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P14

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P30
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Spotlight the BEST & BRIGHTEST attorneys you know
With a 2018 KBA Awards Nomination

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

Learn more about the awards online at http://www.ksbar.org/awards
The KBA Awards Committee is seeking nominations for award recipients for the 2018 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Overland Park. Below is an explanation of each award and a nomination form for completion. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! **Deadline for nominations is Friday, March 2.**

**Phil Lewis Medal of Distinction**

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

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

**Distinguished Service Award**

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

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

**Professionalism Award**

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

**Pillars of the Community Award**

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

- the variety/diversity of law practiced
- impact/high profile law work
- general contributions to the law and legal profession
- specific contributions to the legal profession
- mentoring and support for legal education
- contributions to the State/community
- notable civic activities
- periods of elected or appointed public/government service
- military service
- examples of volunteerism and charitable activity
- reputation in the organized bar, State and community

This award may be but need not be given every year. More than one recipient can receive the award in a one year.
Awards of the Kansas Bar Association (Con’t.)

Distinguished Government Service Award
This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

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

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

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

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

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

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

- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.
Awards of the Kansas Bar Association (Con’t.)

Outstanding Service Awards may recognize:

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

Pro Bono Award(s)

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

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

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

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

Nominee’s Name _______________________________________________________________

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

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

______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________

Nominator’s Name _____________________________________________________________
Address ______________________________________________________________________
______________________________________________________________________________
Phone _______________________________ E-mail ________________________________

Return Nomination Form by Friday, March 2, 2018, to:

KBA Awards Committee
Attn: Deana Mead
1200 SW Harrison St.
Topeka, KS 66612-1806
ANNUAL MEETING 2018
Thurs. & Fri. June 14 & 15
DoubleTree Overland Park
I have become outdated technology. I can remember the use of carbon-paper and typewriters. I maintain a facsimile number on my business card. I still keep updated hard bound annotated statute books in my office which I often use to the chagrin of the younger lawyers in our firm. I am, admittedly, a dinosaur for the most part—ripe for an upgrade or replacement. It is not that I necessarily shy away from technology, as those who know me can attest to my smartphone addiction. It is just that I cannot quite bring myself to consider the thought of ever citing Google or Siri as legal authority to a client, opposing counsel or the court. Yet I recognize the reality that Siri or Watson or some other as-of-yet unnamed artificial intelligence may well, in the not too distant future, be my paralegal, my associate, my opposing counsel, my competition or even my judge.

The legal profession is changing with the rapid advent of new technologies, and it is critical for the Kansas Bar Association and its members to stay abreast of these advances in order to stay relevant. There is without a doubt a place for the use of technology to include artificial intelligence in the practice of law. Although the practice has changed significantly in my lifetime, those changes pale in comparison to what is on the horizon, if any of the prognosticators are correct. In October of this year, Cambridge University held a competition pitting 100 London lawyers against an artificial intelligence program called Case Cruncher. The competition involved predicting the viability of certain claims given a basic set of facts and, somewhat surprisingly, in the 775 predictions made, Case Cruncher prevailed with an accuracy rate of 86.6 percent compared to only 66.3 percent for the lawyers. While there is nothing about this study to suggest that a wholesale replacement of human lawyers by machines is imminent, the implications of how such technology may impact the way lawyers and judges practice law cannot be ignored.

Every day, individuals, businesses and governments struggle with access to legal services. Whether due to financial, geographic or some other restrictions, the traditional provision of such services by the legal community has not satisfied the consumer, our clients, in this era of instant gratification. Clients look for delivery of and access to legal services 24/7 and expect same day turn-around at fee rates no individual or law firm can satisfy. This is the promise of many new legal technologies—an app which an individual looking for answers to a legal question can access to obtain timely, up-to-date and accurate guidance on a legal issue before taking action. Potential clients seek access to legal expertise in rural or underserved areas. These are things that technology promises to provide cheaply and efficiently to practicing lawyers who take advantage of such technology or directly to potential clients themselves.

It is not hard to imagine a person in the relatively near future who seeks services now provided by lawyers consulting instead with computer programs and applications. A person seeking to create a will or similar document might access an app whereby, upon answering a series of interactive questions,
obtains a document that satisfies all the necessary legal requirements. This might occur at 10:00 p.m. from the comfort of the person’s home. Individuals with simple disputes might forego the cost and time involved with a court proceeding and instead utilize an app to separately submit the facts of a legal dispute and accept the computer application’s decision as binding. These are but a few of the applications being developed and tested which could ultimately create wholesale change to the practice of law.

The legal and ethical considerations raised by these technological advances bear careful consideration by the legal community. Many bar associations in other states have already grappled with issues including whether these types of technologies constitute the unauthorized practice of law. They have also sought to address questions of malpractice liability should the services provided through technology be deficient. While these problems may seem hypothetical and distant, the reality is that within the next five years, we are likely to see the application of AI within the legal community, if not the community at large, evolve from infancy to the mainstream. Lawyers and other legal professionals who do not take advantage of these technologies will inevitably fall behind.

To me, justice is a uniquely human concept. I value the independent lawyer and doubt that any computer program will ever be capable of replacing the critical decision-making that is required of a lawyer or judge on a daily basis. At the same time, I recognize that our profession must accept the technological advances that promise to make the practice of law better, fairer, more accessible and more efficient. It is incumbent upon us to address the ethical and other issues brought about by new technologies with forethought rather than hindsight.

I may never give up my law books or my highlighter, but, as time moves forward, I, like every other practitioner, will upgrade to take advantage of new technology so that I am adequately equipped to continue providing the best service possible to my clients.

**About the Author**

**Gregory P. Goheen** is a shareholder at McAnany, Van Cleave & Phillips, P.A., where he has practiced since graduating from Southern Methodist University’s Dedman School of Law in 1993. He received his bachelor’s degree in 1990 from the University of Kansas. Greg is past President of the Kansas Association of School Attorneys and Fellow and past Trustee of the Kansas Bar Foundation.
Limited-Scope Consultation

by Clayton Kerbs

It’s very easy and tempting to casually give legal advice, and we do not have to be sitting behind our desks to do so. More often, it is in the grocery store, during a quick call or text with a friend or acquaintance, at our kids’ activities or at church. As an attorney, you may be trying to help someone who is in need of advice or maybe attempting to get a person to stop bugging you. Whatever the circumstances, we are not doing ourselves or our “client” any favors by conducting business in this manner. It is risky—professionally—for us as the lawyer, and the “client” is not getting our best service.

The bottom-line for us is to control the creation of an attorney-client relationship. It is a factual inquiry whether one exists,1 and you can imagine the courts will create one if needed under the circumstances to protect a harmed “client.” Consider entering into a limited-scope representation prior to an office consultation to avoid being in a precarious situation.

KPRC 1.18 differentiates between prospective clients and current clients. A prospective client would be a person who calls an attorney’s office to see if the attorney takes a certain type of case, for example a divorce.2 No attorney-client relationship exists at this point. The person may then make an appointment and arrive at the date and time set for the appointment. The prospective client then sits across from the attorney to discuss a potential divorce case. Information is revealed about the situation the prospective client finds himself in, but the attorney has not yet agreed to represent him. Does an attorney-client relationship exist?

One Kansas firm has taken steps to clearly define the level of representation being given. A few years ago, I was involved in a very contentious Child-in-Need-of-Care matter, and my clients asked me to pursue a course of action with which I was not comfortable. To be sure I was giving sound advice, I contacted Ashlyn Yarnell from the Law Offices of Ronald W. Nelson, P.A., in Shawnee Mission. Ashlyn arranged for a consultation with my client and sent paperwork in advance of said consultation. The form used made it clear that representation ended unless a subsequent agreement was signed between the parties.

This was the first time I had seen a consultation agreement made to be filled out prior to the prospective client’s arrival for a consultation. But if you apply KRPC 1.18 and 1.2, and follow the consultation up with a non-engagement letter, a consultation agreement makes complete sense for both the attorney and the prospective client. The prospective client will understand the end of the consultation marks the end of the relationship unless a subsequent retainer agreement or engagement agreement is entered into. It has been made clear the attorney will not perform subsequent work for the prospective client unless both parties consent by further agreement. In the case of an ethics investigation, the attorney will have documentation that clearly shows no attorney-client relationship extended beyond the consultation.

So, while it may be convenient to give quick, unfiltered advice, give consideration to implementing a new office procedure that includes a limited-scope consultation agreement to better protect yourself and the people you serve.

2. KRPC 1.18(a).

About the Author

Clayton Kerbs currently practices in his hometown of Dodge City with his father, Glenn. Clayton’s practice consists of domestic and municipal law cases. He attended Creighton University and Washburn University School of Law. Prior to practicing law, Clayton worked for U.S. Senator Jerry Moran. Clayton is married to Leah; they have two sons, Porter and Chandler.
ckerbs@kerbslaw.com
Math and the Law:  
A New Journal Series for 2018!

“I Went to Law School so I Wouldn’t Have to do Math!”

by Adam Dees

Many attorneys, at one time or another, have heard that old joke. But is that premise correct? Although math permeates the law, and somewhat vice versa, attorneys, (outside tax preparers and estate planning attorneys), seldom discuss the implications mathematics has on our profession. Through the course of 2018, the KBA Journal will feature articles from a cadre of attorneys that regularly use math. From calculating child support to determining patent infringements to dealing with economic development, attorneys from all legal realms regularly use math.

Mathematical and logical thinking is all but required to enter law school. The Law School Aptitude Test (LSAT) is replete with it.1 Laws and contracts are replete with “if, then” statements; statements of A=B, B=C, therefore A=C. Symbolic logic can win the day with court arguments; it can enhance contract drafting and create clear, crisp legislation.2 Symbolic logic may yet be used to push the law where it has not gone.

Why, then, do we hesitate to discuss this? Oliver Roeder, in his recent article “The Supreme Court is Allergic to Math,” asserts “The Supreme Court does not compute.”3 He argues for a top-down approach to using quantitative evidence, math and statistics. He requests that the U.S. Supreme Court begin looking towards quantitative evidence, math and statistics, and claims that lower courts will follow suit. Under stare decisis, this approach has merit. And yet, before the Supreme Court can hear the quantitative evidence, that evidence must first be presented to the district and appellate courts. Only then can mathematical and quantitative evidence flow to the Supreme Court for review.

Rather than arguing about how mathematics should be used in the court room, board rooms, and places of governance, this series will demonstrate how math is being used today throughout the legal community. In doing so, we expand the application of mathematics, as society, the law, and calculations advance.

Moreover, as education focuses more and more on science, technology, engineering, and math (STEM), continuing this conversation ensures that attorneys remain a vibrant part of the STEM classification—and even grow their share of that educational sector. This emphasis will continue to encourage former engineers, mathematicians, accountants, financial planners, teachers, and others drawing from STEM backgrounds to attend and succeed in law school, and go on to brilliant legal careers.

