean Moore in Topeka. Elwin is survived by: his wife of 64 years, Margaret; daughters, Janeal Cabbage of Olathe, Beth Horth (John) of Cedar Rapids, IA, Marcy McAfee (Chris) of Shawnee; and grandchildren, Jeremy Horth, Joshua Horth, and Meghan McAfee. He was preceded in death by: his parents; son, Dennis; siblings, Mildred Sammons, Earl Cabbage, Karolyn Cabbage, Velma Karr, and Larry Cabbage.

His funeral service was 2 p.m. Friday, August 25, 2017, at Trinity United Methodist Church, 17th and Main, Hutchinson, with the Reverend Michael L. McGuire officiating. Burial followed in Memorial Park Cemetery, Hutchinson.

The family suggests memorials to the Civitan International Research Center or Trinity United Methodist Church, in care of Elliott Mortuary, 1219 N. Main, Hutchinson, KS 67501.

THOMAS ROBERT DOCKING was born on August 10, 1954, in Lawrence, Kansas, and died Thursday, August 24, in Wichita. He is survived by the love of his life, Jill Sadowsky Docking; son, Brian (Emily) Docking; daughter, Margery Docking; two granddaughters, Charlotte and Jane Docking; and brother William (Judy) Docking of Arkansas City. He was preceded in death by his parents, Governor Robert and Meredith Gear Docking, and his grandparents, Governor George R. and Virginia Docking, and George and Irene Gear.

Tom grew up in Arkansas City, moving to Topeka when his father was elected Governor. He graduated from Topeka West High School and the University of Kansas with a Bachelor of Arts in Political Science and Economics, a Juris Doctor and a Master of Business Administration. Tom was a partner at the Law Offices of Morris, Laing, Evans, Brock & Kennedy, Chtd., where he specialized in taxation, business and estate planning, and banking and commercial law. In April of this year, Tom was awarded the Distinguished Alumnus Citation from the University of Kansas School of Law.

Tom was a fourth-generation Kansan and demonstrated his love for Wichita and Kansas through his commitment to service. He was elected Lieutenant Governor and served one term from 1983-1987 with Governor John Carlin. He served as Chairman of the United Way of the Plains and on various Boards, including the Wichita Downtown Development Corporation and the Wichita Water Conservation Task Force. Tom also served on the Board of Union State Bank of Arkan-
obituaries

DELBERT DALE HALEY. It is with great sadness that we announce the passing of Delbert Dale Haley. Del passed away peacefully on July 12, 2017. Del was born in 1936 to Butch and Lucy Haley in Dodge City, KS and grew up in Kingstown, KS. Del was a member of the Presbyterian Church. Del attended the University of Kansas and received a degree from the School of Journalism. While at KU he was a member of Sigma Delta Chi and a reporter for the KU newspaper. Del remained a life long fan of KU sports. While attending KU, Del was enrolled in the ROTC program. After graduation he entered the US Army and became a 1st Lieutenant in the Signal Corp. Following his military service, Del worked as the assistant editor for Panhandle Lines, a publication of the Panhandle Eastern Pipeline Co. To satisfy a dream, he decided to attend law school at night, earning a law degree from University of Missouri Law School at Kansas City and becoming a member of the Kansas Bar Association. Del joined First National Bank of Kansas City as a Trust Officer midway through law school. This began a thirty-seven year career in trust banking. He worked at numerous financial institutions in several different states until his retirement.

Del was an outdoorsman, a traveler, and a life long voracious reader, always seeking out the library in a new community. He fished and hunted throughout the intermountain west and into Canada. One of Del’s most enjoyable pastimes was watching his grandchildren take part in their sports activities. Del, with his wife, spent the last fifteen years traveling all over the world, visiting thirty countries including the Antarctic and Arctic.

Del is survived by his wife Faustine, of 59 years, daughter Della Young (Charles) Kent, WA, son Todd Haley (Nuala) Moss Beach, CA, sister Marjorie Harter, Livermore, CA, and grandchildren Brendan, Ahren, Cian and Maia.

Del’s internment was on July 28th at Tahoma National Cemetery in Kent, WA. A Memorial Service was held on September 3rd.

In memory of Del, you may make a donation to your local public library in his name.

JOHN DALE LEWIS, ESQ passed away peacefully in his home on September 6th at age 72.

John was born December 14, 1944 in Tecumseh, Kansas to Richard Stanley Lewis and Marguerite (Towery) Lewis.

He was preceded in death by his brother Douglas Lewis and sister Dixie Cottle. He is survived by his wife of 16 years, Bernadette (Wall) Lewis, and his 5 children: Vikkie Lewis of Toledo, OH, Richard Lewis of Fredericksburg, VA, Emily (Lewis) Moran of San Diego, Steven Nahaj of Berlin Germany, and Kelly Nahaj of Great Mills, Maryland; grandchildren Devin Lewis and Brea Nahaj-Taylor; nephew Douglas “Buddy” Lewis and nieces Karla Stribling and Kelli McCammon.

John joined the United States Navy in 1962, a decision that would forever shape his life. During his uniformed naval career, John held various billets in antisubmarine warfare, research and development, engineering, and a diplomatic assignment in Sicily. He was fluent in Italian and a graduate of the Defense Language Institute, retiring after 20 years of honorable service as a Senior Chief.

John spent his free time in the Navy pursuing numerous academic degrees, including a BS from SUNY, a BA from UMD, and a MS in International Studies from ODU. Following his naval service, he earned his Doctorate of Jurisprudence from William and Mary, and did post doctorate work in government contracting at GWU.

John had an illustrious career in law and government. Legal experience includes a two-year internship at NASA and six months at the US Attorney General’s Office before joining the Navy Office of General Counsel (OGC) as an attorney. Mr. Lewis filled several assignments within the OGC including Chief Patent Counsel for the Office of Naval Research in London, UK, and Patent Counsel at NAVAIR in Pax River. He published numerous articles on international intellectual property rights issues, maintained an active grant surveillance program, and successfully prosecuted the office’s only patent application in history. He earned the Meritorious Civilian Service Medal in 1999, and retired from Federal Service in 2003.

John retired to the mountains of Pennsylvania with his wife, where they enjoyed fishing, cooking, cold beers with family and friends, and their beloved “Dottie Dog.” He loved politics, debate, watching Steelers football, and relaxing on the porch, surrounded by the forest.

Friends and family were received at Donald Crawford Funeral Home, Hopwood, PA, on September 9 at 11:00 AM. In lieu of flowers, memorial contributions may be made to Alzheimer’s Association - Greater Pennsylvania Chapter, 1100 Liberty Avenue Suite E-201 Pittsburgh, PA 15222. www.alz.org/PA/ and The American Cancer Society, www.Cancer.org
BASIL C. MARHOFER passed away Wednesday, September 6, 2017 at the Ness County Hospital, Ness City. Basil was born on a farm in Arnold on February 2, 1925 to Olin and Mamie Keyser Marhofer. He graduated from Ness City High School and received his AB Degree as well as his Juris Doctor Degree from the University of Kansas. He attended law school at the University of Colorado and was admitted to the Kansas and Colorado Bar.

