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Meeting the KBA Staff

The main reason that the KBA operates as well as it does is our dedicated and hard working staff. As we just installed a new communications system at our office, it seemed like an opportune time to recognize our staff members, provide their new direct dial phone numbers and email addresses, describe what each of them does for our association so you know who to contact when you need assistance, and, most importantly, allow our members who do not interact with our staff in person to put a face with a name. Presidents come and go, and it is the staff that really carries out the day to day work of our association. To all of them I am eternally grateful.

Executive Administration

Jordan E. Yochim, Executive Director
Administers the affairs and resources of the Kansas Bar Association and the Kansas Bar Foundation in the best interests of the membership, trustees, and the public in accordance with stated policies and directives of the officers and boards of both organizations. Speaks on behalf of the organizations in matters of public interest or on behalf of the organizations in the presidents’ absence. Makes recommendations regarding programs and policies to the boards. Prepares annual budgets and administers resources in accordance with the strategic initiatives and budgets as adopted. Oversees all Association/Foundation personnel including employment and compensation.

Direct: (785) 861-8834 / Email: jeyochim@ksbar.org

Deana Mead, Associate Executive Director
Oversees and coordinates the KBA core services including Member and Market Services, Law Practice Services, and Communications Services. Serves as staff liaison to various association-wide committees including the Diversity and Annual Meeting Planning committees. Serves to oversee KBA operations in the executive director's absence. Ensures that all core services, including associated committees, task forces, and volunteers receive appropriate information and assistance to fulfill the Associations’ mission.

Direct: (785) 861-8839 / Email: dmead@ksbar.org

Member and Market Services

Meg Wickham, Member and Market Services Director
Manages membership recruitment and retention efforts and coordinates various Association member benefits. Develops and implements membership survey and marketing efforts and advises leadership on member policies, levels, and benefits. Leads the KBA’s social media enterprise. Coordinates various KBA-endorsed products and services in accordance with contractual agreements.

Direct: (785) 861-8817 / Email: mwickham@ksbar.org

Krista Isaacs
Provides member database, data reporting, and data management support to the Association/Foundation, members, other legal agencies, and the public. Coordinates the annual membership renewal process, including data capture for new members. Recruits members through the new admittee swearing-in ceremonies. Assists members with member profile and website use questions.

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Law Practice Services

Danielle Hall, J.D., Law Practice Services Director
Directs all aspects of the KBA CLE program, KBA Bookstore, KBA Sections, and Law Office Management Assistance Program (LOMAP). Works with Kansas CLE Commission to design and implement new CLE programs and offers professional development programming. Works with Board of Publishers, authors, and editors to coordinate production of KBA book series. Provides practice management guidance and professional consultations to KBA members. Provides guidance and assistance to section leaders and section members to plan events, publish books, recruit new leadership and members, and provide section outreach. Serves as staff attorney and legal advisor to staff.

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Leslie Garwood
Develops and promotes Continuing Legal Education seminars in all forms. Works with authors/presenters to prepare course materials and handles all events, including on-site, coordination. Keeps apprised of changes in CLE rules and regulations. Provides assistance to section leaders by assisting with section marketing plans, section meetings and conference calls, and section CLE seminars. Interacts with members and non-members on legal education programming, encouraging membership recruitment when practical.

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Dawn Phoenix
Develops and promotes Continuing Legal Education seminars in all forms. Works with authors/presenters to prepare course materials and handles all events, including on-site, coordination. Keeps apprised of changes in CLE rules and regulations. Provides assistance to section leaders by assisting with section marketing plans, section meetings and conference calls, and section CLE seminars. Interacts with members and non-members on legal education programming, encouraging membership recruitment when practical.

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Communication Services

Beth Warrington, Communication Services Director
Oversees all KBA/KBF communications efforts, including those addressed to the media, the membership, the public, or specific audiences. Employs all channels as appropriate to communicate the KBA's position or message. Manages content and production of The Journal of the Kansas Bar Association and the KBA website. Serves as staff liaison to the Media-Bar and Board of Editors committees. Writes or ed-
its all KBA in-house publications, including the weekly newsletter, eblasts, KBA news releases, etc.

**Direct:** (785) 861-8816 / Email: bwarrington@ksbar.org

### Ryan Purcell

Provides desktop publishing and creative design services for KBA/KBF communications and marketing efforts. Assists in creation of advertisements and graphic illustrations for the KBA Journal and public outreach materials. Assists in website and social media communications and design efforts. Serves as Association photographer and maintains photo files.

**Direct:** (785) 861-8826 / Email: rpurcell@ksbar.org

### Legislative Services

**Joseph Molina III, J.D., Legislative Services Director**

Acting on directives from the Board of Governors, Legislative Committee, or Executive Director, and in concordance with the KBA’s mission and policies, implements the legislative initiatives and objectives related to statewide legislation. Leads analysis of proposed legislative actions and determines the potential impact on the KBA, on the judiciary, and on the practice of law. Monitors legislative and regulatory activities and works to advance KBA positions. Secures testimony from legal experts as necessary or requested by the legislature. Provides reports to boards and CLE programming on legislative matters. Serves as staff attorney for the KBA and to the Executive Director.

**Direct:** (785) 861-8836 / Email: jmolina@ksbar.org

### Public Services

**Anne Woods, Public Services Manager**

Working with the KBA/KBF boards and public-focused committees, plans and administers all fundraising and public outreach efforts projects. Oversees the IOLTA program. Manages the daily administrative needs of the KBF, including fundraising, the Fellows program, and KBF events including the annual meeting of the Fellows. Serves as point of contact for KBA/KLS pro bono recruitment and service. Coordinates KBA law-related education efforts.

**Direct:** (785) 861-8838 / Email: awoods@ksbar.org

### Administration and Finance

**Ken Waugh, Administration and Finance Services Director**

Serves as the CFO for the Association and Foundation. Oversees all financial systems and operations assuring all financial transactions comply with association best practices, and fiduciary standards. Oversees all transactions, prepares monthly financial statements, and manages deposits, operational expenses, and special reporting. Oversees time and leave reporting and payroll. Works with the Executive Director, Associate Executive Director, and the executive committees of both boards to generate annual budgets. Processes donations to the KBF and, with the Investment Committee oversees foundation investments. Administers the salary and employee benefit plans of the Association/Foundation. Provides human resources guidance to staff and leadership.

**Direct:** (785) 861-8809 / Email: kwaugh@ksbar.org

### Kathy Johnson

Provides administrative and accounting support to the Association/Foundation. Processes membership dues payments, CLE seminar registrations, and all sales orders through data entry or check deposits. Maintains accounts receivable records, including collection of outstanding invoices. Works with Member and Market Services to prepare for annual membership recruitment. Provides daily bookkeeping and accounting support to staff.

**Direct:** (785) 861-8814 / Email: kjohnson@ksbar.org

### Joyce Neiswender

Provides administrative and reporting support for the KBF IOLTA and Fellows programs. Processes IOLTA interest remittance reports, new IOLTA applications from banks and attorneys, and provides IOLTA reporting to IOLTA grants committee, staff. Maintains giving records for all KBF members. Assists the Public Services Manager in coordinating the annual Fellows drive and Fellows Dinner. Processes the yearly Lawyer Referral Service applications and fees and works with KLS staff to administer the LRS program.

**Direct:** (785) 861-8815 / Email: jneiswender@ksbar.org

### Facilities and Operations Services

**Jamey Metzger, Facilities and Operations Manager**

Oversees care of the Kansas Law Center facilities, including security, grounds, janitorial services, and life-safety equipment. Manages the KBA Print Shop serving KBA members and attorneys. Processes the printing and binding of all in-house publications and bulk mailings. Maintains the inventory for all KBA handbooks and printing supplies.

**Direct:** (785) 861-8810 / Email: jmetzger@ksbar.org

### Governance and Board Services

**Cassandra Blackwell**

Provides administrative assistance to the Association/Foundation leadership, Board of Governors and Board of Trustees. Works with staff liaisons to support all KBA/KBF committees. Provides administrative support to the Executive Director, Associate Executive Director, and Legislative Services Director. Maintains up-to-date records of KBA/KBF board, leadership, committee, and section assignments and terms. Provides events support for Law Center and board events. Corresponds with members and the public and on behalf of the Executive Director and boards. Provides travel assistance to officers and executive staff to board, regional, and national meetings.

**Direct:** (785) 861-8828 / Email: cblackwell@ksbar.org

### 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.

**dddepew@ksbar.org**

(620) 325-2626
Procrastination, Motivation, Deadline

I don’t know if it’s Spring Fever, a slump, an early mid-life crisis, or pure unadulterated laziness, but in its purest form I have recently been attacked with a case of latent procrastination. While I have suffered off and on from this malady in the past, i.e., middle school, high school, undergrad, law school, etc., it has never interfered with my life so much as in its current incarnation.

Webster defines procrastination: “to be slow or late about doing something that should be done; to delay doing something until a later time because you do not want to do it, because you are lazy, etc.,” or “to put off intentionally and habitually” or “to put off intentionally the doing of something that should be done.”

Procrastination for an attorney is definitely a hindrance and not to be tolerated by any client, judge or opposing counsel. This I have learned. I have also learned that the best method to combat procrastination is motivation. How to get motivated when March Madness is in progress, the weather is nice three out of five days, and remodeling is going on all around you and your partners are constantly asking for your opinion concerning decorating options? The answer is: imposing a deadline!

For an attorney deadlines are crucial and a way of life. We are chronically faced with deadlines and that is a very good thing. Due dates for responsive pleadings, briefs, and answer deadlines are a common thing. The motivation for adhering to those deadlines is as simple as client satisfaction, ethical considerations, and career reputation. No brainer.

However, other aspects of the legal profession are not quite as clear cut and the motivation somewhat less compelling. I will admit my main downfall is billing. I keep track of my hours, just not in the most organized way. Our firm uses Sage Timeslips, and it is a wonderful program, when utilized properly. My partners seem to have conquered the billing beast by consistently dictating their time to our billing clerk as they perform services. I, however, keep track of my hours by jotting down my time on a legal pad. When the billing clerk prints out the billing for the entire office, it is very obvious who has and who has not been dictating their time as they go. This practice, or lack thereof, does not harm the client but does not place me in the running for “Most Likely to be Held in the Highest Esteem” among my partners. It also does not make the billing clerk very pleased when she has to redo my billing several days later after I have finally dictated all of my time which I have compiled over the course of a month on my trusty billing legal pad. Ouch! Would it be more efficient if I dictated it as I went? Sure, but where is the fun in that? Thankfully, she likes my mother.

The procrastination thing tends to interfere in my personal life as well. I spend many weekends traveling. I know I’m going to be traveling. It is not a spur of the moment thing. However, is my laundry done well in advance of the weekend? No. In fact, there have been many Friday lunch hours when I’ve had to run home to put wet clothes from the washer into the dryer before returning to work so I will be able to pack as soon as I leave the office for my weekend on the road. Could I do laundry on Thursday night? Wednesday night? Yes. Do I? No. Procrastination. Pure and simple. Solution? I need some motivation to break the pattern. Some deadline imposed by someone other than myself because, to be honest, I’m my own worst enemy. I don’t listen to me.

So what is the perfect solution for procrastination? Well, there isn’t one. However, there are some things you can do if you suffer from it as much as I do. The Writing Center at Georgetown University Law Center offers some helpful tips. The ones I found to be the most helpful to me are:

1. Break the Assignment into Small Pieces: Have you been assigned the task of drafting a Motion for Summary Judgment? The thought of that can be daunting, but if you break it down issue by issue and complete one before the next, it isn’t so bad. Not everything has to be completed at once.

2. Make a Detailed To-Do List with Specific Deadlines: Making a detailed to-do list gives you the satisfaction of crossing things off the list when completed. That alone can motivate some to move onto the next item. Impose specific deadlines to accomplish the tasks. Sometimes easier said than done.

3. Set Yourself Up to Succeed: Put yourself in whatever environment allows you to be the most productive. For some, that is in a room alone with absolute silence. For others, it is at the living room coffee table with the television blaring. Find what works best for you and stick with it. Minimize distractions, whatever they happen to be for you.

4. Use Rewards at Incentives: This one is pretty self-explanatory, but if rewards don’t work for you then use punishments.

5. Call in the Cavalry: If all those research and writing assignments get overwhelming, don’t be afraid to ask for help; even if that help is merely having others know the deadlines you imposed and them holding you accountable and keeping you motivated.

6. Get Started: Often times the easiest solution to procrastination is just getting started. If you never start, you will never finish. Put that pen to paper or those fingers to keyboard and get to work. You’ll be surprised how quickly things get done when you actually start doing them.

For what its worth, I put off writing this article as long as I could. Ironic, don’t you think?

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
What Makes Us Diverse

On Friday, March 7, I had the privilege of attending the University of Kansas School of Law Diversity Banquet. The 19th Annual Diversity Banquet was sponsored by the Black Law Students Association and featured as its Keynote Speaker Jabari Wamble, assistant U.S. attorney. The goal of the event was to celebrate diversity in the legal profession as well as serve as a major fundraiser for the Diversity Scholarship Fund.

During an engaging speech, Wamble emphasized why diversity in the legal profession continues to be essential to the struggle for justice for all. Early in his career while at a conference, Patrick Fitzgerald, former U.S. attorney for the Northern District of Illinois, influenced Wamble's views on the importance of diversity. Fitzgerald emphasized that in all aspects of our legal community, we need people who represent everyone, on all sides, for justice to function appropriately. Wamble connected that to the fact that all too often diversity is bigger than simply one individual's experience.

Listening to Wamble forced me to consider how I view diversity. I agreed to write this article discussing my experiences with diversity in the legal community several months ago; however, I have had a hard time figuring out how to express my thoughts. Four years ago at the very young age of 24, my entire world turned upside down when I learned that not only did I have cancer, but also my best chance at beating it was to amputate my right leg. When you get that kind of news, a million thoughts race through your head. How will I drive, play golf, run? Not to mention the big things such as what about school? Overnight I went from being a second year medical student studying for Boards to being a patient whose days consisted of hospitals, doctor appointments, and rehab. But somehow, no matter how dark it seems, there is always light at the end of the tunnel. I took advantage of my year off from school to really consider my life. Life is far too short not to enjoy your job every day. After really evaluating my life I realized that while I loved certain parts of medical school, it was not the right fit for me. After finally taking the time to figure out what I was not only good at, but also enjoyed, I changed my life plan and applied to law school and have never looked back.

I know intellectually that being an amputee qualifies me as a “diverse attorney” but I normally do not stop to think about the world that way. To me, people are just people and my ultimate goal is for the legal profession to move beyond thinking about diversity in terms of race, gender, or physical disability and instead to recognize that each of us has unique life experiences that can benefit our clients, firms, and the legal community as a whole.

In my first year of law school a woman stopped me in the law school building. She wanted to tell me that she just thought it was so inspiring that I would attempt law school in “my condition.” I politely thanked her; however, as I walked off I was angry. From my perspective the fact that I lost my leg has zero impact on my ability to be successful as a lawyer. While I am sure she had the best of intentions, attitudes like that and phrases, such as “in your condition,” are counterproductive to encouraging diversity. The woman only saw what she perceived as my “limitations.” My former father-in-law was blind but he led a more productive and fulfilling life than just about anyone I know. Instead of seeing an individual’s physical disability in terms of a limitation, we should look beyond and see how the blindness, amputation, etc., gives the individual a unique perspective that could be extremely beneficial. Yes, being an amputee is a unique experience, but having spent time in medical school prior to law school is also a unique experience. The real trick is figuring how each of my life experiences can be used to make me a better advocate for my clients.

At the end of the day, no one gets through life unscarred; my scars are just more visible than others.

About the Author

Amanda Marshall is a graduate of Newman University, summa cum laude, where she received a Bachelor of Science in biology and the University of Kansas School of Law. While at KU Law, she was involved with the Kansas Journal of Law and Public Policy, first as staff editor and then on the executive board as symposium editor.

Marshall currently serves on the KBA Diversity Committee.