The dreaded “word problem,” a mathematical problem expressed entirely in words typically used as an educational tool,4 abounds in the law. When discussing applying for Medicaid, the first questions are: “What resources do a husband and wife have? What resources are exempt under the law? And what resources must be di

Editor’s Note: Back in April of 2017, the Board of Editors put out a call to KBA Section leaders to solicit section members to consider writing substantive pieces for The Journal of the Kansas Bar Association. In response to that effort, I received an email from Adam Dees, expressing interest in seeing an article about the use of mathematics in the practice of law. He noted “Math is an integral part of practicing law and making judgments. It should be given its day,” and suggested that The Journal should consider doing a series on the many ways math is intrinsically connected to the practice of law. We visited on the telephone several times over the following months, and ultimately, Adam agreed to take on the project. He contacted friends and colleagues across the state to author individual feature articles to be published throughout 2018, highlighting the use of math in their area of law. On behalf of the Board of Editors, I say, “Welcome to the fold of member attorneys who take the initiative to write for The Journal!” It is tremendously gratifying to have a member not only come up with the concept, but to agree to coordinate the whole thing for the benefit of all our members. Thank you, Adam. And thanks to those who will provide columns for our 2018 Math and the Law series. This will be compelling and informative reading!
vided between the spouses?" Then, after the division of assets, does the applicant fall below the $2,000.00 requirement allowed by the state? And, from the exempt assets, is there income that the applicant must pay that Medicaid will supplement? This is only one application of law and mathematics. Without the law, we could not create the framework to calculate the resources necessary for a person to receive Medicaid benefits, and without mathematics we could not calculate if the state was adequately providing those resources.

Moving from social benefits to the courtroom, child witnesses are routinely asked what grade they have completed and if they mastered certain skills—one being math. Many times, an individual's ability to do math is relied upon to determine whether a witness is competent to testify.5

At the appellate level, Judge Leben has argued that incorrect math creates ambiguity in contracts.6 In his dissent in In re Marriage of Johnson, Leben argues that the district court agreed with him—so two judges determined that the math was ambiguous and two appellate judges disagreed—a mathematical argument. He further argues a contract is ambiguous when there's more than one way to calculate the math (and yet the majority disagree).7

District courts have been reversed and remanded to do the actual math on the record when determining restitution owed to victims in criminal cases. In Pelso, the district court only held that the defendant should pay five percent of Board of Indigent Defense Services fees. Without knowing the precise amount, the Kansas Court of Appeals determined that the district court could not find that paying BIDS fees did not impose a hardship. Although the defendant could determine the BIDS fees due, it was up to the district court to make that explicit.8 On the other hand, the district court in State v. Westfall calculated that the defendant was capable of paying $500.00 in BIDS fees and was upheld on review.9

Yet math does not always provide an answer (hence the series being "Math and the Law"). The administrator of the estate in In re Estate of Powell argued that a statute of limitations of four months from the date of first publication of notice, or if the identity of the creditor is known, 30 days after actual notices ran on a creditor's claim barred a creditor's claim.10 The creditor had filed a claim 76 days after receiving actual notice, which was outside the 30 day timeframe. The court concluded that it was the longer of the two time periods, four months or 30 days, and that the creditor was within the four-month period. Although the administrator's math was correct, the law was equally clear and the longer period prevailed.

Over the next year, other examples will be highlighted. Through this, practitioners should be able to answer the proverbial question all middle and high school math students ask: when will I need to use these math skills in adult life? Attorneys will answer: every day.

Contrary to the old joke, we did not go to law school and become lawyers because we did not know how to do math—we went to law school and became lawyers because we can do math. We do math daily. When we do math correctly, justice is better served. This is a high goal for a simple tool, one that all lawyers must have in their toolbox.

About the Author

Adam Dees is an elder care attorney practicing in Hays, Kansas with Clinkscales Elder Law Practice, PA. He is a 2011 graduate of the University of Kansas School of Law. He received his bachelor's degree in 2008 from Southwestern College in Winfield, Kansas. Adam is the coordinator of the 2018 Math and the Law series for The Journal.

3. The Supreme Court is Allergic to Math, Oliver Roeder, October 17, 2017. https://fivethirtyeight.com/features/the-supreme-court-is-allergic-to-math/?utm_campaign=Ravel%20Reading%20List&utm_source=hs_email&utm_medium=email&utm_content=57664340&hsenc=p2ANqtz-Vvt0cHcI5O8B7GwaaiXBMEmjtu1pcMqD2FuD2C4aWL3zg9HjTixAwpNxFF沃CUjNXDJq7R4Qq3UtgZeyRWNMPaXJpSij&hsmi=57698058
7. Id.
Lawyers Accepting Bitcoin as Payment for Legal Services

by Larry Zimmerman

The Nebraska bar issued Ethics Advisory Opinion 17-03 in September 2017 addressing whether an attorney may accept digital currencies such as bitcoin as payment for legal services. (The opinion is available at supremecourt.nebraska.gov/17-03.) The opinion is a positive development on one hand because it makes clear that attorneys may accept digital currencies as payment. However, the opinion falls woefully short in meaningful analysis and erects unnecessary barriers to actually accepting such payment. Initial reaction to the opinion by legal ethics analysts suggests it muddies more than it clarifies and should not form a model for other ethics opinions.

What is Bitcoin?

A dollar is created by the United States government and the government controls the supply. Bitcoin is created by computers solving complex mathematical equations. This is called mining, and specific appliances and networks are created solely for the purpose of solving equations and receiving bitcoin as a reward. Each bitcoin created is appended to an open, distributed ledger residing on millions of computers throughout the world. There can only ever be 21 million bitcoins created but once created, each can be transferred securely worldwide without fees.

Securely trading bitcoin relies on technology called the blockchain. The blockchain is a computer protocol for distributing details of a transaction across millions of computers where the details of each transaction are secured by procedures and encryption. This protects the ledger from retroactive alteration and attack. When John sends a bitcoin to Mary, that transaction is appended to the blockchain and communicated through the entire network—every computer. That open distribution makes it impossible for Mary to alter the ledger to suggest John did not pay her. The majority of the blockchain would provide an audit trail revealing her fraud.

The Uniqueness Problem

The principle problem with the Nebraska opinion identified by most commentators is that it treats bitcoin as a unique form of payment without explaining or justifying that unique treatment. One sentence jumps out; “Bitcoin is used by both legitimate businesses and criminals.” In that sentence, the word “bitcoin” could be replaced with literally any other noun in the English language and still be accurate. The assertion of the sentence loses meaning because the premise is non-unique. The entirety of the opinion is trouble in the same way.

It is important to understand that bitcoin is considered property— at least for U.S. federal tax purposes. It is not a currency. The Nebraska opinion notes that Comment 4 of its version of Rule 1.5 allows accepting property for payment of services. In Kansas, Comment 2 to Rule 226 provides the same right. What then makes receiving a bitcoin as payment different from receiving a side of beef for the freezer? Ronald D. Rotunda, author of Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility, wrote, “Because bitcoin is merely a medium of transferring money without using a banker and without paying a fee, it raises no ethics issues unique to it.”

To be clear, it is valid to ask whether the delivery of a side of beef in exchange for drafting a will constitutes a reasonable fee. The question is whether the lawyer is obligated to immediately convert the side of beef to U.S. dollars. To my knowledge, the lawyer was not required to do so in 1896, 1987, or 2016. Rotunda notes, “It’s a business decision, not a question of legal ethics, if the informed client and the lawyer agree to shift the risk of volatility to the lawyer.” If the issue is volatility alone, as the Nebraska opinion hints, then we have a threshold question—what index of volatility will be used and what is the baseline rate which requires conversion of property to cash? The opinion makes no attempt to answer that question.
The Vagueness Problem

Commentators note that the Nebraska opinion allows accepting bitcoin for legal services but inserts a “poison pill” that may discourage it. Specifically, a lawyer must convert the bitcoin payment to U.S. dollars and notify the client immediately. But what is “immediately” in the context of instantaneous digital communication?

Bitcoin can be transferred to a firm’s wallet after hours at 6:36 P.M. on a Friday, December 22. Has the lawyer missed the “immediately” window if he does not make a conversion to cash and provide notice to the client on December 26? If volatility is the primary concern with bitcoin, then that time span could see rates plunge or rise by as much as 25%. The Nebraska opinion would do well to follow examples in financial regulation and statute which prescribe specific time periods.

Culture Conflict

Behind bitcoin is a deep, solid vein of libertarian skepticism about centralized authority and power. Bitcoin was created in the 2008 global financial crisis when the public’s faith in government authorities and corporate fiduciaries proved unrewarding or even catastrophic for many. The nascent technology behind bitcoin offers a way to use computer code to rein-in abuses regulators and compliance officers would not or could not.

The Nebraska opinion responds to that philosophy and concern without addressing it. Its counsel steps clumsily on some of the very features of digital currency many legal consumers find attractive while providing no clear guidance to lawyers who might want to serve those clients. Tread cautiously until a better, clearer opinion drops.

About the Author

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The “Fighting Words Doctrine” at 75: Why it Still Lacks Punch
By Kelly Lynn Anders, JD, MLS

I. Introduction

What, exactly, is a “fighting word,” and how do such words differ from others, with respect to First Amendment protection? How are fighting words viewed today? This essay will provide a detailed overview of the preeminent case, decided 75 years ago, that first discussed the existence of the “Fighting Words Doctrine,” along with additional interpretations of the doctrine and where it falls within the realm of Freedom of Expression.

II. The Case of Chaplinsky v. New Hampshire

On a busy Saturday afternoon in Rochester, New Hampshire, Walter Chaplinsky, a Jehovah’s Witness, passed out religious literature to passersby. Citizens complained to the “City Marshal” that “Chaplinsky was denouncing all religion as a ‘racket.’” When the crowd became restless, the Marshal approached Chaplinsky to issue a warning, and Chaplinsky replied to the Marshal, “You are a [expletive] racketeer” and “a [expletive] Fascist[,] and the whole government of Rochester are Fascists or agents of Fascists.”

Chaplinsky was arrested and charged with violating Chapter 378, Section 2, of the Public Laws of New Hampshire, which stated:

No person shall address any offensive, derisive[,] or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend[,] or annoy him, or to prevent him from pursuing his lawful business or occupation.

He was tried by jury and found guilty in the Superior Court; the conviction was affirmed by the New Hampshire Supreme Court. He appealed the case to the United States Supreme Court, arguing that the New Hampshire statute was invalid because it “placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite.”

Despite Chaplinsky’s assertions that three rights had been violated, the Court limited its review to a free speech analysis because it determined that the other two complaints were unwarranted. The Court reasoned, “The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion . . . .” The Court then analyzed the validity of the statute, stating:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.
The Court determined that the statute was narrowly tailored to “preserve the public peace,” and that the word, “offensive,” was not intended to be “defined in terms of what a particular addressee thinks.”11 Instead, “[t]he test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.”12

Ultimately, the Court upheld the validity of the New Hampshire statute, stating that it “does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace... .”13 However, the Court curiously refrained from clarifying how “Fighting Words” mesh with free speech generally, stating:

We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace... . A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.14

III. Interpretations of Chaplinsky

Not surprisingly, the Chaplinsky decision received negative reviews, especially from Constitutional scholars. Indeed, many First Amendment scholars have harshly criticized the decision’s potential for further complicating debates about the existence of the right to Free Speech in certain circumstances.15

One of the best known and most comprehensive examples of criticism of the Chaplinsky decision is found in a 2004 law review article.16 This 122-page article, long even for law review standards, includes a multitude of valid points.

