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By Alan Rupe, Jason Stitt, and Mark Kanaga

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The Journal of the Kansas Bar Association (ISSN 0022-8486) is published monthly with combined issues for July/August and November/December. The Kansas Bar Association and the members of the Board of Editors assume no responsibility for any opinion or statement of fact in the substantive legal articles published in The Journal of the Kansas Bar Association.

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

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KBA Officers and Board of Governors Elections

It’s not too early to start thinking about KBA leadership positions for the 2014-15 leadership year.

The KBA Nominating Committee, chaired by Lee M. Smithyman, of Overland Park, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates.

Officers

- **President**: Dennis D. Depew
- **President-elect**: Gerald L. Green
- **Vice President**: Natalie G. Haag
- **Secretary-Treasurer**: Stephen N. Six
- **KBA Delegate to ABA House of Delegates**: Linda S. Parks

If you are interested, or know someone who should be considered, please send detailed information to Jordan Yochim, KBA Executive Director, at 1200 SW Harrison St., Topeka, KS 66612-1806, or at jyochim@ksbar.org by **Friday, January 17, 2014**. This information will be distributed to the Nominating Committee prior to its meeting on **Friday, January 24, 2014**. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

Board of Governors

Candidates seeking a position on the Board of Governors must file a nominating petition, signed by at least 25 KBA members from that district, with Jordan Yochim by **Friday, February 21, 2014**. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. The eight KBA districts with seats up for election in 2014 are:

- **District 1**: Incumbents Gregory P. Goheen and Mira Mdivani are eligible for re-election. Johnson County.
- **District 3**: Incumbent Eric L. Rosenblad is eligible for re-election. Allen, Anderson, Bourbon, Cherokee, Crawford, Labette, Linn, Montgomery, Neosho, Wilson, and Woodson counties.
- **District 5**: Incumbent Terri S. Bezek is eligible for re-election. Shawnee County.
- **District 7**: Incumbent Matthew C. Hesse is not eligible for re-election. Sedgwick County.
- **District 8**: Incumbent John B. Swearer is eligible for re-election. Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties.
- **District 11**: Incumbent Nancy Morales Gonzalez is eligible for re-election. Wyandotte County.
- **District 12**: Incumbent William E. Quick is eligible for re-election. Out-of-State.

For more information

To obtain a petition for the Board of Governors, please contact Jordan Yochim at the KBA office at (785) 234-5696 or via email at jyochim@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Lee M. Smithyman at (913) 681-3260 or via email at lsmithyman@ksbar.org or Jordan Yochim at (785) 234-5696 or via email at jyochim@ksbar.org.
Recognition

In my last column, I encouraged everyone to take the next step and recognize those around you who you are thankful for and thank them for being part of your personal “good news.” As we begin 2014, I want to recognize the volunteers that do the heavy lifting and make the KBA function as well as it does. Of course, the Board of Governors and officers handle the general governance of the KBA. They are listed in the front of every Bar Journal. They do a great job of representing our diverse membership and ensure that all viewpoints are considered in the KBA decision making process.

Next, we have the Kansas Bar Foundation officers and board of trustees. They keep the KBF on track as it helps support worthwhile causes around the state. They are listed in the Bar Journal (Page 11).

The KBA and KBF also have a number of committees, task forces, and panels. Many of our general membership may not be aware of just how many there are. They and the chairperson(s) of each are as follows:

- Access to Justice: Patrick H. Donahue
- Annual Meeting Planning: TBD
- Annual Survey of Law: Hon. Steve Leben and Larkin E. Walsh
- Awards: Sara S. Beezley
- Bar Prep: Timothy O’Brien
- Bench Bar: Teresa L. Watson
- Board of Publishers: TBD
- Continuing Legal Education: Mira Mdivani
- Disaster Response Committee: TBD
- Diversity: Eunice C. Peters and Christi L. Bright
- Ethics Advisory: J. Nick Badgerow
- Ethics Grievance: Jane M. Isern
- Fee Dispute Resolution: Hon. Kurtis I. Loy
- Investment (KBF): C. David Newbery
- Task Force for Mandatory IOLTA (KBF): Linda S. Parks
- IOLTA (KBF): Gabrielle M. Thompson
- Joint Operating Committee: TBD
- Journal Board of Editors: Richard D. Ralls
- Legislative: Melissa A. Wangeman
- Media-Bar: Prof. Mike Kautsch
- Membership: Chelsey G. Langland and Vincent M. Cox
- Nominating: Lee A. Smithyman
- Paralegals: Sharon C. Wood
- Scholarship (KBF): Katherine L. Kirk
- Standards for Title Examination: Richard L. Friedeman

Each of these committees, task forces, and panels also has other members who actively participate in the matters that come before them. The complete membership lists for each are available online through the KBA Leadership Guide at http://www.ksbar.org/aboutus.

More familiar to all are the KBA Sections that are available for members to join. Each of the sections provides tangible benefits to their members that go beyond general KBA membership. They and the president of each are as follows:

- Administrative Law: Martha J. Coffman
- Agricultural Law: Aaron M. Popelka
- Alternative Dispute Resolution: Paula J. Wright
- Appellate Practice: Steven J. Obermeier
- Bankruptcy and Insolvency Law: Douglas D. Depew
- Construction Law: Rudolf H. Beebe
- Corporate Counsel: Amanda J. Kiefer
- Corporation, Banking and Business Law: Michael J. Mayans
- Criminal Law: Robin Fowler
- Elder Law: Emily A. Donaldson
- Employment Law: Kelly M. Nash
- Family Law: Jennifer Goheen-Lynch
- Government Lawyers: Scott Gordon
- Health Law: Catherine M. Walberg
- Immigration Law: Matt L. Hoppock
- Indian Law: Vivien J. Olsen
- Insurance Law: Catherine M. Walberg
- Intellectual Property Law: Jason O. Howard
- Litigation: Peter S. Johnson
- Oil, Gas and Mineral Law: Ryan A. Hoffman
- Real Estate, Probate and Trust Law: Stewart T. Weaver
- Solo and Small Firm: Calvin K. Williams
- Tax Law: Jason P. Lacey
- Young Lawyers: Jeffrey W. Gettler

The other officers of these sections are also available online in the KBA Leadership Guide. The officers of the sections rotate on an annual basis and provide section members with a great opportunity to get involved in the KBA in an area of law that is important to them. Section membership also allows other KBA members and the general public to find attorneys who practice in those areas of law by doing an attorney search on the KBA website.

In addition, we have regular contributors to the KBA Journal, such as Matthew D. Keenan, whose articles are always educational and many times outright hilarious. Larry Zimmerman’s technology column is a must read for people like me who sometimes struggle to let technology do all it can for their practice.

Hopefully, after reviewing the above information, you are now more aware of all the things that the KBA does for our
profession and our membership. Without all of those named above, the KBA simply would not be able to do what we do. The amount of time and quality of effort given to these groups within the KBA is simply incredible to me. It makes the job of being president seem insignificant in comparison. Everyone who is involved in any of these groups has my most sincere gratitude, respect, and appreciation for a job well done.

About the President

Dennis D. Depew is an attorney with the Depew Law Firm in Neodesha. He currently serves as president of the Kansas Bar Association.

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**Be It Resolved for the New Year**

**BE IT RESOLVED** that beginning on this date and continuing hereafter . . .

Resolutions. It’s that time of year again. We’ve all made resolutions. I’ve done it. My secretary has a list of them and pulls it out from time to time just to remind me of the ones I haven’t kept (e.g., clean office, organize office, etc.). The problem with resolutions is that after the first week or so, there really isn’t much motivation to keep the resolution. For me anyway. I do understand that a clean and organized office is important. I understand it because my secretary continuously reminds me of this fact. If I had a well maintained office I could entertain clients in there instead of monopolizing the library. Freedom at last!

Unfortunately, what may appear to an outsider as cluttered and unorganized is actually a hotbed for creative thinking. There are studies that show that a messy office promotes creative thinking and stimulates new ideas. Believe it. It is difficult to convince people of that, especially my secretary.

By the way, “entertain” clients. I’ve often wondered about that particular description of what we, legal professionals, do with our clients. Are we monkeys putting on a performance in the confines of our offices in order to woo clients into retaining us? If that were the case, then maybe they should come into my zoo, um, office. But I digress . . .

Resolution. To resolve. To make a definite and serious decision to do something. “Do” something. Making a resolution is one thing. Actually doing the thing which we resolve to do turns out to be quite another. As young lawyers we need to make resolutions and keep them. As mentioned in my article last month, resolving to keep and maintain a useful, workable calendaring system is of utmost importance. I have been successful at that and, because it is working, makes my life easier, and makes workflow smoother, it’s been very easy to continue since inception.

So pondering what my resolutions will be this coming year, I have decided I will make resolutions that will work, make my life easier and make workflow smoother. Hopefully, I will then be able to sustain the resolution throughout the year. How you ask? It’s simple really. Small, short-term changes that, when accumulated over time, will derive large, long-term benefits. For instance, I resolve to place all of the paper-clips currently in my office (wherever said paperclips may be located) into a paperclip holder. Secondly, I resolve to place all of the pens/pencils in my office (wherever said pens/pencils may be located) into a pen/pencil holder. Thirdly, I resolve to place all of the business cards in my office . . . and so on and so forth. If I resolve to do 30 things, one at a time, by the end of January my office will be clean, organized, clutter free, and ready for my secretary’s inspection and approval. I can then entertain all the clients I wish to see in my own office instead of monopolizing the library! Freedom at last!

Of course, work isn’t the only area in which resolutions need to be made. There is always room for personal growth. Along with my list of work resolutions I have personal resolutions. I won’t bore you with them here (though maybe I should so you all can hold me accountable), but I am a little wary. In an article by Katherine Costello dated December 31, 2012, *The 10 Most Common New Year’s Resolutions of 2013* were: (1) eat healthy and exercise regularly, (2) drink less, (3) learn something new, (4) quit smoking, (5) better work/life balance, (6) volunteer, (7) save money, (8) get organized, (9) read more, and (10) finish those around the house “to-do” lists. Ironically, in an article in *Time* magazine by Kayla Webley dated January 1, 2012, the *Top 10 Commonly Broken New Year’s Resolutions* were: (1) lose weight and get fit, (2) drink less, (3) learn something new, (4) eat healthier and diet, (5) get out of debt and save money, (6) spend more time with family, (7) travel to new places, (8) be less stressed, (9) volunteer, and (10) drink less. Based on this information, there’s really no reason to set myself up to fail. Once again, I think it best to incorporate resolutions that may be considered small and short-term but, when accumulated over time, will derive large, long-term benefits. For instance, I resolve to place all of my loose change in a jar to be given at the end of the year to a charitable organization, along with my normal charitable giving of course.

Making ANY resolutions will do, but the key is making sure your resolutions are not so lofty that they seem unattainable and you quickly lose motivation to complete them. Ultimately, my biggest resolution is to KEEP my resolutions. This might just be a first for me and I hope for each of you as well! HAPPY NEW YEAR!!!

---

**About the YLS President**

**Jeffrey W. Gettler** is a partner at the Independence law firm of Emert, Chubb & Gettler LLC. He is also the prosecutor for the City of Independence.

jgettler@sehc-law.com

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February 7, 2014
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- Good, Bad, and Downright Ugly Aspects of Kansas Tort Claims Act Practice
- Tax Appeal Turf Wars: The Proper Role of Non-Lawyer Professionals at COTA
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A Look Inside Public Services

It is a true pleasure to work as the public services manager for the Kansas Bar Association. I knew when I accepted this position that it would encompass things like the Lawyer Referral Service, law-related education, IOLTA, Celebrate Freedom Week, and Celebrate Pro Bono Week. I now know that it includes all of the things listed above and many more. I’d like to share with you three programs that fall within three committees under the public services umbrella.

Law Wise and the KBA Law-Related Education Committee

Have you ever been asked to visit a classroom for career day or maybe for Law Day or Constitution Day? One of the best resources available to KBA members and free to the public is Law Wise. Six times during the school year, Law Wise is sent to numerous teachers and made available electronically on ksbar.org. It is a publication designed to highlight law-related topics for students in grades K-12. KBA member, Kathryn Gardner, is the editor. Judge G. Joseph Pierron Jr., chair of the KBA Law-Related Education Committee serves as a coordinator along with myself and Ryan Purcell, KBA designer. Recent issues have covered topics like pro bono work, bullying, and the Kansas law designating the week containing September 17 as Celebrate Freedom Week. The new law requires the State Board of Education to require history and government curriculum for grades kindergarten through eight that includes instruction on the meaning and context of the Declaration of Independence and the U.S. Constitution. In 2014, the KBA Law-Related Education Committee plans to design curriculum that will be helpful during Celebrate Freedom Week and provide KBA members with helpful information for presentations. The committee receives funding from IOLTA.