19th Annual KU Law School Diversity Banquet.
Building a Sturdy Foundation

I look out my office window as I write today and once again see snow. This is soon after several days of putting down the top on my very old, but very dear, Mazda Miata to enjoy the fresh air and sun and daylight saving time. In the course of a week, green shoots started to nudge up from my garden and tiny buds appeared on the peach tree beside my deck. Then it snowed. Then the bitter cold and ice came. Then, because yes, Dorothy, we are in Kansas, spring started to again once appear, and I had hoped we were through the bad weather period. But, we are in Kansas, and soon there will be spring and summer storms of a very different nature.

No matter how we plan or what we anticipate, we can never really predict what is going to happen. What we can do is build a foundation for our future which is constructed as broadly and wisely as possible. Then we have the resources to assist others and sustain ourselves when need arises.

Making a plan and building a sturdy foundation is what the Kansas Bar Foundation and its Board of Trustees endeavor to do for its members and recipients of its giving. The dedicated staff, which we share with the KBA, and the volunteer board members spend countless hours every year in their quest to increase the foundation’s reserves and provide assistance and support to those in need. From owning the building that holds our sister organization, to providing disaster relief and funds to charitable law-related organizations, and giving students aid in their educational endeavors, the KBF truly sustains and preserves the ideals of the legal profession in a way that an individual cannot always do alone. As we move in to a new season, please consider joining and supporting the foundation.

(This may indeed lead to a “birds of a feather” theme very soon... hmmm)

About the President

Kathy Kirk has been involved in bar and foundation activities for many years. Prior to being in small firm practice with the Law Offices of Jerry K. Levy P.A., she served as the first ADR coordinator for the Kansas Supreme Court. Kirk is currently president of the Kansas Bar Foundation and treasurer of the Kansas Association for Justice.

kathykirk@earthlink.net

Elder Law Hotline Orientation – May 21

Marilyn Harp, Kansas Legal Services executive director, will be hosting an Elder Law Hotline orientation and refresher talk from noon-1 p.m. on Wednesday, May 21, 2014. Please join all or part of this conference call to learn more about the hotline and volunteer opportunities. Elder Law Hotline is a project of KLS. Hotline attorneys answer questions in civil cases for Kansans age 60 or older. Cases may be referred to a local Senior Citizens Law Project attorney or a private attorney through the Elder Law Panel organized cooperatively with the Kansas Bar Association. The hotline addresses the increasing need for quality elder law services in a largely rural state. Considering the limitations on both physical and geographic mobility, a statewide hotline service is an effective method for delivering legal services to elderly Kansans. In 2009, the KBA gave its annual Pro Bono Award to the Elder Law Hotline. That award recognizes a lawyer or law firm for the delivery of direct legal services free of charge to the poor or vulnerable. Participants need to dial (866) 514-9635 and enter PIN 96691970# to join the call.

Visit http://www.kansaslegalservices.org/node/1250 to learn more about the Elder Law Hotline.

My first caller was frustrated with having a small claims judgment and not knowing quite how to use the garnishment forms to collect her judgment. So the questions were practical ones such as how to convert a garnishment form to a “fillable” form and how to get started on collecting the money owed. I could understand her frustration and was happy to spend about an hour by phone and email helping get her what she needed. She thanked me several times, and this felt like I had accomplished something for her and also for the Elder Hotline, KBA, and Kansas Legal Services.

– Bob Hiller, Elder Law Hotline volunteer
Spring Signifies a Fresh Start and New Growth

Do you take in a deep breath when you walk outside after a spring storm and see puddles on the sidewalk, robins looking for worms and a beautiful blue-gray sky? To me it is that long-awaited time when I want to put away wool sweaters, electric blankets, and snow boots. It is the time of year when I feel most like starting something new, being outside, and visiting with friends and neighbors.

The colors of spring remind me of certain things. The egg in the nest, a turquoise blue recharges my energy and helps me focus. The eggshell serves a unique purpose to shelter and protect. In color psychology, turquoise radiates tranquility (blue) and growth (green). It is a perfect time to start a new project, protect the future and grow your professional and personal goals. The perfect place to do that is with the Kansas Bar Foundation and Kansas Bar Association pro bono opportunities. Take the power of spring and harness it to:

1. **Start a giving program** that provides you with an outlet to support your favorite cause or program. One way you can do this is by becoming a Kansas Bar Foundation Fellow. Already a Fellow? Commit to getting to the next level. Visit http://www.ksbar.org/donations/ to learn about the KBF Fellow levels.

2. **Invest your time in a pro bono opportunity** that benefits your peers, the public or future lawyers. As attorneys, you are part of a profession that believes in giving back. Giving does not have to be overwhelming. Consider giving 10 hours of your time this year and adding ten hours a year for the next four years. By year five, you will have given 150 hours of pro bono work. Keep in mind, pro bono encompasses many areas. Do you give your time and expertise to help a local organization develop a program that needs legal review? Do you volunteer to talk to students in a classroom to help them learn about what it is like to be an attorney? Do you write for a publication that helps people understand the three branches of government, civics or the U.S. Constitution? The KBA has numerous members who do this every year. Interested in visiting a classroom for career day or during Celebrate Freedom Week? Contact me. I will help you make the connection.

3. **Create time for yourself** so that you are able to recharge and ultimately provide the best counsel to your clients, time with your family and commitment to your spiritual outlet. Many people start a new year with a resolution. Usually by spring, we have a better understanding of where we want to be with that resolution. Instead of boxing yourself in with a stringent resolution, allow spring to help you reflect and refocus on that promise. Make sure you remember to take care of your needs and do some things that bring you peace and joy.

If this motivates you to want to make a spring donation to the Kansas Bar Foundation just go to www.ksbar.org and click on donate. Need ideas on pro bono opportunities? Contact me and we can work with our affiliate organizations to help come up with a plan that keeps you engaged. Finally, get outside, talk to your neighbors, take a walk in your community and soak in all the new projects and freshness that only come with spring. However you decide to give of your money or time, future generations will benefit and may be inspired to do the same.
The “Get It” Factor

Kansas has a long tradition of handling serious lawyer-discipline cases publicly. Our Supreme Court publishes the background facts and the ruling in each case. That gives Kansas lawyers a chance to learn from the mistakes of others, and I’ve learned quite a few lessons that way over the years.

I want to focus now on one of those lessons: Perhaps the biggest determinant of whether a lawyer still can practice law at the end of the day is whether the court concludes that the lawyer “gets it.” Does the lawyer understand what he or she did that was wrong? Has the lawyer taken responsibility for it? And has the lawyer taken concrete steps to make sure that such an error can’t happen again?

When you think about it, lawyer-discipline cases are a bit of an odd duck. The process seems like a typical lawsuit, something every lawyer knows how to handle. It starts with a complaint, and the lawyer has 20 days to answer. A formal hearing is held, and the rules of evidence and civil procedure apply.

But the best defense may be an admission of the violation combined with sincere remorse and a convincing plan to avoid further violations. That’s not the way we’re taught to defend lawsuits—at least in the initial written answer—so many lawyers tread down the wrong path in the disciplinary process. Most of us are naturally defensive when called on the carpet. Throw in our legal training and the risk of losing our livelihood, and the temptation is great to mount the most stringent defense possible to each allegation.

With that in mind, let’s look at some cases in which lawyers lost—or kept—their license to practice law. The theme that emerges is that those who “get it” do much, much better.

A prime example is the 2001 case of In re Flack. The attorney had formed an alliance with a for-profit company that marketed estate-planning services, which were mostly provided by unsupervised nonlawyers. The victims were primarily “elderly widowed women who were particularly vulnerable,” and they paid good money for services that were misrepresented, causing actual injury to the clients. Among other violations, the court found that Flack had committed the trifecta of misconduct violations—conduct involving fraud or dishonesty (Rule 8.4(d)), conduct prejudicial to the administration of justice (Rule 8.4(e)), and conduct adversely reflecting on his fitness to practice law (Rule 8.4(f)).

Yet the attorney’s license was neither taken nor suspended. Instead, he received two years of probation. How? He admitted to all of the violations, paid over $30,000 in restitution before the hearing, and proposed a detailed plan for supervised probation. The court adopted a probation plan under which Flack would contact all of those who had paid to engage his services through the for-profit company’s marketing efforts, tell them that he was no longer associated with that company, offer to determine whether they had received appropriate representation, and, if not, to provide it, all under the supervision of another attorney.

I should note that Flack was a relatively new attorney, had no prior violations, and a good reputation. But the result still seems extraordinary in light of the violations found and the fact that actual injuries were suffered by especially vulnerable victims.

Contrast it with some other cases:

- In In re Wiles, an attorney licensed in both Kansas and Missouri first had his Missouri license suspended. He continued to use letterhead that said, “Licensed in Missouri and Kansas,” and he tried to continue handling matters on both sides of the state line. After disciplinary proceedings began, he tried to defend his actions—defending his use of the letterhead by saying that the wording was in small type and no one had brought it to his attention. The court essentially said that Wiles simply didn’t “get it”: “Instead of accepting responsibility for his actions, Wiles appears to blame others for failing to notify him of the misleading language on his letterhead.” The court ordered disbarment, saying that “Wiles’ objections to [the hearing panel’s] conclusions . . . make it clear that Wiles does not appreciate the seriousness of his misconduct.”

- In In re Small, a hearing panel and the Kansas Supreme Court concluded that the attorney had engaged in “threats and intimidation tactics” against the opposing counsel in a landlord-tenant case, the trial judge in that matter, the lawyer assigned to investigate the disciplinary complaint, and even the deputy disciplinary administrator assigned to prosecute the ethics complaint against him, along with other violations. A hearing panel recommended a 90-day suspension, but the Kansas Supreme Court raised that to a six-month suspension—one that could end only upon satisfactory evidence that Small “has addressed the problems that led to his misconduct and suspension.” The court emphasized that “the violations proved and respondent’s apparent inability to acknowledge any wrongdoing or address the relevant issues at oral argument before this court demonstrate the need for a period of suspension.” (Emphasis added.)

- In In re Davidson, the attorney had committed several criminal offenses that were alcohol-related, which were found to be criminal acts reflecting adversely on his fitness to practice law and prejudicial to the administration of justice. In addition, the attorney had committed separate ethics violations related to a bar in which he had obtained an ownership interest. The hearing panel recommended a one-year suspension, but the court indefinitely suspended Davidson’s license, noting that his “demeanor and statements at oral argument before this court only amplified our
thinking ethics

concern about his health and his ability to practice law.” The court concluded, “Respondent appeared to have little insight into his problem with alcohol. He exhibited even less interest in solving it. Under these circumstances, and in view of the harm already done to one client, the majority of this court believes indefinite suspension to be necessary.”

• In *In re Jones*, the violations were serious, including continuing to practice law after license suspension and attempting to cover up the violation, and the hearing panel recommended disbarment. So it was not surprising that the court ordered disbarment. But it’s worth noting that the court explicitly tied the disbarment order to the attorney’s failure to take responsibility, especially since this wasn’t his first disciplinary case: “[I]t is clear that the respondent does not appreciate the seriousness of his misconduct. He generally disparages the hearing process and the hearing panel’s conclusions. . . . Apparently, the respondent has learned little from his prior disciplinary experiences. Therefore, we conclude that disbarment is the appropriate discipline.”

When the court reviews a case involving a serious ethics violation, it will want to protect the public from future harm. Ultimately, the attorney whose license is at stake will have to convince the court that he or she understands what happened, knows it was wrong, and has taken the right steps to make sure it can’t and won’t recur.

Genuine remorse is also important. Even if represented by counsel, attorneys before the court on ethics charges have a chance to speak to the court directly, and a sincere apology should be on the program. One should keep in mind the admonition of the late professor, Randy Pausch, who said in the lecture he gave shortly before his death: “When giving an apology, any performance lower than an A really doesn’t cut it.”

So, if you find yourself faced with a potentially serious disciplinary complaint, the first thing to do is to get an objective person to help you through it—namely, a lawyer. Second, focus with your lawyer on how you can show others that you get it. With that focus, the odds are oh-so-much better that you’ll get where you need to be.

About the Author

Steve Leben has been a member of the Kansas Court of Appeals since 2007. Before that, he was a district judge in Johnson County for nearly 14 years and practiced law for 11 years. Leben has been a co-presenter of Ethics for Good, a CLE program sponsored by the Kansas Bar Foundation and presented each June in the Kansas City area, for 15 years.

Voting will begin soon for two contested elections: Secretary-Treasurer and District 7 Governor (only available to members practicing in District 7). This year marks the second year that elections will be conducted online rather than by mail; voting remains completely anonymous.

VOTING BEGINS ON MONDAY, JULY 7

All ballot information will be sent via email. Make sure the KBA has your correct email by logging into the website at www.ksbar.org and updating your member profile.

Should you have any questions, please contact Jordan Yochim, Executive Director, at jeyochim@ksbar.org or at (785) 861-8834 or Beth Warrington, Communication Services Director, at bwarrington@ksbar.org or at (785) 861-8816.
One day during my Evidence class, I was called on by my professor to complete a problem on the board. My mind began racing with thoughts of whether I was prepared, or what my peers would think if I completed the problem wrong. As I walked up to the board I let myself continue those thoughts, but once I reached my destination I took a deep breath and cleared my mind. Every day during class I experience moments similar to this, and I know that once I graduate I will continue to experience stronger forms of anxiety. However, I have found that one of the most effective ways to relieve that stress and anxiety is to practice mindfulness meditation.

Meditation is a difficult concept to grasp and define. Due to its ties to spirituality, meditation is traditionally thought of as a practice designated to a particular religion, usually Buddhism, and therefore many will dismiss meditation as “not for them.” While meditation has a strong relationship with Buddhism and other religions, it should be viewed as an exercise with many different practical applications. There are many different types of meditation, with many different applications, however mindfulness meditation has been found to be especially useful in the practice of law. Mindfulness meditation is the practice of developing an individual’s attention, and learning how to accept our thoughts and emotions without judging them. When considering meditation in this broad concept, we can view it as a practice of clearing one’s mind and allowing for a contemplative state of being. It is in this state of being where we can discover meditation’s healing effects on an individual’s mind.

While meditation is frequently tied to various religious and spiritual traditions, it can be used in numerous secular ways, including relieving the stress and anxiety of life, honing skills like attention and concentration, or building self-confidence. By cleansing the mind, we can practice our ability to focus our attention and become sharper and more aware of our surroundings. Mindfulness teaches us the ability to recognize and accept our thoughts and surroundings, which allows us to notice the randomness of life and of our thoughts. When practicing mindfulness, we can learn to accept feelings such as guilt and frustration for forgetting to send an email or for getting a poor grade on a test. In recognizing these feelings we can decide whether to pursue them or to accept how we are feeling and move on to the next feeling or thought.

Many people may be discouraged from exercising mindfulness meditation because they do not fully understand how to practice it from the outset. However, accepting that we may not fully understand how to practice is the first step of practicing. Meditation is a personal experience that will vary with each individual; therefore as one begins practicing, one may find that her methods change as she becomes more comfortable. Personally, I find that sitting in a dark or dimly lit space helps to settle my mind as I meditate. I slowly close my eyes as I begin to concentrate on my breathing. Keeping one’s attention on breathing provides the meditator something to focus on. As you focus on breathing you may find that other thoughts will enter your mind; in order to hone mindfulness, one simply accepts that he had a thought and brings his focus back to breathing.

In conclusion, continuing this practice of accepting thoughts and bringing the attention back to breathing allows the meditator to sharpen her focus and helps to regulate how her body reacts to certain situations and circumstances. In law school, this allows us to focus on studying for Torts rather than having our mind drift to Property or Contracts; similarly, in practice, mindfulness allows the meditator to focus on a particular client when interviewing him, rather than allowing her attention to wander to another client. However, I find that one of the most important benefits from practicing mindfulness is that it allows us to recognize when we may be stressed or anxious and mitigate the effects rather than let them control how we perceive the world. So the next time you have to present an argument or answer a question in class, instead of letting stress or anxiety control how you react, consider using mindfulness practice to recognize that you have prepared and to calmly weather whatever problem you are facing.

About the Author

Matthew Moore is a second-year law student at Washburn University School of Law. He recently accepted a student editor position on the Family Law Quarterly and is the pro bono liaison for Washburn’s Pro Bono Society. Moore volunteers with several organizations, including Douglas County CASA, Kansas Appleseed, and The Spencer Museum of Art.