First, the author contends that Chaplinsky “violates the First Amendment” by upholding a law that was vague and overbroad, in that the statute’s description of “[a]ny offensive, derisive, or annoying word” lacks the requisite clarity to pass Constitutional scrutiny.17 Second, he claims that “Government has no right to criminalize speech to promote ‘the Social Interest in Order and Morality.”18 He also argues that the ruling “punishes the speaker for the possible violent reaction of the audience.”19 Finally, he states that “the right to criticize the government is the core value of the First Amendment and is protected no matter how offensive the language.”20 He further contends that current “language protected is vastly more offensive than the mild protest in Chaplinsky.”21 To illustrate his point, he provides numerous “colorful” examples.22

In contrast to Chaplinsky’s negative treatment in law reviews, a Minnesota court recently used it in support of its ruling against Free Speech.23 In that case, a man entered a liquor store, cursed at the store clerk, and refused to leave.24 He continued to “utter profanity” and was cited for “disorderly conduct and criminal trespass.”25 At trial, the man argued that he had a right to yell profanities, pursuant to the First Amendment, but he was found guilty of disorderly conduct.26

The man appealed to the Minnesota Court of Appeals—and lost.27 In its reasoning for siding with the trial court’s ruling, the court “explained that ‘fighting words’ remain[] a category of unprotected speech in First Amendment jurisprudence,” and that this “category of unprotected speech remains good law and is appropriate for application in this case.”28 Notwithstanding the recent Minnesota decision, others have distinguished Chaplinsky by attempting to provide further clarity concerning the Fighting Words Doctrine’s reach.29

IV. Conclusion

The Chaplinsky decision is somewhat frustrating because the Court described the existence of a “Fighting Words Doctrine,” yet it failed to clearly or adequately tie it to the concept of free speech—even though it stated that it was limiting its review to a free speech analysis.30 In a sense, the Court skirted the issue by providing the narrowest of reviews—namely, whether the statute placed an “unreasonable restraint” on free speech, and not whether “Fighting Words” were themselves protected as free expression.

Chaplinsky has yet to be overruled, likely due to the very lack of clarity inherent in the decision. What, in essence, is there to overrule? It makes sense that we would not want to completely discount laws that promote decency, particularly those that are tailored to the interests of preventing criminal activity. Yet it’s also highly unlikely that any statute similar to the one used to convict Chaplinsky would be passed today, presumably due to the difficulty of defining a “fighting word” in our current social climate, where “offensive, derisive, or annoying words” are commonplace.

In sum, it remains disappointing that the Court would opt to hear the case, yet fail to address its central issue. Was the Court truly “unable to say” that the New Hampshire statute conflicted with the fundamental right of Free Speech—or was it simply unwilling to take on the toughest of Constitutional foes? Respectfully, I think it was the latter. As a result, 75 years later, we have a doctrine that is strong in name only, along with a fight for clarity that continues.
2. Id. at 569.
3. Id. at 570.
4. Id. at 569.
5. Id.
6. Id.
7. Id.
8. Id. at 571.
9. Id.
10. Id. at 571-72. [Emphasis added.]
11. Id. at 573.
12. Id.
13. Id.
14. Id. at 573-74. [Emphasis added.]
15. See, e.g., David L. Hudson, Jr., “‘Fighting Words’ Case Still Making Waves on 70th Anniversary,” First Amendment Center, http://www.firstamendmentcenter.org/fighting-words-case-still-making-waves-on-70th-anniversary, accessed Feb. 16, 2016. Web. As Hudson states: The Court’s decision ushered in a process of categorization in First Amendment jurisprudence, determining whether speech was protected or unprotected depending on whether it falls into an unprotected category of speech. In the process, the Court ruled against Walter Chaplinsky — probably unfairly.
17. Id. at 460.
18. Id. at 492.
19. Id. at 506.
20. Id. at 516.
21. Id. at 545.
22. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. See, e.g., Cohen v. California, 403 U.S. 15 (1971) (stating that the wearing of a jacket with the words, “[Expletive] the Draft,” did not constitute “Fighting Words” because the words were not directed toward a particular individual).
30. Chaplinsky, 315 U.S. at 571.
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Stop the “Tour Bus”:
The Key to Persuasive Case Use is Thesis

By Jeffrey D. Jackson

We’ve all been told at one time or another that legal writing needs to have a thesis.1 However, something that new law students struggle with and even experienced practitioners sometimes forget is that not only is a thesis needed for the overall document, and for each section inside the document, but also for each paragraph. This need is especially acute in documents that are meant to be persuasive, where each paragraph should be building to the overall conclusion that the writer wants the reader to reach.

Unfortunately, too many legal writers, even experienced ones, don’t think about this when writing. While the resulting product isn’t “bad” in terms of writing, it isn’t as clear or persuasive as it could be. One place that this type of writing tends to crop up most is in the use of cases. Instead of using a thesis sentence to establish the point of the paragraph and tell the reader what he or she is supposed to get out of the case, the writer instead engages in what I call “touring.” That is, the writer takes the reader on a tour of the case, only coming to the point at the end. For example, in a brief concerning scope of employment for respondeat superior:

“In [Williams v. Community Drive-In Theater], a concession worker saw her manager engaged in an argument with a patron. She went to her car and obtained a shotgun in order to assist the manager. Id. at 362. However, as she was carrying the shotgun, it discharged, injuring one of the patrons. Id. The Kansas Supreme Court held that, although she may have used poor judgment, a jury could find that she was still within the scope of her employment if her intent was to help her employer rather than to gratify her own personal desire. Id. at 366-67.”

This is an accurate description of what happened in Williams, but it isn’t effective in giving the reader the important information. It is rather a “tour” of Williams, starting at what happened in the case and moving to what the court decided. It forces the reader to get through the entire paragraph to get to the point, which is really buried in the last sentence. Instead, the writer needs to let the reader know up front what is important:

“An employer can be liable under respondeat superior even though the employee uses poor judgment in his or her actions, so long as he or she is motivated by a desire to further the employer’s interest rather than his or her own personal desire. Williams v. Community Drive-In Theater, 214 Kan. 359, 361, 520 P.2d 1296 (1974). In Williams, a concession worker was held to be in the scope of employment where she was trying to assist her manager in an argument with patrons when the shotgun she was carrying discharged, injuring one of the patrons. The Kansas Supreme Court held that a jury could find the employee was in the scope of her employment if her intent was to help her employer. Id. at 366-67.”

In this example, the pertinent information is stated up front, making the purpose of the paragraph obvious to the reader. The rest of the paragraph fills in the information that supports the initial thesis.

Oftentimes, the writer will recognize that he or she needs a thesis sentence, but fail to recognize what the paragraph is trying to accomplish. The result is more of a “topic” sentence, in that it tells the reader what the paragraph will address, but doesn’t tell the reader what the writer wants the reader to get from the paragraph:

“In Razorback Cab of Ft. Smith, Inc. v. Lingo, 802 S.W.2d...
444, 445 (Ark. 1991), the Arkansas Supreme Court discussed whether a cab driver who punched a passenger was within the scope of employment. The cab driver hit the passenger because the passenger would not put out his cigarette and was annoying the other passengers in the cab. *Id.* at 445. The court stated that although the altercation between the passenger and driver took place outside of the cab, and although the means employed was misguided, the driver was acting at least in part to further the comfort and welfare of the other passengers, and thus was serving the interests of his employer. *Id.* at 446.

It is nice to know what the paragraph will cover. However, it’s not as good as actually telling the reader up front what the main point of the paragraph is:

“In *Razorback Cab of Ft. Smith, Inc. v. Lingo*, 802 S.W.2d 444, 445 (Ark. 1991), the Arkansas Supreme Court held that a cab driver that punched a passenger following the passenger’s refusal to put out a cigarette was acting within the scope of employment because he was looking out for the comfort of his other passengers. The court stated that although the altercation between the passenger and driver took place outside of the cab, and although the means employed was misguided, the driver was within the scope of employment. He was acting at least in part to further the comfort and welfare of the other passengers, and thus was serving the interests of his employer. *Id.* at 446.”

Thesis sentences are especially important for persuasive documents such as motions and briefs. There, each thesis sentence should ideally be a statement in favor of the client’s position, with the remainder of the paragraph providing the support for that statement. An easy way to determine whether your document does this is to take the first sentence of every paragraph and put them together. If you’ve done it right, the collection of sentences should make sense and read like a summary of the argument. A particularly good example of thesis sentences comes from the petitioner’s brief in the recent Supreme Court litigation between Apple and Samsung. That case hinged on whether, as the Federal Circuit held, the jury’s finding that Samsung infringed Apple’s patent with regard to a few components of its smartphones required Samsung to pay damages equal to its entire profits from the sale of those smartphones.\(^2\) In arguing that the entire-profits rule should not be applicable, the petitioner’s brief stated:

The Federal Circuit’s entire-profits rule would lead to disproportionate awards in any patent case that involves (as here) a design patent claiming only a small component of a product’s overall design. Design-patent defendants would have to hand over all of their profits on a computer for infringement of a single patented, preinstalled graphical-interface icon, all profits from a boat for infringing a patent on the design of a marine windshield, all profits on a car for infringing a patented cup-holder design, and so on.

The prospect of such absurd outcomes is not hypotheti-
As this Court has recognized, there is an obvious injustice in a rule by which an infringer may have to pay “his whole profits to each of a dozen or more several inventors of some small improvement.” Seymour v. McCormick, 57 U.S. 480, 490 (1853). And even if the first award of total profit could be deemed to have exhausted all profits from sales of a product, the risk of missing out on the Section 289 lottery would at a minimum cause a race to the courthouse among design patent owners to obtain the first and largest windfall recovery.

As you can see, the thesis statements basically articulate the argument:

The Federal Circuit’s entire-profits rule would lead to disproportionate awards in any patent case that involves (as here) a design patent claiming only a small component of a product’s overall design. The prospect of such absurd outcomes is not hypothetical. Moreover, the practice of partial claiming ensures that there will be many more requests for such disproportionate awards. In addition, the entire-profits rule would invite wasteful and duplicative litigation. As this Court has recognized, there is an obvious injustice in a rule by which an infringer may have to pay “his whole profits to each of a dozen or more several inventors of some small improvement.”

Thus, in order to maximize persuasion and understanding, writers need to remember to stop the tour bus, and use thesis statements.

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The First Amendment SLAPPs Back: An Overview of the Free-Speech Protections of Kansas's New Anti-SLAPP Statute

By Eric Weslander
Introduction

One not need look far in today’s world for prominent examples of threats of dubious legal action against journalists, in retaliation for unflattering reports on the rich and powerful. Examples include an attorney for movie producer Harvey Weinstein threatening to sue the New York Times over reports of sexual-harassment complaints,\(^1\) or an attorney for unsuccessful Alabama U.S. Senate candidate Roy Moore writing that a local news organization should be liable on grounds it “intentionally refused to advance the truth” regarding the sexual-misconduct allegations against Moore, and should be liable for “oppression, fraud, wantonness, and/or malice.”\(^2\)

A Kansas statute enacted in 2016 that has garnered relatively little public attention, K.S.A. 60-5320, the “Public speech protection act,” represents the latest in step in a nationwide battle to fight meritless lawsuits that chill free speech, known as SLAPPs, or “strategic lawsuits against public participation.” Familiarity with this statute—which provides for mandatory attorneys’ fees in the event of a successful anti-SLAPP motion—is a must for attorneys litigating civil matters in Kansas courts. In essence, the statute allows a defendant to bring a special motion to strike a claim early in litigation, if that claim is “based on, relates to or is in response to a party’s exercise of the right of free speech, right to petition, or right of association,” as extensively defined in the statute, shifting the burden to the plaintiff to show that it has a prima facie case. K.S.A. 60-5320(d)

Notably, the statute requires the court to award a successful anti-SLAPP movant its costs and attorneys’ fees, and to order “such additional relief, including sanctions upon the responding party and its attorneys and law firms, as the court determines necessary to deter repetition of the conduct by others similarly situated” K.S.A. 60-5320(g) (emphasis added). By contrast, if the party bringing the claim survives the anti-SLAPP motion, the court may award that party its costs and fees only if the court finds “the motion to strike is frivolous or solely intended to cause delay.” Id. The message to litigants is clear: be very careful before you bring a suit that seeks to punish the exercise of free speech.