Kansans Benefit from Your Participation in IOLTA

Within public services is IOLTA or Interest on Lawyer Trust Accounts. It is IOLTA that provides more than $80,000 in funds each year for the Kansas Bar Foundation’s grant program.

The best part about participating in IOLTA is that it requires very little effort from you. ... The benefit to you is that you are making a difference to someone in Kansas.

The KBA IOLTA Committee, chaired by Gabrielle Thompson, is tasked with reviewing grant requests and making decisions for funding programs that provide civil legal service programs for low-income citizens. This includes law-related education, local and state bar pro bono programs, reduced fee programs and technical support for legal service staff. The funding from IOLTA is made possible by attorneys who participate in the IOLTA program. The IOLTA program collects the interest from lawyers’ client trust accounts which, prior to the creation of the IOLTA program, were held in noninterest-bearing accounts. The client funds deposited in these accounts are either so small or will be held for such a short amount of time that any interest generated would be less than the expenses to set up a separate account or to separate out, keep appropriate tax records, and dispense interest to each client. However, when a number of these small or short term funds are pooled together, they can produce significant amounts of revenue for law-related charitable public service projects. Participation in the Foundation’s IOLTA program is voluntary on the part of both Kansas lawyers and financial institutions. The Kansas IOLTA program works with 137 banks that provide IOLTA accounts for 3,871 attorneys. In 2014, the Kansas IOLTA program will celebrate its 30th year of operation. The best part about participating in this program is that it requires very little effort from you. The process of establishing an account is simple and requires almost no maintenance on your part. The benefit to you is that you are making a difference to someone in Kansas. For example, the IOLTA grant to the Kansas CASA program will make it possible for them to train more volunteers and thus to provide more children with a court-appointed special advocate.

Public Services Pamphlets and the Access to Justice Committee

We hear the term equal access to justice quite often. At the KBA, we take that seriously. One of the committees under the public services umbrella is the KBA Access to Justice Committee. Serving as chair is Pat Donahue. KBA is lucky to have a person like Pat as chair of that committee. His career has been devoted to the very topic. Appropriately, the committee stays informed about issues and resources related to access to justice. In an effort to provide free information on law-related topics, the committee is responsible for the review and distribution of more than 20 pamphlets. It is not unusual for a teacher to call and request 50 copies of the “On Your Own” pamphlet for high school seniors. Other topics include The Automobile Accident, Is a Living Trust for You, Marriage and Divorce, Ways to Settle Your Dispute, and Child Custody, Support and Visitation. In 2014, a new pamphlet designed specifically for attorneys will be available. The KBA and the Kansas Coalition Against Sexual and Domestic Violence, have worked together to publish a pamphlet that provides attorneys with information and tips about working with survivors of domestic violence. All of the pamphlets are available to KBA members at no cost. The pamphlets are available to others in limited quantities for the cost of shipping and at a reduced cost for larger quantities. All of the pamphlets are available online at http://www.ksbar.org.

I have shared resources and programs from three KBA committees within the public services program. Next month, I will share information about the KBA Lawyer Referral Service and the KBA Scholarship Committee.

If there is a reason to celebrate, public services will be ready! One thing that attracted me to this position is the opportunity to do a lot of celebrating. A co-worker recently comment-
ed that I should install a disco ball in my office for all of the “celebrate this and celebrate that weeks.” Celebrate Freedom Week in September and Celebrate Pro Bono Week in October kept us busy. One new event added during Celebrate Pro Bono Week was Jeans for Justice day. The first year brought in more than $1,000 which will be used for pro bono programs at Kansas Legal Services.

Please stop by my office the next time you are at the KBA. I love hearing about your ideas and suggestions for public service programs. ■

2014 IOLTA Grants

Kansas Legal Services Inc. – $43,139
To provide advice and representation for low income persons in Kansas for general legal, family, consumer and housing issues and for victims of domestic violence, sexual assault and stalking.

CASA of Kansas – $8,000
To fund volunteer supervisory staff positions. Staff positions recruit, screen, train, and supervise CASA volunteers so that they may serve in child-in-need-of-care cases.

National Institute for Trial Advocacy – $8,776.50
To fund “Advocacy Skills Training,” a three-day workshop that will focus on the needs of specialized public service attorneys and serve practitioners who cannot travel to larger program destinations due to time and budget constraints.

KBA YLS Mock Trial Program – $5,000
To provide no-cost legal services to residents of Douglas County who are financially disadvantaged.

To provide pro bono services to refugees resettled by the Catholic Charities’ Refugee and Migrant Services Program and individuals from the community at large who are predominantly Hispanic.

To coordinate programs that focus on providing Kansas residents with resources and information about law-related matters of interest to educators, students, and the public.

Western Professionals/Immigration Professionals – $5,000
To advance the educational goals of students and the broader understanding of and respect for the law through structured and fairly administered mock trials.

YWCA Crisis Center-Wichita – $2,084
To fund three free legal clinics for survivors of domestic violence, as well as support for the volunteer training program.

KBA YLS Mock Trial Program – $5,000
To offer a reduced fee program to indigent migrants who qualify for either Deferred Action for Childhood Arrivals or a U-visa. The program will cover all of the individual’s attorney fees, assuming they meet all the qualifications.

• Total: $71,999.50

2014 Class Action Residual Fund Grants

KBA Law-Related Education Committee – $10,000
To provide pro bono services to refugees resettled by the Catholic Charities’ Refugee and Migrant Services Program and individuals from the community at large who are predominantly Hispanic.

To host two days of training. One day is for Kansas attorneys and the other for advocates. The training will focus on domestic violence and sexual assault and how these issues affect custody decisions.

To provide no-cost legal services to residents of Douglas County who are financially disadvantaged.

University of Kansas School of Law-Pro Bono Project – $5,570
To develop a program that will match Kansas citizens seeking pro bono legal aid with licensed Kansas attorneys willing to provide such aid. The program will have separate sections for clients who are military veterans and law enforcement officers.

• Total: $30,570
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NAPABA’s 25th Annual Convention Comes to Kansas City, Broadens Horizons

One of the highlights of my 2013 year that broadened my horizons, delighted my intellect, and gave me a great energy boost was attending the National Asian Pacific American Bar Association (NAPABA) annual convention in Kansas City on November 7-10, 2013. NAPABA has more than 40,000 members, including Asian-Pacific American lawyers, judges, and law students from all over the United States and the Asian-Pacific region of the world. NAPABA conventions bring together lawyers considered to be the premier experts in their fields, state and federal judiciary, general counsels for major corporations, law students participating in the Thomas Tang International Moot Court Competition, and scholars across the world for the International Law Symposium.

More than 1,200 NAPABA members came to Kansas City for the association’s 25th annual convention in 2013 to learn, network, and get inspired. This was the first time a NAPABA convention came to Kansas City. During the four-day convention, with more than 45 CLE panels on cutting-edge legal developments and dozens of social events every day, I felt that I had traveled the world. I met hundreds of patent and intellectual property attorneys, from private counsel to in-house attorneys at Microsoft and Apple. I learned about legal issues that U.S. businesses face in China, Hong Kong, and Vietnam from experts, such as Nick Wang, who says he practices law from the “aisle seat” on flights between the United States and China. I met women lawyers who described challenges of navigating cultural land mines and strategies for success working on transactions in the Pacific Rim. I met so many fascinating people, and had a chance to be exposed to unexpected points of view and mind-opening ideas from lawyers from many regions in the United States and Asia. While NAPABA members from New York, California, Arizona, India, and Korea were clearly surprised how “nice” Kansas City was, and made repeated trips to Oklahoma Joe’s for our super-tasty barbecue, I felt that I would like much more time with my newly-met colleagues to ask so many questions about their practices and experiences that were unlike my own.

I asked Christopher C. Javillonar, a partner at the Kansas City office of Bryan Cave LLP, who, along with Gregory Wu of Shook Hardy and Bacon, Peter Chung of Benton Lloyd and Chung, and other members of the Asian American Bar Association of Kansas City, brought the convention to Kansas City, to share a few words about the convention:

Q: Chris, you have served as president of the Asian American Bar Association of Kansas City and on NAPABA Board while working on this project. What did it take to bring the NAPABA’s 25th Annual Convention to Kansas City?

Christopher Javillonar: There are so many pieces that had to be put in place before we could bring the NAPABA convention to Kansas City. The first piece was to develop a strong relationship and sense of trust with NAPABA. After serving on their Board of Governors, we not only developed this trust, but also learned about what it would take to host a convention of this magnitude. It was important to understand the challenges that would face us so that we could be prepared to meet those challenges. Secondly, we put together a very talented and dedicated team. Our local bar association worked tirelessly to scout out venues, evaluate CLE proposals, talk to potential speakers, and work with other groups and organizations to lay the groundwork for a successful event.

Q: How significant was it having the national NAPABA Convention right here in the heartland?

CJ: I cannot overstate the importance of bringing an event like this to the heartland. First of all, it was a wonderful opportunity to demonstrate to a diverse audience that we have the facilities and capabilities to host a successful event in the Midwest. Secondly, it provided this national group to draw upon a new audience that perhaps would not normally attend this event because it is typically hosted in larger coastal cities. At the same time, members of our local bar association were able to meet nationally recognized experts in their fields, notable judges, and politicians.

In summary, I was so impressed with NAPABA that I am going to the 26th Annual NAPABA convention in Arizona this year, and I hope you will consider joining me as well.

About the Author

Mira Mdivani practices corporate immigration law with the Mdivani Law Firm in Overland Park. She serves on the KBA Board of Governors and on the KBA Diversity Committee.

mmdivani@uslegalimmigration.com
Give ‘em the Write-Around

Performing at Super Bowl XL, the aging but still vainglorious Mick Jagger exulted that “everything comes to he who waits.” Little did he know that what awaited him was a word war. The aging but still punctilious William Safire pointed out that Jagger’s pronoun was in the objective case and thus should have been “him.”¹ To excel as a writer, which star should you follow—rock or grammar?

You needn’t choose. Even stuffy style guides sometimes give you the run-around with contradictory advice. The May 1, 2013 hearing or the May 1, 2013 hearing? Kansas’s attorney or Kansas’s attorney? When it comes to gray areas of usage, the messy reality is that you may not please all your readers. On the one hand, modernists (and Trekkies) will applaud your efforts to boldly split infinitives that nobody has split before. On the other, traditionalists will harumph at perceived monstrosities up with which they cannot put. Instead of taking sides in such linguistic kerfuffles, give ‘em the write-around.

Good legal writing steers clear of constructions that distract readers. The focus should be on your substance, not your syntax. Just as you’re better off eschewing “forte” in speeches because no matter how you pronounce it, half your audience will smugly think you’re wrong, likewise you should avoid no-win traps in documents. Write around them by recasting the trouble spots: At the hearing on May 1, 2013, the attorney for Kansas . . . .

For example, you may pause when drafting “Neither the trustees nor the beneficiary [get or gets] satisfaction of the judgment.” It sounds clunky either way, so try a rewrite: “The trustees do not get satisfaction, nor does the beneficiary.” Or perhaps even this Jaggeresque take: “The trustees and the beneficiary alike can get no satisfaction.”

Flexibility is a crucial asset for any writer. Maybe you want to describe an idea as a “brainchild.” That is fine, but if your sentence is “Employees’ [brainchildren or brainchilds] are the employers’ property,” a different formulation is preferable. Though dictionaries support “brainchildren,” that word evokes disturbing sci-fi imagery. Rather than use the technically incorrect “brainchilds,” go with the singular: “An employee’s brainchild is the employer’s property.”

Grammatically, it is proper to ask who cares about whom. Factually, some might ask, who does care about “whom”? Many lawyers, judges, and clients, that’s who. Even if “whom” is slipping toward obsolescence, plenty of legal readers expect to see it when appropriate. But not, of course, when inappropriate. Alas, fear of forgetting the “m” can lead even eminent writers to hypercorrection.

Pity the court wrestling with this actual sentence in an opinion: “At trial, Miller refused to testify unless the district court excluded four young . . . men who or whom she felt posed a threat to her personal safety.”² The argument for the nominative case is that “who” is the subject of “posed a threat”; the (flawed) argument for “whom” is that it is the object of “she felt.” But a practical reaction is, so what?

Judges routinely deflect questions not squarely before them, and this court could have sidestepped the Nominative v. Objective case altogether: “four young . . . men she felt posed a threat . . . .” Or if that seemed too casual, another way around the thorny issue—which, for the record, the court bungled—would have been a Solomonic splitting of the sentence: “At trial, Miller felt that four young . . . men posed a threat to her personal safety. She refused to testify unless the district court excluded them.”