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A Eulogy

Everything has to come to an end, sometime.

— L. Frank Baum, “The Marvelous Land of Oz”

So it is with the Shawnee County Electronic Filing system – the first in Kansas and the first of its kind anywhere. That system shut down on Friday, April 25 at 3 a.m. to make way for the new statewide electronic filing system. Though the statewide system merits discussion, the little Shawnee County project deserves a fitting eulogy.

The public part of the project began with an unexpected announcement in October 1996 from Judge Terry Bullock, then-chief judge in Shawnee County. He suggested to the assembled Topeka Bar Association members that he intended to accept electronic pleadings by email in 1997. It was a ludicrous goal. Few firms even had email at the time, and electronic court filing was the domain of federal projects targeting areas like asbestos class action cases.

Bite-sized Progress

The planning was anything but ludicrous, however. Bullock and his team had assembled statistical data about filings. That data affirmed the 90-year-old Pareto Principle or the 80/20 rule, which states that roughly 80 percent of effects are from just 20 percent of the causes. In Shawnee, some 80 percent of the pleadings filed were filed by just 20 percent of the filers. There were also hints in the data suggesting that some 80 percent of all pleadings were just 20 percent of the total pleading types available. This data allowed a manageable scope for the project. If Shawnee targeted a few pleading types and a few filers, the project would be cheaper, faster, and more robust while still producing dramatic returns.

This is still a unique approach. Most projects launch with a goal to be all things to all filers. It is an expensive and unpredictable approach that has resulted in many failed electronic filing projects or projects that perform poorly toward their forecast targets. It turns out that stuffing the entire apple in your mouth at once is riskier than taking small, digestible bites.

Bite-sized Programs

Once the scope of the Shawnee project was focused narrowly with a few pleading types and a few filers, the software design displayed some unique decisions as well. Because the project was starting with a small subset of filers and documents, the software would need to function like Lego building bricks. The first brick could stand alone but new bricks should “click” together to add features quickly and uniformly.

For example, the primary brick parsed email pleadings to format data for import into the court’s case management system. That parser was built from the beginning to manage multiple filings at a time and to handle payment for all pleadings at once. Once that parser was built, it took part of an hour to create an electronic filing app for the Palm Pilot (unprecedented). A few minutes more and a web-based interface was ready as well. Integration into law firm case management was straightforward too, with some firms creating interfaces without professional IT staff. Keeping things small and focused was, once again, the secret to taking huge leaps.

The software was developed under a unique license as well. The software released under a GNU Public License (gnu.org) to encourage freedom to share and modify the software. That freedom was enhanced by the free price. I obtained a copy of the parser at the very outset of the project and modified it for our firm’s case management software. It took minor tweaks to enable it to parse the court’s electronic returns to a format my system could read. The software was adaptable even to output XML code – a format too underdeveloped for our use in 1996 but which is now a backbone of many electronic filing systems. There was even some proof-of-concept work showing it could hook into Full Court.

Trailblazing

The Shawnee electronic filing system did not lead Kansas to the forefront of e-filing in the nation. Our project did not roll out to other counties. Even today its design goals and features are rejected off-handedly by other courts busy reinventing the wheel. It was a massive, unprecedented success, however.

The original development costs were about $250,000 and the development process from concept to live filing was under six months. Participation from volunteer filers resulted in over 80 percent of pleadings switching off paper at the project’s peak and still beats 60 percent 18 years later and some five years after active development of the system was halted. The project has significantly reduced court expenses in all areas related to filing. Those savings were shared with – not transferred to – filers. (Most electronic filing systems such as the federal CM/ECF or Kansas’ simply transfer the costs from a clerk’s office to filers as an added expense of filing, meaning courts must mandate use.)

If there is ever a Hall of Fame for trail blazers in the Kansas legal community, a section must be reserved to tell the tale of a small project that yielded huge results. Any plaque commemorating the achievement must recognize those involved in pitching, programming, and maintaining the project. At the very least, recognition should go to Judge Terry Bullock, Sally Henry, Angie Callahan, Rex Easton, and April Easton for their hours spent pioneering the most successful, dollar-for-dollar, electronic project in court history. As the lights finally turn out on that project, we understand as Frank Herbert did, “There is no real ending. It’s just the place where you stop the story.”

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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The Dwindling Art of a Simple Letter

Forty-nine cents. A first-class U.S. stamp costs 49 cents today. I had to look that up for this column,¹ because I so rarely use an actual stamp any more. In this era of rapid-fire electronic communication, I have become accustomed to instantly exchanging thoughts, impressions, and information of all sorts. I suspect I’m not alone.

And while we perhaps associate texts, instant messages, chats, and even email primarily with our social lives, these platforms are quickly overtaking more traditional forms of communication in our business and professional lives. Indeed, clients, opposing counsel, and law firm partners expect swift responses to their inquiries and requests, and it likely more common that these exchanges take place over smart phone than a landline or even a computer.

But lawyers must be mindful that quick communication is not necessarily casual communication. Further, without the formal structure of our more traditional communications, it is easy to overlook the form and function of certain historical staples of an attorney-client relationship, including simple letters.

A letter to the client, while perhaps interrupting the flow of other lawyerly work, is an efficient and effective way to maintain communication with the client. Letters allow practicing attorneys to set out the scope of representation, to confirm a meeting time, to give a status update, to remind the client to do something, or even to give legal advice. The content and form of the letter will vary based on the type and purpose of the document, but good writing strategies are generally applicable to all client communications.

First, think about the audience. Who is the client? How sophisticated or educated or perhaps even law-trained is that person? Those considerations will determine what kind of terminology you use and how thoroughly you explain legal concepts. Comment 2 of Rule 2.1 of the Kansas Rules of Professional Conduct reminds us that “[a]dvice couched in narrowly legal terms may be of little value to a client [and] [p]urely technical legal advice . . . can sometimes be inadequate.” When we have more frequent, but less formal exchanges with clients, it is easy to lose sight of their level of familiarity with the legal realm, or to simply assume that they are cognizant of the primary stakes and motivations.

Second, identify the purpose of the letter. Use your opening paragraph to answer the reader’s initial questions about why you’ve sent the letter, what it’s about, and whether it’s good or bad news. Get to the point and orient your reader about the content of the letter. Include references to prior conversations or projects or enclosed documents as necessary to give context.

Consider also the tone of the letter. Written words ripped out of an envelope can be cold and distant. To the extent you’re conveying less than thrilling news, choose your words carefully and consider pre-empting the letter with a phone call to provide a more personal touch. No matter how carefully drafted, it is impossible to anticipate the way that your client will read your letter in a letter.² Don’t forget, too, the basics of writing clearly and concisely.

Be sensitive to the appearance of the letter and choose your formatting options to optimize effectiveness. Use bulleted lists – this isn’t an appellate brief after all. Add underlined subheadings for portions of the letter. Limit your paragraphs to four or five sentences to enhance readability.

Close your letter politely, reaffirming the tone and purpose of the letter you originally identified in the first paragraph. Summarize your conclusions or advice, specify the next steps to be taken (and by whom), remind your client who they should call if they have questions about the content of the letter. Sometimes this last paragraph is the place to identify specific limitations of the advice or recommendations.

And finally, some little details that won’t make your letter extra brilliant, but that could possibly make you look dumb if you mess them up. Date your letter. Get the date right. Be sure to include the recipient’s (correct!) name and address. Number the pages of your letter. Sign in blue ink rather than black (to make it easier to differentiate copies and the original). Remind your client to preserve attorney-client privilege by not disclosing the contents of the letter to anyone else. Keep a copy of the letter in your files.

Many of these reminders are fairly basic, though I certainly hope I haven’t crossed the line into insultingly simple. I am all too aware, however, how easy it is to forget about things like dates and page numbers and addresses when so much of our communication is automatically time-logged and delivered instantly via a preset contact list.

Being aware of basic letter-writing best practices can help a lawyer maintain a professional appearance and credibility as an advisor. Frequent communication with a client is a good thing; it keeps lawyers out of ethical hot water. But even when we choose to save ourselves the 49 cents and fire off a quick email, we should remain cognizant of the far greater investment the client is making in our legal services.

About the Author

Emily Grant teaches Legal Analysis, Research, and Writing at Washburn University School of Law. She still sends hand-written thank-you notes and does not own a smart phone.

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Footnotes

1. I was guessing 44 cents. I was close.
2. The ubiquitous winky smile :) can’t save you in a formal letter.

In a future column, we would like to answer your legal writing questions. Email questions to pkeller@ku.edu with the subject line SUBSTANCE & STYLE. You can also mail your questions to Pam Keller, University of Kansas School of Law, 1535 W. 15th St., Lawrence, KS 66045.
The Case of “Mandatory” CLE v. Three Keenan Boys

Editor’s note: This month’s column was originally published in April 2007.

Long before the mandatory CLE there was a concept that attorneys took CLE to learn something. To be better attorneys. To help their clients. And in the universe of CLE, there is probably no continuing legal education topic more dreadful than tax and estate issues. Or, arguably, more important.

Anyway, a long time ago, in a galaxy far, far away, my dad was determined to get his share of CLE. The year was 1972. And the presenter was one Jim Logan. He was the former KU Dean and knew a lot about estate and tax issues, and someone at the public television station in Topeka thought he needed an audience. Logan stood in front of the camera, stiff as a frozen corpse, and waxed and waned on estate tax issues. “Must see TV” this was NOT. The Dean was sandwiched between Jacques Cousteau “the early years” and the fall Public TV fundraising drive. Maybe one or two people on the entire planet dared to watch this stuff. And one was my dad.

Now dad had this figured out. He wouldn’t dare burden the main television with this programming. This show ran on Saturday afternoons. So he put it on the basement television. In our home, this was no elaborate den. It was a “combat zone” where my parents tossed the kids during bridge club and anytime anyone of importance came over. This was the dungeon where three sons would engage in fighting, kicking, and screaming. My older brother, Tim, would practice his wrestling moves, build bombs from leftover firecrackers, and have poker tournaments. Dad knew all this, of course, which is why he taped it. But this was long before the VCR, so he taped it with an audio tape, using pillows around the television to protect the audio quality. It was a crude production. It was like attempting to record Mozart in the New York subway.

The three boys cared little about any of this. But what happened next brought religion to our world. On our first huge road trip, probably to Colorado, dad, without warning, popped in one of his treasured tapes. He played the tapes throughout the car. With all due respects to Jim Logan, this made Chinese Water torture like a day at the Ritz Carlton. The most horrible punishment on the planet. Nothing you could do would drown out the drone.

We endured this torture on Highway 56 on the way to Wichita, along I-70 east to Topeka, and west to Denver. We heard about spillover trusts, blended trusts, generation skipping trusts and trusts that you create when you are on your death bed. Which is where we thought we were. There was nothing we could do to insulate our ears. There was no iPod, no Walkman, no headphones. It was anguish that the Geneva Convention outlawed in the early 1960s. Sometimes over the background noise you could make out boxing matches, spitball fights, and other teenage battles. When it was over, we could have drafted a generation skipping trust between gym and algebra in high school.

And so earlier this month I went snooping in my parents home. And there I found the treasure trove of tapes. My hand shook as I held it closely, not knowing whether to burn it or frame it.

In writing this column, Judge Logan told me that his presentation actually earned a national award for CLE. Three boys named Keenan obviously had no vote in the matter.

About the Author

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

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Members in the News

Changing Positions

Amy L. Allen has joined Barkley Inc., Kansas City, Mo., as chief legal counsel.
Phillip R. Anderson has joined Kozeny & McCubbin L.C., Fairway.
Sara B. Anthony, Stacy M. Bunck, and Justin Dean have been promoted to shareholders at Ogletree Deakins, Kansas City, Mo.
Jennifer C. Bailey has joined Erise IP P.A., Overland Park, as a partner.
Patrick R. Baird has joined the Attorney General’s Office for Missouri, Kansas City, Mo., as assistant attorney general.
Cami R. Baker has been appointed as a municipal court judge, Augusta.
Dale W. Bell has joined TFI Community Services Inc., Emporia.
Brian J. Christensen has joined Jackson Lewis P.C., Overland Park.
Kristen A. Cooke has joined Schmitt, Mulhern LLC, Kansas City, Mo.
Ryan P. Hellmer has joined Corefirst Bank & Trust, Topeka, as a trust officer.
Robb G. Hunter has joined Monnat & Spurrier Chrd., Wichita, as an associate.
Andrew N. Kovar has become partner at Triplett, Woolf & Garretson LLC, Wichita.
William A. Larson has joined the Kansas Association of Insurance Agents, Topeka, as general counsel.
Daniel E. Lawrence has been promoted to member at Fleeson Gooing Coulson & Kitch LLC, Wichita.

Scott C. Long and Burke D. Robinson have formed Long & Robinson LLC, Overland Park.
Robert J. Luder and John R. Weist have formed Luder & Weist LLC, Overland Park.
Lucinda H. Luetkemeyer has joined Spencer Fane Britt & Browne LLP, Kansas City, Mo.
John T. Paul has been promoted to member by Biggs Law Group L.C., Wichita.
Tucker L. Poling has joined Sander Warren & Russell LLP, Overland Park, as an associate.
Jennifer A. Poynter has joined Wilson, Elser, Moskowitz, Edelman, Dicker LLP, Denver.
Melody L. Rayl has joined Fisher & Phillips LLP, Kansas City, Mo.
Timothy R. Sipe has joined Hamilton Laughlin Barker Johnson & Jones, Topeka, as an associate.
Stanford J. Smith Jr. has been named the new managing partner at Martin, Pringle, Oliver, Wallace & Bauer LLP, Wichita.
Alan E. Streit has joined the Kansas Turnpike Authority, Topeka, as general counsel.

Changing Locations

Robert P. Burns P.A. has moved to 9435 E. Central, Bldg. 100, Wichita, KS 67206.
Daniel J. Coughlin and Martin W. Mishler have merged both practices changing it to, Mishler Coughlin Law LLC, 821 Main St., PO Box 283, Sabetha, KS 66534-0283.

Stephen O. Griffin has moved to 105 E. St., Ste. 500, Kansas City, MO 64106.
The St. Louis office of McAnany, Van Cleave & Phillips P.C. has relocated to 505 N. 7th St., Ste. 2100, St. Louis, MO 63101.

Miscellaneous

Jonathan W. McConnell, Wichita, has been elected to the board of directors of the American Collegiate Society for Adapted Athletics.
Kimberly A. Vining, Wichita, has been elected president of the Wichita Women Attorneys Association for 2014-15.

Editor’s 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

Wilbur Deane Geeding

Wilbur Deane Geeding, 91, of Wichita, died March 1. He was born March 20, 1922, in Chanute to Deane and Getta Geeding. Following his service in the Army during World War II, he graduated from the University of Kansas in 1947 with a Bachelor of Arts and in 1950 with a Bachelor of Laws. In 1968, Geeding received his Juris Doctor. Geeding practiced law continuously in Wichita from 1953 through his retirement, but even then, he came into the office on a daily basis until his death.

Geeding was a member of Albert Pike Lodge No. 303, A.F. & A.M., and Cedar Lodge No. 103 in Chanute; 33 Degree Mason in the Wichita Scottish Rite and a member of the Kansas York Rite Bodies; Midian Shrine Temple in Wichita; a featured soloist in numerous Wichita Bar Shows; musical director of the Hillbilly Band (aka Bourbon Street 7); and also played and sang in the Dads of Dixieland.

He is survived by his wife, Grace; three sons, Martin, of Wichita, Paul, of Raleigh, N.C., and Edward, of Clarinda, Iowa; five grandchildren; and three great-grandchildren. Geeding was preceded in death by his parents and his first wife, Marian.

Ronald D. Prochazka

Ronald D. Prochazka, 72, died March 12 at his home in Liberal. He was born on October 15, 1941, in Little Rock, Ark., the son of Dr. Otto and Susan (Furlong) Prochazka. He grew up in Liberal and graduated from Liberal High School in 1959.