Background

The term “SLAPP,” coined by two law professors in the 1980s,\(^3\) refers to suits designed to chill free speech and impose costs on the speaker. The most common causes of action associated with SLAPP suits are libel and defamation; other common causes of action for SLAPPs include interference with contract or business, antitrust violation, and unfair competition.\(^4\) As stated by the Maine Supreme Court in a decision involving that state’s anti-SLAPP act, the “classic anti-SLAPP case” is one in which “citizens who publicly oppose development projects are sued by companies or other citizens.”\(^5\)

The effort to pass these statutes nationwide, in states including Kansas, goes to the very heart of our democracy: the free exchange of ideas and the ability to speak out about matters of public importance, even if the content of the speech is inconvenient or unflattering to someone else. The United States Supreme Court has recognized that this country’s origins instilled a “profound national commitment to the principle that debate on public issues
should be uninhibited, robust, and wide-open,” as embodied in the First Amendment to the U.S. Constitution. The Bill of Rights of the Kansas Constitution further provides at §11 that “The Liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights.” (emphasis added).

Today, as an extension of this legacy, public officials and public figures generally cannot win a defamation case unless they show that the statement was made with “actual malice,” i.e., with knowledge of its falsity or reckless disregard for the truth. The U.S. Supreme Court first adopted this First Amendment standard in its landmark 1964 decision in New York Times v. Sullivan, a case in which the Montgomery, Alabama police commissioner sued the New York Times for publishing a political advertisement about police handling of civil-rights protesters including Dr. Martin Luther King, Jr. Although the Sullivan ruling effectively “constitutionalized” the law of defamation, the “actual malice” standard relating to public officials had long been the law in Kansas and other states at the time of the Sullivan decision, and Sullivan cites the Kansas decision of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), for the proposition that “It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.”

As powerful as the legal protections for free speech are, however, a viable legal defense takes time and money—and often too much of both. In testimony supporting Kansas’ anti-SLAPP statute, the late Rep. Jan Pauls stated, “Our court system is increasingly seen not as a means for swift justice, but as a game, used by some, of drawn out punishment for those without deep pockets.” Potential costs associated with SLAPP suits include not only out-of-pocket expenses on behalf of the litigants, but also time, distraction, anxiety, and lost work time. On a societal level, proponents of anti-SLAPP acts argue, meritless SLAPP suits create a drain on judicial resources and potentially chill the exercise of free speech.

To well-known Internet-law scholar Eric Goldman, anti-SLAPP statutes exist in part to protect “negative truthful information,” such as critical consumer reviews, which he calls the “highly endangered species of the information ecosystem.” This type of information is endangered, he says, “because it’s goring someone’s ox, and the ox is going to gore back.” Although the concept of SLAPP laws originally arose in the context of protecting against suits that seek to suppress citizens’ rights to petition the government, in today’s world, Goldman said “I think about SLAPPS as covering any lawsuit that’s designed to suppress socially important speech [such as consumer reviews or investigative journalism]… there’s a wide range of other kinds of socially important content that we want to encourage and foster.”

As discussed further below, the first Kansas cases testing the anti-SLAPP statute are now working their way through the courts. Some high-profile cases from other jurisdictions show the wide-ranging scenarios that could set the stage for an anti-SLAPP motion to strike, including the following:

- A coal-energy executive and his affiliated companies suing HBO personality John Oliver over a satirical report that likened him to the comic movie character “Dr. Evil.” This suit was filed in state court in West Virginia, which has no anti-SLAPP statute; nevertheless, the suit has been widely analyzed under the rubric of SLAPP-type suits).
- A weekly newspaper publisher suing the publisher of competing publication, alleging defamation based on competing publisher’s non-actionable opinions.
- A forest-products company suing the environmental group Greenpeace International, along with various affiliate groups, executives and board members, alleging violation of RICO statutes and other causes of action over allegedly “false and misleading” information disseminated by the group.
- A plaintiff suing the founder of the website “TechDirt.com” for $15 million over a series of detailed, factually supported articles challenging the plaintiff’s assertion that he invented email.
- The owner of the Washington Redskins suing the Washington City Paper over factually supported articles criticizing him.

At last count, approximately 32 states and the District of Columbia had anti-SLAPP statutes, although they vary greatly in the type of activities they encompass and the procedures involved in bringing a motion. This variation—with the attendant potential for forum-shopping—has prompted advocates to seek federal anti-SLAPP legislation, and has caused the Uniform Law Commission to convene a drafting committee for a potential Uniform Anti-SLAPP Act, to be convened in early 2018.

The Public Participation Project, which tracks anti-SLAPP statutes and litigation nationwide, rates Kansas’ new statute (enacted July 1, 2016) as “good,” giving it a grade of “B.” As originally proposed, the Kansas statute would have applied only to suits where the defendant’s conduct involved “public participation and petition.” The scope of the statute was later broadened to encompass any claim that concerns “a party’s exercise of the right of free speech, right to petition or right of association.”

II. Mechanics/substance of special motion to strike

The basic mechanics of a Kansas anti-SLAPP motion to strike, pursuant to K.S.A. 60-5320, are as follows: the motion to strike must be filed within 60 days of service of the most recent complaint, but the trial court in its discretion can allow the motion to be filed later in the litigation process. Pursuant to the statute, a hearing on the motion shall be held not more than 30 days after service.
To successfully invoke the protections of the anti-SLAPP statute, a defendant bringing the motion to strike must first make a prima facie case that the claim targeted by the motion “concerns a party’s exercise of the right of free speech, right to petition or right of association” (emphasis added). Each of these terms is separately defined as follows, bringing a wide range of conduct within the scope of the statute:

- “Exercise of the right of free speech” is defined as any communication “made in connection with a public issue or issue of public interest.”

In turn, public issues or issues of public interest are defined (without limitation) to include an issue “related to: (A) Health or safety; (B) environmental, economic or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product or service in the marketplace.”

- “Exercise of the right to petition” is defined to include communications “in or pertaining to” various governmental proceedings, or in connection with, encouraging, or seeking consideration of an issue by the government.

- “Exercise of the right of association” means a communication between individuals “who join together to collectively express, promote, pursue or defend common interests.”

Based on these broad definitions, virtually any lawsuit that seeks to impose damages for a defendant speaking out on matters that go beyond personal, private affairs—whether that topic is an alleged scam by a business, a school official’s actions, a city-commission meeting, or union activity, to name just a few examples—could potentially trigger the anti-SLAPP Act’s provisions.

Courts face interpretive challenges when deciding anti-SLAPP motions that relate to speech at the margins of what might be considered a “public issue” or matter of public interest. While no one would dispute that a statement made by a government official in a public meeting, for example, would be an issue of public interest, courts face a more nuanced decision when the speech at issue involves private actors but arguably implicates public concerns. Some examples of topics in which courts have found no public interest (under varying state-law formulations of that term) include distribution of Playboy Mansion party videos; a plaintiff’s HIV-positive status, and a website parodying a rival company’s business.

Once the party bringing a Kansas anti-SLAPP motion to strike meets this first prong of the test, the burden then shifts to the responding party to establish a likelihood of prevailing on the claim “by presenting substantial competent evidence to support a prima facie case.” In making this inquiry, the Court must consider the pleadings and any supporting or opposing affidavits. All other discovery, motions or pending hearings are stayed upon filing of the motion, but the court may allow specified limited discovery upon motion and for good cause shown. The party making the anti-SLAPP motion may bring an interlocutory appeal from a trial-court order denying the motion to strike, or a mandamus action in the event that the trial court fails to rule on the motion in an expedited fashion; in this situation, further proceedings are stayed pending determination of the appeal.

Thus, in one hypothetical scenario in which an anti-SLAPP statute might be employed, imagine that a public figure—a prominent local community leader who is a well-known “local celebrity,” in this instance—sues a journalist for defamation over a statement published in a news article, which claimed that the community leader spent public funds improperly as part of a grant program. The community leader knows the basic substance of the article’s allegations to be true, but thinks they were “sensationalized” and “negative” and decides to file suit to punish the journalist and deter similar stories in the future. Because the community leader is a public figure and the story at issue relates to the leader’s status as a public figure, to succeed on a claim of defamation, the plaintiff would ultimately have to establish that the journalist wrote the article with actual malice, i.e. with knowledge of its falsity, or with reckless disregard for the truth.

Prior to enactment of the anti-SLAPP statute, the journalist’s counsel could have brought a motion to dismiss pursuant to K.S.A. 60-212(b)(6) early in the lawsuit for failure to state a claim upon which relief could be granted. However, under Kansas’ lenient notice-pleading standards—which test only the sufficiency of the allegations, assuming the plaintiff’s factual allegations to be true—defense counsel would have faced an uphill battle, in that the trial court would be required to credit plaintiff’s allegations for purposes of the motion, deferring resolution of any factual questions until the summary-judgment stage. Thus, if the plaintiff flatly alleged in the petition that the facts alleged in the article were false, and that journalist knew the facts to be false at the time the article was published, those allegations likely would have been enough to survive a motion to dismiss and to open up the door to costly discovery. Although the journalist would have still been able fully articulate constitutional free-speech defenses at the summary-judgment stage, there was no procedural mechanism to “smoke out” the fundamental flaws in the plaintiff’s case early in the course of litigation. Nor would there have been the potential to recover attorneys’ fees in the event that the trial court was to grant the early motion to dismiss, or the potential for an interlocutory appeal of a ruling denying the motion to dismiss.

By contrast, under the new statute, once the journalist demonstrated that the lawsuit at issue concerned the journalist’s right to free speech—here, at minimum, issues related to government, community well-being, and a public figure—the burden would immediately shift to the plaintiff to provide a substantive justification of the claim. Rather than being able
to rest on the bald allegations of the petition—including the groundless assertion that the journalist knew the statements to be false—the plaintiff would now be required to establish a likelihood of prevailing on the claim supported by “substantial competent evidence.” The plaintiff would therefore have to “put up or shut up” early in the litigation process, and it is likely that during this process this hypothetical plaintiff would not be able to come up with any evidence, much less substantial competent evidence, that the journalist knew the allegations to be false. This failure to muster evidence should thus cause the case to be dismissed up front, sparing the journalist the delay, expense, inconvenience, and frustration of defending a meritless lawsuit through discovery—and potentially imposing attorney’s fees on the plaintiff. In the event that the court was to deny the motion, the moving party could appeal the ruling immediately pursuant to the anti-SLAPP statutory provisions.

“The beauty of anti-SLAPP law is that it is a procedural approach to the issue. You start with the premise that if it is challenging socially important speech, the burden is on the plaintiff to explain why they have a case,” Internet scholar Goldman stated in a recently recorded panel discussion of the Congressional Internet Caucus Advisory Committee. “They don’t just get to go in and say ‘I’ll figure it out later. I might have a case, maybe I don’t. We’ll find out later,’ with the meter running for the defendant all along the way.”

Unlike some states’ statutes, the Kansas statute does not specify extent to which non-moving party may amend its petition either before or after the motion, leaving courts to apply and analogize to existing procedural rules regarding amendment.

III. Unresolved issues/concerns:

In recent years, anti-SLAPP statutes around the country have come under fire in a number of legal challenges. The most high-profile of these cases involve questions about whether anti-SLAPP statutes unconstitutionally impinge on a litigant’s ability to petition the court for redress and obtain a trial on the merits of their case. In a 2015 decision, the Washington Supreme Court held that Washington’s anti-SLAPP statute violated the right to a jury trial. Unlike Kansas’ statute, the Washington statute required the plaintiff to establish its probability of success by “clear and convincing evidence,” requiring the court to weigh the evidence and therefore creating a “truncated adjudication of the merits of a plaintiff’s claim, including non-frivolous factual issues, without a trial.”