Basil was in private practice of law since 1951 he was also County Attorney, City attorney, and Mayor, Past President of County Bar Association all in Ness City. He was Past President Judicial Council Committee on Municipal Courts, past officer of Leagues of Kansas Municipalities, school attorney for Dist. #303 from 1962 – 1994, Secretary/Treasurer of Ness County Bank Building Foundation, and worked with the Ness County Community Concert Association. Basil served in the 61st Infantry Division of the US Army in Europe during WWII and was in the U.S. Army Band from 1945-1946.

Basil joined Rotary in 1954. He became District Governor in 1969, Director of Rotary International in 1987 and was Vice President of Rotary International 1988-89. He chaired many committees and represented the President of Rotary International around the world. He was a Paul Harris Fellow and a major donor to the Rotary Foundation.

He was a member of the First Church of Christ, Scientist of Boston, Massachusetts and Christian Science Society of Ness City. Basil was a member and Past Master of Walnut Valley Masonic Lodge #191, Ness City and Starlight Chapter #84 order of Eastern Star, Ness City.

On September 5, 1987, he married Cecilia Lewand in Ness City.

He is survived by his wife, Cecilia; his sister, Betty Clark, Denver; nieces, Cheryl (Larry) Thomas, Houston and Janet Clark, Colorado Springs; great niece and nephew, Nicholas (Ronda) Thomas, Denver and Stephanie Green, Beaumont, Texas; five great-grandnieces and nephews and one great-great niece; step-children, Tara (Chuck) Frey, Ellis and Tony Lewand, Houston. He was preceded in death by his parents and brother-in-law, Charles Clark.

Funeral service was on Saturday, September 9, 2017, at the United Methodist Church, Ness City with burial in the Ness City Cemetery.

Memorial contributions may be given to the Ness City Rotary Scholarship Fund or Cedar Village.

GENE MARSDON OLANDER was born on October 31, 1932, in Bartlesville, Oklahoma and died Thursday, August 24, 2017, at KU Medical Center in Kansas City, Kansas after a short illness.

He is survived by the love of his life, wife Judy Tholen Olander of Topeka, and the pride of his life, daughter Marcie Olander Rosenston, son-in-law Jerald Rosenston, and grandchildren Lauren and Bradley Rosenston, all of West Chester, Ohio.

He was preceded in death by his parents, Eugene and Margaret Tucker Olander, and his three younger brothers David, Tom, and Frank.

Gene grew up in Bartlesville, moving to Topeka where his family relocated on the death of his mother. He graduated from Topeka High School and joined the U.S. Navy, serving on the USS Wiseman destroyer escort and as lead sonarman on the Gato class diesel submarine USS Rasher. He graduated from Kansas State University where he was a Phi Delta Theta, and earned his Juris Doctrate at Washburn University School of Law.

Gene began his legal career in private practice, but shortly found his niche as a criminal prosecutor, starting as an assistant to the county attorney and becoming the county attorney and then district attorney. He was the chief law enforcement officer in Shawnee County from 1969 to 1993. He retired in 1993, having personally prosecuted more than 100 homicide cases, all resulting in convictions. He was active in the National District Attorneys Association, the Kansas County and District Attorneys Association, Kansas and Topeka Bar Associations, Topeka Lawyers Club, and Topeka Crimestoppers. Gene was instrumental in founding the YWCA’s Battered Women Task Force (now the Center for Safety and Empowerment), supporting it until his death. He served as the Chair of the Kansas Racing and Gaming Commission from 1995 to 2005.

Gene was a member of the Topeka Downtown Kiwanis Club for over fifty years, the Arab Shrine Temple, and the Lakeview Fishing and Shooting Association.

Gene’s legacy lives on through the statewide District Attorney system he helped to create, and the in-laws, nieces, nephews, former stepchildren, friends, and professional colleagues that he loved and who loved him in return.

An event honoring Gene’s life was being planned for a later date.

Memorial contributions in the name of Gene Olander may be made to the YWCA Center for Safety and Empowerment, 225 SW 12th, Topeka KS 66612 or the Topeka Community Foundation for the Gene Olander Fund, 5431 W 29th #300, Topeka KS 66614.
DON B. STAHR, 87, partner of Bever Dye Tax Law, LLC, passed away August 20, 2017. Don was born September 24, 1929 in Waco, Nebraska to Theo and Mildred Stahr. He would obtain his Doctorate of Law at Washburn University, and was an avid Shockers and Cornhuskers fan. Don enjoyed playing pitch and spending time with his grandkids and family. He was preceded by wife of 62 years, Dana Stahr. Don is survived by son, Douglas Stahr; daughter, Debbie (George) Seward; brother, Verle (Peggy) Stahr; nieces and nephews, Bruce, Katherine, Tom, David, Virginia and their families; sister-in-law, Arlene (Chuck) Muhlenbruck; special friend, JoAnn Hutto; grandchildren, Lindsey (Shane) Galles, Peter Seward, Kelly (Kellie) Seward, and Brendon (Kristina) Stahr; great grandchildren, Teagan, Haydin, Emmersyn and Steele Galles, Stevie, Boone, Knox Seward. The funeral service was held August 29, 2017 at Ascension Lutheran Church. Memorials may be made to the Belin Foundation and Bever Dye Foundation both at 301 N. Main St. Ste 600, Wichita, KS 67202; Ascension Lutheran Church, 842 N. Tyler Rd., Wichita, KS 67212, or donor’s choice.

JOHN WILLIAM STONE, 95, passed away Wednesday, August 30, 2017. He was born in Pittsburg, Kansas 2/14/1922, to Emery Darwin and Elinor Klenn Stone.

John grew up in Kansas City, Mo., and graduated from Southwest High School and Kansas City Missouri Junior College. He then attended Kansas University where he was a member of Sigma Nu fraternity.

As a senior in the Business School, he was drafted into the Army to serve in WWII. John married Verlee Reece of Scandia, Kansas, his college sweetheart, July 31, 1943. They lived happily for 67 years, until her death September 2, 2010. Dr. Stone attended the University of Nebraska and received a Bachelor of Science and Doctor of Dental Surgery degree in 1948. He also received a Juris Doctor degree from Washburn University Law School in 1973. From 1948 to 1951 he practiced dentistry in Atchison, Kansas. In 1951 and 1952 he served, as a 1st lieutenant, with the 1st Marine division in Korea. In 1952, the family moved to Topeka, where Dr. Stone practiced general dentistry until his retirement in 1986.

John was president of the Kansas Dental Association and a member of the Kansas State Board of Health, Kansas Bar Association, Fellow of the American College of Dentistry and Fellow of the Royal Society of Health (London). He also served on the Board of Directors of the Western Fuel and Supply Company, Shawnee Country Club, Salvation Army, Topeka Country Club and had membership in Junior and Senior Chamber of Commerce, Masonic Organizations and The Arab Shrine. John also acted as a Medical/Dental lobbyist for many years.

He and Verlee were members of the Westminster Presbyterian church. In addition to his numerous academic and professional accomplishments, John was a good golfer, instrument rated pilot and accomplished cook. He was a loving, generous father, grandfather and great-grandfather. His humor and wit were legendary. In his later life, “PaPa you can’t say that in public”, was commonly said by his family.