Prochazka joined the U.S. Navy after completing his freshman year at St. Benedict’s College in Atchison. He received an honorable discharge in July 1964. That fall, he began his sophomore year at Kansas State University and graduated with a degree in business administration in 1967. Prochazka attended Washburn University School of Law, graduating in 1973 with a juris doctorate. In 2009, he retired from his position as chief of relocation in the Bureau of Right Away with the State of Kansas.

Prochazka is survived by his wife, Kathy; brothers, Phil, of Wichita, and Tom, of Moose Pass, Alaska; sisters, Anne, of Denver, and Zuki, of Denver; stepson, Kyle, of Anders; five step-grandchildren; and two step-great-grandchildren. He was preceded in death by his parents and his sister, Carole.

KALAP Foundation

Upholding the Integrity of the Bar

A Campaign to Benefit Lawyers in Need

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Prior to the 1970s, addiction was seen as a moral problem, not a medical problem, and as such, anyone who offered addiction as an excuse for destructive (of self or others) behavior faced an overwhelmingly uphill battle in courts of law. Then, beginning in the 70s, some psychologists and medical doctors began to conceptualize addiction as a disease process. Contributing to that paradigm shift were cultural factors such as reaction against “oppressive” moralization and scientific advances in disciplines such as genetics (e.g., it was determined that some people were genetically more vulnerable to addiction than others, a hand which many overplayed – quite successfully for a while – as “proof” that addictive behavior was not a choice).

In criminal matters, most if not all American jurisdictions have continued to exempt voluntary intoxication, even in the throes of addiction, as the basis of an insanity defense, although many jurisdictions, to varying degrees, have allowed it to be considered a mitigating factor. Legally, the “disease model” of addiction has taken its strongest root in products-liability matters, most notably suits against tobacco companies (although there has been a smattering of recent suits filed against food-products manufacturers). Curiously, alcoholic-beverage manufacturers have seen relatively few “disease”-based products-liability suits. Many Americans who wholeheartedly embrace tobacco addiction as having forced plaintiffs to smoke seem not to have similarly embraced alcohol addiction as having forced plaintiffs to drink. I will address the psychology underlying this paradox momentarily, as it is illustrative of what I contend is yet another paradigm shift with respect to addiction in the courtroom.

To look at mainstream American media reportage on addiction over the past several years, one might think that subscription to the disease model was well on its way to unanimity. Obesity has been dubbed a disease by the American Medical Association, and Oreo cookies have been alleged to be as addictive as cocaine. It is important to bear in mind, however, that what is reported in the mainstream media often lags several years behind the relevant scientific literature. I contend, in fact, that the very proliferation of the disease model is making an ironic contribution to a pendulum reversal of sorts. As the disease model “drumbeat” has built to a crescendo, it seems to have reawakened public skepticism and pitted the “wisdom of crowds” (collective common sense) against the wisdom of addictionologists. Once overindulgence in everything from cocaine to alcohol to cigarettes to Oreos to sex to gambling to shopping to video games to . . . allegedly meets diagnostic criteria for a “disease,” the entire category begins (again) to insult the sensibilities of many Americans, including, I think, many jurors.

And just as American minds are reopening to another re-conceptualization of addiction, the relevant scientific literature, if not mainstream media reportage, has reached the point where it explains why neither genetic markers nor psychophysiological “cravings” preclude individual choice. Over the past few decades, many plaintiff’s lawyers have argued, and many jurors have believed, that no one would “choose” to risk the destructive consequences of addictive behavior and that plaintiffs’ “compulsions” nevertheless to engage repeatedly in such behavior must therefore have been “irresistible.” Enter the rapidly-advancing science of behavioral economics, which can now account for those phenomena equally parsimoniously and more consistently with common sense.

A growing body of elegantly-designed and highly-statistically-valid studies demonstrates that an addict’s temporal frame of reference is better-predictive of his or her addictive behavior (or suspension/cessation thereof) than genetics, socialization, cravings or any other factor. Consider that when a nicotine addict craves his next cigarette, the value to him of the pleasure which he expects to obtain from that next cigarette almost certainly outweighs the value to him of the infinitesimal statistical loss of lifespan which he expects to incur from that next cigarette (i.e., the infinitesimal increase, owing to that next cigarette, in his odds of developing cancer later in his life). Thus, giving in to his craving, albeit resistible, and smoking that next cigarette actually is a rational choice (i.e., it requires neither genetic destiny nor compulsion irresistibility) for our nicotine addict, if his temporal frame of reference is the next 15 minutes rather than the next 15 years.

Furthermore, the behavioral economy of the choice illustrated above assumes that our nicotine addict is fully aware of his statistical odds of developing cancer later in his life. The likelihood of his choosing nevertheless to smoke that next cigarette would only be compounded were he to ignore readily-accessible information about the cancer risk associated with smoking. And yet another relatively new line of well-designed, well-validated research demonstrates that our nico-
tine addict, in fact, is likely to do just that. When a rational individual desires to engage in a behavior (e.g., smoking) that involves a known risk (e.g., cancer), available scientific data now clearly demonstrate that the individual is highly likely to “filter” risk-substantiating information out of his decisional process and to attend to neutral or risk-minimizing information, thereby increasing the ratio of present pleasure value to future loss value (i.e., increasing, albeit negligently, the rationality of his decision to smoke).

Despite the foregoing, I am not predicting that products-liability suits based on the alleged addictiveness of the products involved – whether cigarettes, Oreo’s, or video games – are going away anytime soon. For the foreseeable future, plaintiffs’ lawyers will find no shortage of experts still willing to argue that addiction is a disease which produces irresistible compulsions. Such experts will continue to show jurors genetic models of addiction, diagrams of how addicted brains appear different from non-addicted brains, etc., and while much of their data will remain correlational and probative of neither causation nor causal directionality, their commitment to it is understandable. Nobody (OK, almost nobody) becomes an addictionologist and dedicates a career to the study of addiction if he or she does not subscribe to the disease model (in fact, it likely would be difficult to get admitted to an advanced addictionology training program without quasi-religious adherence thereto). And, once one enters that discipline, one’s entire professional existence (grants, publications, etc.) is predicated upon producing corroboration and explication of that very disease model.

What I am predicting is that future “battles of the experts” in products-liability cases involving alleged addiction will pit experts armed with the latest science on the decisional – the “choice” – aspect of addiction against experts regurgitating what has evolved into conventional wisdom, that addiction is an irresistible-compulsion-producing disease. As those battles play out, we will essentially be moving forward to the past in that experts who are able to cogently counter the disease model will be persuasive, because they will validate jurors’ common sense rather than counterintuitively argue for its suspension. Americans’ apparent reluctance to equate the “compulsive” effects of nicotine and alcohol, noted above, is probably not rooted in any widespread perception of alcohol as particularly less addictive than nicotine. It is more likely rooted in the fact that a majority of American adults enjoy alcohol yet must moderate their enjoyment of it in order to avoid the negative personal and professional consequences of intoxication (i.e., most American adults have personal experience self-regulating successfully with respect to alcohol).

Ultimately, virtually all American adults know others who have quit all kinds of addictive behaviors. Moreover, mountainous data show that when such individuals finally quit (for good, not just temporarily), more often than not, they have done so without professional assistance (no, I am not recommending against professional assistance, particularly when physiological withdrawal symptoms are possible, just reporting a fact). And guess what those individuals typically say changed at the points where they finally abandoned their addictive behaviors (often after multiple failed attempts)? A child said, “I’m afraid you’re going to die if you don’t quit.” Or an employer said, “I’m not going to pay for your health insurance if you don’t quit.” Or a spouse said, “I’m leaving you if you don’t quit.” Something happened that shifted the addict’s temporal frame of reference from short-term to long-term and caused the addict to consider aggregate rather than just immediate risk implications of his or her behavior, whereupon rational became irrational, and “irresistible” became resistible.

About the Author

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Regulating Speech Behind the Schoolhouse Doors

By Sarah J. Loquist-Berry
The right to freedom of speech provided by the First Amendment is one of this country’s most treasured founding principles. To protect it, we will suffer the most offensive speech imaginable. Yet, even this principle does not provide absolute protection. Nowhere is this more true than in our schools. While students retain their right to freedom of speech, the Supreme Court has “repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”

Consider the following situations: a student holds up a sign endorsing drug use at a public event; a student criticizes the state’s governor on social media; a student creates a fake profile of the principal on a social media site; a student engages in “cyberbullying” of another student away from school. Are any of these situations protected First Amendment speech? The answer is simple – it depends on the facts.

The First Amendment

The First Amendment to the U.S. Constitution states in relevant part as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .” Upon first glance, one might conclude that the First Amendment’s prohibition against the establishment of religion (the “Establishment Clause”) and providing for the free exercise of religion (the “Free Exercise Clause”) are unrelated to the prohibition against restricting freedom of speech; however, as will be discussed below, issues involving freedom of speech are often intertwined with the Establishment Clause and/or the Free Exercise Clause. Accordingly, any discussion regarding freedom of speech must necessarily include some discussion of the Establishment Clause and the Free Exercise Clause.

The U.S. Supreme Court has often explained the requirements of the Establishment Clause as follows:

The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

The Tests for Religious Speech

With respect to the Establishment Clause, the U.S. Supreme Court has set forth three different tests. The first is most commonly known as the Lemon Test. Applying the Lemon Test in the public school context, a school district can only take an action benefitting religious activity when: (1) the activity has a secular purpose; (2) the primary effect of the activity neither promotes nor prohibits religion; and (3) the activity does not make the school district appear excessively entangled with religion. If the purpose of the activity is religious, the primary effect of the activity is to encourage or inhibit religion, or the activity gives the appearance of excessive entanglement, then the activity or practice is unconstitutional.

The second test created by the U.S. Supreme Court under the Establishment Clause is often referred to as the Coercion Test. Under the Coercion Test, the court determines whether the school district has directed a formal religious exercise. If it has, then the school district has unconstitutionally coerced the participation of those who object to the exercise. It does not matter to the court’s determination whether the coercion was intentional or inadvertent.

Finally, the third test set forth by the U.S. Supreme Court under the Establishment Clause is often referred to as
the Endorsement Test. Applying the Endorsement Test, the court considers whether a reasonable observer would determine that the school district impermissibly endorsed or promoted a particular religion. Specifically with respect to a display, the U.S. Supreme Court has stated that the "effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.'"

Student Freedom of Speech

Keeping the above tests in mind with respect to religious speech, it is important to remember that the courts have created more specific tests with respect to student freedom of speech. With respect to student speech, it includes not only the spoken word. Rather, it can take many forms, including the freedom to wear certain clothing, jewelry, or other accessory. Speech can also include a student's right to create certain drawings or writings. While the protection of student speech may not be as broadly applied as it is for adults, students certainly do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."14

In 1969, the U.S. Supreme Court issued its decision in Tinker v. Des Moines Independent Community School District – a decision that remains one of the leading cases in the area of student freedom of speech to this day. In Tinker, high school students were prohibited from wearing black arm bands to school to protest the country’s involvement in the Vietnam War. The plaintiff students were asked to remove their armbands, and, when they refused, they were suspended from school until they were willing to return without the armbands. The students refused to return without their armbands until after the planned period for wearing the armbands had ended. In making the decision to suspend students who refused to remove the armbands, the school district did not provide any evidence that the wearing of the armbands would be disruptive to the school.18

Accordingly, the Supreme Court found that the school district had “banned and sought to punish [the students] for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of [the students].”19 The Supreme Court specifically stated that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”20 Thus, the Tinker test requires a school district to show substantial disruption of – or material interference with – school activities in order to over-

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Student Freedom of Speech

Student Freedom of Speech

...come a student's First Amendment rights. Later cases have tweaked the Tinker test somewhat, but it still remains valid.

Tinker stood as the leading U.S. Supreme Court case on student freedom of speech until 1986 when the Court issued its decision in Bethel School District No. 403 v. Fraser (hereinafter Fraser). At issue in Fraser was whether the First Amendment protected a student's lewd speech given during a school-sponsored assembly to nominate another student for an elected office in the student government. The student had discussed the speech with two teachers before delivering it and had been warned that he should not give the speech and that doing so would likely have severe consequences. The student gave the speech despite those warnings and was suspended for three days and removed from the list of candidates to give the commencement speech for violating the school rule prohibiting the use of “obscene” language.

In the course of ruling in favor of the school district, the Supreme Court noted that one purpose of the public school system is the "inculc[ation] of fundamental values necessary to the maintenance of a democratic political system," including the "habits and manners of civility." The freedom of speech rights of students are not necessarily the same as those of adults, in part because "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." Thus, "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." The U.S. Supreme Court’s most recent decision dealing with student freedom of speech was Morse v. Frederick, issued in 2007. In January 2002, the school district allowed students and staff to watch the Olympic Torch Relay as it passed down the street in front of the high school. At this school-sanctioned and school-supervised event, one of the high school students held up a banner which stated “Bong Hits 4 Jesus” and refused to take down the banner when directed to do so by the school principal. The student was suspended for 10 days because the banner violated the school district’s policy prohibiting public expression that advocated the use of illegal substances. As noted by the Superintendent in upholding the principal’s decision, the “common-sense understanding of the phrase ‘bong hits’ is that it is a reference to a means of smoking marijuana.”

The Supreme Court framed the issue as “whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.” During the course of reaching a decision in favor of the school district, the Supreme Court reviewed its holdings in both Tinker and Fraser. The Supreme Court determined that there were two basic principles set forth in Fraser which were pertinent to its review of this case. “First, Fraser’s holding demonstrates that the constitutional rights of students in public school are not automatically co-extensive with the rights of adults in other settings.” “Second, Fraser established that the mode of analysis set forth in Tinker is not absolute.” The Supreme Court went on to discuss the compelling interest in deterring drug abuse by schoolchildren. Thus, the Supreme Court concluded that
school districts have the right to restrict speech "reasonably regard[ed] as promoting illegal drug use."41

Student Dress and Hair Regulations

Students also have a First Amendment right to govern their appearance and wear the clothing of their choice; however, that right is subject to the countervailing interest of the school district to provide public education to all students.42 Thus, once a student has been afforded due process and it has been established that the student violated the school regulation, the Kansas Supreme Court stated in Blaine v. U.S.D. 261 that the only question remaining was whether the regulation for student conduct was constitutionally permissible.43 That question requires the court to consider whether the board of education has a proper justification to impose a dress code regulation based upon a rational school purpose.44 In addition, the dress code regulation must be motivated by legitimate school concerns.45 The regulation must not be arbitrary, capricious, or unreasonable, and it must not be enforced in a discriminatory manner.46 Furthermore, the regulation cannot be unreasonable or oppressive.47

To be considered reasonable, the regulation must “further the educational processes in the school and the means adopted to accomplish a purpose must be appropriate to accomplish the educational mission.”48 In that instance, the Kansas Supreme Court determined that there was substantial evidence in the record to support the reasonableness of the hair length regulation and determined that the regulation was permissible.49 In reaching that conclusion, the Kansas Supreme Court noted:

Boards of education are given an important role in the training and education of our children. The high school educational mission requires that hundreds of immature, volatile and aggressive adolescents be brought together in confined quarters. Most of these youth are seeking their own identity as well as an education. If a suitable atmosphere for instruction, study and concentration is to be provided, the students and the teachers must be subjected to a wide variety of disciplinary rules. For many adolescents learning is a discipline rather than a pleasure and it must be carried on in dignified and orderly surroundings if it is to be practiced satisfactorily. Obedience to duly constituted authority and respect for those in authority should be instilled in young people.50

It is clear from the remainder of the opinion that that rationale played an important role in the Kansas Supreme Court’s decision in Blaine. In fact, it is the same rationale, albeit sometimes worded differently, which is often used to support the restriction of student freedom of speech.