Personal safety may be paramount, but one should also exclude words that pose threats to personal pronouns’ safety. In a recent list of “outrageously ungrammatical and solecistic gaffes,” legal writing guru Bryan Garner included this example from a law review: “He who suffered the loss must be compensated by [she or her] who inflicted the wrong.”³ The law review went with “she.” Garner insisted on “her.”

But one lawyer’s “literary gore,” as Garner put it, is another’s music. In an informal poll, most of my peers chose “she”—not after consulting Fowler,⁴ but just because “it sounds better.” And so the cure may be worse than the solecism. Indeed, unless you are writing private letters to Mr. Garner, your readers may sometimes misinterpret precision as pretension. Wholly aside from unintended commentary about sexual dynamics—why is the law review sentence’s generic victim male and the tortfeasor female?—both proffered alternatives suffer from awkwardness. A smoother solution improves the sentence by writing around the pronoun problem: “Who suffer losses must be compensated by those who inflicted them.”

You can’t always write what you want, but if you try sometimes, your readers can get what they need—substantive analysis, not syntactical sideshows. So when you approach a lexical morass, try circumventing it by giving ‘em the write-around. Such editing can take extra effort, but not to worry, there is no rush; when it comes to writing, time is on your side. After all, as Mr. Jagger could have unobjectionably proclaimed at the game, everything comes to those who wait.

About the Author

Alex Glashausser is a professor of law at Washburn University School of Law, where his teaching focuses on civil procedure and torts. He received his B.A. from Harvard College in 1990 and his J.D. from Duke University School of Law in 1995.

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Footnotes

How Not to Facebook

Participating in social media without crossing ethical boundaries is easy enough. Two very simple rules are usually adequate to govern all conduct:

1. If it is OK to say offline, it is OK to say online;
2. If it is not OK to say offline, it is not OK to say online.

Despite those simple rules, some lawyers and judges believe that social media is particularly rife with ethical danger. Many wear abstinence from social media as a badge of honor reflecting their steely will against the alluring siren call of public conversation. Those who forget the Two Rules often invoke a “devil made me do it” defense, suggesting their own intemperance is attributable to gremlins in the machine. These reactions to social media play out in the unfortunate case of Judge Henry P. Allred, of Walker County, Ala.

Curious Tale from Alabama

Back in 2011, Judge Allred and “Lawyer A” got crosswise over appearances at hearings. Instead of a finding about whether Lawyer A had actually failed to appear, Judge Allred broadly cautioned Lawyer A that she would be in contempt if she missed appearances. (Other documents outside the complaint indicate multiple attorneys were similarly warned.) Things boiled over in March 2012 when Lawyer A allegedly failed to appear at a hearing and was found in contempt by Judge Allred. The judge then sent his sheriff to Lawyer A’s office in a neighboring county to arrest Lawyer A.

Lawyer A was away from her office but immediately contacted Judge Allred’s office. He declined to speak with her and later refused multiple requests for a hearing or meeting with Lawyer A’s attorneys. Judge Allred insisted that Lawyer A must surrender herself to authorities and wait in jail until he returned from vacation.

During this back and forth, Judge Allred posted his side of the conflict to his Facebook page and concluded saying, “Her office lied to the deputy and she’s been running ever since. She’s made a bad situation much worse. She’s basically in open defiance of numerous orders from me to turn herself in. She’s gone from one act to contempt to about five. She’s a fugitive and she’s facing twenty five days now.” Judge Allred asked his Facebook friends to “Please spread it far and wide.” The judge sent a similar tale and instructions to arrest Lawyer A by email to every circuit and district judge in Alabama.

The contempt case against Lawyer A made its way through the appeals court in Alabama and Judge Allred’s finding of contempt was reversed. In addition to her appeal, Lawyer A filed a complaint against Judge Allred resulting in formal charges for violations of Canons 1, 2A, 2B, and 3A(6) related to his Facebook post.

Judge Allred obtained an expedited resolution by consenting to reprimand and censure. The court accepted the lesser sanction because it believed Judge Allred acknowledged his misconduct. He did agree to send an apology – to all circuit and district judges. No apology to Lawyer A was forthcoming or required.

The apology letter is notable. Regarding his Facebook post, he says, “Second, I want to caution everyone about the dangers of social media. Once something is posted to a forum where others (even close friends) can have access to it, control over that posting is lost forever. Regardless of intent, judges are, and should be, held to a higher standard of conduct.” His comments suggesting a higher standard of conduct for judges is correct but the judge’s grasp of social media is not.

Simple Rules, Simple Life

First, social media did not create the Judge Allred’s post, encourage his post, or otherwise create any unique or unpredictable dangers. Judge Allred voluntarily violated the Two Rules. Second, the judge casually dodged genuine responsibility for his post suggesting some feature of social media was to blame for the publicity instead of his own purposeful instruction to “Please spread it far and wide.” Wisely, Judge Allred recognized his personal inability to obey the Two Rules and closed his Facebook page. Anyone able to follow such simple dictates need not be so over-dramatic.

Social media is part of society’s public square. Estimates show that up to one billion people access some form of social media daily. Most counsel to avoid its siren call is counter to our obligation to “. . . further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.” (KRPC, Rule 226(6)) We must also engage to fulfill our duty “. . . to challenge the rectitude of official action. . . .” (KRPC, Rule 226(5)) This is difficult when the threat of ethics sanctions are weighed – especially as sanctions for lawyers’ conduct online are often more severe than for judicial conduct. Nevertheless, keeping the law and lawyers relevant to the greater culture requires active engagement where our culture mixes and mingles. The two simple rules have adequately governed in-person conduct for decades and are fully adequate to online conduct as well.

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and an 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 Section.

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'You Have Been Endorsed on LinkedIn’: What Now?

I. What is LinkedIn?

There are a number of social media sites on the Internet which provide interaction and client development through exposure and mutual communication. One such site – and probably the largest – is LinkedIn, a site where one may register and provide a personal biography, including a photograph, list educational and employment background, honors and awards, as well as links to published articles, blogs, and websites.

Additionally, a member may give a summary self-description (such as “trial lawyer and ethics counselor”) and list the primary areas of focus for one’s practice.

The key benefit to a site like LinkedIn is the ability to “connect” with anyone else who is also a member and who agrees to accept you as a connection. Those members (nearly a quarter billion) are located all over the world and work in all kinds of businesses and professions.

One of the functions of LinkedIn is to permit “recommendations,” a narrative written by another member about the endorsee’s abilities. These could be accolades from clients or observations by opposing counsel.

Another of the functions of LinkedIn is the “endorsement,” which allows a member to “endorse” another member – with or without personal knowledge – in numerous areas of expertise fitting somewhere within the general definition of the member’s profession. The endorsee receives a message, advising of the endorsement. If added to the profile by the endorsee, the endorsement then appears on the member’s page, under the heading “Skills & Expertise,” with a photo link for each person who has endorsed the member for each area. In addition, after accepting an endorsement (by clicking “Add to Profile”), the endorsee is given the opportunity to endorse other members, as their profile photos appear, one after another, with a suggested area of expertise.

II. What are the risk areas and relevant rules?

False Specialization? Under Rule 7.4(a), MRPC, a lawyer “may communicate the fact that the lawyer does or does not practice in particular fields of law.” However, under subsection (d) of the same rule, “[a] lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field of law, unless” the lawyer is actually certified by an organization approved by the state bar or the ABA. The Kansas Bar Association does not approve any certifying organizations, so one is limited to those certifying organizations approved by the ABA. Thus, care should be taken in presenting accurate information under the personal biographical area of the member’s page.

Higher Standard of Care? Another area of risk could arise in the malpractice area. By claiming to be an expert or specialist, a professional may be held to a higher standard of care than a non-specialist.

Client Confidences? If a client were to give a narrative recommendation about a lawyer, that narrative might include client confidential information protected from public disclosure under Rule 1.6, MRPC. While it is the client’s information to share, it could also include work product or legal advice.

False Advertising? Because an endorsing member may have no personal or direct knowledge of the endorsee’s true expertise, there is a risk that a member may be endorsed as having expertise in an area where s/he does not even practice. If a member is “endorsed” by someone else as having expertise, is that a “communication” by the lawyer? Rule 7.1(a), MRPC, prohibits a lawyer from making a “false or misleading” communication about the lawyer or his/her services, such as “a material misrepresentation of fact or law.”

Further, Rule 7.1(c) prohibits advertising which “is likely to create an unjustified expectation about results the lawyer can achieve.”

A South Carolina Ethics Advisory Opinion states that a lawyer is responsible for any recommendations, endorsements, or ratings given to that lawyer on a third-party website. That opinion holds that, by participating in the web listing, the lawyer member is responsible for the content of that listing. Therefore, it further holds:

Information on business advertising and networking websites are both communications and advertisements; therefore, they are governed by Rules 7.1 and 7.2. While mere participation in these websites is not unethical, all content in a claimed listing must conform to the detailed requirements of Rule 7.2(b)-(i) and must not be false, misleading, deceptive, or unfair.

Paying for Advertising? Rule 7.2(c) prohibits a lawyer from “giving anything of value to a person for recommending the lawyer’s services.” Thus, while members may endorse each other, there should be no agreement to exchange endorsements, implying a quid pro quo.

III. What can you do about it?

The key is that each LinkedIn member controls his/her own profile. Given the risks outlined above, some commentators

Footnotes

1. http://www.linkedin.com
2. “LinkedIn operates the world’s largest professional network on the Internet with more than 238 million members in over 200 countries and territories. Professionals are signing up to join LinkedIn at a rate of more than two new members per second.” http://press.linkedin.com/about.
4. A current list of approved certifying organizations may be found on the ABA’s website at http://www.americanbar.org/groups/professional_relations/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html.
7. Id.
suggest turning off the option which adds endorsements to one’s LinkedIn profile. Assuming one does not wish to go that far, care should be taken.

**Watch Your Profile.** In creating and updating your personal profile, make sure you do not claim specialization or certification other as permitted by Rule 7.4(a).

**Watch Your Recommendations.** When a member gives a narrative recommendation, the endorsee should review it closely and add it to his/her profile only if it is accurate and not misleading, and it does not contain privileged, work product, or client confidential information. In addition, the recommendation should not create false and unjustified expectations as to the results of the lawyer’s future work.

**Watch Your Endorsements.** When a contact member endorses another member, the endorsee should review it, and make sure that it covers an area in which the endorsee actually practices and can claim some ability. A member should periodically review the endorsements in his/her profile, and delete any which do not accurately portray the lawyer’s abilities and practice areas.

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**About the Author**

J. Nick Badgerow is a partner with Spencer Fane Britt & Browne LLP in Overland Park, where he practices as a trial lawyer and ethics counselor. He is chairman of the Johnson County (Kansas) Ethics and Grievance Committee, Kansas Supreme Court Ethics 20/20 Commission, Judicial Council Civil Code Committee, and Kansas Bar Ethics Advisory Committee; and member of the Kansas State Board of Discipline for Attorneys and Kansas Judicial Council.

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**Connection**

Eldon Shields, Partner in Gates, Shields & Ferguson
Overland Park, Kansas & Blue Springs, Missouri

From the beginning, ALPS connected with the Main Street lawyer during a real time of need. For partner and longtime policyholder, Eldon Shields, that connection has remained strong over the past 25 years. Since 1988, ALPS has continued to fulfill its promise to its policyholders and the legal community as a whole.

Hear more from ALPS policyholder Eldon Shields at 25.alpsnet.com
Warning: This Column is about THE LAW

What I’m about to write may shock you, so be prepared. But this month’s column is about THE LAW. Yes, a legal column. More than just that, it’s a First Amendment column. So, grab some smelling salts, get back in your chair, and once you’ve finished reading this, you might just qualify for CLE credit. Doubtful, but think positive.

You see, a long time ago, a high school library here in the metro had an award-winning book on its shelves that was removed by order of the school board. The book, “Annie on My Mind” by Nancy Garden, recounts a story of a romantic relationship between two high school girls. The book is fiction. But the controversy resulting from the school board’s decision to remove the book was anything but; once placed, and then removed, several students sought to assert their First Amendment rights to have the book kept on the shelf. The year was 1995.

Kansas City Star reporter Joe Robertson recently described the controversy this way: “The book was highly acclaimed in literary circles. It turned out that copies of the book had already been sitting essentially unnoticed on some school library shelves, including those at Olathe South High School. Most school boards in the area rejected the gift of the books. The Olathe school board took the extra step of removing its existing copies.”