In May 2017, the Massachusetts Supreme Judicial Court “dramatically shifted” the legal landscape under that state’s decades-old anti-SLAPP statute by creating a new, subjective standard under which a plaintiff may defeat an anti-SLAPP motion if the plaintiff can show that its “primary” motivation for bringing the claim was not to chill the defendant’s rights. The Massachusetts court stated that the remedy provided by that state’s legislature was not intended “to be used instead as a cudgel to forestall and chill the legitimate claims—also petition activity—of those who may be truly aggrieved by the sometimes collateral damage wrought by another’s valid petitioning activity.”

Also in May 2017, the Maine Supreme Judicial Court introduced new procedural safeguards for early evidentiary hearings, discovery and resolution of conflicting facts under that state’s then-22-year-old anti-SLAPP statute (which incidentally applies only to lawsuits based on a defendant’s exercise of the “right of petition”). The decision noted the varying burden-shifting rules that the state has used over the past two decades to balance two aspects of the right to petition the government—the right to engage in petitioning speech and the right to seek redress from the courts for claimed speech-related injuries—listing that when considering an anti-SLAPP motion, the court “must attempt to recognize and protect both the defendant’s actions that might constitute an exercise of his First Amendment right to petition—here, [defendant’s] statements about [plaintiff’s] alleged involvement in illegal and immoral acts—and [plaintiff’s] right of access to the courts to seek redress for those same actions.”

Another recent issue that has surfaced is government agencies’ attempts to use anti-SLAPP suits to dismiss lawsuits relating to governmental actions. In a May 2017 decision, the California Supreme Court held that the defendant, a public university, could not invoke the anti-SLAPP statute to dismiss a professor’s lawsuit over being denied tenure, stating that a claim “may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.” By contrast, in a subsequent decision, the California Court of Appeals in August 2017 upheld the trial court’s grant of a school district’s anti-SLAPP motion to strike a lawsuit by a teacher, where the “gravamen of the complaint” related to protected conduct by the school district, including communications and actions relating to the internal investigation into sexual-abuse allegations against the teacher.

The most vexing current procedural issue involving anti-SLAPP laws nationwide is a circuit split over whether anti-SLAPP laws are substantive or procedural, an inquiry that is linked to the potential for forum-shopping and the growing movement to enact a federal anti-SLAPP statute. At least two circuits, the U.S. Courts of Appeal for both the First and Ninth Circuits, have held anti-SLAPP provisions to be substantive laws that do not conflict with the Federal Rules of Civil Procedure, thus allowing various state anti-SLAPP laws to be used as a tool for defendants in federal court. The First Circuit, for example, concluded in 2010 that Maine’s anti-SLAPP act did not create a substitute for the Federal Rules, but rather “created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities.” The court held that refusing to apply the Maine anti-SLAPP statute in federal court “would result in an ineq-
suitable administration of justice between a defense asserted in state court and the same defense asserted in federal court… Likewise, were [the Maine statute] not to apply in federal court, the incentives for forum shopping would be strong.”

The U.S. Court of Appeals for the District of Columbia Circuit has taken the opposite view, concluding in a 2015 decision in a case filed by Yasser Abbas (son of Palestinian leader Mahmoud Abbas) that the D.C. anti-SLAPP act “conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial.” The Abbas decision relied in part on a characteristically feisty concurrence by Judge Alex Kozinski in a 2013 decision by the Ninth Circuit Court of Appeals, which has recently garnered newfound attention. In that decision, Kozinski urged the Ninth Circuit to overturn its prior precedent allowing federal courts to apply state anti-SLAPP statutes, stating, “Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof.”

Interestingly, Kozinski’s concurrence came in a case involving a defamation counterclaim filed by Trump University against a former student who had sued it for deceptive business practices. One observer recently noted that, given the traction that Kozinski’s concurrence has now obtained among some courts, Donald J. Trump may have actually played a role in “open[ing] up our libel laws,” as he famously promised to do on the campaign trail, before he ever took office.

At the time of this writing, appeals involving whether anti-SLAPP acts are “substantive” or “procedural” are pending in the 11th Circuit (Carbone v. Cable News Network, a case involving CNN’s reporting on infant-mortality rates at a Florida hospital), and 10th Circuit (Los Lobos Renewable Power v. Americulture, a case involving neighbors’ dispute over a property leased for a geothermal power facility.)

**IV. Kansas’ first test case**

The first case before the Kansas Court of Appeals involving this state’s new anti-SLAPP act is a dispute out of Johnson County in which a businessman sued for defamation over alleged false statements made on blogs, social media and emails, allegedly made by a woman with whom he previously had a romantic relationship. The defendant brought a motion to strike and attached an affidavit in which she denied making many of the alleged statements. (Presumably, absent evidence that a defendant *actually made a statement* of some kind, a plaintiff would be unable to establish a necessary element of a defamation claim). The trial court, however, denied the motion to strike, on the grounds that the defendant could not simultaneously take advantage of the Act while denying that she made the alleged defamatory statements.

Thus, the narrow issue currently on appeal with regard to Kansas’ statute is whether a speaker is required to admit that it has made the disputed statements before being entitled to invoke the statute’s protections—or, put another way, whether a defendant is entitled to protections of the statute, even while denying having engaged in protected activity. In her brief, the defendant/appellant emphasized that whether the anti-SLAPP act applies depends not on whether a defendant admits or denies specific statements made in the petition, but rather depends solely on the nature of the plaintiff’s claims. In defendant/appellant’s view, the trial court’s ruling relieved the plaintiff of establishing that he had *some* evidence supporting *each* element of his claim, averting the act’s requirements, while effectively requiring the defendant to incriminate itself in order to make a motion to strike.

Plaintiff/appellee countered that the trial court’s ruling was supported by the statute’s plain language, and that if a defendant denies making the statements at issue, the defendant could not have engaged in exercise of free association, speech or petition, all of which necessitate some form of communication under the plain language of the statute.

During oral argument on this case in November, a three-judge panel of the Court of Appeals wrangled with questions such as: is the special motion to dismiss more like a motion to dismiss or a motion for summary judgment? In determining whether to apply the statute, should the trial court primarily look to the nature of the plaintiff’s claim or to the nature of the defendant’s response? How much limited discovery, if any, should a trial court allow the parties in this situation, assuming the procedure of the special motion to strike applies, before ruling on the plaintiff’s likelihood of prevailing? If the Court were to remand the matter for further consideration, would the parties soon end up back before the appeals court on another interlocutory appeal?

In short, although this case raises interesting procedural and mechanical questions and competing public-policy arguments, it does not pose the fundamental constitutional question that other courts have faced regarding a plaintiff’s and a speaker-defendant’s competing rights to petition the government—an issue that likely will surface in Kansas another day.

**Conclusion**

In conclusion, all litigators practicing in Kansas Courts should be aware of, and seek to familiarize themselves with, provisions of the anti-SLAPP act. Although the fate of these statutes is uncertain, and they are a magnet for constitutional challenges, they offer proponents of free speech a powerful weapon to expose, eliminate and deter meritless suits.

**About the Author**

Eric Weslander is an associate with Stevens & Brand LLP in Lawrence, KS and a former journalist. His practice includes a variety of litigation matters including business disputes, personal injury and media law.
8. Remarks of Eric Goldman from panel discussion, “Frivolous Defamation Suits vs. Online Reviews—Gagged by the Law(yers), posted June 7, 2017 by the Congressional Internet Caucus Advisory Committee, available at https://www.youtube.com/watch?v=qOl2ef05Sc
9. Id.
13. https://www.techdirt.com/articles/20170613/21220237581/chilling-effects-slapp-suit-story.shtml ; see Shiva Ayyadurai v. Floor64 Inc. db/a Techdirt, et al., No. 1:17-cv-10011-FDS, U.S. District Court, District of Massachusetts. The trial court granted Defendants’ motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on September 6, 2017, but denied Defendants’ motion to apply the California anti-SLAPP statute and instead applied Massachusetts’ more narrow anti-SLAPP statute, which did not encompass the types of statements at issue.
17. Id.
18. Id.
19. Id. § (c)(4).
20. Id. §(c)(5).
21. Id. §(c)(3).
24. Gaudette v. Davis, 160 A.3d 1190 (Me. 2017). The case arose from the defendant’s publicly reported statements alleging that a former police employee was involved in a years-old sexual-abuse scandal.
25. Id. at 1195.
28. See Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999) and Godin v. Schenck, 629 F.3d 79, 81 (1st Cir. 2010). The Fifth Circuit also appeared to hold in 2009 that SLAPP statutes are procedural, not substantive, Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 168-69 (5th Cir. 2009), but noted in a recent decision that this is an “open question.” See Block v. Tanenhaus, 867 F.3d 585, 589 n.2 (5th Cir. Aug. 15, 2017).
29. Godin, 629 F.3d at 88.
30. Id. at 91-92.
32. Makaefi’s Tram Univ., 715 F.3d 254, 275 (9th Cir. 2013).
34. T&T Financial of Kansas City, LLC v. Taylor, Case No. 117624.

Note from the Editor: In response to a ruling handed down just as this issue of The Journal was going to press, author Eric Weslander added the following:

“In a per curiam memorandum opinion issued December 22, 2017 and not designated for publication, the Court of Appeals panel concluded that the district court erred by denying the motion to strike based solely on the Defendant’s denial that she made some of the communications at issue.

The Court summarized the statute’s background, citing the statement of purpose in the statute that the act is meant “to encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum extent permitted by law while, at the same time, protecting the rights of a person to file meritorious lawsuits for demonstrable injury.” K.S.A. 2016 Supp. 60-5320(b). The Court found each party’s interpretation of the statute to be reasonable, but noted the Legislature’s direction that the provisions of the Act’s shall be applied and construed liberally to effect its general purpose. Id. (k).

The Court therefore held that although there was no other state authority directly on point, persuasive authority supported Defendant’s argument “that step one of the analysis focuses on the claim upon which a motion to strike is based and it is irrelevant whether the defendant admits or denies making the statements in question.” The Court cited a number of California cases holding that a defendant’s assertion that it is innocent of the accused conduct is irrelevant to the first step of the anti-SLAPP analysis, i.e., whether the statute applies in the first instance, and should instead be analyzed under the second step of the inquiry— that is, the plaintiff’s likelihood of prevailing based on substantial competent evidence.

The Court remarked the case for further analysis consistent with the statute, including whether the communications identified in the petition “were made in connection with a public issue or public interest.”

The Journal of the Kansas Bar Association
Have You Considered Adding Video Conferencing to Your Practice?

by Sarah Rust-Martin

According to a study conducted by the Legal Resource Technology Center of the American Bar Association, only about 20% of lawyers were using video conferencing in 2016. And, of those 20%, only about 4% were using video conferencing regularly. But, when compared to other businesses, that is far below average. Why? Because video conferencing can reduce travel and other related costs by as much as 30% for businesses that go virtual.

Video conferencing comes with many benefits, particularly in a rural state such as Kansas where traveling to meet with clients can be costly and transportation can be an issue for many clients. Setting up video conferencing in one’s office can allow an attorney to meet with more clients in one day than would be possible by travel alone. And, it can allow the attorney to cover a wider catchment area as well, thereby potentially meeting needs in underserved areas.

The most important question to ask when considering video conferencing is **what am I wanting this service to do for me?** This question will allow you to sort through potential products and services out there in the realm of video conferencing to find the one that works best for you.