For example, a school district may ban the wearing of the Confederate flag if it has caused disruption or violence in the school and the policy is enforced without viewpoint discrimination.51 However, if the school district bans the wearing of the Confederate flag, it may be considered viewpoint discrimination to allow the wearing of Malcolm X apparel.52 Likewise, if an alleged violation of the dress code does not cause disruption under Tinker or is not considered lewd under Fraser, the courts will not uphold a ban on clothing or accessories that are worn as speech.53

Student Publications

In 1988, the U.S. Supreme Court addressed student First Amendment rights in conjunction with student publications.54 In Hazelwood v. Kuhlmeier, students who were staff members of a high school newspaper filed suit alleging that their First Amendment rights had been violated by the school district when two pages of one issue were deleted due to concerns over an article discussing experiences of pregnant students at the school and an article discussing the impact of divorce on students.55 The high school principal directed the deletion of the article regarding the pregnant students because he believed the students could be identified from the information in the article and because he believed the references to sexual activity and birth control were inappropriate for some of the younger students at the school.56 Likewise, the principal objected to the article regarding the impact of divorce on students because one student, who was named in the article, made disparaging comments about her father’s behavior leading up to and during the course of the divorce.57 Because the issue of the school newspaper in question was the last one for the school year, the principal believed there was not sufficient time to edit the paper and either remove the two articles or revise them to address the concerns.58 Accordingly, he directed the journalism teacher to withhold the two pages on which the two articles appeared and publish a four-page newspaper, rather than the planned six-page newspaper.59

The Supreme Court first determined that the school newspaper was not a public forum, based upon the newspaper’s role in the curriculum, the fact that is taught during the regular school day by a faculty member, the level of control exercised by the journalism teacher, and the final review by the principal.60 The Supreme Court went on to distinguish Hazelwood from the situation in Tinker, finding that Hazelwood involved the question whether the school district was required to affirmatively promote student free speech, rather than merely tolerate the student free speech, as was at issue in Tinker.61 The Supreme Court noted that the issue involved expressive speech, such as school-sponsored publications and theatrical productions, which parents, students, and other members of the public “might reasonably perceive to bear the imprimatur of the school.”62 As a result, the Supreme Court determined that the school district had the right to exercise greater control over student speech “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be
inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. To hold otherwise would prevent schools from fulfilling the obligation to teach students cultural values and to prepare students for later professional training. Therefore, the Supreme Court found no violation of the students' First Amendment rights.

While the Hazelwood decision gives school districts broad rights to control school-sponsored student speech, the Hazelwood analysis is not the only analysis that must be considered in Kansas. The Kansas legislature has enacted the Student Publications Act. Under that Act, a “student publication” is “any matter which is prepared, substantially written, or published by students, which is distributed or generally made available, either free of charge or for a fee, to members of the student body, and which is prepared under the direction of a certified employee.” The Student Publications Act specifically states, “[t]he liberty of the press in student publications shall be protected. School employees may regulate the number, length, frequency, distribution, and format of student publications. Material shall not be suppressed solely because it involves political or controversial subject matter.” Nonetheless, the Student Publications Act further provides that a student publication that is libelous, slanderous, or obscene, or creates a material or substantial disruption of normal school activities is not protected under the Act. Likewise, the publication of a matter which “commands, requests, induces, encourages, commands, or promotes conduct that is defined by law as a crime or conduct that constitutes a ground of expulsion of students” is not protected under the Act.

However, review of the material and encouraging students to express themselves in a manner “consistent with high standards of English and journalism shall not be deemed to be or construed as a restraint on publication of the material or an abridgment of the right to freedom of expression in student publications.” In addition, the Student Publications Act states that the student editors “are responsible for determining the news, opinion, and advertising content,” subject to the limitations of the Act. However, “[s]tudent publication advisers and other certified employees who supervise or direct the preparation of material for expression in student publications are responsible for teaching and encouraging free and responsible expression of material and high standards of English and journalism.” While the Student Publications Act does somewhat expand the free speech rights of students in school-sponsored student publications, the Act also provides some protection for school districts from liability based upon the content of student publications and holds students who have reached the age of 18 accountable for the content.

Regulating Speech at Graduation

In 2009, the Tenth Circuit Court of Appeals addressed a case involving a student’s religious speech during a valedictory address at graduation. In Corder v. Lewis Palmer School District No. 38, the high school principal required the class valedictorians to submit their proposed speeches for prior review. The plaintiff student did provide her speech to the principal for review, but proceeded to give a different speech during graduation which included her personal religious views. As a result, the student was not permitted to receive a diploma until after submitting a public apology, which was distributed via email. After receiving the diploma, the student filed suit against the school district.

The Tenth Circuit Court of Appeals determined that the appropriate standard for reviewing the speech at issue in Corder was the Hazelwood analysis. Because the valedictory speech was a school-sponsored activity, the school district was allowed to exercise “editorial control over the style and content” of the speech as long as the district’s actions were “reasonably related to legitimate pedagogical concerns.” Likewise, the Tenth Circuit Court of Appeals concluded that the same Hazelwood analysis applied to the apology the student was compelled to write. Because the student’s speech was school-sponsored, the school district was free not only to censor the student’s speech, but also to compel the student’s apology. The court held that the forced apology was reasonably related to the school district’s pedagogical concerns based upon the discretion of school officials to ensure that speech is not attributed to the school district in error. Likewise, the court held that the school district did not violate the student’s free exercise of religion because the policy of reviewing the valedictory speeches in advance was religion-neutral. The student was disciplined for failing to follow the neutral policy – not for her religious beliefs.

The Ninth Circuit Court of Appeals addressed a similar First Amendment argument in 2009. In Nurre v. Whitehead, the plaintiff student sought permission for her wind ensemble to play “Ave Maria” at the graduation ceremony. The superintendent denied the request because the title of the musical piece could be construed as an endorsement of religion. Although the Ninth Circuit Court of Appeals held that instrumental music is considered speech under the First Amendment, the court did not find a violation of the student’s right to freedom of speech for the refusal to allow her to play “Ave Maria.”

The court assumed without deciding that the high school graduation was a limited public forum and then determined that the school district’s decision to use only secular music was reasonable and stemmed from a decision to remain neutral toward religion. The court next reviewed the student’s claim that the school district violated the Establishment Clause by demonstrating hostility toward religion. Applying the Lemon Test to the facts of this case, the court determined that the school district had complied with all three prongs of the Lemon Test and, accordingly, had not violated the Establishment Clause. While the court found no violation in the school district’s actions in the case, it specifically stated that it was not ruling that playing religious music at graduation was unconstitutional, but rather was simply determining that the superintendent’s refusal to allow the playing of “Ave Maria” was reasonable under the facts of the situation and the superintendent’s understanding of the law.

Social Media and Cyberbullying

While all student First Amendment issues must be decided on a case by case basis, very little guidance has been provided by the courts for school districts to apply in instances of
off-campus postings on social media (such as MySpace, Facebook, and Twitter) about other students or school staff members. Thus far, the U.S. Supreme Court has not decided any student free speech case which might provide clearer guidance to school districts in off-campus online speech cases.

In 2007, the Second Circuit Court of Appeals became the first circuit to address a case involving off-campus online student speech. In Wisniewski v. Board of Education of Weedsport Central School District, an eighth grade student created an instant messaging (IM) icon consisting of a drawing of a pistol shooting someone in the head, blood splatters, and the statement “Kill Mr. VanderMolen” below the drawing. Although the icon was not sent to any school officials, it was sent to some of the student’s friends and, eventually, another classmate of the student provided a copy of the icon to their teacher, Mr. VanderMolen. After receiving a copy of the icon, the teacher shared it with the school principal, who then contacted the superintendent and the local police. The student expressed regret, but was still suspended for five days, pending a hearing. Nonetheless, the teacher requested, and was allowed, to stop teaching the student’s class. The police investigation determined that the icon had been created as a joke, that the student understood the severity of the incident, and that the student was no real threat to the teacher. A psychologist evaluated the student and reached the same conclusion as the police.

At the school’s disciplinary hearing, the hearing officer determined that the student’s actions should not be construed as a joke, that he had threatened the health and welfare of a school staff member, and that he had caused substantial disruption within the school due to the reassignment of the teacher, the internal and police investigations, and the need to interview other students during class time. As a result, the hearing officer recommended that the student be suspended for one full semester, and the Board of Education approved the recommendation. Shortly thereafter, the student’s parents filed suit against the school district alleging violation of the student’s First Amendment rights.

The Second Circuit applied the Tinker analysis to the incident, holding that, even if the student’s “transmission of an icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of Tinker,” it “crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline of the school.’” Accordingly, the student’s speech was not protected under the First Amendment, even though it was off-campus speech.

Contrary to the Second Circuit, the Third Circuit issued two decisions in 2011 in which it held the school districts could not discipline students for off-campus online speech. In Snyder v. Blue Mountain School District, a middle school student was suspended after creating a fake MySpace profile of the principal on the student’s home computer. Although the fake profile did not identify the principal by name, school or location, it did include his official photo, which was copied from the school’s website. The Third Circuit described the profile as follows:

The profile was presented as a self-portrayal of a bisexual Alabama middle school principal named “M–Hoe.” The profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family. For instance, the profile lists M–Hoe’s general interests as: “detention, being a tight ass, riding the fraintrain,” spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents.

At first, the profile could be viewed by anyone who knew the web address of the profile or who searched MySpace for one of its terms, but the student later restricted access to only her MySpace friends. The principal learned of the profile from another student, who printed a copy of it at the principal’s request. Two teachers informed the principal the day before he received a copy of the profile that students were discussing it in class, although the profile could not be accessed through a school computer. Although the student wrote a letter of apology to the principal and his wife, the student was suspended for 10 days.

The Third Circuit opined that, while the profile was “disturbing,” it was “so outrageous that no one took it content seriously.” The Third Circuit applied the Tinker standard to the incident and found that the school district did not present any evidence of substantial and material disruption as a result of the profile. Even though the student made the profile available to her friends, the Third Circuit found that she had taken steps to make the profile private and, thus, did not intend for it to reach the school. The Third Circuit further considered whether the Fraser standard could be applied, but found that it did not apply to off-campus speech. Accordingly, the Court held that the school district had violated the student’s First Amendment rights by disciplining her for the profile.

Likewise, in Layshock v. Hermitage School District, a high school student created a MySpace “parody profile” of the principal after school, using the student’s grandmother’s computer. The student copied the principal’s photo from the school website, but did not use any other school resources to create the profile. In creating the profile, the student answered survey questions indicating that the principal was an alcoholic, shoplifted, used steroids, smoked marijuana, and took drugs.

The student allowed other students within the district to access the profile by listing them as friends, and most, if not all, of the high school students eventually had access to the profile. After the student created the profile, at least three other students created profiles which were more vulgar and offensive. The plaintiff student shared his version of the profile with other students during class. During the course of the investigation, the student admitted that he had created one of the profiles and voluntarily apologized to the principal. Nonetheless, the student was suspended for 10 days, placed in an alternative program, banned from all extracurricular activities, and not allowed to participate in graduation.

Again, the Third Circuit applied the Tinker standard to this incident. The Third Circuit held that the student had en-
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gaged in off-campus conduct while creating the profile and, as such, the school district’s discipline violated the student’s First Amendment rights. Furthermore, although the student’s speech reached into the school, the court held that that did not transform the speech into on-campus speech. Because the student’s speech did not cause disruption within the school, the school district violated the student’s First Amendment rights by imposing discipline.

The Fourth Circuit also addressed the issue of student free speech with respect to social media in Kowalski v. Berkeley County Schools. In Kowalski, a senior girl created a MySpace page titled “S.A.S.H.” using her home computer. Kowalski claimed the acronym stood for “Students Against Sluts Herpes.” Kowalski sent invitations to approximately 100 students to join the group page. Another student joined the page from a school computer and then uploaded pictures which alleged that the victim of the S.A.S.H. page had herpes and was a whore. Kowalski and other students at the high school commented how funny the pictures were and made other negative comments about the student victim.

The victim’s father contacted the student who had posted the photos to express his anger, causing him to contact Kowalski. However, Kowalski was unable to delete the S.A.S.H. group and photos and instead changed the group page title to “Students Against Angry People.” The next morning, the victim and her father made a harassment complaint regarding the S.A.S.H. page and provided a printout of the information. The school administration investigated the complaint and found that Kowalski had violated the policy against “harassment, bullying, and intimidation” and disciplined her with a 10-day suspension and a 90-day “social suspension.”

Kowalski sued the district, asserting that the disciplinary action violated her free speech rights because she had created the MySpace page from home. The Fourth Circuit disagreed, stating “the language of Tinker supports the conclusion that public schools have a ‘compelling interest’ in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.” The Kowalski Court also noted that bullying has become a “major concern” in the public schools and that schools have a duty to protect students from harassment and bullying. Thus, the court was “confident that Kowalski’s speech caused the interference and disruption described in Tinker as being immune from First Amendment protection.”

Although Kansas has not yet experienced appellate litigation on the issue of discipline for off-campus student speech, Kansas has enacted a statute to address the concept of cyberbullying. The statute defines “cyberbullying” as “bullying by use of any electronic communication device through means including, but not limited to, email, instant messaging, text messages, blogs, mobile phones, pagers, online games, and websites.” In addition, the statute defines “bullying” as:

(A) Any intentional gesture or any intentional written, verbal, electronic or physical act or threat either by any student, staff member or parent towards a student or by any student, staff member or parent towards a staff member that is sufficiently severe, persistent or pervasive that such gesture, act or threat creates an intimidating, threatening or abusive educational environment that a reasonable person, under the circumstances, knows or should know will have the effect of:

(i) Harming a student or staff member, whether physically or mentally;

(ii) damaging a student’s or staff member’s property;

(iii) placing a student or staff member in reasonable fear of harm to the student or staff member; or

(iv) placing a student or staff member in reasonable fear of damage to the student’s or staff member’s property;

(B) cyberbullying; or

(C) any other form of intimidation or harassment prohibited by the board of education of the school district in policies concerning bullying adopted pursuant to this section or subsection (c) of K.S.A. 72-8205, and amendments thereto.
develop plans to address bullying “on school property, in a school vehicle, or at a school sponsored activity or event.” Any plan developed by the school districts must include training for staff members and students. While the statute provides a definition of cyberbullying that would seem to permit discipline for off-campus conduct, the statute then limits the board policies and plan to address bullying to conduct occurring “on school property, in a school vehicle, or at a school sponsored activity or event.”

Conclusion

As this discussion demonstrates, there are no clear answers to questions regarding the protection of student speech by the First Amendment. Each instance must be carefully considered based upon its unique facts. Even so, without further guidance from the U.S. Supreme Court regarding off-campus student speech, particularly on the Internet and social media, school districts will continue to struggle in determining whether disciplinary action should be imposed.

About the Author

Sarah J. Loquist-Berry graduated magna cum laude from Pittsburg State University in 1994 with a Bachelor of Science degree in education. She received her legal education at Washburn University School of Law, where she served as business editor of the Washburn Law Journal, and graduated magna cum laude in 1997. Loquist-Berry currently serves as an attorney with the Kansas Association of School Boards in Topeka.

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Regulating Speech

ENDNOTES

1. See Snyder v. Phelps, ___ U.S. ___, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011). The U.S. Supreme Court described this dilemma as follows: “Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”

2. Id. at 1220.


4. Note that this article is not intended to comprehensively address all of the case law regarding freedom of speech for students, nor does it address the case law regarding freedom of speech for teachers/public employees. Rather, the discussion should be considered a starting point for any research needed on those issues. Accordingly, this article will focus primarily on U.S. Supreme Court, Tenth Circuit Court of Appeals, and Kansas Supreme Court cases.

5. U.S. Const., Amend. 1.


8. Id. at 612-13.


10. Id. at 586-87.


12. Id. at 595.

13. Id.

14. Tinker, 393 U.S. at 506.

15. Id. at 504.

16. Id.

17. Id.

18. Id. at 508.

19. Id.

20. Id.

21. Id. at 509 (quoting Burnside v. Byars, 363 F.2d at 749).

22. For example, the Tenth Circuit Court of Appeals has held that a school district may regulate certain speech by policy if it can demonstrate actual disorder or disturbance involving such speech. However, the school district must implement such policy in an equal and consistent manner. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366-68 (10th Cir. 2000). In that case, the speech at issue was the student’s drawing of a Confederate flag, which was deemed to be a violation of the school district’s policy against racial harassment and intimidation. Id. at 1363. The policy had been implemented in response to racial tension and violence in the schools, some of which was related to the Confederate flag. Id. at 1362. Although no disruption had occurred as a result of the specific incident, the school district was not required to wait for a disruption because it was entitled to forecast the likelihood of disruption based upon previous incidents. Id. at 1366-67. See also Taylor v. Rowseal Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (holding that the district did not violate student free speech or free exercise rights by banning distribution of rubber fetus dolls).