When the request of the students to return the book was declined, the legal wheels started moving. My firm, Shook, Hardy & Bacon, represented those students in a lawsuit against the Olathe School District challenging the school district’s action. After a trial, Judge G. Thomas Van Bebber agreed with the plaintiffs and found the district’s actions violated the First Amendment.

Following the conclusion of the case, Shook donated its fee award—with some additional funds—as a charitable contribution totaling $200,000 to establish the Johnson County First Amendment Foundation. One of my partners, Gene Balloun, and a former partner, Judge David J. Waxse, who had represented the students, were instrumental in establishing and organizing the Foundation. The Foundation was established “to promote a better understanding among Kansas students . . . of First Amendment and other Constitutional rights.”

Since its inception, the Foundation has sponsored various speakers on the First Amendment and the Constitution, including Anthony Lewis, a two-time Pulitzer Prize-winning writer for the New York Times. Lewis wrote “Gideon’s Trumpet,” the story of an indigent, one Clarence Earl Gideon, and his request for legal counsel upon his arrest. When Lewis passed away last year, the New York Times described the book this way: “Mr. Lewis wrote ‘Gideon’s Trumpet’ in large part during a four-month newspaper strike. The book told the story of Clarence Earl Gideon, a Florida drifter accused of breaking into a poolroom who was tried and convicted without a lawyer, and it sought to place the decision his case gave rise to in a larger context.” The rest, as they say, is now taught in the law schools under the heading Gideon v. Wainwright.

On November 12, the Foundation helped bring former Supreme Court Justice Sandra Day O’Connor to Yardley Hall at Johnson County Community College. There she found an audience of more than 1,000 students from 24 different high schools. In the audience were some of those initial plaintiffs, and in some cases, their parents, plus the author, Nancy Garden, in addition to numerous judges, as well as representatives from KU, Washburn, and UMKC law schools.

It was a harmonic convergence of all things good with an iconic figure of our time leading the assembled.

While speaking to students and encouraging them to make a difference, Justice O’Connor was also promoting her program for civics education, iCivics. The iCivics website (www.icivics.org) describes that program as “a non-profit organization dedicated to reinvigorating civic learning through interactive and engaging learning resources. Our educational resources empower teachers and prepare the next generation of students to become knowledgeable and engaged citizens.”

Very much like five knowledgeable and engaged students did at Olathe South High school, some 18 years ago.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon LLP, Kansas City, Mo., since 1985.
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Mandatory Pro Bono as Confidence Builder for Law Students

Two of the biggest fears facing a law student are: “How am I going to practice in a real-world setting when I graduate from law school?” and “How am I going to handle a real case?” Law students can find answers to these questions if given the opportunity of mandatory training through pro bono. Law school gives us great insights about a legal career, teaches the law and its nuances, and helps students develop analytical and ethical skills, but does not offer enough opportunity for practical work. Experiential learning through pro bono, clinic, or externship – specifically as a graduation requirement – can help law students acquire enough experience and skills to begin their career paths in various legal settings with confidence. Pro bono as a type of mandatory experiential learning program will instill the pro bono ethic in students as future lawyers and directly benefit the community. In general, pro bono is viewed as a necessary and useful means for practicing attorneys to help indigent people with various legal issues, and provide them access to legal services. However, the pro bono experience must be integrated into the law school curriculum, so that the importance of this professional obligation is understood even before law students make the transition to practicing attorneys, and most importantly, to build confidence and expertise before stepping into a legal career.

Pro bono work as a mandatory course will give students the opportunity to apply their legal knowledge to real facts, and to develop a high sense of responsibility toward the profession, clients, and matters they handle, as well as the time management skills and professional judgment that are prerequisites for success in any legal career. A mandatory pro bono requirement as a part of the law school curriculum would ensure that all students share in the experience. On a very practical level, law students will understand the level of detail with which they need to become comfortable in order to work competently as an attorney. In the present day, law students must become familiar with local community resources so as to better serve the needs of their clients. Over the long-term, law school graduates who participate in pro bono service enter their profession a bit wiser and with more tools than graduates without such experience.

While at law school, we are always being asked the same questions by professors, employers, and friends: what area of the law interests us most, and what type of law we are going to practice when we graduate. Often, these are the hardest questions for a law student to answer, because the average law student does not have any idea about how a particular area of the law works in practice, or what challenges and benefits to expect. Having the opportunity to be exposed to various areas of the law and explore them in practice by providing pro bono services while at law school will assist law students to identify their interests in choosing their future practice areas.

Another significance of pro bono for law students is to add value to their résumés and become more marketable in this challenging employment environment. Besides the skills and experience pro bono imparts, it will start to provide students with professional contacts and references that will be crucial for future job searches. Students who participate in a pro bono program will likely acquire the tools necessary to be successful in securing employment and subsequently maintaining relationships with clients. Networking with potential clients is also touted as a virtue of pro bono from a marketing perspective. For example, pro bono can be a way for law students to develop relationships with the board members of local community organizations, who may be corporate leaders or have important contacts with potential employers and future clients. Pro bono, in this sense, is not just about what students do, but also whom they meet.

Although law schools usually offer skills courses that teach students certain lawyering skills and various legal procedures by simulation, students still do not receive the sense of how it works in real cases with real clients. Another great means of obtaining real experience by working with real clients on legal matters is the law clinic. However, not all students get the opportunity to study in the law clinic, depending on the limited availability of spots, scheduling conflicts, personal interests, or a job. A mandatory pro bono requirement in law schools would ensure that all students gain an invaluable experience in problem solving, drafting documents, and negotiating between parties. Students receive training in the area of law related to their placements, including court experience. A required pro bono program would help to bridge the gap between theory and practice, and enrich understanding of how law relates to life.

The most effective method of preparing law students for legal practice once they graduate and inspiring the ethical obligation to benefit others whose need for legal assistance is, in many situations, dire, can be accomplished by instituting mandatory pro bono course in all law schools.

About the Author

Lusine Akobian is a second-year law student at Washburn University School of Law. She received her master’s degree in English and political science in Armenia. Akobian is currently a prosecution intern at City of Topeka.

Footnote

The 2014 Kansas legislative session begins on the second Monday of January. This year the Capitol will begin receiving legislators on January 13, 2014. The composition of the legislature will remain very similar with only a very few new faces due to retirements, appointments, and one unfortunate death. The newest Kansas legislators include Rep. Steven Anthimides (R-Wichita), Rep. John Carmichael (D-Wichita), Rep. Bud Estes (R-Dodge City), Rep. Kent Thompson (R-Iola), and making a return to the Capitol, Rep. Mike Kiegerl (R-Olathe). These new faces will have to acclimate themselves quickly in order to make significant contributions prior to reelection campaigns in the fall.

In addition, these newest members will have to find their place among the three groups that occupy the House Chamber. It is easy enough to peg the lone Democrat’s allegiance, but the other four new members will have to decide if they will side with the conservative leadership in the House or if they find themselves more aligned with the moderates. How that decision plays out will undoubtedly impact their primary races next August.

In the meantime, Kansas legislators will have to deal with K-12 and higher education funding, the impact of the 2013 tax plan, the denial of federal Medicaid dollars, issues with privatization of KanCare, and determining if new Common Core Standards will move forward. Layer all of that on top of a competitive gubernatorial race in the fall and 2014 starts to look very interesting.

Legislators will also have to deal with several proposals initially introduced in 2013 that attempt to alter the jurisdiction and retirement age of Kansas appellate court judges. The KBA reviewed both of those bills (HB 2415 and HB 2416) and unanimously voted to oppose them in 2014. In addition, the KBA Board of Governors decided to support the present merit selection process for new members of the Kansas Supreme Court and to support the return of the process to the Kansas Court of Appeals.

The KBA will be engaged on several other issues that have a direct impact on the practice of law. For instance, the KBA has introduced a bill to revise the Kansas Revised Limited Liability Company Act (see HB 2398). The KBA will also reintroduce a bill aimed at clarifying when a distribution of trust assets can be made under the Uniform Trust Code. The KBA will support several proposals outlined by the Kansas Judicial Council. Finally, the KBA will work with the Judicial Branch to maintain Access to Justice Standards. These proposals, along with a variety of other information pertaining to the Kansas Legislature, can be found on the KBA Legislative Homepage at http://www.ksbar.org.

The KBA website also allows you to find your legislator, track legislative proposals, and find information on lawyers who serve as Kansas legislators. The newest lawyer-legislator is Rep. John Carmichael (D-Wichita). Carmichael will complete the partial term of long-time Wichita Rep. Nile Dillmore who retired last summer.

Carmichael represents the 92nd District in Wichita. He earned is political science degree from the University of Kansas in 1979, his administration of justice degree from Wichita State University in 1980, and his law degree from KU School of Law in 1982. Carmichael is of counsel with the law firm of Conlee, Schmidt and Emerson LLP in Wichita. He has been a member of the Wichita Bar Association and the KBA for more than 30 years. He will serve on House Judiciary, Elections, and Energy/Environment committees this year.

Rep. John Carmichael being sworn in at the Kansas Capitol by Kansas Supreme Court Justice Carol Beier.

2014 Kansas Legislature
The official state website for the Kansas Legislature is http://www.kslegislature.org.
From that site, you can find information on the House and Senate members and contact information, calendars, bill introductions, committee activity, minutes of committees, committee memberships, and virtually anything related to the Kansas Legislature.

- Kansas Senate: 32 Republicans/8 Democrats
- Kansas House of Representatives: 92 Republicans/33 Democrats


Gov. Sam Brownback

Attorney General Derek Schmidt
The website for Attorney General Derek Schmidt is http://ag.ks.gov/.

About the Author
Joseph N. Molina III currently serves as the legislative services director for the Kansas Bar Association. He previously served as chief legal counsel for the Topeka Metropolitan Transit Authority and assistant Kansas attorney general. Molina earned his J.D. from Washburn University School of Law.

jmolina@ksbar.org
Members in the News

Changing Positions
Hon. Edward E. Bouker has been reappointed as 23rd Judicial District chief judge, Hays.
Scott R. Burrus, Matthew A. Spahn, and Samantha M. Woods have joined Martin, Pringle, Oliver, Wallace & Bauer LLP, Wichita.
Michael P. Cannady has joined Fleeson, Gooing, Coulson & Kitch LLC, Wichita, as special counsel.
Shannon Cohorst Johnson, John G. Peryam, and Brad K. Thoenen have been promoted to shareholders at Seigfreid Bingham P.C., Kansas City, Mo.
Shelley I. Ericsson has joined Armstrong Teasdale LLP, Kansas City, Mo.
Alex P. Flores and Jade M. Martin have joined Klenda Austerman LLC, Wichita, as associates.
Jordan J. Ford and Jeremy K. Schrag have joined Kutak Rock LLP, Wichita.
Eric L. Hansen has joined Payne & Jones Chtd., Overland Park.
Matthew P. Harlow has joined AGCO Corp., Hesston, as intellectual property counsel.
Ashley G. Hawkinson has joined Stinson Morrison Hecker LLP, Kansas City, Mo., as an associate.
Hon. Mike Keeley has been reappointed as 20th Judicial District chief judge, Great Bend.
Hon. David J. King has been reappointed as 1st Judicial District chief judge, Leavenworth.
Hon. Daniel L. Love has been reappointed as 16th Judicial District chief judge, Dodge City.
Daniel Lynch has joined Johnston, Eisenhauer & Eisenhauer LLP, Pratt.
Brandon T. Ritcha has joined Matthew Ricke’s Kingman Law Firm, Kingman.
Logan M. Rutherford has joined Bryan Cave LLP, Kansas City, Mo., as an associate.
Kyle P. Sollars has joined Stinson, Lasswell & Wilson L.C., Wichita, as an associate.
Hon. Larry T. Solomon has been reappointed as 30th Judicial District chief judge, Kingman.
Cody R. Smith has joined Geisert Wunsch Watkins & Graffman, Kingman.
Hon. Evelyn Z. Wilson has been reappointed as 3rd Judicial District chief judge, Topeka.

Changing Places
Daniel S. Bell has moved to 7301 W. 133rd St., Ste. 302, Overland Park, KS 66213.

Editors note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.