Dr. Stone is survived by three of his children and their spouses. Dr. John S. Stone (Judy) of Topeka, Lizabeth Huston (Tim) of Overland Park, Kansas, and David W. Stone (D’Wayn) of Highlands Ranch, Colorado; as well as nine grandchildren and eleven great-grandchildren.

He was preceded in death by his wife Verlee, daughter Kathy and his brother Klenn. John felt “I lived a good life, with a maximum of luck, did little harm and was pleased to have been here”.

Visitation was held Saturday, September 16, 2017, at Mount Hope Chapel, followed by a memorial service, burial and reception. In lieu of flowers, the family requests donations to the American Red Cross to assist those affected by Hurricane Harvey and sent in care of Penwell-Gabel Southwest Chapel, 3700 SW. Wanamaker Rd., Topeka, KS 66610.

To leave a message for the family online, please visit www.PenwellGabelTopeka.com.

Ending Note:

NOTE TO FAMILIES, LAW FIRMS AND OTHER AGENCIES:

IF YOU WOULD LIKE A PHOTO TO APPEAR IN THE JOURNAL WITH THE OBITUARY OF A LOVED ONE OR EMPLOYEE (who was a KBA member)

The Journal of the KBA will be pleased to run a photo with an obituary, but there are specific requirements regarding the format and resolution of the photo.

In order for a digital photo to print well, it must be submitted electronically in a .jpg, .jpeg, .tiff or .eps format, and it must be at least 300 dpi. Anything of lower resolution simply will not print well. Photos may be emailed to: editor@ksbar.org

Be sure to include full name of the deceased in the email!

If you have an actual photo you’d like to use, you can scan it at 300 dpi and submit it electronically. If you do not have the ability to scan it, please mail the photo the KBA with a copy of the newspaper obituary; the obituary and photo will run in the next possible issue of The Journal. Photos will be returned upon request. Please mail to:

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Listen Like a Lawyer

As lawyers, most of us are constantly evaluating our written and oral communication skills. We evaluate how well we have communicated our position, our solution, our advice. But do we evaluate the skill we used beforehand—the skill so essential to formulating our position, our solution, our advice—our ability to listen? Do we periodically evaluate our listening ability? Do we ever evaluate it?

Listening is a lawyering skill we can improve, like any other. And I would argue the more experienced lawyers we become—the more efficient we are at formulating our position, our solution, our advice—the more imperative it is to step back and evaluate how well we are listening.

We are least likely to focus on listening to someone we disagree with, someone with a different viewpoint. Yet in lawyering, this pervades almost everything we do: every case deals with someone with a different viewpoint, every board meeting has the potential for conflict, every employment issue at the firm draws out conflicting sides of a story, and so on. This column offers some ways to better listen to people with different viewpoints. And it concludes with tips on what may be the hardest listening of all: listening to constructive feedback about ourselves.

The International Listening Association’s streamlined definition of listening is a useful starting point. Listening is the process of receiving, constructing meaning from, and responding to spoken or nonverbal messages. The HURIER model breaks the process down into steps. HURIER stands for Hearing, Understanding, Remembering, Interpreting, Evaluating, and Responding. My tips focus on constructing meaning from a speaker’s words—on improving our ability to understand, interpret, and evaluate a speaker’s words. To better understand, interpret, and evaluate a speaker’s words—especially a speaker with a different viewpoint—we need to slow down, think more, have a comprehensive focus, and adopt a growth mindset.

Slow down, think more. We process information faster than we speak. This allows us, as lawyers, to develop a counterargument in our mind while another person is speaking. (I purposely didn’t say while we are listening to another person. We really can’t call it listening if our minds are already coming up with a counterargument. At best, we are in hearing mode.) This tendency to jump to the counterargument is helpful in an appellate oral argument, but it impedes the effectiveness of our listening in many other situations. I don’t need an empirical study to prove this. The evidence is clear from my personal experience of interrupting my husband every time he tries to explain his side of a disagreement. Slowing down to listen means more, though, than simply waiting our turn to talk. Waiting has the nice effect of making the other person feel like we are listening. But we must push further. Instead of jumping to the counterargument, use that extra processing time to think more deeply about the speaker’s words, ideas, purposes, and intentions.

Have a comprehensive focus; don’t be solely self-focused. One tool to help you think more deeply about another’s words is to think about those words in the speaker’s context. For most lawyers, our default setting is the self-focused listener. We immediately process the speaker’s words in reference to ourselves. Thus, the kinds of ideas that pop into
our head are “That happened to me once,” or “I would never make that decision,” or “I had a client [employee, colleague, board member, experience, etc.] like that.”6 When we’re self-focused, we’re quickly relating or fitting the speaker’s experience into our own set of experiences in a particular way. It leads us to jump to conclusions about how the information affects us or to make quick judgments about the speaker or the information.

We can expand our understanding by thinking about the speaker’s words more comprehensively and empathetically.7 Then the questions and ideas that pop into our heads are more like “What experiences did she have that lead her to that conclusion?” “What information does she have that she is not sharing at this point?” “How does she feel about that?”

We can allow ourselves to think more comprehensively about the speaker’s words by temporarily suspending a critical evaluation of those words and by not letting emotions create over-stimulation or even antagonism to the speaker’s words.8 We’ll also listen better if we listen with humility—if we see our understanding as a work in progress, if we ask ourselves, “What else can I learn from what she said?”

Avoid thinking of the speaker’s words in binary terms, as only true or false. For example, think of a conflict as a diamond with many facets: It may be true that I shouldn’t have shoved you, but it’s also true that you should not have called my sister a name, and it’s also true that you wouldn’t have called my sister a name if she hadn’t made up a story about you the day before.9 We need to leave space in our minds for an understanding that accounts for both what we already know and for the speaker’s new information.

We should also think about what the speaker might be feeling or how the speaker’s experiences have contributed to his ideas. Empirical evidence from the medical profession shows that empathy is associated not only with improvements in patient satisfaction, but in improvements in diagnostic accuracy and patient follow-through on prescribed treatment plans.10 It follows that in the legal world, we can better understand a case or conflict, and get more buy-in to any solution, by empathizing with the experiences of those we are listening to.

Have a growth mindset. In legal writing education, we are paying a lot more attention to the learner’s mindset. If students believe that they can develop their skills over time and that feedback can help, they have a growth mindset that can power their learning.11 I think the same applies to listening. If you want to improve at listening, then you have to be willing to learn something more from the speaker. You can learn more by avoiding the following triggers.12 (This is especially important when you are receiving negative feedback about your own performance. Because let’s face it, we almost always initially disagree with negative feedback.)

- **Truth triggers** – don’t immediately think “that’s wrong”; “that’s not helpful”; or “that’s not me.” Calm that inner voice and work to understand the reasons for the speaker’s words or the negative feedback before you reject them.
- **Relationship triggers** – don’t let your immediate feelings of being unappreciated or disrespected block your ability to absorb the feedback. And fight the urge to blame the speaker or reject a speaker’s words because you don’t like or don’t care for the speaker.
- **Identity triggers** – fight the urge to take the feedback personally, to get defensive, or to begin questioning everything. Allow yourself to believe you can grow and learn from the negative feedback or from the speaker’s offending words.14

1. The title for this column, and much of the information in it, came from the blog “Listen Like a Lawyer” by Jennifer Romig, Professor of Practice at Emory University School of Law. If you are interested in learning a lot more about how to listen like a lawyer, please access her blog at https://listenlikealawyer.com/.
6. Id.
7. Id.
10. Id. at 156.
11. Hamilton, supra note 8, at 151 & nn. 61-64.
13. Id.
14. Id.