24. The content of the student’s speech is set forth in Justice Brennan’s concurring opinion, as follows: “I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

“I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

“Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

“Jeff is a man who will go to the very end—even the climax, for each and every one of you.

“So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.”

Id. at 687.

25. Id. at 677-78.

26. Id. at 678.

27. Id. at 678-79.

28. Id. at 681.

29. Id. at 682.

30. Id. at 681.

31. Id. at 683.


33. Id. at 397.

34. Id. at 396-97.

35. Id. at 398. The suspension was later reduced to eight days. Id.

36. Id. at 398.

37. Id. at 403.

38. Id. at 404-05 (quoting Fraser, 478 U.S. at 682).

39. Id. at 405.

40. Id. at 407.

41. Id. at 408.

42. Blaine v. Bd. of Educ., Haywille Unified Sch. Dist. No. 261, 210 Kan. 560, 566, 502 P2d 693, 698 (1972) (“A student has a right to govern his own personal appearance but the state has a countervailing interest in providing public education for all students, and on proper showing that state interest may justify intrusion upon the student’s individual right.”). That case involved three male students who were suspended for willfully violating the school regulation regarding the length of hair for male students. Id. at 562.

43. Id. at 566.

44. Id. at 566-67.

45. Id. at 567.

46. Id.

47. Id.

48. Id.

49. Id. at 571.

50. Id. at 570.

51. West, supra note 22, 206 F.3d at 1366. See also Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013) (not a violation of student’s free speech rights to prohibit clothing bearing the Confederate flag): Dariano v. Morgan Hill Unified Sch. Dist., ___ F.3d __, 2014 WL 768797 (9th Cir. Feb. 27, 2014) (no violation of student free speech to prohibit clothing bearing American flag after tension between Caucasian and Hispanic students).


53. B.H. v. Easton Area Sch. Dist., 725 F.3d 293 (3rd Cir. 2013). In that case, the court held that the district could not ban middle school students from wearing bracelets which said “I ♥ boobies! (KEEP A BREAST).” The bracelets were worn to promote breast cancer awareness, did not cause actual disruption, and were not considered plainly lewd. Id. at 320-23.


55. Id. at 262.

56. Id. at 263.

57. Id. The principal was unaware that the journalism teacher had deleted the student’s name from the final draft of the article. Id.
to impart particular knowledge or skills to student participants and audiences.” Id.
63. Id. at 271.
64. Id. at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493, 74 S. Cr. 686, 691, 98 L. Ed. 873 (1954)).
65. Id. at 272-73.
66. K.S.A. 72-1504, et seq. The historical annotations of the Student Publications Act indicate it was enacted in 1992 (likely in response to the Hazelwood decision) and that the Act has not been changed since it was first enacted.
67. K.S.A. 72-1505(b).
68. K.S.A. 72-1506(a). Thus, the provision seeks to limit the control school districts are allowed to exercise over student publications pursuant to Hazelwood.
69. K.S.A. 72-1506(c).
70. Id. The grounds for suspension or expulsion of a student are set forth in K.S.A. 72-8901, and include the following: (1) “[w]illful violation of any published regulation for school conduct adopted or approved by the board”; (2) “conduct which substantially disrupts, impedes or interferes with the operation of any public school”; (3) “conduct which endangers the safety of others or which substantially impinges upon or invades the rights of others at school, on school property, or at a school supervised activity”; (4) “conduct which, if the student is an adult, constitutes the commission of a felony [or misdemeanor] or, if the student is a juvenile, would constitute the commission of a felony [or misdemeanor] if committed by an adult;” or (5) “disobedience of an order of a teacher, peace officer, school security officer or other school authority when such dis- obedience can reasonably be anticipated to result in disorder, disruption or interference with the operation of any public school or substantial and material impingement upon or invasion of the rights of others.” K.S.A. 72-8901(a)-(f).
71. K.S.A. 72-1506(c).
72. K.S.A. 72-1506(b).
73. K.S.A. 72-1506(d).
74. K.S.A. 72-1506(d). The section further states that “no such ad- viser or employee shall be terminated from employment, transferred, or relieved of duties imposed under this subsection for refusal to abridge or infringe upon the right to freedom of expression conferred by this act.” Id.
75. K.S.A. 72-1506(e) (stating that student publications are not expres- sion of district policy; district, board, and employees are not responsible in civil or criminal action for statements in student publications; and student editors and authors who are 18 or older can be sued in civil or criminal action for involvement in preparation and publication of student work).
76. Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219 (10th Cir. 2009).
77. Id. at 1222.
78. Id. The speech included the following relevant statements:
We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His name is Jesus Christ. If you don’t already know him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him.
79. Id. at 1222-23.
80. Id. at 1229.
81. Id. at 1229 (quoting Hazelwood, 484 U.S. at 273).
82. Id. at 1231.
83. Id. at 1231.
84. Id.
85. Id. at 1232-33.
86. Id. at 1233.
87. Nurre v. Whitehead, 580 F.3d 1087 (9th Cir. 2009).
88. Id. at 1090.
89. Id.
90. Id. at 1093 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S. Cr. 2746, 105 L. Ed. 2d 661 (1989) (“[m]usic is one of the oldest forms of human expression,’ and ‘as a form of expression and communica- tion, [it] is protected under the First Amendment’.”).
91. Id. at 1095, 1098.
92. Id. at 1094-95.
93. Id. at 1095.
94. Id. at 1096-98.
95. Id. at 1098.
97. Id. at 35-36. Mr. VanderMolen was the student’s English teacher at the time. Id. at 36.
98. Id. at 36.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id. at 36-37.
105. Id. at 37.
106. Id.
107. Wisniewski, 494 F.3d at 38-39 (citing Morse v. Frederick, 551 U.S. 393, 127 S. Cr. 2618, 2625, 168 L. Ed. 2d 290 (2007) (quoting Tinker, 393 U.S. at 513)). Other circuits have also held that off-campus threats made via social media are not protected speech. See D.J.M. v. Hannibal Public Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011); Wynar v. Douglas County Sch. Dist., 728 F.3d 1062 (9th Cir. 2013). Likewise, an elementary school student who wished to “[b]low up the school with the teachers in it” as part of drawing created in class was not protected from disciplinary action based upon his free speech rights. Cuff ex. rel B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109 (2d Cir. 2012).
108. Id. at 39-40. The Second Circuit reached a similar decision in Don- inger v. Niehoff, 642 F.3d 334 (2d Cir. 2011).
109. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3rd Cir. 2011); Laszloch v. Hermitage Sch. Dist., 650 F.3d 205 (3rd Cir. 2011). Both deci- sions were issued on June 13, 2011.
110. Snyder, 650 F.3d at 920.
Regulating Speech

111. Id. at 920.
112. Frain was the last name of the principal’s wife, who worked in the school as a guidance counselor.

113. Id. at 920.
114. Id. at 921.
115. Id. at 921.
116. Id. at 922.

117. Id.
118. Id. at 921.
119. Id. at 926, 928.
120. Id. at 930-31.
121. Id. at 932.
122. Id. at 933.
123. Layshock, supra note 109, 650 F.3d at 207.

124. Id. at 207-08.
125. Id. at 208.
126. Id.
127. Id.
128. Id. at 209.
129. Id.

130. Id. at 210. No other students were disciplined in connection with the profiles. Id.

131. Id. at 213-14.
132. Id. at 216.
133. Id.
134. Id. at 219.

136. Id. at 567.
137. Id. However, another student who posted to the page claimed it stood for “Student’s Against Shay’s Herpes.” Id. Shay was the first name of the student who was the target of the MySpace page. Id.

138. Id.
139. Id. at 568. The photos included a picture of the victim student with a label “portrait of a whore” and another picture of the victim student with red dots on her face and “a sign near her pelvic region that read, ‘Warning: Enter at your own risk.’” Id.

140. Id.
141. Id.
142. Id.
143. Id. at 568-69.
144. Id.
145. Id. at 570-71.
146. Id. at 572.
147. Id.
148. Id.
149. Id. at 577.
153. K.S.A. 2013 Supp. 72-8256 (b), (c).
155. K.S.A. 2013 Supp. 72-8256 (b), (c).
**FACTS:** The property at issue in this eminent domain proceeding is a 36.2 acre, unimproved tract of land in Anderson County. Property owners Donald and Susan Diebolt purchased the property for $250,000 in 2006 for the purpose of adding a Garnett location to their lumberyard business, but no improvements had been made to the property before USD 365 initiated condemnation proceedings. After the school district filed its petition, the trial judge appointed three appraisers who valued the property at $278,800. The Diebolts appealed the appraiser’s award and requested a jury trial. The Diebolts claimed the property was worth $432,000 based on multiple factors, but the court would not allow Diebolt to explain the cost appraisal method by which he determined the value because he was not an expert. The school district appraised the property between $188,000 and $249,000 based on comparable sales. The jury returned a verdict of $249,000.

**ISSUES:** (1) Eminent domain and (2) admission of evidence.

**HELD:** Court held a property owner must base his or her opinion on matters that are relevant to the jury’s determination of fair market value. And if the property owner is basing his or her opinion on the cost appraisal method, a foundation must be laid establishing that the owner has the requisite expertise to perform the appraisal. Court held the trial judge allowed a property owner, who did not have appraisal expertise, to express a valuation opinion but appropriately applied Kansas case law and excluded testimony that was not relevant to the jury’s determination and was beyond the owner’s expertise.

**STATUTES:** K.S.A. 26-501, -504, -508, -513; and K.S.A. 60-401, -405, -456

**SCHOOL FINANCE**

**GANNON ET AL. V. STATE OF KANSAS**

**SHAWNEE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS**

**NO. 109,335 – MARCH 7, 2014**

**FACTS:** This is a “school finance” case that concerns Article 6 of the Kansas Constitution as well as various Kansas educational statutes, including the School District Finance and Quality Performance Act (SDFQPA) and the capital outlay levy. The defendant, the state of Kansas, appeals from various holdings by a three-judge district court panel. The panel’s holdings included a determination that the state violated Article 6 when the legislature underfunded K-12 public education between fiscal years 2009 and 2012, as well as a related determination that the legislature failed to consider the actual costs of providing a constitutionally required education before making its funding decisions. Its holdings also concluded that additional constitutional violations occurred because the legislature either withheld or reduced certain funding to which school districts were statutorily entitled. The panel enjoined the state from taking certain actions regarding school finance legislation. The plaintiff school districts and 31 individuals named in the pleadings as students and their guardians, cross-appealed arguing the panel was wrong when it rejected education as a fundamental right under the Kansas Constitution, denied their substantive due process and equal protection claims, and refused to order the state to make “capital outlay state aid” payments for fiscal year 2010 to which many districts were entitled by statute. They also complained the panel set “base state aid per pupil” at only $4,492 for fiscal year 2014 and denied their claims for attorney fees.

**ISSUE:** School finance

**HELD:** Court held the panel correctly ruled that the individual plaintiffs did not have standing to bring any claims, and the plaintiff school districts did not have standing to bring their equal protection and due process claims. As for the districts’ claims arising under Article 6 of the Kansas Constitution, Court held that those claims are justiciable because they are not political questions. But Court also held the panel did not apply the correct constitutional standard in determining that the state violated the Article 6 requirement of adequacy in public education and ordered the panel to apply the standards set out in *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186 (Ky. 1989) and presently codified in K.S.A. 2013 Supp. 72-1127. Court remanded to the panel to apply the standard articulated and to make additional findings. As for the capital outlay funding claims, Court held that the panel correctly ruled that the state created unconstitutional, wealth-based disparities by withholding all capital outlay state aid payments to which certain school districts were otherwise entitled under K.S.A. 2012 Supp. 72-8814(c). Court additionally held that the panel correctly refused to order payment of capital outlay state aid to which districts were otherwise en...
ruled that the state created unconstitutional, wealth-based disparities by prorating the supplemental general state aid payments to which certain districts were entitled under K.S.A. 2012 Supp. 72-6434 for their local option budgets. Lastly, Court held that the panel correctly ruled that the plaintiffs were not entitled to attorney fees. Court remanded for the panel to enforce the affirmed rulings on equity and to fashion appropriate remedies. Court remanded for the panel to apply the correct constitutional standard to plaintiffs’ claims arising under Article 6 of the Kansas Constitution.

STATUTES: K.S.A. 45-222; K.S.A. 60-237, -1507, -2101 K.S.A. 72-1127, -64b02, -64b03, -6405, -6431, -6434, -8801, -8804, -8814; K.S.A. 75-3701, -3722, -3725, -6702

CRIMINAL

STATE V. BROWN
ATCHISON DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS

NO. 105,678 – FEBRUARY 28, 2014

FACTS: A jury found Brown guilty of rape and aggravated indecent liberties with a child. The elements jury instructions did not include Brown’s age, but the jury answered in the affirmative to special questions on the verdict forms as to whether Brown was 18 years of age or older at the time the offenses were committed. In the process of sentencing Brown to two consecutive off-grid sentences of life imprisonment, the prosecutor committed reversible misconduct during closing arguments; (5) the district court erred in imposing lifetime electronic monitoring as part of the sentences; (6) the journal entry of sentencing did not correctly reflect the sentences pronounced from the bench; and (7) cumulative error denied him a fair trial.

ISSUES: (1) Jury verdict, (2) special jury questions, (3) sufficiency of the evidence, (4) prosecutorial misconduct, (5) sentencing, and (6) cumulative error

HELD: Court held that failing to include the element of age in the jury instructions on the crimes elements and submitting the same to the jury as special questions on the verdict forms was clearly erroneous. However, the Court applied a harmless error analysis and affirmed Brown’s convictions. Court found that the prosecutor misstated the sexual assault nurse’s testimony, but held that the misconduct did not require a reversal. Court rejected Brown’s claims of misconduct concerning prosecutor remarks about Brown’s sexual desires and remarks about Brown’s treatment of his wife that had no relevance to the trial. Court held that sufficient evidence supported Brown’s convic-
tions, that Brown failed to preserve the issue of accepting the jury’s verdicts without inquiring into their accuracy, and cumulative error did not affect the outcome of the trial. Court vacated the erroneous portions of Brown’s sentence and remanded to the district court to vacate the references to lifetime electronic monitoring and lifetime post-release supervision.

STATUTES: K.S.A. 21-3502, -3504, -4643, -6817; K.S.A. 22-3421, -3423, -3717; and K.S.A. 60-261

STATE V. CHARLES
RENO DISTRICT COURT – AFFIRMED IN PART AND VACATED IN PART
COURT OF APPEALS – AFFIRMED IN PART AND VACATED IN PART
NO. 102,981 – FEBRUARY 28, 2014

FACTS: Jury convicted Charles on eight of nine counts each of aggravated burglary and misdemeanor theft. At sentencing hearing, district judge ordered Charles to pay restitution “as contained within the presentence report” which indicated that restitution for one victim was yet to be determined. Restitution order filed three weeks later set $1,192.69 restitution for that victim, and included restitution for victim on charges that led to acquittal. Charles appealed, arguing: (1) insufficient evidence supported both alternative means of committing aggravated burglary by “entering into” and “remaining within” each home; (2) insufficient evidence supported two misdemeanor convictions when uncontroverted evidence showed he took more than $1,000 in property; (3) district court lacked subject matter jurisdiction to impose additional restitution after sentencing hearing ended, and to set restitution for victim on charges that led to acquittals; and (4) district court erred in using Charles’ criminal history not proved to a jury to increase Charles’ sentence. In unpublished opinion Court of Appeals vacated restitution order for victim related to acquittals, and affirmed Charles’ convictions and sentence. Review granted.

ISSUES: (1) Sufficiency of evidence of aggravated burglary, (2) sufficiency of evidence of misdemeanor theft, (3) subject matter jurisdiction to impose additional restitution, and (4) criminal history score

HELD: Aggravated burglary, K.S.A. 21-3716, does not restrict application of its “remaining within” language to instances when an initial entry is lawful. In this case the state presented sufficient evidence that Charles both entered into and remained within the victim’s home. As in State v. Frierson (decided this same date), the holding in State v. Gutierrez, 285 Kan. 332 (2007), is reaffirmed.