Obituaries
Daniel L. Swagerty
Daniel L. Swagerty, 80, of Topeka, and formerly of Chillicothe, Mo. died November 28. He was born March 2, 1933, in Chula, Mo., the son of Ray and Sylvia (Frizzell) Swagerty. He graduated from Chillicothe High School in 1951, the University of Missouri in 1956, and Washburn University School of Law in 1968. Swagerty served in the U.S. Army and the 82nd Airborne.
Swagerty served as Hodgeman County attorney and also had a successful law practice in Dodge City. He was a member of the Kansas Trial Lawyers Association, Kiwanis, American Legion, and Disabled Veterans of America.
He is survived by three children, Daniel L. Swagerty Jr. M.D., of Overland Park, Debra A. Swagerty, of Topeka, and Kathryn Zack, of Leawood; five grandchildren, Margaret Swagerty, Hannah Swagerty, and John Swagerty, all of Overland Park, and Joshua Zack and David Zack, both of Leawood; longtime companion, Marilyn Shipp, of Chillicothe, Mo.; five siblings, Robert, Wanda, Sam, Sherry, and Mike; and numerous nieces and nephews.
Swagerty was preceded in death by a son, John Laurence Swagerty; his parents; and siblings, Harold and Mary Lee. ■

Christi J. Hilkir Vaglio has moved to 4801 Main St., Ste. 310, Kansas City, MO 64112.
Erin D. Schilling has moved to 900 W. 48th Place, Ste. 900, Kansas City, MO 64112.

Miscellaneous
Daniel E. Monnat, Wichita, has been inducted into the American Board of Criminal Lawyers.
Edward L. Robinson, Wichita, has been appointed as chair of the Board of Editors for the Journal of the Kansas Association for Justice.
Don L. Scott, Liberal, has been selected to receive the Prosecutor of the Year Award at the Kansas County and District Attorneys Association Fall Conference Awards Luncheon.
Stinson Morrison Hecker LLP has merged with Leonard, Street & Deinard to form Stinson Leonard Street LLP.

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QWPW
Quintairos, Prieto, Wood & Boyer, P.A.
Attorneys At Law
A multi-office national law firm is seeking ATTORNEYS in the Kansas City, Lawrence, Topeka or Wichita area. Must have experience in civil trial and/or insurance defense litigation. Portable book of business is a plus.

E-mail resume to resume@qwpwblaw.com
The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from July through December 2013. Your commitment and invaluable contribution is truly appreciated.

Christina Lewis Abate, The Bar Plan Mutual Insurance Co., St. Louis
Matthew D. All, Blue Cross and Blue Shield of Kansas Inc., Topeka
Mark A. Andersen, Barber Emerson L.C., Lawrence
Tony L. Atterbury, Depew Gillen Rathbun & McInteer L.C., Wichita
Francis Baalmann, Foulston Siefkin LLP, Wichita
Beau P. Ballinger, AARP Foundation, Denver
Theresa L. Barr, Barr Law Firm, Lawrence
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In courts across the country, lawyers have had to deal with single-motive and mixed-motive statutory language in employment discrimination and retaliation lawsuits. Time and time again, lawyers have argued over the language to be used in jury instructions regarding what level of causation each party must prove to show discrimination and retaliation or the lack thereof. “But for,” “a motivating factor” or “because of” are the words and phrases most frequently bandied about, between arguments over whether the jury should shift burdens of proof back and forth between the parties at various points in deliberations.

This past term the U.S. Supreme Court issued an opinion that will put an end to those arguments in retaliation claims brought under Title VII of the Civil Rights Act of 1964. The Court held that Title VII retaliation claims are subject to the more-restrictive “but for” causation standard, as opposed to the less-demanding “motivating factor” standard that applies to Title VII discrimination claims.
I. A Retaliation Case Study

Consider the following mythical (but true-to-life) situation.

Meet Frank Hazard, a relic of yesterday’s Mad Men era. Frank has been on the board of directors for the Manufacturing Company of America for the past 20 years for really one reason: he loves the annual Board meetings, always held at a warm-weather resort with a nice golf course. Frank frequently makes comments now considered politically incorrect, but everyone knows Frank is harmless and that his jovial comments are simply a way to break the ice in tense situations.

In our hypothetical case, several years ago, Frank participated in a board meeting convened to discuss a reduction in force affecting middle managers within the company’s Fargo, N.D., office. The discussion included the need to make a decision to retain one of two assistant managers. Cindy, an employee with marginal performance reviews who had filed a sexual harassment complaint against the company three weeks earlier, or Jim, a recent college graduate with obvious ambitions to move up in the company, were the employees in question. During the board’s discussion, Frank joked, “Cindy can’t get as much done as Jim, probably because Jim is able to walk down the hall without getting sexually harassed.” And indeed, because Cindy does not work as efficiently as Jim, the company selected Jim for retention and Cindy for lay-off.

Now fast forward. Cindy has talked with an attorney who told her that the “temporal proximity” (or short length of time between her complaint of sexual harassment and her termination) would give her a great case of retaliation. The attorney warned Cindy, however, that she faced an uphill battle in proving retaliation: everyone knew that Jim was a more efficient worker than Cindy, Cindy routinely received poor evaluations, and temporal proximity by itself will not win a retaliation case. Cindy filed her lawsuit against the company.

Remember Frank and his jovial comments? During a board member’s deposition, Cindy’s attorney asked about the board’s discussion of who to retain and who to lay off. The board member remembered Frank’s joke and testified, “I assumed Frank was joking,” but “couldn’t be entirely sure” because that would “require me to speculate, and I’m not supposed to speculate during my deposition.”

Frank was also deposed. He admitted making the comment, but testified, “Everybody knew I was joking.” When asked why he voted to retain Jim and lay off Cindy, he answered, “I don’t remember.” After his deposition, Frank resigned from the board.

As for the lawsuit, Cindy’s attorney knew two things. First, it is unlikely that every board member voted to retain Jim because he, unlike Cindy, “can walk down the hall without getting sexually harassed.” But second, there is strong evidence that Frank, who provided no other reason, did vote to retain Jim because of Cindy’s sexual harassment complaint.

The critical question is now: Did Frank’s retaliatory animus make any difference in the vote? Perhaps enough board members knew of Cindy’s performance issues to carry the day in any event. Perhaps some of the board members were really impressed by Jim. Or perhaps several board members did not really care who the company retained and made it their practice to vote however Frank voted. And you thought the law and Rules of Evidence prohibited juries from considering speculation? The most important question in this case can now only be answered by asking: what would have happened if Frank were not in the boardroom that day.

II. The Supreme Court’s Nassar Decision

The U.S. Supreme Court has now decided who must prove what in such a case of mixed motives. In the case of University of Texas Southwestern Medical Center v. Nassar, the Court held that employees like Cindy will face the task of proving that a decision-maker’s retaliatory animus made a difference in the employment decision. Thus, it is not sufficient for a Title VII retaliation plaintiff to simply show that retaliatory animus was a motivating factor, and then shift the burden to the employer to show it would have made the same decision anyway. The ruling followed the

Footnotes

1. 133 S. Ct. 2517 (2013).
Court's 2009 decision in *Gross v. FBL Financial,* which held that a plaintiff bringing a claim under the Age Discrimination in Employment Act likewise must show that he or she would not have suffered an adverse employment action but for his or her age—in other words, age was the factor that made a difference.

**A. History of the Mixed-Motive Standard**

Price Waterhouse v. Hopkins has been 25 years in the making, beginning with a landmark Supreme Court opinion in 1989 that embraced the “mixed motive” standard in Title VII discrimination cases. The journey was further shaped by congressional intervention, circuit court rulings, changes to the membership of the Supreme Court, and all sorts of new- and old-fashioned politics.

1. *Price Waterhouse v. Hopkins*

To begin at the beginning, let's return to the past and the Supreme Court's decision in *Price Waterhouse v. Hopkins* in 1989. There, the Court recognized a “motivating factor” causation standard to be applied in a very narrow range of Title VII cases. Proceeding from the premise that “Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations,” a plurality of justices held that “when a plaintiff . . . proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.”

*Price Waterhouse* described the difference between the mixed- and single-motive theories as follows:

In [single motive] cases the issue is whether either illegal or legal motives, but not both, were the ‘true’ motives behind the [employment] decision. In mixed-motive cases, however, there is no one ‘true’ motive behind the decision. Instead the decision is a result of multiple factors, at least one of which is legitimate.

*Price Waterhouse,* however, suggested no limitations on what evidentiary showing a plaintiff must meet in order to demonstrate that discrimination was a motivating factor. Justice O'Connor explained that “the burden on the issue of causation” would shift to the employer only when “a disparate treatment plaintiff [could] show by direct evidence that an illegitimate criterion was a substantial factor in the decision.” Federal courts viewed Justice O'Connor's concurrence as “controlling” and applied the “direct evidence” standard when deciding whether to give a “motivating factor” jury instruction.

2. 1991 Amendments to Title VII

In 1991, largely in response to the *Price Waterhouse* decision, Congress amended Title VII in three significant ways. First, the 1991 amendments established an alternative for proving that an “unlawful employment practice” has occurred: “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”

Second, the 1991 amendments provide that if a plaintiff is able to demonstrate that discrimination was a motivating factor in an employment decision, the employer has only a *limited* affirmative defense that restricts the remedies available to a plaintiff. To avail itself of the affirmative defense, the employer must “demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor.”

Third, the 1991 amendments allow compensatory and punitive damages for intentional discrimination under Title VII, but cap the damages based on the employer's size.

3. Lower Court Rulings After the 1991 Amendments

In the years after the 1991 amendments, but before the Supreme Court's decision in *Gross,* lower courts continued to apply *Price Waterhouse's* “direct evidence” requirement both to Title VII retaliation claims and ADEA claims. The Eighth Circuit's opinion in *Gross,* for instance, held that the plaintiff was not entitled to a “motivating factor” instruction because she did not present direct evidence of discrimination. In doing so, the Eighth Circuit explained that because the 1991 amendments to Title VII did not affect the ADEA, *Price Waterhouse,* along with its requirement of direct evidence, continued to apply:

Gross conceded that he did not present ‘direct evidence’ of discrimination, so a mixed motive instruction was not warranted under the *Price Waterhouse* rule. Gross's claim should have been analyzed under the *McDonnell Douglas* framework. The burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in FBL's employment action.

Gross contends that there was no error, because the Civil Rights Act of 1991 and the Supreme Court's decision in *Desert Palace Inc. v. Costa* supersede *Price Waterhouse* and our precedents applying *Price Waterhouse* to the ADEA . . . . We conclude, however, that § 2000e-2(m) does not apply to claims arising under the ADEA. By its terms, the new section applies only to employment practices in which 'race, color, religion, sex, or national origin' was a motivating factor. When Congress amended Title VII by adding § 2000e-2(m), it did not make a corresponding change to the ADEA, although it did address the ADEA elsewhere in the 1991 Act.

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4. Id. at 258 (emphasis added).
5. Id. at 260.
6. Id. at 276 (emphasis added).
8. See Landgraf v. USI Film Prod., 511 U.S. 244, 250 (1994) (discussing 1991 amendments as a response to *Price Waterhouse*).
11. Id.
14. Id. The Court's reference to "the McDonnell Douglas framework" refers to the burden-shifting framework adopted by the U.S. Supreme Court in *Price Waterhouse*.
Also, until the Supreme Court’s ruling in Gross, lower courts likewise held that because the 1991 amendments to Title VII did not affect Title VII’s retaliation provision, Price Waterhouse and its direct evidence requirement continued to apply.15

4. Gross v. FBL Financial Services

In 2009, the Supreme Court decided Gross v. FBL Financial Services Inc.16 The Court held “that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action.”17 And “[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”18 In other words, no part of the Price Waterhouse framework applied to the plaintiff’s age discrimination claim.

Gross reached this result in part because of what the 1991 amendments did not amend. Gross explained as follows:

Congress has since [Price Waterhouse] amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was a motivating factor for an adverse employment decision . . . . Unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2), even though it contemporaneously amended the ADEA in several ways.19

The Court, in holding that a “motivating factor” standard is never available in an ADEA case, refused to “ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.”20 Given this causation standard, the mixed-motive theory does not apply in ADEA cases.

B. Fifth Circuit’s Ruling in Nassar

In Nassar, the U.S. Court of Appeals for the Fifth Circuit held that a mixed-motive theory of retaliation is available under Title VII, just as with a discrimination claim under Title VII.21 However, as with the ADEA, Title VII’s retaliation provision “does not provide that a plaintiff may establish [retaliation] by showing that [it] was simply a motivating factor.”22 This is because the 1991 Act did not amend Title VII’s retaliation provisions, just as it did not amend the ADEA’s provisions.