About the Author

Pamela Keller is a clinical professor at the University of Kansas School of Law. She directs the lawyering skills program, moot court, and the judicial field placement. Before teaching she practiced employment law with Ice Miller in Indianapolis and clerked for the Hon. John W. Lungstrum, U. S. District Court of Kansas.
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Applications Due
Friday, October 27 by 5 p.m.
Evaluate Your Firm’s Marketing Efforts Using Cost-Per-Case

If a law firm uses more than one marketing channel, it can be difficult to know which ads are performing best. Digital campaigns like pay-per-click advertisements will have a detailed list on exactly how much a firm has spent on your campaigns and how well your ads are performing, but what about traditional marketing channels like TV commercials, newspaper ads, and billboards? It can be challenging to know exactly how much revenue has been received from these types of campaigns.

Fortunately, the cost-per-case (CPC) metric can be used to determine the exact profitability of any marketing channel. By utilizing cost per case, a firm can evaluate all of its marketing efforts and pinpoint which campaigns are most valuable.

What is Cost-Per-Case?

A firm’s cost per case is the exact value of how much in advertising dollars it spent to sign one new client. The equation can be calculated as follows:

\[
\text{CPC} = \frac{\text{Total Marketing Spend}}{\text{# of New Clients}}
\]

Not every client will have a cost. For example, if a woman recommends a family law attorney to her friend who needs a divorce, the firm will have spent $0 for this new client.

Why Does a Firm Need to Use Cost-Per-Case?

CPC is valuable because it allows a firm to compare different forms of marketing head-to-head. This can be difficult to do alone because some channels may appear to be successful simply due to volume alone. To see an example of how to determine CPC and evaluate the data found, we can use billboards as an example. While there is heated debate regarding billboards’ effectiveness, there is no denying that it’s a very popular marketing platform for legal professionals.

Billboards and CPC

Lamar Advertising is currently the nation’s largest billboard provider. A law firm seeking a billboard in Topeka would have many options. For example, a billboard on SW 10th Avenue near Stormont Vail Hospital currently runs for $2,500 for a month-long campaign. Lamar estimates that 250,000 people will see this billboard.

While it’s unlikely that even 1% of hospital passersby will need the assistance of a legal professional, it would not be unreasonable for a firm to sign up four new clients from this advertisement. Using the CPC formula, the cost per client in this hypothetical situation would be $625 (Four clients divided by the $2,500 spend).

Is $625 a “Good” Cost-Per-Case?

One of the most important factors to keep in mind is that there’s no such thing as a “good” CPC. What will matter is how much revenue a firm expects from the client.

A bankruptcy attorney in a rural area of Kansas might earn less than $1,000 from one client filing for Chapter 7 bankruptcy. Spending $625 on one client would be wildly unprofitable in this situation. Personal injury firms on the other hand often make $15,000 or more per claim. A firm averaging five-figure settlements would be able to be profitable with costs of $625.

When in doubt, firms should shoot for a CPC of 15% of their expected revenue returns to stay profitable.

Other Factors to Keep In Mind

1. Your CPC relies on accurate data. If a firm does not know how claimants found its services, there will be no way to accurately determine a unique CPC. The best way to attribute new clients is by asking every claimant, “How did you hear about our firm?”

2. Sometimes a high CPC is justified if it either yields high-quality cases, or if it is necessary to give a firm the caseload it requires. For example, let’s say a Social Security disability firm signs one new client per month through a small CPC campaign at a cost of just $28 per signed case. While this is wildly profitable, one new client per month is not enough to keep even a solo practitioner in business. If a firm is able to offset the costs elsewhere, it should consider keeping high-cost campaigns that yield a small number of high-quality claimants, or costly campaigns that give enough volume to stay running.

Once a firm evaluates its CPC, it can focus its effort and budget on marketing channels that are most profitable.

Article submitted by Deanna Power
eGenerationMarketing
www.eGenerationMarketing.com
ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN THE MATTER OF DAVID R. ALIG
NO. 17,358—AUGUST 25, 2017

FACTS: In a letter signed August 21, 2017, David R. Alig voluntarily surrendered his license to practice law in Kansas. At the time of surrender, a disciplinary complaint was pending against Alig. HE LD: The court accepted the surrender and Alig was disbarred.

ORDER OF DISBARMENT
IN THE MATTER OF ELDON L. BOISSEAU
NO. 8,022—SEPTEMBER 13, 2017

FACTS: In a letter dated August 31, 2017, Eldon L. Boisseau, an attorney licensed to practice law in Kansas, voluntarily surrendered his license. A complaint was pending at the time of surrender; the complaint alleged that Boisseau violated Kansas Rules of Professional Conduct by having been convicted of attempting to evade or defeat tax. HE LD: The court found that the surrender should be accepted and that Boisseau should be disbarred.

ORDER OF DISBARMENT
IN THE MATTER OF DANIEL L. BALDWIN
NO. 16,283—AUGUST 16, 2017

FACTS: In a letter signed August 16, 2017, Daniel L. Baldwin, attorney licensed to practice law in Kansas, voluntarily surrendered his license to practice law in Kansas. At the time Baldwin surrendered his license a formal hearing was pending regarding two docketed disciplinary complaints. The complaints involved issues of competence, diligence, safekeeping property, and fees. HE LD: The court examined the files of the office of the Disciplinary Administrator and found that the surrender of Baldwin’s license should be accepted and that he should be disbarred.

ORDER OF DISBARMENT
IN THE MATTER OF BILL HAROLD RAYMOND
NO. 15,504—AUGUST 25, 2017

FACTS: In a letter signed August 21, 2017, Bill Harold Raymond, an attorney licensed to practice law in Kansas, voluntarily surrendered his license. At the time of surrender, a disciplinary complaint was pending which alleged violations of the KRPC. HE LD: The court found that the surrender of Raymond’s license should be accepted and Raymond was disbarred.

CIVIL

DUTY—NEGLIGENCE—TORTS
RUSSELL V. MAY
SEDGWICK DISTRICT COURT— COURT OF APPEALS
IS AFFIRMED IN PART AND REVERSED IN PART—
DISTRICT COURT IS AFFIRMED IN PART AND
REVERSED IN PART—CASE REMANDED
NO. 111,671—AUGUST 25, 2017

FACTS: Russell discovered a lump in her breast in 2008. Dr. Goering, her primary care physician, sent Russell for diagnostic imaging. The physicians who viewed the images felt that the mass was benign and sent Russell back to Dr. Goering. Russell’s obstetrician recommended that Russell have a biopsy to put her mind at ease, but Russell did not follow up. A few years later there were signs that the lump was growing, so Russell again called Dr. Goering, who ordered diagnostic testing. At that time a biopsy was performed and cancer was discovered. Russell filed suit against Dr. Goering plus two other physicians who provided care. The district court granted Dr. Goering’s motion for judgment as a matter of law but denied the motion as to the other two doctors. A jury found that neither of those doctors was at fault. The Court of Appeals affirmed the district court’s grant of the motion for judgment as a matter of law and the Supreme Court granted a petition for review. ISSUES: (1) Grant of motion for judgment as a matter of law; (2) admission of expert testimony HE LD: Russell presented sufficient evidence to show that Dr. Goering owed a duty to meet the standard of care. Russell and Dr. Goering had a physician-patient relationship. And there was sufficient evidence presented to show that Dr. Goering breached the appropriate standard of care and that a reasonable jury could conclude that this breach was a proximate cause of Russell’s delayed diagnosis. There is no evidence that the district court’s grant of the motion for judgment as a matter of law was harmless. The disputed answers given by the expert were ambiguous and there is no reasonable probability that the assumed error affected the verdict against Dr. May. STATUTES: K.S.A. 60-250(a), -260(a), -261; K.S.A. 60-404