- Do you want to collaborate on documents with clients, share screens, and chat with clients and participants while on the conference?
- Will you use one room in the office for video conferencing room that will remain set up with all of the necessary tools or will you be carrying your laptop around to do video conferencing on-the-go?
- Are you looking for a cloud-based service and, if so, what questions do you need to ask to know what happens after the call(s) – where is the data stored and what type of security is used?1

Additionally, the attorney will want to consider the cost of the product. There are some free products out there, but not many. A few, such as Zoom, will allow you to use the product for free up to 40 minutes and up to 50 participants, but if you want to add the additional features, support, and functionality, then you must pay for the service. And, this is true across the board. In order to have access to increased functionality and features, the attorney will need to pay for the service and the product.2

When selecting a product, be sure to pick a tool that is easy to use. You will need to be competent on this tool so by picking one that is easy to master you will better ensure your ability to reach the level of competence. Also, your clients will need to use this product and if there is an excessive amount of downloading and technological sophistication needed to use it then you may have upset clients and decreased satisfaction with your services.

Support is an important feature to think about when considering video conferencing. Paying for a product will increase the accessibility to support and this will allow the attorney to focus on being the attorney on the call and not the tech expert. Thus, if the client has trouble logging in, or there is a problem with the platform, then there is someone else to call other than the attorney having to try to troubleshoot all of the tech issues along with the legal ones.3

Some accessories may be necessary to make your video conferencing services flow. You will need a computer, security software, and the video-conferencing service. Zoom, Google Hangout, Skype for Business, WebX, and Go-to-Meeting are just a few of the services on the market today. You will want to explore the products available to find the right fit for your practice. Additionally, when setting up video conferencing in your practice you will want to make sure you have a high-
quality webcam and headphones. Even if you are the only one in the room, or in the building, you may want to use headphones. Oftentimes, when speaking directly toward the computer it can leave a muffled echo that does not sound professional. You will want to test your sound quality prior to the first video conference with a client.4

When considering any type of technology every attorney must consider the implications to client confidentiality. Given the range of ethical issues raised by using technology in a law practice, we must always try to identify appropriate security measures to keep client information safe and protected. Here are a few questions to ask regarding technology and data security at your firm:

- Are your physical, organizational and technological security measures adequate?
- Are you using firewalls and intrusion detection software appropriately?
- Are you using anti-malware software appropriately?
- Are there firm policies in place regarding technology use?
- Are firm lawyers and staff given adequate technology training?
- Do you have measures in place to ensure data integrity?
- Is your data backed-up?
- Are your passwords, other access restrictions and authentication protocols sufficient?
- Do you use encryption, where appropriate?
- When discarding equipment, do you take appropriate measures to guard against unauthorized disclosure of client information?
- Is there an incident response plan in place at your firm?5

Once a choice is made regarding a type of security, a video-conferencing product, and the place and type of storage for client information, all of this information should be listed in the client engagement letter providing notice to clients about how and where their information will be kept and secured by the firm.

Video conferencing can open your practice to new areas, new clients, and new possibilities. While there are many things to consider before jumping in to video conferencing, it can be an exciting opportunity to grow your practice. Before starting, you will want to remember to arrive at your conference early, every time, because software glitches happen, and you always want to be prepared. If you are early to the conference, then you always have a chance to troubleshoot problems and glitches. And, remember if you are on the screen, or in the room, then people can see you. You are always visible during a video conference, so be prepared to watch your mannerisms and facial expressions and be “on” for the entire call.6

If you have any questions related to video conferencing, contact Sara Rust-Martin, KBA Law Practice Management Attorney, 785-861-8821, or srustmartin@ksbar.org

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Important Correction Notice:
to the Substantive Article in the October Issue of The Journal

Correction to “Awarding Damages for Breach of Contract: Direct or Consequential”
The Journal article titled “Awarding Damages for Breach of Contract: Direct or Consequential” previously summarized the holding from State ex re. Stovall v. Reliance Ins. Co. (See Pg. 23, column 2, second line from the top of the page.)

“Following this proposition, the court held that it was error for the district court to determine that the state’s additional finance, design, and administrative costs were direct damages and thus limited to the cap stated in the contract.”

The sentence misstated the categorization of damages, and should have stated:

“Following this proposition, the court held that it was error for the district court to determine that categories (1), (3) and (4) were direct damages and thus limited to the cap stated in the contract.”

The Kansas Bar Journal’s article previously miscategorized these damages. The Journal regrets the error.

The Journal of the KBA is looking for YOU if:

- You have an idea for a substantive article for The Journal and are ready to pursue it;
- You enjoy writing and research and would like to take on a topic already identified by the Board of Editors as an issue of interest to our members and readers;
- You know of a lawyer in your practice or community who is an unsung hero or has an unusual or fascinating avocation and would like to see their story in print;
- You are interested in writing a shorter, feature article on an area of practice or issue of concern to your colleagues;

Please contact The Journal editor at: editor@ksbar.org or visit with any member of the Board of Editors (see list on Page 4 of The Journal of the KBA)
Thank you Kansas IOLTA banks and attorneys with IOLTA trust accounts!
Your participation in IOLTA makes it possible for Kansans to receive civil legal services.

“There is no shortage of unmet legal needs each year across Kansas,” said Scott Hill, IOLTA Committee Chair. “While we always hope we can do more, the Kansas Bar Foundation is proud to partner with Kansas banks to assist Kansas organizations in providing much needed legal services.”

2018 IOLTA Grant Recipients:

**Kansas Legal Services $25,000**
To provide civil legal services through advice and representation to victims of domestic violence, sexual assault, and crime victims throughout the state.
www.kansaslegalservices.org

**Catholic Charities of Northern Kansas $5,000**
To provide low-cost immigration services to 350 immigrants in 2018 and to provide consultations in Hays and Manhattan on a monthly basis. The organization will also provide ten scholarships to low-income individuals who would like to pursue citizenship but need ESL classes to improve English skills and civic knowledge. www.ccnks.org

**Kansas CASA $10,000**
To increase their ability to advocate for children by increasing the number of trained volunteers and increasing the supervision of volunteers in the state.
www.kansascasa.org

**National Institute for Trial Advocacy $10,226**
To provide a three-day public services advocacy skills training program at no charge for public service attorneys in Kansas. The learning-by-doing program provides a setting for attorneys to develop trial advocacy skills. www.nita.org

**KBA Law Related Education Committee $3,000**
To provide Law Wise, a free, electronic resource for educators that provides lesson plans and information about civics, history, government and the law. To also provide other printed materials for students and educators.
www.ksbar.org/educator_resource

**El Centro $5,000**
To serve low-income immigrants during a critical time. The funding will be used for the Immigrant Assistance Clinic providing legal resources and services in the Topeka and surrounding areas. www.elcentrotopeka.org

**Wichita Family Crisis Center $2,574**
To support the implementation of free legal clinics for low-income survivors of domestic and sexual abuse and to increase the volunteer base for the services provided.
www.wichitafamilycrisiscenter.org

Additional ways to give:
- Volunteer for a pro bono opportunity: http://www.ksbar.org/page/probono
- Shop on Amazon and select the Kansas Bar Foundation as your Amazon Smile charity. https://smile.amazon.com/
- Convert your non-IOLTA trust account to an IOLTA trust account. http://www.ksbar.org/mpage/iolta
- Visit with Jordan Yochim, KBA/KBF Executive Director about a gift planning opportunity. jeyochim@ksbar.org or 785-234-5696.

Thank you, Fellows of the Kansas Bar Foundation!
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My name is Bryan Alkire. I graduated from Washburn University School of Law in 2013 and passed the Missouri bar in 2014 despite being blind, hearing impaired and having a mostly paralyzed right arm and hand. This article will focus on how I meet the challenges of these disabilities in the workplace.

Disabilities:

Being born three months premature caused my disabilities. I was born with severe hearing loss in my left ear and profound loss in my right ear. I was born with premature retinopathy which caused low vision through college. Toward the end of college, my retinas detached leading to blindness. I now only have light perception, meaning I can only see lights and shadow. Lastly, I was born with mild cerebral palsy (CP) which affects the right side of my body, mainly in my right arm and hand. While I can grasp handles with my right hand, I have no fine motor control, e.g. I cannot use the hand to write, type, or hold a phone. Additionally, I have neural yoking which means my right hand will attempt to mimic the movements of my left hand.

Mobility:

The first challenge I face with being blind and hard of hearing is getting to work because I can't drive. I've used a couple of different options for getting to work. One is the bus system which works well for short routes with bus stops that don't require crossing busy streets. The second option is called paratransit. It's a ride service mandated by the ADA. The service is reliable if one has the same drivers and a consistent schedule. For trips on short notice, the best option is to have someone drive me where I need to go.

Once I get to work I have a couple of ways of moving around the building. Most of the time I would use my white cane, which looks like a golf club with a rolling ball at the
bottom of the cane. To move around I sweep the cane in front of me in arcs in order to detect objects and features in my path. If I don’t know the way to a particular office, if time presses, or if someone offers, I will take sighted guide to where I need to go. This involves me holding someone’s elbow as they walk with me guiding me through the building.

**Productivity:**

Once I get to my workspace I use several devices which enable me to perform all job functions. My primary device is a software program called JAWS. It’s a screenreader which literally speaks aloud whatever is on the computer screen. It reads the desktop, it reads what’s on the internet, and it reads text documents and OCR format PDFs. This means I’m able to conduct legal research, communicate via email, and perform many other usual tasks of employment. JAWS’ primary limitation is that it can’t read graphics or non-text based coding which many specialized apps use. JAWS reads aloud to me the information on my computer, so to keep others from overhearing what I’m doing or to hear in a noisy environment, I plug a device called a Com Pilot into my computer. The Pilot is a device I wear around my neck and it feeds the input from the computer directly to my hearing aid. It’s as if the computer is speaking directly into my ear. My hearing aid lowers the background noise while the Com Pilot is engaged so that I can focus on my work yet, be aware if someone is trying to get my attention or the phone rings.

Generally, I don’t need to use special devices when communicating with people one on one in a quiet environment. However, if the situation is noisy or the person is far away or soft-spoken, I use a FM system to communicate. The FM system is a microphone and a receiver. The person speaking wears the microphone around their neck and speaks normally. I wear the receiver around my neck and the speaker’s voice is sent to my hearing aid. Just like the Com Pilot, it’s as if the person is speaking directly into my ear.

The same principle works with a phone. Either the Com Pilot or the FM receiver can be plugged into a headphone jack on a phone and be used for communicating with a person at the other end as needed. Additionally, the Com Pilot can be used with an iPhone to keep others from overhearing the phone while voiceover is being used. Voiceover is Apple’s built-in screenreader on all Apple devices from Macs to the i-devices. In many ways voiceover is easier to use than JAWS, as voiceover is built directly into the operating system for maximum efficiency, particularly when using Apple apps. The primary limitation of voiceover is that not all third-party apps code for voiceover. In those instances, JAWS can be used.

**Conclusion:**

It’s true that my disabilities make life and work more challenging than for the average attorney. However, given my strong work ethic and the proper tools, I am able to be just as or even more productive than the average or above average attorney.

In this article I’ve discussed my disabilities and how I compensate for those disabilities in the workplace. If you are interested in learning more about how you can help the blind, the deaf, and the deaf-blind in the workplace, see the footnotes below for sites with information.