The Fifth Circuit followed its precedent set in Smith v. Xerox Corp.,23 where it had found that it must decide how to proceed “in light of Price Waterhouse, which specifically provided that the ‘because of’ language in the context of Title VII authorized the mixed-motive framework, and Gross, which decided that the same language in the context of the ADEA meant ‘but-for,’ but also refused to incorporate its prior Title VII decisions . . . .” In Smith, the Fifth Circuit held that the “Price Waterhouse holding remains our guiding light.”24 The court reasoned, “The Supreme Court recognized that Title VII and the ADEA are ‘materially different with respect to the relevant burden of persuasion.’”25 As the Fifth Circuit put the issue, “Because the Court recognized this difference but was not presented in Gross with the question of how to construe the standard for causation and the shifting burdens in a Title VII retaliation case, we do not believe Gross controls our analysis here.”26

However, as the Smith court noted, other circuit courts of appeal had come to much broader conclusions on the basis of Gross. For example, the Seventh Circuit characterized Gross as holding that unless a statute provides otherwise, a plaintiff must demonstrate but-for causation “in all suits under federal law.”27 As Smith makes clear, the Fifth Circuit simply was unwilling to take the implication of Gross this far without direction from the Supreme Court to do so. Nassar provided the opportunity for the Supreme Court to do just that.

C. Supreme Court’s Ruling in Nassar

The Court, in deciding Nassar,28 took an in-depth look at the construction of Title VII’s provisions, noting that its anti-retaliation provision appears in a different section from its ban on status-based discrimination. Following its reasoning in Gross, applying the dictionary definition of “because” to held that the mixed motive provisions of the 1991 Act do not apply to retaliation claims; Kubicko v. Ogden Logistics Services, 181 F.3d 343, 352 (7th Cir. 1999) (“Civil Rights Act of 1991 does not expressly roll back Price Waterhouse’s application to retaliation claims.”); Russell v. Grace Presbyterian Village, No. 3:05-cv-0030P, 2006 WL 740066 (N.D. Tex., March 22, 2006) (“The Court agrees that Title VII retaliation claims are still governed by Price Waterhouse and not 42 U.S.C. § 2000e-2(m) . . . . Every circuit court that has examined the issue in detail has held that it does not apply to retaliation claims.”).

17. Id. at 2353.
18. Id.
19. Id. (emphasis added).
20. Id. at 2349.
21. Nassar, 674 F.3d at 454, n. 16.
22. Id.
23. 602 F.3d 320, 329-30 (5th Cir. 2010).
24. Id. (finding that “It is not our place, as an inferior court, to renounce Price Waterhouse as no longer relevant to mixed-motive retaliation cases, as that prerogative remains always with the Supreme Court.”).
25. Id.
26. Id.
27. Fairley v. Andrews, 578 F.3d 518, 525-26 (7th Cir. 2009).
require a “but-for” causation standard, the Court found that this standard applied to Title VII retaliation claims as well as ADEA claims.

The Court rejected the argument that the standard set forth in the 1991 amendments (at U.S.C. § 2000e-2(m)) applied. The Court reasoned that this standard is restricted, on its own terms, to five of the seven prohibited discriminatory actions, indicating Congress’ intent to confine that provision’s coverage to only those types of employment practices.29

Further, the Court said that applying the Section 2000e-2(m) standard to retaliation cases would be “inconsistent with the design and structure of the statute as a whole.”30 Just as the Court had found in Gross that Congress could have amended the ADEA to include the lower standard, Congress could have amended the anti-retaliation subsection to also include the lower standard. Finally, the Court rejected the argument that retaliation constituted a “form” of discrimination for Title VII purposes, given “a statute as precise, complex, and comprehensive as Title VII.”31

In reaching its decision, the Court acknowledged employers’ long-standing complaint that the lower causation standard encouraged the filing of frivolous claims and made it more difficult to obtain summary judgment on dubious claims.32 The Court noted the risk of an employee who knows he is about to be terminated for performance reasons being tempted to make an unfounded charge of discrimination, only to claim retaliation when the unrelated employment action comes.33 The Court also refused to grant deference to the EEOC’s views on the matter, finding that “these explanations lack the persuasive force that is a necessary precondition to deference . . .”34

III. Nassar’s Impact on Employment Litigation

Nassar has practical implications on the practice of employment law. At least for the time being, those practical implications have not extended to summary judgment practice and, for a couple of reasons, probably should not. First, the “but for” causation standard mentioned in Nassar is not new to single-motive discrimination and retaliation claims.35 Because Nassar changes nothing about single-motive discrimination and retaliation claims, summary judgment should not be any more or less frequently granted in single-motive cases.

This leaves mixed-motive cases. But in order to be classified as a mixed-motive case, the plaintiff must present evidence that both directly bears upon an employment decision and directly reflects the decision-maker’s discriminatory animus.36 Courts routinely find evidence of falsity by way of discriminatory statements that are much milder and much less pointed than those that would give rise to a mixed-motive case.37 Evaluating mixed-motive evidence within the McDonnell Douglas framework would inevitably result in denial of summary judgment.

Although its impact on summary judgment will be small, Nassar will substantially affect employment trials and pre-trial submissions in all but Title VII discrimination cases. Before Nassar, an employer had the burden of proving that discriminatory animus which contributed to the employment decision did not cause the employment decision. After Nassar, the plaintiff/employee at all times retains the burden to prove, under a “but for” standard, that an adverse employment action would not have occurred absent discriminatory animus. Psychological research shows that causation standards substantially affect the outcome of jury trials.38 But vigorous advocacy for too generous a causation standard, if successful, can lead to an unfavorable result on appeal. In addition to increasing the probability of a verdict for the employer, Nassar establishes a simple and universally applicable rule that a jury should be instructed with a “but for” causation standard under every federal employment statute except Title VII’s prohibition against discrimination. In these cases, a one-size-fits-all rule was much needed, considering that the proper causation standard had before depended upon answering such hazy questions as whether the plaintiff produced a “thick cloud of smoke” to support her allegations of discrimination.39

And if determining whether to give a mixed motive instruction was a confusing process for lawyers and judges, imagine how confusing the process is for jurors once a mixed-motive...
The Plaintiff’s Burden of Proof

The Plaintiff’s Burden of Proof instruction is given. Before Gross and Nassar, the plaintiff, by proving that at least a “shred” of a prohibited motive infected an employment action, shifted a burden upon the defendant to prove by a preponderance of the evidence that, hypothetically, the employment action would have taken place even absent that prohibited motive. Gross noted these logistical difficulties when it limited Price Waterhouse to Title VII discrimination claims.40 In light of Gross and Nassar, attorneys can now confine closing arguments to discussions of the facts of the case, rather than explanations of the confusing burden-shifting framework that will govern the jury’s deliberations.

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ATTORNEY DISCIPLINE

ORIGINAL PROCEEDING IN DISCIPLINE
IN RE SUSAN L. BOWMAN

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Bowman, of Seneca, an attorney admitted to the practice of law in Kansas in 1987. Bowman's disciplinary matter involved her representation as a guardian ad litem and also administrator of an estate involving the minor and her failure to properly perform duties of both.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be suspended from the practice of law for a period of 12 months.

HEARING PANEL: The hearing panel determined that respondent violated KRPC 1.3 (2012 Kan. Ct. R. Annot. 582) (candor toward tribunal); 3.3(a)(1) (2012 Kan. Ct. R. Annot. 588) (professional competence); 8.1(b) (2012 Kan. Ct. R. Annot. 634) (failure to respond to demand for information from disciplinary authority); 8.4(c) (2012 Kan. Ct. R. Annot. 643) (engaging in conduct involving misrepresentation); 8.4(d) (engaging in conduct prejudicial to the administration of justice); and Kansas Supreme Court Rule 218 (2012 Kan. Ct. R. Annot. 545) (failure to cooperate with the disciplinary process). The hearing panel recommended that respondent be suspended for a period of twelve months and develop a plan of probation.

HELD: Court found respondent filed no exceptions to the hearing panel's report. A majority of the court concluded that respondent should be suspended from the practice of law for 12 months. Respondent may be reinstated to the practice of law after six months provided a reinstatement hearing is conducted under Rule 219, wherein both the hearing panel and the office of the disciplinary administrator approve her proposed probation plan. Further, the respondent shall provide to the hearing panel and the office of the disciplinary administrator a written report from a licensed psychiatric, psychological, or social work professional approved by the Kansas Lawyers Assistance Program that includes an opinion that there are no current impediments to respondent's ability to practice law. The reinstatement panel must satisfy itself from the information in that report and any other evidence submitted to it that respondent has successfully addressed the problems that led to her misconduct and suspension. If reinstatement is recommended by a panel after a hearing conducted under Rule 219, the remainder of respondent's 12-month suspension from the practice of law shall be suspended, and she shall be allowed to practice while on probation for an additional 24 months. Provided her probation is completed successfully, she will be released from the suspended portion of her suspension.

A minority of the Court would impose the discipline level recommended by the Office of the Disciplinary Administrator: that the respondent be suspended for a period of 12 months and be required to appear at a reinstatement hearing pursuant to Supreme Court Rule.

ORIGINAL PROCEEDING IN DISCIPLINE
IN RE STEPHEN WEBB FREED

FACTS: In a letter signed on November 5, 2013, respondent Freed, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas. At the time the respondent surrendered his license, there was a panel hearing pending in accordance with Supreme Court Rule 211 (2012 Kan. Ct. R. Annot. 350). The complaint alleged that respondent violated Kansas Rules of Professional Conduct 1.3 (2012 Kan. Ct. R. Annot. 454) (diligence); 1.4 (2012 Kan. Ct. R. Annot. 473) (communication); 1.16 (2012 Kan. Ct. R. Annot. 558) (termination of representation); 3.4(c) (2012 Kan. Ct. R. Annot. 589) (disobedience of court orders); and 8.1(b) (2012 Kan. Ct. R. Annot. 634) (failure to cooperate with the disciplinary process). The complaint alleged that respondent violated Supreme Court Rule 207(b) (2012 Kan. Ct. R. Annot. 329) (failure to respond to docketing of the complaint); Supreme Court Rule 211(b) (failure to file answer to the formal complaint); and Supreme Court Rule 218 (2012 Kan. Ct. R. Annot. 397), amended December 1, 2012 (disbarred or suspended attorneys).

HELD: Court, having examined the files of the Office of the Disciplinary Administrator, found that the surrender of the respondent's license should be accepted. Freed is disbarred from the practice of law in Kansas, and his license and privilege to practice law are revoked.

ORIGINAL PROCEEDING IN DISCIPLINE
IN RE PHILLIP DEAN KLINE

FACTS: This is a contested original proceeding in discipline against respondent, Kline. The formal proceedings began with the disciplinary administrator's complaint against Kline filed on January 14, 2010. This complaint alleged 11 KRPC violations for Kline's alleged misconduct related to his investigation of abortion clinics while he served as Kansas attorney general and for his role with a citizen-requested grand jury while he served as Johnson County district attorney. The formal disciplinary proceedings spanned a 21-month period. During that time, the three-attorney hearing panel ruled on numerous prehearing motions, including permitting the disciplinary administrator to file two amended complaints to which Kline responded. The proceedings culminated in 12 days of evidentiary hearings—eight in February 2011 and March 2011 related to allegations concerning Kline's abortion clinic investigations and four more days in July 2011 concerning Kline's conduct regarding the
citizens’ grand jury. During the July hearing, the panel also heard evidence regarding aggravating and mitigating circumstances that might affect the nature or degree of discipline imposed. The panel released its 185-page Final Hearing Report on October 12, 2011, dividing the claims into 14 general areas of misconduct and finding Kline violated the KRPC in 10 areas, with multiple violations in some. And based on its conclusion that Kline “ha[d] repeatedly violated many of the Kansas Rules of Professional Conduct, including the most serious of the rules, the rules that prohibit engaging in false or dishonest conduct,” the panel recommended an indefinite suspension of Kline’s license to practice law. Kline filed a 175-page pleading captioned “Exceptions to the Hearing Panel Final Report” on December 22, 2011, thereby noting his objections to the hearing panel’s report and triggering this review.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator argued for disbarment.

HEARING PANEL: The hearing panel concluded Kline committed multiple violations of the Kansas Rules of Professional Conduct (KRPC) while serving as Kansas attorney general and as Johnson County district attorney. The panel recommended an indefinite suspension.

HELD: Court concluded indefinite suspension is the appropriate discipline. In arriving at this conclusion, Court considered all the aggravating and mitigating circumstances. But three of those aggravating circumstances compelled the ultimate conclusion that indefinite suspension is the appropriate discipline: Kline’s selfish motive; his pattern of misconduct; and his refusal to acknowledge the wrongful nature of any of his misconduct. Court detailed the multiple instances in which the evidence demonstrated Kline acted with a selfish motive, and the pattern of conduct that caused great concern. Court stated the violations were significant and numerous, and Kline’s inability or refusal to acknowledge or address their significance is particularly troubling in light of his service as the chief prosecuting attorney for this state and its most populous county.