CRIMINAL

APPEALS—CONSTITUTIONAL LAW—
CRIMINAL PROCEDURE—EVIDENCE—
JURY INSTRUCTIONS—STATUTES
STATE V. BROWN
CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. SHAYLOR
RENO DISTRICT COURT—AFFIRMED ON ISSUES SUBJECT TO REVIEW
COURT OF APPEALS—AFFIRMED ON ISSUES SUBJECT TO REVIEW
NO. 108,103—AUGUST 18, 2017

FACTS: Shaylor was convicted of manufacturing methamphetamine. Kansas Offender Registration Act (KORA) was subsequently amended to define an “offender” required to register as including Shaylor’s offense unless a court found the manufacturing of the controlled substance was for personal use. Shaylor was then convicted of failing to register as a drug offender. On appeal, she claimed the retroactive application of the KORA amendment violated the Ex Post Facto Clause, and also claimed for first time on appeal the district court’s finding as to whether Shaylor possessed drug precursors for personal use violated Apprendi. In an unpublished opinion, Court of Appeals affirmed on these issues. Review granted.

ISSUE: Kansas Offender Registration Act - ex post facto and apprendi
HELD: As set forth in State v. Meredith, 306 Kan. ___ (2017), non-sex offenders seeking to avoid retroactive application of KORA provisions must, in order to satisfy “effects” prong of test in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), produce a record that distinguishes - by the “clearest proof”- KORA’s effect on those classes of offenders from the Act’s effects on sex offenders as a class. Record in Shaylor’s case failed to make this required showing. This also defeats her Apprendi claim about the district court’s finding as to personal use.

DISSENT (Beier, J., joined by Rosen and Johnson, JJ.): Dissent is consistent with votes in Meredith and State v. Huey, 306 Kan. ___ (2017). The current KORA registration requirement is punishment in effect if not intent, whether claim is raised under Ex Post Facto Clause or Eighth Amendment. And it is no less so for a drug offender than a sex offender.


IDENTITY THEFT—REEMPTION
STATE V. GARCIA
JOHNSON DISTRICT COURT—COURT OF APPEALS IS REVERSED, DISTRICT COURT IS REVERSED
NO. 112,502—SEPTEMBER 8, 2017

FACTS: An investigation revealed that Garcia used identity information belonging to another person when he obtained employment. As a result of this investigation, Garcia was charged with one count of identity theft. Prior to trial, Garcia filed a motion to dismiss in which he claimed that his prosecution was preempted by the Immigration Reform and Control Act of 1986 (IRCA). The district court denied the motion and Garcia was convicted as charged. His conviction was upheld by the Court of Appeals and his petition for review was granted.

ISSUE: Is State prosecution preempted by the IRCA
HELD: Garcia raised an “as-applied” preemption claim. During oral argument, Garcia narrowed his claim and argued that an as-applied, field preemption existed. But he made other claims in earlier proceedings, and the court will consider any type, category, and sub-type of preemption. The IRCA does not allow state prosecution for identity theft as this prosecution is expressly preempted by federal statute.

CONCURRENCE: (Luckert, J.) State prosecution of Garcia was preempted. But the doctrines of field and conflict preemption apply rather than express preemption.

DISSENT: (Biles, J.) Garcia’s use of someone else’s identity information to secure employment is not expressly preempted by federal statute. And although it is a narrower question, implied preemption is similarly inapplicable. The majority’s holding will make it difficult to prosecute anyone for identity theft in Kansas.

DISSENT: (Stegall, J.) The majority’s reading of IRCA gives Congress power that it does not have. Justice Stegall joins Justice Biles with the exception that he does not believe implied preemption is a close call.

STATUTES: 8 U.S.C. § 1324a, § 1324a(a), § 1324a(b), §1324a(e), (f), § 1324a(h)(2), 18 U.S.C. § 1546(b)
IDENTITY THEFT—PREEMPTION
STATE V. MORALES
JOHNSON DISTRICT COURT—COURT OF APPEALS IS REVERSED, DISTRICT COURT IS REVERSED
NO. 111,904—SEPTEMBER 8, 2017

FACTS: Morales applied for a job and provided a Social Security number, permanent resident card, and Social Security card. A subsequent investigation revealed that the Social Security number provided by Morales belonged to someone else. Morales was charged with identity theft and making a false information. Prior to trial Morales filed a motion to dismiss, claiming that his prosecution was preempted by the Immigration Reform and Control Act of 1986 (IRCA). The district court denied Morales’ motion and Morales was convicted after a bench trial. His conviction was upheld by the Court of Appeals.

ISSUE: Is State prosecution preempted by the IRCA

HELD: It is questionable whether this issue was properly preserved for appellate review. But the court chose to address the merits because Morales’ dispositive issue is one of law, and justice required a decision on the merits. State prosecutions such as this one are expressly preempted by IRCA.

CONCURRENCE: (Luckert, J.) Justice Luckert did not agree with the majority that express preemption applies. But she believed that the doctrines of field and conflict preemption did apply.

DISSENTS: (Biles and Steggall, J.J.) They dissented for reasons elaborated upon in State v. García.

STATUTE: 8 U.S.C. § 1324a(b)(5)

IDENTITY THEFT—PREEMPTION
STATE V. OCHOA-LARA
JOHNSON DISTRICT COURT—COURT OF APPEALS IS REVERSED, DISTRICT COURT IS REVERSED
NO. 112,322—SEPTEMBER 8, 2017

FACTS: Ochoa-Lara obtained identity information belonging to other people in order to obtain employment. After he was discovered, the State charged Ochoa-Lara with identity theft and making a false information. Prior to trial, Ochoa-Lara filed a motion to dismiss, claiming that his prosecution was preempted by federal law. That motion was denied and Ochoa-Lara was convicted. His conviction was affirmed by the Court of Appeals and the Supreme Court granted his petition for review.

ISSUE: Is State prosecution preempted by the IRCA

HELD: It is questionable whether this issue was properly preserved for appellate review. But the court chose to address the merits because the dispositive issue was one of law, and justice required a decision on the merits. State prosecutions such as this one are expressly preempted by IRCA.

CONCURRENCE: (Luckert, J.) Justice Luckert did not agree with the majority that express preemption applies. But she believed that the doctrines of field and conflict preemption did apply.

DISSENTS: (Biles and Steggall, J.J.) They dissented for reasons elaborated upon in State v. García.