Kansas law presumes all personal property has some value. To prove misdemeanor theft, state need not prove the value of stolen property was less than $1,000. In this case, despite testimony of two burglary victims that their stolen property was worth more than $1,000, there was sufficient evidence of misdemeanor theft.

On facts in case, the additional restitution award of $1,192.69 set only by order following Charles’ sentencing hearing must be vacated because district court lacked subject matter jurisdiction to enter the order. Judge’s restitution procedure did not measure up to relatively lax standard of practice prior to new standard set forth in State v. Hall (decided this same date).
Appellate Decisions

Criminal history claim is defeated by State v Ivory, 273 Kan. 44 (2002).

STATUTES: K.S.A. 21-3701(a)(1), -3701(b), -3701(b) (3), -3701(b)(5), -3716, -3716(a)(1), -3716(b); and K.S.A. 22-3421

STATE V. DEAN
MEADE DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS
NO. 105,625 – FEBRUARY 28, 2014

FACTS: Ten-year-old S.W. advised her teacher that she and her “grandpa” touched each other in “private places” and it made S.W. uncomfortable. S.W. also said that her grandpa had given her a ring and said he wanted to marry her. After S.W.’s teacher reported S.W.’s allegations, law enforcement conducted an investigation through which it learned that 57-year-old Dean, who was unrelated to S.W., was the man she referred to as “grandpa.” A subsequent search of Dean’s home revealed a number of videotapes, including one in which two young girls exposed their genitalia. A jury convicted Dean of rape, aggravated criminal sodomy, sexual exploitation of a child, and two counts of aggravated indecent liberties with a child.

ISSUES: (1) Prior crimes evidence, (2) jury instructions, (3) prosecutorial misconduct, and (4) sentencing

HELD: Court held the trial court properly admitted the factual basis for Dean’s 1984 conviction for indecent liberties with a child and also a video focusing on young girls’ knees and genital regions and Dean cuddling with a young girl. Court found the trial court erroneously instructed the jury that the other crimes evidence could only be considered for purpose of proving intent or knowledge. But, Court held the instruction essentially granted Dean more protection than the law afforded him. Court found Dean waived his Confrontation Clause challenge by failing to timely and specifically object that the district court erroneously admitted an excerpt from his 1984 PSI regarding his conviction of indecent liberties with a child. Court held the prosecutor’s comment that Dean was “guilty, guilty, guilty, guilty, guilty” was a shorthand reference to the conclusion to be drawn from the evidence regarding each of Dean’s five charges. Court held the prosecutor inappropriately commented that one of the victim’s friends had not reported that Dean sexually abused her because “it hadn’t happened yet” but the error did not require reversal. Court held that Dean’s sentence was illegal because the trial court departed from the standard Jessica’s Law sentence of a minimum mandatory 25 years to life imprisonment and it imposed an indeterminate sentence of 20 years to life instead of departing to the sentencing guidelines.


STATE V. EDDY
SALINE DISTRICT COURT – AFFIRMED
NO. 106,132 – MARCH 21, 2014

FACTS: Eddy was convicted on multiple counts of sex offenses against 4-year-old granddaughter. On appeal he claimed there was insufficient evidence to support rape conviction because state failed to prove both alternative means in statutory definition of sexual intercourse. He also claimed the district court erred in denying Eddy’s request for psychological evaluation of the victim to determine admissibility of victim’s testimony.

ISSUES: (1) Alternative means – sexual intercourse definition and (2) psychological evaluation

HELD: Alternative means claim is defeated by State v Britt, 295 Kan. 1018 (2012). There was sufficient evidence in this case to support the sexual intercourse element of crime of rape.

No abuse of discretion in district court’s denial of motion for an evaluation. Nonexclusive factors for assessing existence of compelling circumstances warranting psychological evaluation of a sex abuse victim are stated and applied. Eddy failed to establish any valid reason that would support a finding of compelling circumstances. A psychological examination of the victim would have added nothing to the question of Eddy’s specific intent, and his motion for evaluation appeared to be a prime example of a fishing expedition.

STATUTES: K.S.A. 21-4643(d) and K.S.A. 22-3601(b)(1)

STATE V. FRIERSON
SEDGWICK DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED
NO. 103,304 – FEBRUARY 28, 2014

FACTS: Jury convicted Frierson of aggravated robbery and aggravated burglary involving attack of victim in home by two intruders. District court overruled Frierson’s motion in limine to suppress admission of a cap the victim knocked off one of the intruders. Frierson claimed chain of custody was broken by investigating officer not appearing at trial. At sentencing, district judge ordered $950 in restitution and held any further amount of restitution open for 30 days to determine victim’s dental expenses. A subsequent order entered without further hearing increased Frierson’s restitution amount to $1262. Frierson appealed arguing: (1) insufficient evidence supported both alternative means of aggravated burglary by entering or remaining within victim’s residence; (2) district court erred in admitting cap as evidence, (3) district court erred in denying Frierson’s request to instruct jury on battery as lesser included offense, (4) cumulative error denied Frierson a fair trial, (5) district court lacked jurisdiction to increase amount of restitution in order filed 28 days after sentencing hearing, and (6) district court improperly used Frierson’s criminal history to enhance sentence. Court of Appeals affirmed in unpublished opinion. Review granted on all issues.

ISSUES: (1) Sufficiency of evidence of aggravated burglary, (2) motion in limine to suppress evidence, (3) lesser included offense instruction, (4) cumulative error, (5) subject matter jurisdiction to impose additional restitution, and (6) criminal history score

HELD: State v Gutierrez, 285 Kan. 332 (2007), was reaffirmed and remains firmly in place as the legal standard of proof. Language of K.S.A. 21-3716 does not restrict application of its “remaining within” language to instances in which an initial entry is lawful. Sufficient evidence supported Frierson’s aggravated burglary conviction.

District judge did not err in denying Frierson’s motion in limine. Court of Appeals’ decision was affirmed even though
panel erroneously reviewed district judge's ruling on motion under abuse of discretion standard. Correct multistep evidentiary standard was stated.

No error in not instructing jury on battery. Court of Appeals reached right result, but flaws in panel's reasoning were noted. Because there is no intent requirement attached to the infliction of bodily harm in aggravated robbery, battery is not a lesser included offense of aggravated robbery.

No error to support Frierson's claim of cumulative error.

New standard set forth in State v. Hall (decided this same date) to be followed in setting restitution was satisfied under circumstances in this case despite absence of a continued hearing in open court with Frierson present and no explicit waiver of his right to be present.

Criminal history score claim is defeated by State v. Ivory, 273 Kan. 44 (2002).

STATUTES: K.S.A. 21-3107, -3107(2)(b), -3412(a), -3412(a)(1), -3412(a)(2), -3426, -3427, -3716; and K.S.A. 22-3421

STATE V. HALL

SHAWNEE DISTRICT COURT – AFFIRMED

COURT OF APPEALS – AFFIRMED

NO. 102,495 – FEBRUARY 28, 2013

FACTS: Hall was convicted of attempted rape, attempted second-degree murder, and aiding a felon. District court imposed prison term and ordered restitution to remain open for 30 days. At later hearing, district court ordered Hall to pay more than $32,000 in restitution, including $469 for relocation expenses of attempted rape victim. Hall appealed, arguing in part the district court lacked subject matter jurisdiction to alter the sentence by imposing restitution after pronouncement of sentence. Alternatively he argued the victim's relocation expenses were not caused by the crime and thus were improper. In unpublished opinion Court of Appeals affirmed the restitution order, relying on State v. Cooper, 267 Kan. 15 (1999). Review granted on restitution arguments.

ISSUES: (1) Subject matter jurisdiction to set restitution amount and (2) relocation expenses

HELD: District court had subject matter jurisdiction in this case to set amount of Hall's restitution, but standard practice to be followed in future cases is set forth. Because restitution constitutes a part of a criminal defendant's sentence, its amount can be set only by a district judge in open court with the defendant present. Until any applicable restitution amount is decided, a defendant's sentencing is not complete. A sentencing hearing may be continued or bifurcated so that restitution is ordered at one setting and the amount decided at a later setting. In such instances from this date forward, a district judge should specifically order the continuance or bifurcation. State v. McDaniel, 292 Kan. 443 (2011), and related cases were discussed. A premature notice of appeal seeking review of a conviction and sentencing yet to be completed remains dormant until final judgment including the entire sentence is pronounced from the bench.

Scope of restitution statutes, K.S.A. 21-4603d(b)(1) and K.S.A. 21-4610(d)(1), is noted. Under facts in this case, substantial competent evidence supported district judge's determination that relocation expenses incurred were caused by Hall's crime, thus restitution award was proper under K.S.A. 21-4603d(b)(1). Court of Appeals' categorical analysis on moving expenses, by examining how other jurisdictions treated such expenses as part of restitution, is disapproved.

STATUTES: K.S.A. 21-4603d(b)(1), -4610(d)(1), -4721(i); K.S.A. 22-3405(1), -3424(c), -3601, -3608, -3608(c); and K.S.A. 2002 Supp. 21-4603d(b)(1)

STATE V. MORRIS

CRAWFORD DISTRICT COURT – AFFIRMED

NO. 107,768 – MARCH 7, 2014

FACTS: Morris was imprisoned after conviction on two counts of felony murder and one count of aggravated arson. Although all involved in Morris' sentencing—the prosecution, the defense, and the district court judge—recommended that Morris serve his time in a security hospital, the Department of Corrections has chosen to house him in one of Kansas' penitentiaries. This appeal arises out of the denial of Morris' motion to withdraw his no contest pleas to the three charges. Morris argues that the denial was an abuse of discretion.

ISSUE: Motion to withdraw plea

HELD: Court found no abuse of discretion concerning the judge's failure to inquiere explicitly about promises at the plea hearing or Morris' inability to understand the only relevant promise that had been made and its distinction from those that had not been made. Court rejected Morris' claims of ineffective assistance of counsel based on his claims that he was forced to choose between his Fifth and Sixth amendment rights and that counsel waited until the last minute to file the motion to suppress. Court also stated that the record does not support appellate counsel's argument that Morris did not understand a no contest plea or its likely consequences. Court found no cumulative error. Court ultimately found no manifest injustice that compelled withdrawal of Morris' plea.

STATUTES: K.S.A. 21-4603d; K.S.A. 22-3210; and K.S.A. 75-5209

STATE V. MOSHER

SHAWNEE DISTRICT COURT – AFFIRMED

NO. 107,961 – MARCH 14, 2014

FACTS: Mosher entered guilty pleas to felony murder and conspiracy to commit first-degree murder. On appeal from sentences imposed, Mosher claimed the sentencing judge abused its discretion in ordering sentences to be served consecutively rather than concurrently as recommended in the plea agreement.

ISSUE: Sentencing discretion

HELD: Based on facts in case, a reasonable person could agree with sentencing judge's conclusion that consecutive sentences were appropriate. Sentencing judge considered the amount of planning and effort that went into the violent murder and how it could have been prevented. Those considerations were not offset by Mosher's acceptance of responsibility, the nature of rehabilitative programs to be completed before his release on parole, and/or the savings resulting from his decision to plead instead of exercising right to jury trial.

STATUTES: K.S.A. 21-4701 et seq., -4721(c)(1); and K.S.A. 22-3601(b)(1)
STATE V. SANTOS-VEGA
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
NO. 104,485 – MARCH 21, 2014

FACTS: Santos-Vega was convicted of two counts of aggravated indecent liberties with a child. On appeal he challenged the constitutionality and legality of his hard 25-year sentence. He also claimed: (1) K.S.A. 21-3504(a)(3)(A) sets out alternative means of committing aggravated indecent liberties, (2) jury should have been instructed to unanimously agree upon specific act underlying each of the convictions, (3) district court erred in not granting motion for mistrial after detective violated order in limine and Doyle v. Ohio, 426 U.S. 610 (1976), by testifying that Santos-Vega invoked rights under Miranda v. Arizona, 384 U.S. 466 (1966), and (4) cumulative error denied him a fair trial.

ISSUES: (1) Alternative means – aggravated indecent liberties, (2) unanimous jury verdict, (3) violation of order in limine, and (4) cumulative error

HELD: Alternative means claim was defeated by controlling Kansas Supreme Court cases, e.g., State v. Newcomb, 296 Kan. 1012 (2013).

There was unanimity error in this multiple acts case. State did not inform jury which of three acts to rely upon in finding Santos-Vega guilty of the two charged offenses, and district court failed to give unanimity instruction.

District court abused its discretion in failing to treat detective’s volunteered and nonresponsive testimony as a fundamental failure in the trial proceedings. District court’s ruling on motion for mistrial was based on erroneous conclusions of both fact and law, and detective’s testimony implicated Santos-Vega’s constitutional right to remain silent.

Cumulative impact of those two errors of substantial magnitude substantially prejudiced Santos-Vega’s right to a fair trial. State failed to prove beyond a reasonable doubt that the errors did not contribute to guilty verdicts. Reversed and remanded for a new trial. Sentencing issues not addressed.


STATE V. SCHUMACHER
WICHITA DISTRICT COURT – AFFIRMED
NO. 106,103 – MARCH 6, 2014

FACTS: Schumacher shot and killed his ex-wife while his daughter watched nearby, and was convicted of first-degree premeditated murder and endangering a child. On appeal Schumacher claimed insufficient evidence supported both convictions, and claimed district court abused its discretion in refusing to grant motion for mistrial based on two allegations of prosecutorial misconduct in rebuttal closing argument: (1) when prosecutor asked jury to compare sound of gun cocking heard in open court with “click” heard on a recording of the crime, and (2) when he asked jury for justice for victim.

ISSUES: (1) Sufficiency of the evidence and (2) prosecutorial misconduct

HELD: Sufficient evidence supports both convictions. Under facts in the case, prosecutor fairly commented on the evidence and did not commit misconduct when he suggested the clicking sound heard when gun was cocked was the...
same clicking sound heard on video just prior to Schumacher shooting victim. Holding in *State v. Brinklow*, 288 Kan. 39 (2008), that prosecutor cannot ask jury to convict a defendant in order to give victim justice, was reiterated. Here, prosecutor erred when he twice asked for justice for victim, but under facts in case those brief comments did not deny Schumacher a fair trial.

**STATE V. TAYLOR**

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

**NO 108,130 – MARCH 14, 2014**

**FACTS:** Twenty-three years after sentencing in a 1987 case, Taylor filed motion under K.S.A. 22-3504 to correct illegal sentence, claiming speedy trial violation deprived sentencing court of jurisdiction to impose sentence, and sentencing court improperly ordered sentences to run consecutive to sentences not yet imposed in another 1987 case. District court summarily denied the motion. Taylor appealed on both claims, and argued he was entitled to appointment of counsel under K.S.A. 22-3504.

**ISSUES:** (1) Speedy trial, (2) consecutive sentences, and (3) appointment of counsel

**HELD:** The speedy trial claim challenged Taylor’s convictions in the 1987 case, and cannot be raised in K.S.A. 22-3504 motion to correct illegal sentence. Sentencing court erred by running sentences in this case consecutive to sentences not yet impose in the other 1987 case pending against Taylor. Matter was remanded for district court’s consideration the whether Taylor was on release in that other case when the crimes in this case were committed, such that K.S.A. 1987 Supp. 21-4608(4) would have required consecutive sentences.

Appointment of counsel claim raised for first time on appeal was not considered.