Court unanimously concluded that the weight of the aggravating factors—i.e., Kline’s inability or refusal to acknowledge the line between overzealous advocacy and operating within the bounds of the law and his professional obligations; his selfish motives; and his lengthy and substantial pattern of misconduct—weigh more heavily than the mitigating factors and merit his indefinite suspension.
that the Court should abandon this court-made doctrine in favor of our state's statutory comparative fault system in which any alleged assumption of risk would be considered as just one factor when determining proportionality of fault based on the circumstances. Court held that the comparative fault statute should control, and overruled prior case law adhering to the assumption of risk doctrine as an absolute bar to recovery. Court reversed and remanded the case to the district court for reconsideration under the comparative fault rubric.

STATUTES: K.S.A. 20-3018(b); K.S.A. 44-501, -505; and K.S.A. 60-208, -258a, -2101

CRIMINAL

STATE V. FOSTER
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 104,083 – NOVEMBER 15, 2013

FACTS: Foster was convicted of offenses including forgery for attempting to cash a check. Court of Appeals affirmed the forgery conviction, rejecting Foster's argument that "issuing or delivering" in K.S.A. 21-3710(a)(2) establishes alternative means of committing forgery, and that state failed to present sufficient evidence that satisfied both alternatives. 46 Kan. App. 2d 233 (2011). Review granted to resolve any conflict with an unpublished Court of Appeals' decision regarding the alternative means issue, State v. Owen, No. 102,814 (Kan. App. 2011).

ISSUE: K.S.A. 21-3710(a)(2) – Alternative means

HELD: Legislative history of K.S.A. 21-3710 was examined, finding legislature did not intend to create alternative means of committing forgery through its use of "issuing or delivering" language in K.S.A. 21-3710(a)(2). State did not have to present evidence that Foster both issued and delivered the check. Foster's conviction was supported by sufficient evidence that he delivered a fraudulent check knowingly and with intent to defraud. Meaning of subsequent changes to forgery statute not applicable here, and for future determination.

STATUTES: K.S.A. 2012 Supp. 21-5823; K.S.A. 21-3710, -3710(a)(1), -3710(a)(2); K.S.A. 84-1-101 et seq.; K.S.A. 84-3-103(b); K.S.A. 84-3-104(a); K.S.A. 84-3-105(a), K.S.A. 2008 Supp. 21-3110(26); K.S.A. 2008 Supp. 84-1-201(15); and K.S.A. 21-3710 (Weeks 1974)

STATE V. JONES
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 105,420 – NOVEMBER 8, 2013

FACTS: Jones appeals his jury conviction of two counts of first-degree murder. It was undisputed that defendant Jones shot and killed Delatorre and Esparza in a parking lot outside of Jones' apartment. Jones argued self-defense at trial. He argued for the first time on appeal that under Kansas' version of a "Stand-Your-Ground Law" in effect at the time of the crime, K.S.A. 21-3219, he is immune from prosecution. In the alternative, he alleged that prosecutorial misconduct deprived him of a fair trial.

ISSUES: (1) Immunity and (2) prosecutorial misconduct

HELD: (1) Court held immunity under K.S.A. 21-3219 cannot be invoked for the first time on appeal after conviction. Court stated if a defendant believes he or she is entitled to Stand-Your-Ground immunity under K.S.A. 21-3219, then the defense must be asserted before trial opens or a dispositive plea is entered. Such an assertion is a timely trigger of the state's probable cause burden. A defendant who waits to invoke K.S.A. 21-3219 immunity until appeal after conviction simply waits too long. By that time, the facts and the defendant's guilt beyond a reasonable doubt have been established. In Jones' situation in particular, the jury rejected his claim of self-defense. That meant the state had already borne an evidentiary burden far higher than the probable cause burden imposed upon it by the Stand-Your-Ground statute. (2) Court also found no error in the prosecutors' statements
about premeditation and that the comments allegedly invoking the passions and sympathies of the jury were well within the wide latitude granted to the prosecutor. However, the Court found the prosecutor misstated the law on the jury’s consideration of the lesser-included charges, but the Court held the error was harmless.

STATUTE: K.S.A. 21-3208, -3211, -3213, -3219, -3401, -3410, -4204

STATE V. KEY
ELLIS DISTRICT COURT
COURT OF APPEALS DISMISSAL OF THE APPEAL
REVERSED AND THE CASE REMANDED TO THE
COURT OF APPEALS
NO. 104,651 – NOVEMBER 8, 2013
FACTS: Key was charged with driving under the influence of alcohol, a nonperson felony because of his two previous misdemeanor convictions for the same offense. During the felony proceeding, Key challenged the state's reliance on one of his misdemeanor convictions, claiming his attorney in that case had filed a guilty plea without consulting him. The district court judge was unwilling to entertain what he saw as an impermissible collateral attack on the prior conviction. Key entered a guilty or no contest plea to the felony charge. At sentencing Key again objected to the state's reliance on the earlier misdemeanor conviction, but the district judge overruled the objection and sentenced Key to the penalty for a felony conviction. The Court of Appeals issued an order in which it determined that, absent a motion to withdraw plea, it lacked jurisdiction to hear Key's appeal under K.S.A. 22-3602(a).

ISSUES: (1) DUI and (2) prior convictions
HELD: Court held that a defendant charged with felony driving under the influence (DUI) under K.S.A. 2007 Supp. 8-1567 may challenge before the district court the validity of a prior misdemeanor conviction. If the defendant pleads guilty or no contest to the felony, the defendant will be limited on appeal to arguing the impropriety of the prior misdemeanor's effect as a sentencing enhancement. Under K.S.A. 22-3602(a), there is no appellate jurisdiction for a direct appeal of a felony conviction after a guilty or no contest plea.

STATUTES: K.S.A. 8-1567; K.S.A. 21-4701, -4721; K.S.A. 22-3208, -3210, -3602; and K.S.A. 60-1507

STATE V. LOWRANCE
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 101,458 – NOVEMBER 8, 2013
FACTS: A jury convicted Lowrance of capital murder under K.S.A. 21-3439(a)(4) for the intentional and premeditated killing of Rachel Dennis in the commission of, or subsequent to the commission of, attempted rape.

ISSUES: (1) Prosecutorial misconduct; (2) removal of jurors; (3) prior sexual conduct; (4) opinion testimony; (5) sufficiency of the evidence; and (6) cumulative error
HELD: Court affirmed Lowrance's conviction, holding: (1) the prosecutor did not commit reversible misconduct in closing argument by commenting on the defense expert’s compensation or in drawing reasonable inferences from forensic evidence; (2) the trial judge's removal of a juror did not cause substantial prejudice; (3) the trial judge did not err in allowing the prosecution to introduce evidence of Lowrance's prior, premarital sexual relationship because the evidence was relevant, not prohibited by K.S.A. 60-447 as contended by Lowrance, and not unduly prejudicial; (4) the trial judge did not err in admitting opinion testimony of a lay witness regarding Lowrance's state of mind because the testimony satisfied the criteria of K.S.A. 60-456; (5) there was sufficient evidence for a rational factfinder to convict Lowrance of capital murder; and (6) cumulative error did not deprive Lowrance of his right to a fair trial.
STATE V. ROBERTSON
BUTLER DISTRICT COURT – AFFIRMED
105,882 – NOVEMBER 8, 2013

FACTS: Robertson was convicted by a jury in 2002 of first-degree murder, arson, and aggravated burglary. The evidence against him included a videotape of his interview with law enforcement, which was played for the jury. Robertson received a hard 50 life sentence after the district judge determined that the murder had been committed in an especially heinous, atrocious, or cruel manner. Robertson’s unsuccessful direct appeal, among other things, attacked the district judge’s denial of his motion to suppress his statements to law enforcement. Robertson then filed a motion under K.S.A. 60-1507. The district court dismissed the motion without an evidentiary hearing, and the Court of Appeals affirmed that dismissal. His later motion to correct an illegal sentence, raising issues related to the use of his statements to law enforcement, also was denied. Still later motions filed in district court sought relief from his convictions and sentences; one of those motions also was entitled “motion to correct illegal sentence” and contained arguments similar to those raised before. All of the motions also were denied in the district court. Robertson recently obtained a copy of the videotape of his interview with law enforcement, and that evidently prompted the motion underlying this appeal. The district court summary denied his pro se motion to correct an illegal sentence and clerical errors.

ISSUES: (1) Illegal sentence and (2) res judicata

HELD: Court held a defendant’s motion to correct an illegal sentence seeking to relitigate a suppression issue based on his transcription of a videotaped interview with law enforcement did not require an evidentiary hearing in the district court and is barred by the doctrine of res judicata.

STATUTES: K.S.A. 22-3504; and K.S.A. 60-1507
COURT OF APPEALS

CIVIL

LEGAL MALPRACTICE AGAINST BOARD OF INDIGENTS’ DEFENSE SERVICES, STATUTE OF LIMITATIONS, ACTUAL INNOCENCE, AND GUILTY PLEA

MASHANEY V. BOARD OF INDIGENTS’ DEFENSE SERVICES ET AL.

SEDGWICK DISTRICT COURT – AFFIRMED


FACTS: In 2003, Mashaney was charged in Sedgwick County with aggravated criminal sodomy and two counts of aggravated indecent liberties with a child with his 5-year-old daughter. The court-appointed attorney (now defendant) Sweet-McKinnon to represent him in the criminal proceedings. Mashaney’s first trial resulted in a mistrial. Mashaney was retried and convicted on all three counts. Mashaney moved pro se for posttrial relief, claiming his trial lawyer had been ineffective. The district court appointed counsel for Mashaney and conducted a hearing on his motion. The district court denied Mashaney’s motion, and he was sentenced to prison. Mashaney appealed his conviction to the Court of Appeals where he was represented by attorney (now defendant) Girard-Brady. Mashaney’s convictions were affirmed on appeal. In April 2008, Mashaney moved for relief under K.S.A. 60-1507 based on ineffective assistance of appellate counsel. The district court denied the relief, but in September 2010 the Supreme Court reversed and remanded for an evidentiary hearing. In April 2011, following the mandated evidentiary hearing on Mashaney’s motion, the district court set aside Mashaney’s convictions. The district court found that due to appellate counsel’s deficient performance, Mashaney was prejudiced to the extent that there was a reasonable probability that, but for counsel’s deficient performance, the appeal would have been successful. Mashaney’s case was placed back on the trial calendar. In December 2011, in advance of his retrial and pursuant to a plea agreement with the state, Mashaney entered an Alford plea of guilty to two counts of attempted aggravated battery and one count of aggravated endangering of a child. The court accepted his plea and imposed a 72-month prison sentence to be followed by 12 months of post-release supervision, a sentence that was somewhat less than the time Mashaney had already served on his original conviction. Mashaney was released from custody. In January 2012, Mashaney commenced this action for legal malpractice against Board of Indigents’ Defense Services (BIDS), Sweet-McKinnon, and Girard-Brady, claiming that on account of their negligent representation in his criminal case he was “forced to serve nearly eight (8) years in prison which would not have occurred had he received proper representation.” Mashaney claimed he was innocent of the charges. He alleged that he “adamantly contested the allegations from the very beginning and strongly denies that he ever abused his young daughter.” Mashaney claimed both economic and noneconomic damages. He claimed that when he was arrested he was employed by his stepfather in a home improvement business and that as a result of his wrongful conviction he “lost nearly eight (8) years of wages and development of his career while improperly imprisoned.” He also claimed his imprisonment interfered with his relationship with his children as well as with “several family members and friends who passed away while he was in prison.” BIDS moved to dismiss on the grounds that it lacked the capacity to be sued. Sweet-McKinnon answered the petition, claiming that Mashaney was estopped from pursuing this action by the guilty plea he entered in December 2011. In her answer Girard-Brady claimed estoppel and waiver and contended that Mashaney’s claim was barred by the two-year statute of limitations. These defenses came before the court on motions to dismiss and for judgment on the pleadings, which the court granted.

ISSUES: (1) whether BIDS may be sued for legal malpractice; (2) whether Mashaney’s civil malpractice claims against the individual attorneys are barred by the two-year statute of limitations; (3) whether such malpractice claims are dependent upon Mashaney showing that he was actually innocent of the criminal charges for which he was convicted; and (4) if so, whether an Alford plea of guilty to amended charges foreclosed Mashaney from proving his innocence.

HELD: Court concluded that (1) BIDS, a subordinate government agency, does not have the capacity to sue or be sued. Therefore, BIDS was properly dismissed as a party. (2) With respect to the statute of limitations issue, Mashaney’s cause of action for legal malpractice did not accrue until he obtained post-conviction relief. Here, the post-conviction relief resulted in Mashaney being granted a new trial. But the retrial did not take place because Mashaney pled guilty to reduced charges. (3) In his legal malpractice case, Mashaney would have been required to show that he was actually innocent of the sex crimes for which he was tried and convicted in order to prevail. (4) But Mashaney pled guilty to amended charges, and he cannot show that the factual bases for his guilty pleas were different from the facts that led to his original convictions at trial. Court held the district court did not err in determining that, based upon his guilty pleas, Mashaney was foreclosed from proving at a malpractice trial that he was innocent of the acts for which he was originally convicted.