STATUTE: 8 U.S.C. § 1324a(b)(5)

APPEALS—CONSTITUTIONAL LAW—CRIMINAL PROCEDURE
STATE V. TAPPENDICK
SALINE DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED
NO. 109,272—AUGUST 25, 2017

FACTS: Tappendick convicted in 2011 of offenses committed in 2008. Sentence imposed included lifetime registration under Kansas Offender Registration Act (KORA). For first time on appeal, Tappendick argued the KORA registration requirement violated the Ex Post Facto Clause because KORA required only a 10-year registration period in 2008. Court of Appeals concluded this issue was not properly preserved, rejecting Tappendick’s reliance on two exceptions for considering the issue for first time on appeal. Tappendick filed petition for review, alleging Court of Appeals incorrectly ruled he could not raise this claim for first time on appeal.

ISSUE: Preservation of issue on appeal

HELD: The petition for review failed to challenge the panel’s stated reasons for concluding that Tappendick did not satisfy the exceptions’ requirements. Panel’s decision to not consider the ex post facto claim is affirmed.


OFFENDER REGISTRATION; STATUTES
STATE V. WATKINS
RENO DISTRICT COURT—COURT OF APPEALS IS AFFIRMED, DISTRICT COURT IS AFFIRMED
NO. 110,702—SEPTEMBER 8, 2017

FACTS: After being convicted of several felonies, Watkins was required to register under the Kansas Offender Registration Act (KORA) because the district court found that Watkins used a deadly weapon when committing the offenses. For the first time on appeal, Watkins argued that the registration requirement violated his constitutional rights because the facts that prompted registration were not found by a jury beyond a reasonable doubt. The Court of Appeals decided to address the merits of Watkins’ claim and rejected his arguments. The Supreme Court granted review.

ISSUES: Could Watkins’ punishment be enhanced without a jury finding the presence of aggravating factors

HELD: Precedent holds that KORA is a non-punitive, civil regulatory scheme and lifetime registration requirements are not a punishment. Because the registration requirement was not a punishment, there is no need for a jury to make the deadly weapon-use finding.

CONCURRENCE: (Malone, J.) The doctrine of stare decisis required this decision, but he believed that KORA is so punitive in effect that it negated any legislative intent to the contrary.

STATUTES: [No substantive statutes cited.]
CIVIL

DEBTOR AND CREDITOR—LIENS—TRUSTS
CHANEY V. ARMITAGE
MONTGOMERY DISTRICT COURT—AFFIRMED
NO. 115,977—SEPTEMBER 15, 2017
PREVIOUSLY FILED AS AN UNPUBLISHED OPINION

FACTS: Armitage created a trust that would hold certain assets, including real estate that he designated as a homestead. After that time, the district court entered judgment in Chaney’s favor against Armitage. Armitage’s health failed, and he moved to a care facility, which prompted Chaney to file an application for writ of special execution against Armitage’s homestead. The district court issued the writ and directed the sheriff to levy execution. Armitage later died with no family living at the homestead. His heirs moved to set aside the writ of special execution claiming that no judgment lien could ever attach to Armitage’s homestead. The district court denied the motion, finding that because there was no spouse or children living at the property after Armitage’s death, the assets were subject to summary execution. The heirs appealed.

ISSUE: Whether a writ of special execution can ever attach to homestead property, even after the death of the homestead owner

HELD: The homestead designation on Armitage’s property expired at his death because it was not occupied by his children or spouse. Because it no longer had a homestead exemption, the residence became trust property and, under the terms of the trust, was to be used to pay the estate’s debts and expenses.


IMMUNITY—NEGligence
WILLIAMS V. C-U-OUT BAIL BONDS
JOHNSON DISTRICT COURT—REVERSED
NO. 116,095—AUGUST 18, 2017

FACTS: The Williams family was at home when several armed representatives of C-U-Out Bail bonds came to their door searching for their daughter-in-law, who had absconded. Although they told the bond company that the daughter-in-law was not at the house, the company refused to leave and forced its way in with a steel battering ram. The Williamses called the police department for help. Overland Park police officers came near the scene but never on the Williams’ property, and the officers watched while the bond company entered the home and allegedly threatened the occupants. The Williamses filed suit against both the bond company and the Overland Park Police Department. The district court granted the city’s motion to dismiss for failure to state a claim, finding that the police officers who responded to the call owed no duty to the Williamses, and that the city was immune from liability under the discretionary function exception to the Kansas Tort Claims Act. The Williamses appealed.

ISSUES: (1) Proper standard of review; (2) did the police department owe a duty to the Williamses? (3) is there immunity under the KTCA?

HELD: Kansas has not yet adopted the federal standard of review for motions to dismiss. The court is not required to accept as true legal conclusions that are contained within the petition. Under the "public duty doctrine", a governmental agency owes a duty to the public at large rather than to individuals. Here, the officers’ act of responding to a 911 call did not create a special relationship. Deciding whether to make an arrest is discretionary on the officers’ part. Their investigation here is not meant to be subject to judicial review, and the district court properly found immunity under the KTCA.

STATUTES: K.S.A. 2016 Supp. 22-2202(m), 60-208(a), 75-6104(c), -6104(e), -6104(n); K.S.A. 13-1339, 22-2401, -2405(3), -2809

STATUTORY INTERPRETATION—ZONING
LAYLE V. CITY OF MISSION HILLS
JOHNSON DISTRICT COURT—REVERSED
NO. 116,095—AUGUST 18, 2017

FACTS: The Layles’ fence at their residence did not meet zoning regulations in Mission Hills. But over 20 years, the Layles were given two variances to either repair or replace the fence, even though it would not meet regulations. In 2012, the Layles sought to remove and replace the pickets and rails of the fence without changing the fence posts. The city denied the request, finding that the work could not be authorized without approval from the Architectural Review Board and the Board of Zoning Appeals. After a number of appeals, the ultimate decision was that the proposed work was a replacement of the fence requiring new variances. The Layles appealed.

ISSUES: (1) Application of correct standard of review; (2) was the proposed work a repair or a replacement

HELD: An issue that requires a court to interpret regulatory or statutory criteria uses a de novo standard of review and not a review for reasonableness. Whether the proposed fence project constituted a repair or a replacement was actually a question of law. Repair of fence sections did not constitute a full replacement. Repairs do not require a variance and the city could have granted the building permit that was requested by the Layles.

STATUTES: K.S.A. 12-759(e)(1), -759(f)
EMPLOYMENT—INSURANCE—WORKERS COMPENSATION
HENSON V. DAVIS
SEDGwick DISTRICT COURT—AFIRMED
NO. 112,292—SEPTEMBER 18, 2017
PREVIOUSLY FILED AS AN UNPUBLISHED OPINION

FACTS: Henson was badly injured at work. Coworkers attempted to take him to the hospital, but a manager for the employer—Belger Cartage—redirected Henson to a clinic. A doctor at that clinic treated Henson for several days before returning Henson to work. A later physician discovered the severity of Henson’s injuries. He eventually underwent surgery and was unable to return to work. Henson later recovered damages from a medical malpractice action that he brought against the first physician who misdiagnosed him. The damages included costs not available in a workers compensation action, but did not include any damages for future medical expenses. After the jury returned its verdict in the malpractice action, Belger Cartage asked for a lien against the verdict for payments it had already made to Henson. The district court paid some reimbursement to Belger Cartage but denied its request for a credit against any future medical expenses. Belger Cartage appealed.