**About the Author**

Bryan Alkire is blind and hearing-impaired. He graduated from Washburn University School of Law in December 2013 and passed the Missouri bar in 2014. Bryan is currently looking for full time employment and can be reached at 660-229-3288 (preferably by text) or at bryanalkire@gmail.com

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1. For more information on premature retinopathy, visit https://nei.nih.gov/health/rop.
2. 49 C.F.R. § 37.
3. For more information on how I use my cane, visit https://www.wikihow.com/Use-a-White-Tipped-Cane.
5. For further explanation about JAWS, visit http://www.freedomscientific.com/Products/Blindness/JAWS.
7. For more information on the FM system, visit https://www.hearinglink.org/living/loops-equipment/fm-systems/.
8. For more information about Voiceover as used by the blind and visually-impaired, visit https://applevis.com.
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Members in the News

New Positions

Brenda West Hagerman has been named a partner in the Smith & Burnett, L.L.C., a Larned law office that has served the area since 1947. The firm will now be known as Smith, Burnett & Hagerman, L.L.C.

Adam C. Mauck has joined the Topeka law firm of Henson, Hutton, Mudrick, Gragson & Vogelsberg, LLP as an associate. Adam is a May 2017 graduate of the University of Kansas School of Law.

Matthew Wine has joined the law firm of Spencer Fane LLP as an associate in the firm’s Real Estate Group in Kansas City. As a former banker and former staff attorney for the Missouri Housing Development Commission, Wine has extensive experience with a unique blend of financial and legal experience.

New Locations

Henson, Hutton, Mudrick, Gragson & Vogelsberg, LLP has relocated its office to 3649 SW Burlingame Road, Suite 200, Topeka, KS 66611-2155.

Notables

Bretz and Young, L.L.C, law firm out of Hutchinson has been selected for inclusion on U.S. News & World Reports 2018 “Best Law Firm” list for the fourth year in a row. Firms are included based on professional excellence with persistently impressive ratings from clients and peers.

Jim Caplinger, a Topeka attorney, was highlighted in a recent Topeka Capital Journal article for his significant contributions—as a lawyer, a collector and a fan—to the Evel Knievel Museum. Caplinger served as an advisor to the group working to establish the museum at the Topeka Harley Davidson shop, helping them on real estate matters, setting up the 501(3)c nonprofit organization and in purchasing and arranging shipment of a good deal of Knievel memorabilia, including the Skycycle rocket, the helmet from the Caesar’s Palace crash, jewelry and many other items.

Judge Daniel D. Creitz, chief judge for the 31st Judicial District, has been reappointed by the Kansas Supreme Court to another two-year term as chief judge. Creitz has served as a district judge since May 2002 and as chief judge since 2011. His district includes Allen, Neosho, Wilson and Woodson counties.

Judge Kim W. Cudney has been reappointed by the Kansas Supreme Court to another two-year term as chief judge of the 12th Judicial District. Cudney has served as district judge and chief judge since 2016. The district covers Cloud, Jewell, Lincoln, Mitchell, Republic and Washington counties.

Judge F. William Cullins has been reappointed to a two-year term as chief judge of the 14th Judicial District, effective Jan. 1, 2018 through Dec. 31, 2019. The 14th District includes Chautauqua and Montgomery Co. Cullins, a native of Caney, Kan., served as Montgomery Co. Attorney, Coffeyville City Attorney and as an attorney in private practice before becoming a judge.

Judge Joe Dickinson, a district court judge in the 9th Judicial District since 2002 has been reappointed to another two-year term as chief judge of the district, a post he’s held since August 2015. Dickson presides over cases in Harvey and McPherson counties.

Dugan and Giroux Attorneys at Law (Daniel Giroux and Paul Dugan) welcomed a Valley Center high school student, Mariah Behms, to serve as an intern in their office. For her excellence and maturity in participating as an intern, Behms was named October 2017 Intern of the Month. The high school works with local businesses to give students an opportunity to push themselves beyond their own comfort zones.

Justin Ferrell, Concordia, was nominated by Republic County Republicans to fill the vacancy resulting from the resignation of Republic County Attorney Marlea James. Once nominated, Ferrell’s name was submitted to the Governor’s office for formal approval.

Tom Harris, Valley Center Attorney, has been appointed to serve on the Newton Medical Center Board of Directors.

Judge Amy Harth has been reappointed to serve another two-year term as chief judge of the 6th Judicial District which covers Bourbon, Linn and Miami counties. Harth worked as
a Miami Co., prosecutor and as a public defender before becoming a judge.

**Joseph, Hollander and Craft LLC** had seven attorneys honored by the Missouri & Kansas Super Lawyers 2017 of which three were named to the Prestigious “Rising Stars” list. (Fewer than five percent of all attorneys are selected as Super Lawyers.) Those listed as Super Lawyers include: Managing Partner **Christopher M. Joseph**, Topeka and Lawrence; **Ross A. Hollander**, Wichita, Chair of the Civil Litigation and Employment Law Division; **M. Kristine Savage**, Topeka; **Dionne M. Scherff**, Overland Park/Kansas City); Rising Stars designees were: **Michelle Moe Witte**, Wichita; **Casey Y. Meek**, Lawrence; and **Diane L. Bellquist**, Topeka.

**Judge Mike Keeley** was reappointed by the Kansas Supreme Court to another two-year term as chief judge of the 20th Judicial District. Keeley has served as a judge in the district since 1993 and as chief judge since 2004. He presides over cases in Barton, Ellsworth, Rice, Russell and Stafford counties.

**Judge Peggy Kittel** reported for jury duty on a trial in Douglas County in November. Although willing to serve, Kittel ultimately was not selected to the panel. Kittel has served the 7th Judicial District since 2008 and has been chief judge since 2016. She was recently appointed to another term as chief judge.

**Eric Kjorlie** was selected for the Lifetime Achievement of America’s Top 100 Attorneys. Selection is “by invitation only,” and reserved to identify the nation's most exceptional attorneys. Less than ½ of 1 percent of active attorneys receive this honor.

**Judge Oliver Kent Lynch** was appointed by the Kansas Supreme Court to complete the remainder of a chief judge vacancy in the 11th Judicial District and to then serve the full two-year term beginning Jan. 1, 2018. Lynch has been a district judge since 2005, overseeing cases in Cherokee, Crawford and LaBette counties.

**Judge Scott E. McPherson** of Sterling was appointed by the governor as a district judge in the 20th Judicial District. McPherson fills the vacancy created when Judge Ron Svaty resigned. He has served as the Rice County Attorney since 2007 and was previously an assistant County Attorney in Barton County and an Assistant District Attorney in Douglas County. The 20th Judicial District includes Barton, Ellsworth, Rice, Russell and Stafford counties.

**Justin Meeks** has resigned from his position as Bourbon County Attorney to concentrate solely on his role as county counselor. Bourbon Co. is the only county in Kansas that has had one person filling both roles (county attorney and county counselor.) Meeks felt he could not serve well in both positions as each has a large workload.

**Monnat & Spurrier, Chartered, President Dan Monnat** has been named to the Top 100 list for the 12th time while **Sal Intagliata**, shareholder in the firm, has been named to Super Lawyers for the fourth consecutive year.

**Dave Mudrick**, a partner in the Topeka firm of Henson, Hutton, Mudrick, Gragson, and Vogelsberg LLP was selected to the 2017 Missouri and Kansas Super Lawyers list.

**Judge Gary Nafziger** was reappointed to a two-year term as chief judge in the 2nd Judicial District. He has served as a judge in the 2nd District since 1982 and has been chief judge since 2006. The 2nd Judicial District includes Jefferson, Jackson, Wabaunsee and Pottawatomie counties.

**Judge James Patton** will serve another two-year term as chief judge in the 22nd Judicial District, having been reappointed to the position by the Kansas Supreme Court. Patton has been a judge in the district since 1995 and chief judge since 2001. The 22nd extends across Doniphan, Brown, Nemaha and Marshall counties.

**Scott B. Poor**, attorney and advisor at Hartstein Poor, LLC, has joined the KANZA Bank board of directors.

**Judge Michael Powers** was reappointed by the Kansas Supreme Court to another two-year term as chief judge of the 8th Judicial District. The 8th District encompasses Geary, Dickinson, Marion and Morris counties.

**Judge Preston Pratt** was a reappointed to another term as chief judge of the 17th Judicial District which encompasses Decatur, Norton, Phillips Smith, Graham and Osborne counties. Pratt has served as district judge and chief judge in the 17th Judicial District since 2011.

**Nicholas St. Peter** has been appointed to another two-year term as chief judge of the 19th Judicial District which covers Cowley County. St. Peter has been a judge in the district since 2004 and has been chief judge since 2010.

**Judge A.J. Wachter**, Chief Judge of the 11th Judicial District made his retirement official on Dec. 18, 2017. Wachter served the district from the Crawford County Judicial Center in Pittsburg, where he’d been a district court judge since 2002 and chief judge since 2013. The district includes Cherokee, LaBette and Crawford counties.

**Judge Merlin Wheeler** has been reappointed by the Kansas Supreme Court to a two-year term as chief judge of the 5th Judicial District. Wheeler has served as a judge in the 5th Judicial District since 1990, and has been chief judge since 1998. He oversees cases in Lyon and Chase counties.

**Judge Marilyn Wilder** of the 9th Judicial District has been named by Newton Medical Center to serve on its board of directors.

**Judge Meryl Wilson** was reappointed as chief judge of the 21st Judicial District where he has served as a district court judge since 1997 and as chief judge since 2012. Wilson presides over cases in Riley and Clay counties.

**Judge Wendell Wurst**, chief district judge of the 25th Judicial District has been reappointed for another two-year term. Wurst has served as a district court judge in the 25th since 2009, and as chief judge since 2012. Wurst presides over cases in Finney, Kearny, Hamilton, Greeley, Wichita and Scott counties.

**Judge Rene Young** has been reappointed by the Kansas Supreme Court to another two-year term as chief judge in the 28th Judicial District. Young has served as a district court judge in the 28th since 2006 and as chief judge since 2015.
Gary M. Peterson, 77, Topeka, passed away Tuesday, December 5, 2017. Gary was born July 1, 1940, in Clay Center, Kansas, the son of Marvin and Fern Peterson. He was a graduate of Topeka High School in 1958 and then attended Washburn University, where he graduated with his Bachelor’s degree in Business and was a member of the Kappa Sigma Fraternity. He was a 4-year letterman in football for Washburn, where he played both offensive guard and defensive linebacker.

Gary married Vicki Loebsack on November 27, 1963, in Topeka. Gary began his working career at the Topeka-based Goodyear manufacturing plant and later moved to Franklin Manufacturing Co. in Webster City, Iowa, where he was involved with personnel management with both firms. In 1973, Gary and his family moved back to Topeka after he was accepted to Washburn Law School. He passed the bar and began private practice in 1976, specializing in workers’ compensation. In 1993, Gary was appointed to the newly established Kansas Workers Compensation Appeals Board as a judge, where he was instrumental in establishing the guidelines for workers’ compensation for the state of Kansas. He retired from the board in 2003. He finished his career working part-time for Jeff Cooper at his law firm, where Gary played a consultative role with workers’ comp cases and helped with many written opinions.

Gary was very involved in his community, including the United Way, Sherwood Lake Club, Topeka Bar Association, Kansas Bar Association and American Bar Association. But, his greatest passion was coaching his sons in football, basketball and baseball. Over the years, he positively affected the lives of many young athletes. Gary and his wife Vicki loved to travel and enjoyed many cruises throughout their married years, including cruises through the Mediterranean and Asia. In recent years, they spent winter months in Maui and Aruba, with Aruba being their preferred destination. Gary and Vicki also loved playing golf and were long-time club members – first with Shawnee Country Club and then with Topeka Country Club. Most of all, they loved to dance. They danced on their first date and never stopped dancing through 54 years of marriage.