CONCURRING IN PART AND DISSENTING IN PART: Judge Atcheson concurred with the majority’s decision concerning BIDS as a proper defendant and the statute of limitations question. However, Atcheson dissented with the actual innocence rule and would hold the actual innocence element distorts malpractice law.

STATUTES: K.S.A. 21-3301, -3414, -3504, -3506, -3608a; K.S.A. 22-3209, -4501, -4520; and K.S.A. 60-212, -513(a)(4), (b), -1507

PERSONAL INJURY, PECULIAR RISK DOCTRINE, AND STATUTE OF LIMITATIONS

DUMLER V. CONWAY

OSBORNE DISTRICT COURT – AFFIRMED


FACTS: Dumler appeals the dismissal of her personal injury lawsuit. She was injured when her car struck some mud on the roadway adjacent to a field where ensilage was being harvested. Not knowing exactly who left the debris on the roadway, Dumler sued Wentz, the farmer who owned the field where the ensilage was being harvested. When Conway later raised the defense that he was not liable for the negligence of Wentz Enterprises LLC, an independent contractor he had hired to harvest the ensilage, Dumler sued Wentz as well. The district court granted Conway summary judgment, holding that he was not liable for Wentz’s negligence. The court also granted summary judgment to Wentz based on the statute of limitations because more than two years had elapsed from the date of the accident and the date Dumler sued Wentz.

ISSUES: (1) Personal injury, (2) peculiar risk doctrine, and (3) statute of limitations

HELD: Court held the district court correctly determined that the peculiar risk doctrine does not apply in this case. Court stated there is no evidence to reasonably support a finding that the operation of farming equipment across the roadway was likely to create an unsafe build-up of mud. Dumler presented no evidence that would demonstrate, for example, that farming equipment routinely leaves excessive mud and...
debris that is unsafe. To the contrary, the Department of Transportation representative testified that although he sees mud on the highways during the ensilage-cutting time of the year, it is “out of the ordinary” and it does not happen often. Thus, the district court did not err in granting summary judgment to Conway based on the general rule that a contractee is not liable for the negligent acts of an independent contractor. Court also held the district court did not err in determining that Dumler’s claim against Wentz was barred by the statute of limitations because she failed to make her claim within two years of the date of her accident—when she first had substantial injury and her fact of injury became known. Court stated there is no dispute that Dumler knew she was injured on the date of her accident. This knowledge of her “fact of injury” is the only thing that matters under K.S.A. 60-513(b).

**REAL ESTATE, MEDIATION, AND PROPERTY LINES**

**BARRABAN V. HAMMONDS ET AL.**

**JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

**NO. 105,993 – OCTOBER 18, 2013**

FACTS: This case arises out of the sale of real estate in Johnson County—parcels of land originally owned by Glenn and Vanilda Hammonds through some family trusts. The Hammondses had a house that sat mostly on one lot but overlapped a few feet over the lot line of another parcel, Lot 52. The Hammondses sold Lot 52 to Benjamin and Linda Piccirillo, who built a house on Lot 52. The Piccirillos then sold Lot 52 to Manual and Lois Baraban. Disputes arose once the Barabans discovered that the Hammondses’ house at the border of Lot 52 actually sat partially on that lot; the Barabans demanded removal of the house, and eventually the Barabans sued the Hammondses and the Piccirillos. The district court enforced an alleged settlement agreement between the Barabans and the Piccirillos, ending the Piccirillos’ involvement in the suit—an order that came only after the court heard testimony from a mediator about what the parties had agreed to in mediation. The district court then ruled after a contested trial that the Barabans’ deed to Lot 52 should be reformed, or modified, to show that the portion on which the Hammondses’ house sits belongs to the neighboring lot.

**ISSUES:** (1) Real estate, (2) mediation, and (3) property lines

**HELD:** Court stated that K.S.A. 2012 Supp. 60-452a gives all parties involved in mediation a privilege to prevent anyone from disclosing “any communication” made during mediation, and the Barabans objected to the mediator’s testimony at the hearing. Court held the district court should not have allowed that testimony, and without it there’s no evidence upon which the alleged settlement can be enforced. Court reversed the district court’s order enforcing the settlement. Court stated the district court’s modification of the property lines was based on an agreement between the Hammondses and the Piccirillos about the lot’s border and upon the Barabans’ ability to have detected that the house overlapped the boundary line. Court held there was sufficient evidence to support the district court’s ruling on both points, and affirmed its judgment as between the Barabans and the Hammondses.

**STATUTES:** K.S.A. 5-512(a), (b), -514; and K.S.A. 60-452a

**SERVING ALCOHOL TO MINORS AND STRICT LIABILITY**

**MCJS INC. D/B/A REED’S RINGSIDE SPORTS BAR AND GRILL V. KANSAS DEPARTMENT OF REVENUE**

**SHAWNEE DISTRICT COURT – AFFIRMED**

**NO. 108,788 – OCTOBER 25, 2013**

FACTS: This is a civil regulatory proceeding in which the Kansas Department of Revenue Division of Alcoholic Beverage Control (ABC) fined MCJS Inc. d/b/a Reed’s Ringside Sports Bar and Grill (Reed’s) $500 for violating K.S.A. 41-2615 by permitting a minor to possess or consume alcohol on its premises. The Director of the ABC (Director) found that Reed’s is responsible for ensuring that minors do not possess or consume alcoholic beverages on its premises and that K.S.A. 41-2615 creates absolute civil liability on a licensee for any violation of the statute. Reed’s appealed without success to the secretary of the Department of Revenue (Secretary) and then to the district court. Reed’s claims that the agency and the district court erred in finding that K.S.A. 41-2615 imposes strict...
liability on a licensee and in finding that the minor possessed or consumed alcohol on its premises.

ISSUES: (1) Serving alcohol to minors and (2) strict liability

HELD: In the context of a civil regulatory proceeding, court concluded that the agency and the district court did not err in finding that K.S.A. 41-2615 imposes strict liability on a licensee such that the statute is violated whenever a minor possesses or consumes alcohol on its premises. Court concluded that the evidence was sufficient to support a finding that the minor possessed or consumed alcohol on Reed's premises.

STATUTES: K.S.A. 41-2601, -2615, -2633a; and K.S.A. 77-603(a), -621(a), (c), (d)

CRIMINAL

IN RE A.M.M.-H.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 109,355 – NOVEMBER 8, 2013

FACTS: In April 2011, A.M.M.-H. pled guilty to aggravated indecent liberties with a child and aggravated intimidation of a witness. The parties agreed to proceed under extended juvenile jurisdiction proceedings found in K.S.A. 2012 Supp. 38-2347(a)(3). For his juvenile sentence, the district court ordered A.M.M.-H. to serve 24 months' incarceration at the juvenile correctional facility and then 24 months' aftercare. For his adult sentence, the court ordered A.M.M.-H. to serve 59 months' incarceration. The court left the amount of restitution open but ordered costs in the amount of $823. In September 2012, A.M.M.-H. signed several documents in order to effectuate his conditional release from the juvenile correctional facility. On September 17, 2012, A.M.M.-H. appeared in district court for a permanency hearing. The court entered an order establishing reintegration with the specific finding: "[A.M.M.-H.] has been reintegrated and is ordered to follow all conditions of conditional release." Just over a month after starting his conditional release, A.M.M.-H.'s ISO reported that A.M.M.-H. had left home and failed to return. A warrant was issued for his arrest on November 21, 2012, and he was taken into custody on November 26, 2012. The State filed a motion to revoke A.M.M.-H.'s juvenile sentence and impose the adult sentence. The state alleged A.M.M.-H. had failed to notify his ISO of contact with the police involving A.M.M.-H.'s association with known gang members, he had failed to abide by curfew by running away, and he had failed to pay correction and court fees. The district court held a full evidentiary hearing on the state's motion and granted the same. After revoking A.M.M.-H.'s conditional release, the district court imposed A.M.M.-H.'s 59-month adult sentence and ordered him into the custody of the Department of Corrections.

ISSUES: (1) Extended juvenile jurisdiction proceedings and (2) revocation of conditional release

HELD: Court stated that if a juvenile violates the conditions of the juvenile sentence, the juvenile court may immediately lift the stay and, if consistent with the adult sentence, order the juvenile into the custody of the Kansas Department of Corrections. After a hearing on the alleged violations, if the court finds a violation of the conditions, the court shall revoke the juvenile sentence and order the imposition of the adult sentence previously ordered. K.S.A. 2012 Supp. 38-2364(b). Court held that under the facts of this case, a juvenile who completes the incarceration portion of a juvenile sentence under the extended juvenile jurisdiction proceedings and is granted conditional release may be ordered to serve the adult sentence previously entered by the court if the juvenile violates the provisions of the conditional release under K.S.A. 2012 Supp. 38-2364(b) and K.S.A. 2012 Supp. 38-2369(4)(C).


STATE V. CRADDICK
DOUGLAS DISTRICT COURT – VACATED
AND REMANDED WITH DIRECTIONS
NO. 108,355 – NOVEMBER 1, 2013

FACTS: Craddick pointed his Ruger Airhawk pellet rifle at his victims and threatened to shoot them if they did not put his dog on the ground. The state charged Craddick with two counts of aggravated assault with a Airhawk air rifle. At the preliminary hearing, Craddick's victims testified that he threatened to shoot them with his "rifle gun." The information was subsequently amended to charge two counts of attempted aggravated assault with a "pellet rifle." Craddick pled no contest to the amended charges, and the district court adopted the preliminary hearing evidence as the factual basis for his plea. The presence investigation (PSI) report recommended that the district court apply the special sentencing rule that changes a guidelines sentence from presumptive probation to presumptive prison if the person felony was committed with a firearm. Craddick filed an objection to the PSI report. He argued he did not commit a person felony with a firearm, triggering a presumptive prison sentence under K.S.A. 2011 Supp. 21-6804(h), because his Ruger Airhawk pellet rifle did not qualify as a firearm under K.S.A. 2011 Supp. 21-5111(m). The State agreed that Craddick had used a Ruger Airhawk pellet rifle to commit his crimes. After hearing the arguments of counsel, the district court found that Craddick's crimes were committed with a firearm. Consequently, the special rule was applied and Craddick was sentenced to a controlling term of 11 months' imprisonment—a mitigated guidelines sentence of 11 months on one count and a standard guidelines sentence of six months on the other count, to run concurrently.

ISSUES: (1) Felony firearm conviction and (2) pellet rifle

HELD: Court held Craddick's pellet rifle was not a firearm under K.S.A. 2011 Supp. 21-5111(m) because rather than propelling projectiles by force of an explosion or combustion, it propels projectiles by force of air or gas. The district court's erroneous firearm designation required the court to vacate Craddick's sentence and reverse and remand his case for resentencing.

STATUTE: K.S.A. 2011 Supp. 21-5111(m), -6804(h)

STATE V. HILTON
ELLIS DISTRICT COURT – AFFIRMED
NO. 102,256 – NOVEMBER 8, 2013

FACTS: Hilton was put on probation in two separate felony cases, and the district court followed the parties' agreement by making the two probation terms—each lasting 12 months—consecutive to one another. A month later, Hilton violated one of the conditions of her probation. The state asked that probation be revoked in both cases and that Hilton be required to serve the prison sentences for both crimes. Hilton argued that since the probation terms were made consecutive to one another she was only serving the first probation at the time of the violation. As a result, she argued, the court could only revoke the probation for the first offense, meaning that she would only have to serve one of the two prison terms. The district court revoked probation in both cases and ordered her to serve both prison terms.

ISSUE: Probation revocation

HELD: If a defendant commits misconduct after the district court has announced that probation will be granted, the district court has the inherent authority to revoke that probation even if the probation term has not yet formally commenced. Court concluded that the judge can revoke both probation in this case and affirmed the district court.

CONCURRING: Judge Atcheson concurred in the decision, but questioned the legality of the consecutive terms of probation in the first place.

STATUTES: K.S.A. 21-4603, -4608, -4611(c)(7); and K.S.A. 22-3716(a), (b)

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Positions Available

Senior Counsel. We are looking for an experienced attorney to join the America Life Inc. team. Responsibilities will include: management of legal personnel and outside counsel, litigation, compliance issues and risk assessment analysis. Candidates must have at least 9 years of litigation experience and 15 years of insurance industry experience. If interested, please send résumé to: sarah. acebedo@americo.com.

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