ISSUE: Is Belger Cartage entitled to a credit against potential future medical expenses

HELD: Because the malpractice verdict did not contain any provision for future medical expenses, Belger Cartage is not entitled to any credit.

STATUTE: K.S.A. 44-504(b)

CIVIL PROCEDURE—CONTRACTS—DIVORCE—EVIDENCE
IN RE MARRIAGE OF JOHNSTON
JOHNSON DISTRICT COURT—REVERSED
AND VACATED
NO. 115,256—AUGUST 18, 2017

FACTS: The Johnstons divorced in 2011. Despite having significant assets and debts and highly technical military pay, the couple created a separation agreement without the assistance of counsel. They agreed that Jim would pay Pamela $1,000 per month from his military retirement pay for the rest of her life, unless she remarried. He also agreed to a lump-sum transfer of $100,000 from his retirement account. After 3 years, Jim motioned the district court to relieve him of his duty to pay Pamela $1,000 because, he alleged, Pamela was living in a marriage-like relationship. That motion was denied. But the district court sua sponte put a 121-month cap on Jim’s maintenance obligation. Pamela did not appeal this order, but she did obtain counsel and sought to reopen the separation agreement regarding Jim’s military retirement benefits. After hearing testimony, the district court divided Jim’s military retirement benefits equally between both parties but did not alter the obligation to pay maintenance for 121-months. Jim appealed.

ISSUES: (1) Authority to modify property settlement agreement; (2) ability to modify earlier order on spousal maintenance

HELD: Authority to modify the separation agreement would have had to come from K.S.A. 60-260(b)(6). There was no ambiguity in the agreement or any evidence of mistake. But even if there was, Pamela failed to seek relief within one year. Because a more specific provision of K.S.A. 60-260(b) applied, Pamela is barred from using the catchall provision at 260(b)(6) in an attempt to circumvent the statutory time limits. The district court had no jurisdiction to modify the prior separation agreement and its order doing so is void.

Parties may agree to extend maintenance beyond the 121-months mentioned in the statute.

DISSENT: (Leben, J.) The property settlement agreement was ambiguous, giving the district court jurisdiction to modify it under K.S.A. 60-260(b)(6).

STATUTES: K.S.A. 2016 Supp. 23-2712, -2904, 60-260(b); K.S.A. 60-260(b)

ADMINISTRATIVE LAW; WORKERS COMPENSATION VIA CHRISTI HOSPITALS V. KAN-PAK LLC
WORKERS COMPENSATION BOARD - REVERSED
NO. 116,692 – AUGUST 25, 2017

FACTS: Pinion was burned while working for Kan-Pak LLC and was treated at Via Christi Hospital. Although Pinion’s treatment cost over $1 million, Kan-Pak’s insurance carrier paid much less than that to Via Christi. The 2010 fee schedule for workers compensation introduced the “stop-loss method” that was meant to be applied to particularly costly services. That fee schedule persisted in 2011, but an addition was made which instructed that providers should be reimbursed using either the stop-loss method or the traditional method, whichever was least. It is unclear how or when the rule was amended, and insurers who inquired were told to ignore it. But Kan-Pak’s insurer would not, claiming that this was a properly published regulation that must be followed. Both the hearing officer and Board found that they could not alter the written language of the regulation and this appeal followed.

ISSUE: Is the language in the 2011 regulations enforceable

HELD: The Division of Workers Compensation has a statutory obligation to adopt rules and regulations which establish a fee schedule. Every step of the process must follow the statutory rules. The 2011 amendment to the fee schedule that introduced the “whichever is least” language did not follow the required procedure; there was no cost study to gauge the impact of the addition of the statement. Because the rule process here did not follow proper procedure and the rule change was apparently an accident, the court is not required to enforce it.


EMPLOYMENT—STATUTES
MULLEN V. KANSAS EMPLOYMENT SECURITY BOARD OF REVIEW
RENO DISTRICT COURT—AFIRMED
NO. 115,682—SEPTEMBER 15, 2017
PREVIOUSLY FILED AS AN UNPUBLISHED OPINION

FACTS: Mullen sustained a workplace injury and was unable to work for 2 years. He was terminated in April 2013 and filed for unemployment compensation. That claim was denied on grounds that he did not file for benefits within 4 weeks of being released to return to work. An appeals referee affirmed on grounds that Mullen failed to file his claim within 24 months of the injury. After Mullen filed a petition for judicial review, the district court affirmed on the same grounds. Mullen appealed.

ISSUE: Is K.S.A. 2016 Supp. 44-705(g)(2) ambiguous when applied to claimants that remain employed more than 24 months following a qualifying injury

HELD: The language of K.S.A. 2016 Supp. 44-705(g) is clear and unambiguous. Because Mullen did not file an unemployment
claim within 24 months of sustaining a qualifying injury, he cannot qualify for an alternative base period. While the outcome may not be fair, the statute must be read as written.

STATUTES: K.S.A. 2016 Supp. 44-702, -703(b), -703(d), -703(h)(h), -705(e), -705(g)(2), -706(a), -709(i), 77-621(a)(1), -621(c)

STATUTES; TRUSTS
HUTSON V. MOSIER
DOUGLAS DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, REMANDED
NO. 117,020 – SEPTEMBER 8, 2017

FACTS: While in her 70s, Hutson transferred assets to a pooled supplemental needs trust. The trustee was given the authority to administer the trust and meet needs that were not being met by either any public agency or source of private income. While the trust was still in place, Hutson applied for Medicaid benefits to assist with her long-term care needs. The Medicaid application was approved, but a transfer penalty was put in place; Hutson’s Medicaid benefits were delayed 313 days. Hutson appealed, and the district court eventually determined that federal statutes required the transfer penalty because Hutson did not receive fair market value for the transfer. Hutson appealed.

ISSUES: (1) Did the district court incorrectly interpret the rules and regulations surrounding Medicaid eligibility; (2) Did the district court err by finding that Hutson did not receive fair market value for her transfer

HELD: The trust to which Hutson contributed satisfied the requirements for a pooled supplemental or special needs trust. But a person over age 65 who transfers assets to such a trust is subject to the imposition of a transfer penalty if the transfer is for less than fair market value. The evidence in the record on appeal was insufficient to show whether Hutson received fair market value for her transfer. The case was remanded to the district court for supplemental fact finding on that issue.

STATUTES: 42 U.S.C. § 1396a(a), § 1396(c), § 1396p(c), § 1396p(d)(4)(A), § 1396p(d)(4)(C); K.S.A. 2016 Supp. 77-621(a)(1); K.S.A. 77-425, -622(b)

ATTORNEY FEES—JUDGMENT
RICHARDSON V. MURRAY
JOHNSON DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, REMANDED
NO. 115,745—AUGUST 18, 2017

FACTS: The Richardsons purchased a home from the Murrays, and brought suit after experiencing water intrusion in the residence. Before trial, the Murrays submitted an offer of judgment and the Richardsons accepted it. After judgment was entered, the Richardsons sought attorney fees and expenses. The district court allowed court costs but not attorney fees, and the Murrays promptly tendered payment. The Richardsons failed to timely file a satisfaction of judgment. As a result, the Murrays sought an award of statutory penalties and attorney fees. The district court granted that motion and the Richardsons appealed.