**STATUTES:** K.S.A. 2011 Supp. 22-3601(b)(3); K.S.A. 22-3504; and K.S.A. 1987 Supp. 21-4608, -4608(4)

**STATE V. WILLIAMS**

**DOUGLAS DISTRICT COURT – AFFIRMED IN PART AND VACATED IN PART**

**NO. 106,166 – MARCH 7, 2014**

**FACTS:** Williams entered guilty pleas to charges of rape and sexual exploitation of a child. On rape conviction, hard 25-year prison sentence and lifetime post-release supervision sentence was imposed. For sexual exploitation conviction, district court imposed 34-month prison term and mandatory lifetime post-release supervision. Williams appealed the lifetime post-release supervision sentence for sexual exploitation of a child, claiming cruel and unusual punishment under Kansas and U.S. constitutions. In response brief the state argued in part: (1) no appellate jurisdiction to appeal the presumptive 34-month prison sentence; (2) challenge was rendered moot by lifetime supervision or parole for rape sentence; and (3) challenge was waived by not being raised in district court. No reply brief addressed the jurisdiction and mootness arguments.
ISSUES: (1) Appellate jurisdiction, (2) mootness, (3) preservation of constitutional claims, and (4) Eighth Amendment categorical proportionality claim

HELD: Related issues of first impression were involved. Because post-release supervision is a distinct portion of the sentence, a presumptive prison sentence does not render appellate court without jurisdiction under K.S.A. 21-4721(c)(1) to review imposition of a lifetime post-release supervision period. Also, consistent with State v. Ross, 295 Kan. 1126 (2012), mandatory lifetime post-release supervision for a sexual exploitation of a child conviction is not within the presumptive sentence for the crime, thus appellate review was not barred as to this aspect of Williams’ sentence.

Appeal is not moot. Williams’ lifetime supervision for rape must be vacated pursuant to State v. Casby, 293 Kan. 326 (2011), and there are pertinent distinctions between lifetime post-release supervision and parole.

Merits of Williams’ claim under § 9 of Kansas Constitution were not reviewed because claim was not preserved and that claim could not be raised for first time on appeal. Categorical claim under Eighth Amendment was considered notwithstanding Williams’ failure to comply with Rule 6.02(a)(5). Warning issued to future litigants that noncompliance with Rule 6.02(a)(5) will risk a ruling that an improperly briefed issue will be deemed waived or abandoned.

Lifetime post-release supervision for a first-time offender over age 18 convicted of sexual exploitation of a child for crimes involving possession of pornographic images of children under age 18 is not categorically disproportionate under Eighth Amendment to U.S. Constitution.


**Court of Appeals**

**Civil**

**DIVORCE AND MILITARY PENSION**

**FOX V. FOX**

**RILEY DISTRICT COURT – AFFIRMED**

**NO. 109,785 – MARCH 14, 2014**

FACTS: Edward and Veronia Fox were married in Germany on December 22, 1979. At that time, Edward Fox was a serviceman with the United States Army stationed in Germany and Veronia Fox was a German citizen. Approximately 17 years into the marriage, Edward Fox retired from the U.S. Army and began employment with the U.S. Civil Service. During the entirety of the marriage the parties were domiciled in Germany, and when the marriage failed, Edward Fox filed for divorce in the district court of Aschaffenburg, Germany. On October 13, 2009, that court entered a final decree of divorce. At Edward Fox’s request, and over Veronia Fox’s objection, the German court did not attempt to enter a judgment with respect to Edward Fox’s pensions, either from the Army or under the Federal Employee Retirement System. The German court stated that the question of whether Veronia Fox was entitled to share in Edward Fox’s pensions was “reserved” to the “law of obligation.” Following the divorce, sometime in 2011, Edward Fox was transferred to a Civil Service position at Ft. Riley. On April 2, 2012, Veronia Fox filed her petition in this case in Riley County District Court, seeking “to divide property not divided at the divorce.” The district court granted Edward Fox’s motion to dismiss on the grounds that it lacked subject matter jurisdiction. Specifically, the court held that Edward Fox’s “military and civil service pensions are his separate property” and that Kansas law cannot “operate to create marital property where there was no marriage existing at the time the owner of the property came to Kansas.” As such, the court determined that dismissal was necessary as it was “without subject matter jurisdiction to award any separately owned property of Mr. Fox, including his federal pensions, to his former wife.”

ISSUES: (1) Divorce and (2) military pension

HELD: Court stated the phrase “consent to the jurisdiction of the court” in the Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408(c)(4) (2012) refers to personal jurisdiction, not to subject matter jurisdiction. A party cannot consent to subject matter jurisdiction pursuant to the USFSPA. Court held under Kansas law, parties cannot confer subject matter jurisdiction by consent, waiver, or estoppel. Equitable arguments and doctrines, no matter how compelling, are insufficient by themselves to confer subject matter jurisdiction upon a court. Court concluded that the subject matter jurisdiction over marital property created by K.S.A. 2013 Supp. 23-2801 does not extend to include property of parties to a divorce action filed in a foreign country when the parties never lived in Kansas and did not own property in Kansas, prior to the divorce becoming final in the foreign country.

STATUTE: K.S.A. 23-201, -2801

**EMPLOYMENT SECURITY AND APPEAL TIME**

**NORRIS V. KANSAS EMPLOYMENT SECURITY BOARD OF REVIEW**

**SHAWNEE DISTRICT COURT – REVERSED AND REMANDED**

**NO. 109,428 – MARCH 21, 2014**

FACTS: Norris worked as a service technician for Air and Fire Systems from 2008 until 2011 when she voluntarily terminated her employment. Norris alleged she left her employment because the company’s president was wrongfully withholding commissions and behaving in an unprofessional manner. After Norris applied for unemployment benefits, an examiner for the Kansas Department of Labor denied her request, finding Norris left without good cause attributable to the work or her employer. Norris timely appealed. A KDOL referee affirmed
the examiner’s decision. On February 14, 2012, the KDOL board mailed its decision affirming the referee’s ruling and told her she had 16 days after the mailing date to appeal to the district court. Instead, Norris mailed a motion to reconsider on March 1, 2012, which was 16 days after the board had mailed its decision. The board informed Norris her motion was not a proper appeal. On March 21, 2012, – 36 days after the board’s initial decision – Norris filed an appeal in district court. The district court dismissed for lack of jurisdiction finding Norris’ motion for reconsideration did not toll the running of the 16-day appeal period. Norris filed a motion to alter or amend for applicability of provisions of the KJRA, but the court denied the motion, finding the arguments could have been presented prior to the court’s decision.

ISSUES: (1) Employment security and (2) appeal time

HELD: Court stated that actions of the Kansas Employment Security Board of Review are subject to judicial review under the KJRA. A party affected by the board’s decision may seek reconsideration by the board within 16 days of the date of the board’s mailing of the decision. After 16 days, the board’s decision becomes final and is not subject to reconsideration by the board. If reconsideration of the board’s decision has not been requested, a petition for judicial review of a final order shall be filed within 30 days after service of the order. If reconsideration of the board’s decision has been requested, a petition for judicial review of a final order shall be filed within 30 days after service of the order rendered upon reconsideration or within 30 days after service of an order denying the request for reconsideration. If the board does not act on a petition for reconsideration within 20 days after the filing of the petition for reconsideration, the party may petition for judicial review of the final order at any time with 90 days of service of such final order. Court found the district court had jurisdiction to review the matter.

STATUTES: K.S.A. 44-701, -709(i), (g); K.S.A. 60-259(f); and K.S.A. 77-529, -601, -607, -613(b), (c), -631(b)

SUMMARY JUDGMENT – PROMISSORY ESTOPPEL
BOUTON V. BYERS
POTTAWATOMIE DISTRICT COURT – REVERSED AND REMANDED
NO. 109,026 – MARCH 14, 2014

FACTS: Bouton filed promissory estoppel action seeking recovery for father’s (Byers’) breach of oral promise in 2005 to bequeath the family farm and ranchland to her if she left her law school faculty position and helped manage Byers’ cattle business. Byers subsequently sold the home place and surrounding land, and bequeathed all assets to charity. He also denied making any such promise to Bouton. District court granted summary judgment to Byers, finding in part that Bouton’s reliance on the 2005 promise was unreasonable given her education and the circumstances. Bouton appealed. Byers cross-appealed on alternative claims that would otherwise bar Bouton’s action.

ISSUES: (1) Summary judgment and (2) alternative grounds for summary judgment

HELD: District court erred in dismissing the promissory estoppel claim. Record as a whole viewed in light most favorable to Bouton would allow a factfinder to conclude Bouton reasonably relied on Byers’ 2005 promise and that Byers reasonably could have anticipated that reliance. Although litigants with legal or business training recognize the benefit of a written agreement, they are not deprived of claims based on promissory estoppel. Also, employment agreements between Byers and Bouton are unrelated to and/or distinct from the 2005 promise at issue in this action.

Court examines and finds no merit to five alternative arguments that promissory estoppel action was barred:

(1) Bouton’s previous litigation and settlement agreement in action brought as shareholder in corporation owning land that Byers sold lacked common legal grounds with present action.

(2) Promissory estoppel does not require a showing that the promisor misrepresented a material fact or never intended to honor the promise. Careless passages in First Bank of Wakeeney v. Moden, 235 Kan. 260 (1984), Marker v. Preferred Fire Ins. Co., 211 Kan. 427 (1973), and other Kansas cases are not persuasive.

(3) Three-year limitations period in K.S.A. 60-512(1) applies in this case. Dearth of Kansas appellate authority on statute of limitations applicable to promissory estoppel claims was noted.

(4) The promissory estoppel claim was not barred by statute of frauds. Bouton’s theory of recovery entailed restitution placing her in the financial position she would have occupied had she not relied on the 2005 promise to her detriment. Kansas statute of frauds does not impose an impenetrable legal barrier to that sort of restitutionary recovery on an oral promise, even if the promise itself called for the transfer of land.

(5) Byers’ argument, that the correct measure of damages for breach of promise is the value of services Bouton provided at the ranch, recasts both Bouton’s claim and the factual record.


WORKERS COMPENSATION, SETOFF, AND SOCIAL SECURITY
HOESLI V. TRIPLETT INC. ET AL.
WORKERS COMPENSATION BOARD – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 109,448 – MARCH 7, 2014

FACTS: Douglas K. Hoesli was injured at work and filed a workers compensation claim. Because Hoesli—who was not yet retired but who was at full retirement age—had already begun collecting Social Security retirement benefits, the administrative law judge (ALJ) determined that the setoff provision in K.S.A. 2010 Supp. 44-501(h) should apply to his permanent partial disability award and reduce the award by the amount of Social Security benefits he receives. The Workers Compensation Board affirmed, but it refused to consider the setoff’s applicability to Hoesli’s temporary total disability award because neither party had raised that issue prior to oral argument. Hoesli argued both that the board erred in applying the setoff and also that the setoff was unconstitutional. Hoesli’s employer, Triplett Inc. cross-appealed, contending that the board erred in finding that it lacked jurisdiction to consider the issue regarding Hoesli’s temporary total disability (TTD).
ISSUES: (1) Workers compensation, (2) setoff, and (3) Social Security

HELD: Court stated that at the time of Hoelsi’s work-related injury, he was entitled to receive and was receiving two streams of income. Neither source of income was subject to setoff or any other limitation. Hoelsi would have continued to receive both undiminished streams of income into the future but for his work-related injury. The grant of a workers compensation award in this case would serve to make Hoelsi whole. It would replace an income he was legally receiving and would place him in a position similar to the position he was in prior to his injury. To apply the setoff would act as a penalty, placing Hoelsi in a worse position than he was in prior to the injury. Court held that to apply the K.S.A. 2010 Supp. 44-501(h) setoff would result in an outcome inconsistent with the stated purpose of wage-loss replacement under our workers compensation statutes and therefore reversed the board. Court also held that applying a setoff to the TTD benefits involves different questions of law and statutory interpretation than applying it to the permanent partial disability benefits and the TTD issues were not raised before the ALJ. Court held that the board properly concluded that it lacked jurisdiction to consider it on appeal and hearing the issue for the first time on appeal would run afoul of the KJRA.

STATUTES: K.S.A. 1976 Supp. 44-510f(c); K.S.A. 44-501, -510c, -510d, -510e, -551, -555c; and K.S.A. 77-601, -617

STATE CRIMINAL

STATE v. PATTERSON
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
NO. 109,995 – FEBRUARY 28, 2014

FACTS: Officers executed a search warrant that authorized them to search the premises of a specific Wichita address. While on the property, officers searched not only the residence but also a white Mercedes parked in the driveway. Officers recovered evidence of drug offenses from the Mercedes. Subsequent to the search, Patterson was charged with a number of offenses stemming from the evidence recovered in the house and car. Patterson filed two motions: one to suppress all the evidence seized pursuant to the warrant and one to separately suppress the evidence recovered from the Mercedes. The district court granted the latter motion, determining that the search warrant did not extend to the Mercedes because it did not constitute part of the residence’s curtilage. The state appealed, arguing first that the Mercedes was within the residence’s curtilage and second that the officers searching the vehicle did so in good faith.

ISSUES: (1) Search and seizure and (2) curtilage

HELD: As a general statement of law, it is well settled that the Fourth Amendment to the U.S. Constitution protects not only an individual’s residence from unreasonable searches and seizures, but also the area surrounding the house called the “curtilage.” In Kansas, it has been generally held that a search warrant describing only the residence will authorize a search of any buildings or vehicles within the curtilage even though they are not specifically described in the warrant. The ultimate question in determining whether property is embraced by a premises’ curtilage is whether the area in question is so intimately tied to the home itself that it should be placed under the home’s umbrella of Fourth Amendment protection. Four principal factors guide whether the area is under the “umbrella” of the curtilage: (1) how near the area is to the home; (2) whether any enclosures surrounding the home embrace the area in question; (3) how the area is used; and (4) whether the resident has acted to protect the area from observation by people passing by. Court held the driveway and automobile in this case were so intimately tied to the home itself that they should be placed under the umbrella of the curtilage for purposes of the search warrant. For that reason, the officers did not exceed the scope of the warrant by searching the automobile.

STATUTES: No statutes cited.
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Leawood, Kansas. Perfect for solo practitioner, 196 square foot corner office in office building at 112th and Nall. Walking distance to Town Center, Sprint campus, etc. Office has hardwood floors, large windows, and includes use of conference room, reception etc. External signage (visible from Nall) is available with long-term lease, or purchase. Lease for $1,100/month, or will sell my 20 percent interest in the 2,400 sf building unit (the other 80 percent of the building is used by a small accounting firm). Contact Daniel Langin at (913) 661-2430 or dlangin@langinlaw.com.

Office Sharing/Office for Lease—Country Club Plaza, Kansas City. Office sharing or office lease opportunity on the Country Club Plaza in a Class A high profile corner building with ample free public parking for clients. 200 to 11,000 square feet available. Window offices available, high-speed DSL, printer, copier, facsimile, scanning, telephone, kitchen facilities, reception area, and multiple conference rooms. Offices are state-of-the-art with award-winning interior finish and design. Dedicated area available for your assistant if needed. Reasonable rent. No long-term lease required. Some possibility of business referrals depending on your area of practice. We are an AV-rated litigation firm with full management, accounting, research, and other support services. We would consider cost sharing these services with a compatible transactional, tax, and/or real estate practice. Professional, collegial, friendly atmosphere with other attorneys. Confidential inquiries can be made to Michael Grier at mgrier@wardengrier.com.

Office Space Available. Great space for attorney, businessperson, or CPA. Up to 3,000 feet available, conference room, security system, easy access to downtown Topeka or interstate. Call Bob Evenson at (785) 231-7987.

Office Space for Lease. Located at 921 SW Topeka Blvd., which offers quick and easy access to downtown Topeka including the County, Municipal, and Federal Courthouses; State Capitol Building; Docking State Office Building; Curtis Building; and more. There is available space on the first or second floor of the building, which includes individual offices and/or office suites. The building also includes a beautiful glass atrium sitting room used as an art display. Provided services include private parking and receptionist services. Please call Swinnen & Associates LLC at (785) 272-4878 for more information and to schedule an appointment to view the space.

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David is a trial attorney representing the victims of serious personal injury, with an emphasis on transportation, medical negligence and products liability cases. David represents clients throughout the Midwest region of the United States. David has represented clients in federal and state courts and has argued cases before the Kansas Court of Appeals and Supreme Court.

After working as a newspaper reporter for The Associated Press and the Omaha World-Herald, David served as an articles editor on the Kansas Law Review before graduating from the University of Kansas School of Law. David is a member of the Missouri Association of Trial Attorneys and the Kansas Association for Justice, which recently honored him in 2013 with the Thomas E. Sullivan Award in recognition of significant promise and commitment as a developing leader for the association.

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