ISSUES: (1) Decision on attorney fees and related expenses; (2) untimely satisfaction of judgment

HELD: The offer of judgment was silent on whether attorney fees were included with court costs. Generally, attorney fees are not part of costs and are available only if a statute or other authority defines costs to include attorney fees. As the offering party, the Murrays were obligated to make a clear and unambiguous offer. Because the offer was silent on this matter, the Richardsons were allowed to seek attorney fees outside the context of costs. Under the terms of the contract, the Murrays must reimburse the Richardsons for all reasonable attorney fees for work reasonably performed in pursuing relief. Filing a satisfaction of judgment would not have prevented the Richardsons from appealing the district court’s denial of their request for attorney fees. For that reason, the district court did not err in assessing the statutory penalties against the Richardsons.


CONTEMPT—DUE PROCESS
IN RE PATERNITY OF S.M.J. V. OGLE
DOUGLAS DISTRICT COURT—REVERSED AND REMANDED
NO. 115,776—AUGUST 25, 2017

FACTS: Jacobs and Ogle had a child together and then separated. After the separation, Ogle persistently made disparaging remarks about Jacobs, both in front of his child and to the community at large. Ogle’s remarks did not stop even after Jacobs was given sole custody of the child and Ogle’s parenting time was restricted to supervised visits and monitored phone calls. After Ogle shared remarks about Jacobs with her employer, Jacobs lost her job. She asked the district court to hold Ogle in contempt for violating its order not to share accusations about her with third parties. Ogle was ordered to appear at a contempt hearing but he failed to do so despite knowing about the hearing. The district court held the hearing in Ogle’s absence and found Ogle in contempt. The judge ordered monetary sanctions plus a 30-day jail term that would be suspended if Ogle paid. Ogle appealed.

ISSUE: (1) District court’s ability to hold the hearing

HELD: Statutory provisions did not allow the district court to hold a hearing without Ogle. When Ogle did not attend the hearing the district court should have either attempted to secure his presence with a phone call or issued a bench warrant for his arrest. Because the hearing violated Ogle’s due process rights the district court’s order must be vacated.

STATUTES: K.S.A. 2016 Supp. 20-1204a, -1204(b), -1204a(b), -1204a(c)

ATTORNEY AND CLIENT—HABEAS CORPUS
MCINTYRE V. STATE
DOUGLAS DISTRICT COURT—REVERSED AND REMANDED
NO. 111,580—SEPTEMBER 1, 2017

FACTS: McIntyre was convicted of several serious felonies. His convictions were confirmed upon direct appeal, and his first K.S.A. 60-1507 motion was denied by the district court; that denial was affirmed on appeal. More than 10 years later, McIntyre filed a second 1507 motion claiming that counsel for his first 1507 was ineffective. That motion was summarily denied by the district court—the grounds given for the denial were that McIntyre had no right to counsel because there was no rule requiring effective retained counsel in a collateral, civil attack. McIntyre appealed that ruling, and it
was affirmed by the Court of Appeals on different grounds. But the Supreme Court granted review and sent the case back to the Court of Appeals so that McIntyre’s substantive claims could be addressed.

ISSUE: Statutory right to effective assistance of counsel in 1507 appeals

HELD: The statutory right to counsel for 1507 movants is based on the apparent merits of the 1507 action rather than the financial means of the movant. A statutory right to counsel attaches once the district court determines that the motion presents substantial questions of law or trialable issues of fact. Once that statutory right attaches, the movant is entitled to effective representation regardless of whether counsel is appointed or retained. In this case, the fact that the district court held a hearing on McIntyre’s 1507 motion means there were substantial questions of law—which also means that he had the right to effective assistance of counsel. And once an appeal is filed, the statutory right to effective assistance attaches regardless of the relative merits of the motion and regardless of whether counsel was appointed or retained.

STATUTE: K.S.A. 22-4501, -4506, -4506(b), -4506(c), 60-1507

CRIMINAL

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EVIDENCE—FOURTH AMENDMENT—JURY TRIAL—SEARCH AND SEIZURE

STATE V. CHAVEZ-MAJORS

BUTLER DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, REMANDED

NO. 115,286—AUGUST 18, 2017

FACTS: Chavez-Majors had a motorcycle accident, and was unconscious when officer and EMS arrived at scene. Observing evidence that Chavez-Majors had been under the influence of alcohol, officer directed EMS to conduct warrantless blood draw. Test results showed twice the legal blood-alcohol limit. District court denied Chavez-Majors’ motion to suppress the test result, finding officer had probable cause with exigent circumstances to justify the warrantless search and seizure. Chavez-Majors was convicted at a bench trial of aggravated battery while driving under the influence (DUI). On appeal, he claimed for first time that he did not waive his right to a jury trial. He also claimed the district court erred by denying motion to suppress evidence that was unconstitutionally obtained.

ISSUES: (1) Waiver of right to jury trial, (2) motion to suppress blood draw evidence

HELD: Waiver claim was considered. Two-part test in State v. Irving, 216 Kan. 588 (1975), is applied finding Chavez-Majors did not knowingly and voluntarily waive right to jury trial. District court’s mention that plea agreement was in part “in contemplation of waiver of right to jury trial” did not satisfy Irving’s first requirement, and there was no compliance with Irving’s second requirement. The conviction was reversed and case was remanded to afford right to jury trial or to effect a valid waiver.

Consent exception, or applicability of Kansas implied consent statute, was not asserted in this case, and third requirement of three-part test in Schrmerber v. California, 384 U.S. 757 (1966), was not challenged. The first two parts of the Schrmerber test were applied to the two claimed exceptions. Limited Kansas case law found applying Schrmerber’s exigent circumstances requirement in warrantless blood draw DUI cases. Comparable U.S. Supreme Court reviewed for guidance, finding the metabolism of blood alcohol is a factor that can be considered. Under totality of circumstances in this case, district court’s conclusion that probable cause with exigent circumstances justified the warrantless blood draw was supported by substantial competent evidence.


JURISDICTION—SENTENCING

STATE V. REEVES

RILEY DISTRICT COURT—AFFIRMED

NO. 117,120—SEPTEMBER 1, 2017

FACTS: After a conviction, the district court made border box findings and sentenced Reeves to 36 months’ probation with an underlying presumptive sentence of 32 months’ imprisonment. Reeves had a rocky start with probation and was before the court on multiple occasions for probation violation hearings. Reeves finally acknowledged that probation was not working for him, and he asked to be sent in to do his time. But he asked that his prison sentence be reduced from 32 months to 23 months. The district court denied the request to modify the sentence and Reeves appealed.

ISSUE: Whether the district court erred by refusing to modify the sentence

HELD: The district court did have jurisdiction to modify Reeves’ sentence had it chosen to do so. Reeves is not attempting to appeal his original sentence under the Kansas Sentencing Guidelines Act. His appeal is limited to the sentence imposed at revocation and there is statutory authority for this appeal. But under the facts of the case, the district court did not err by refusing to modify Reeves’ sentence.

STATUTE: K.S.A. 2016 Supp. 21-6815(a), -6820(c)(1), 22-3601(a), -3602(a), -3608(c), -3716(c)(1)(E)
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From the Appellate Court Clerk's Office

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