Survivors include his wife, Vicki, of 54 years; his two sons, Jeff (Gayla) and their children, Blake and Lauren, Topeka, and Jared (Lisa) and their children, Tayler, Rylee and Hayden, Owasso, OK. He also is survived by his sister, JoAnn, her four sons and their families. A celebration of his life was held on Saturday, December 16, 2017, at Topeka Fellowship Bible Church, Topeka, Kansas. The family suggests memorial contributions be made to CASA of Shawnee County, 501 SE Jefferson, Suite 2002, Topeka, KS 66607, or visit www.casaofshawneecounty.com.
Robert Hall Wagstaff (1941 - 2017)


Robert attended Border Star Elementary and Pembroke Country Day School in Kansas City before graduating from Dartmouth College in 1963, where he was a member of Sigma Nu. He then graduated from the University of Kansas School of Law in 1966. In 1967, after serving as Assistant Attorney General for the state of Kansas, Robert ventured to the frontier town of Fairbanks, Alaska, at the request of Alaska Attorney General Edgar Paul Boyko, where he polished his skills in the trial and appellate courts as an Assistant District Attorney for two years.

Robert then moved to Anchorage, Alaska, and embarked upon a distinguished career as a trial lawyer and appellate advocate. His work ranged from criminal defense, aviation law, Native American rights to medical malpractice, and culminated in a 14-year real estate fraud class action lawsuit. But he was best known and admired as an implacable force dedicated to constitutional rights and civil liberties, representing many clients pro bono.

Robert argued over 70 appeals before the Alaska Court of Appeals, Alaska Supreme Court and the Ninth Circuit Court of Appeals. In 1973, at the age of 32, he made his first of two appearances before the U.S. Supreme Court, successfully arguing the denial of his client’s right to confront witnesses under the Sixth and 14th Amendments. Robert was nationally known in particular for the Ravin v. State right to privacy case, which affirmed limits on government intrusion into the home. Universally respected, Robert became President of the Alaska Bar Association, a member of the Alaska Judicial Council, and his dedicated support of the American Civil Liberties Union resulted in his being elected to ACLU National Board of Directors from 1971 to 1977.

Equally accomplished in aviation, Robert began flying in 1967 and became a passionate and extraordinarily knowledgeable pilot and flight instructor. He flew single and multi-engine aircraft, seaplanes, helicopters and jets. He thrilled in flying the Douglas DC-3, a historic aircraft which he described as a war hero and the ultimate tail-dragger. He flew widely over Alaska, Canada, and the Lower 48 states. For a time, he flew to his satellite law office in Dillingham, Alaska, where he slept on the floor, and he relished flying to remote villages to meet with clients. He served as President of the United States Aeronautical Foundation for eight years, as a Member of the Airspace Committee, Alaska Airman’s Association for three years, and was a recipient of the Federation Aeronautique Internationale Air Sports Medal in 1991.

In 2002, the University of Oxford accepted Robert in a postgraduate law course. His spirit of adventure led him to fly his own twin engine plane to England, choosing the northern route across Labrador, Greenland and Iceland. He spent a total of 17 hours in the air over eight days.

Although Robert and his wife Cynthia planned to stay in Oxford for only a year, they found it so stimulating they stayed for 10 years. Robert earned a Master of Studies in Legal Research in 2006, and a Doctor of Philosophy in 2011. Robert and Cynthia found their lives enriched by their academic pursuits and their friendships with their colleagues in Oxford and London and during their frequent flights into the Scottish Highlands, the Isle of Jersey and the Continent.

Robert participated in numerous international human rights forums during these years. Robert’s thesis research resulted in his book, Terror Detentions and the Rule of Law, which Oxford University Press honored with publication in 2014. Robert was also a “petrol head,” (a keen fan of motorsports), a passion he shared with friends at home and abroad. He was a member of the Royal Automobile Club in London and very appreciative of the Club’s sartorial regulations.

In the words of a good friend and colleague: "It goes without saying that he was a powerful and accomplished lawyer and understood his first duty was to bring the law to bear in defense of justice and equality. He was a great man in his lifelong dedication to law and justice. I will miss his unshakeable belief that all the identifiable failures in justice and equality could ultimately be fixed."

He is survived by his wife, Cynthia Fellows; brother, Thomas and wife Starr; sister, Katherine; sons, Ian, Robin and Dylan; grandsons, Alexander and Will; granddaughter, Lily; stepdaughter, Jada Quinn Livingston, her husband Trevor and their children Rose, Mack and Louis.

A Memorial Service was held on Nov. 18, 2017, at Grace and Holy Trinity Cathedral in Kansas City, Mo. In lieu of flowers, donations to the ACLU were appreciated.
John B. Williams (1948 - 2017)
The Honorable John Benson Williams of Kansas City, Mo., 69, retired Judge of the Kansas City Missouri Municipal Court, died suddenly from a massive pulmonary embolism Saturday, November 25, 2017. Memorial Mass was held Thursday, Nov. 30, at St. Elizabeth Catholic Church, Kansas City, Mo. Visitation with family and Life Celebration followed at the Uptown Theater. Contributions in honor of John’s life work may be made to the National Alliance for the Mentally Ill., PO Box 62596, Baltimore, MD 21264 or www.nami.org/donate

John was born in Kansas City, MO, on March 24, 1948. He attended St. Elizabeth Catholic School, and was a member of the great class of Rockhurst High School of 1966. During his early years he also managed a thriving career as a multi-talented performer, with stints on a local seasonal television show, print ads in the Western Auto catalog, roles in Starlight productions, and for those of us of a certain age, a recurring commercial at area drive-ins, luring us all to the concession stand for "Intermission Time!" Playing guitar with his talented brother Billy on drums in bands during high school (the Little Lites, the Royal Tones) and at dances and parties helped him pay his own way through college and later law school. He somehow squeezed in a year as a postal carrier too. At RHS, he and his debate partner John Immele were responsible for winning the state title in debate, an accolade he carried proudly (and deservedly) his entire life.

He married his first wife Deidre Pierron (now of Sunnyvale, CA) and daughter Linda was born in 1968. He earned his Bachelor’s Degree in Economics from University of Missouri-Kansas City in 1970, where he continued his debate winning ways, and met many of the dear friends he still has to this day, including Phil Cardarella and Katheryn Shields. In 1971 he began his professional political career working as chief aide (and ear whisperer) for Mayor Charles B. Wheeler, after being his assistant alongside Jerry Jette during the mayoral campaign, putting to work political skills he learned from home and family. After a year in politics, John decided a law degree was the thing, and returned to UMKC Law School, graduating in 2 1/2 years in order to stay abreast of his younger brother Billy, who was also at UMKC Law. They graduated together in 1973.

John worked as a Kansas City Missouri City Assistant City Prosecutor from 1974-1978, where he was the Trial Director, and then in private practice for several years from 1978-1982. He spent several years preparing taxes for Bob Haley Tax Services. John continued working on political campaigns in the Kansas City area, including as the candidate in two special elections to fill house seats in the Missouri House of Representatives, which he lost, but loved nevertheless. He was appointed to the Missouri Judicial Nominating Commission 1980-83, and a member of the Committee for County Progress Board of Directors. John co-authored chapters on "Counties" and "Special Districts" for the Missouri Local Government Law Missouri Bar CLE deskbook. His political involvement continued as the local chairman of Morris Udall’s campaign for U.S. President in 1976 and in 1988 as the Missouri field coordinator for Michael Dukakis for President. In 1982 when Bill Waris ran for Jackson County Executive, John was instrumental in his victory. John was appointed County Counselor in 1983, and served two terms in that capacity, until 1991, when he returned to private practice. During his time at Jackson County he was immensely proud of his role in the negotiations of the contracts which extended the leases on the stadiums, keeping his beloved Royals and Chiefs in KC for 25 more years.

John was appointed Judge of the Kansas City Municipal Division of the Kansas City Circuit Court on May 4, 1995. He served an unprecedented seven terms as Presiding Judge from 1996-1997 and 2000-2004. In 2002, the first in the country mental health specialty court was being developed and funded in Kansas City Municipal Court and John was asked by then-Jackson County Executive Kathy Shields to preside over it, a position he held from 2002 until his retirement. The KCMO Mental Health Court, an innovative, collaborative partnership between the justice and mental health systems that diverts people with mental health issues from the criminal system into treatment instead, has received numerous awards and is a model for specialty courts nation-wide under John’s direction. He received the National Association for the Mentally Ill of Greater Kansas City’s Community Service Award in November 2002. He was recognized for his community leadership by the Jackson County Mental Health Court Commission in June of 2006, and also in that year, he received the Judicial Recognition Award from the Association of Women Lawyers of Greater Kansas City for his work with the Mental Health Court.

John was an active and valued member of the American Judges Association, where he had many dear friends around the country, and attended their conferences often twice each year. He served on the Board of Governors of the AJA from 1998-2006, and again from 2009 until his death. He was tapped by multiple presidents to act on their Executive Committees, acknowledging his special insider knowledge of the organization and his unique political skill set. As in so many other arenas, John was always happier being the "kingmaker", not the "king." John was a member of the Missouri Bar Association,
the Kansas City Metropolitan Bar Association, the American Judges Association, Missouri Municipal and Associate Circuit Judges Association, the National Institute of Municipal Law Officers, the Missouri Trial Lawyers Association and the American Trial Lawyers Association. He was admitted to the Missouri Supreme Court; United States District Court; Western District of Missouri; United States Court of Appeals for the Eighth Circuit; United States Court of Appeals for the Tenth Circuit; and Supreme Court of the United States. John retired from the bench in July, 2015, after 20 years of dedicated and honorable service.

He had begun an enjoyable retirement of increased travel, a lot more reading, some consulting work, and a little bit of sleeping in. Things John loved, in no particular order: his pontoon boat on Longview Lake; the buddies at J.J.’s every afternoon; ”The Rank Dudes”; sunset over the Lake of the Ozarks; being right; softball at Tower Park; the Royals and the Chiefs; making lists; playing the piano for the family at gatherings, or just for himself; the breeze off the ocean under the palapa on the beach in Puerto Vallarta; a "spirited" debate with anyone (Larry Sells); watching the stars; an evening out with his wife Molly and pals Bob & Margene; being on a cruise ship; his family, especially his brother Billy; keeping everything "just in case"; sitting under the holly tree watching the neighbors walk by; planning the next trip; knowing that Molly was always right next to him.

By far his greatest love and of whom he was most proud: his girls. Although separated in age by 30 years, his daughters Linda (Sissy Marie) and Natalie (Sissy Jeanne) are best friends, loyal daddy's girls, his toughest debate opponents, his finest singing partners, and his roughest and most honest critics. They share his passion for the Royals, his fabulous dancing ability, his amazing vocabulary, his tiny ears, and his love for ridiculous puns. They will have Dad stories for the rest of their lives, and will never stop missing him, and will never have a greater fan. He leaves too soon his wife, his partner, his travel companion, his "kid," his best friend: Molly. They were married in 1995, after much persuasion on both parts, at one time or another. Their daughter Natalie was born in November of 1998. Their marriage was a true adventure, and she is bereft without him by her side to talk to, walk with, play with, dance with, argue with, fly off with, and get old with.

John was preceded in death by his father O.B. Williams, his brother William Randall Williams, and his cousin Jimmy Heilman. He is survived by his wife, Molly Williams and daughter Natalie of the home, daughter Linda Williams Taylor and her husband David; mother, Dorothy Williams, sisters, Mary Jeanne Byrd and husband Mike, Darlene Piane; nieces and nephews Austin Williams, Michelle (Matt) Stephens and Melissa Williams; Rob (Erin), Jeff (Megan), Kenny (Kelly) Byrd and Cindy (Matt) Brennan; Lucian Piane, Denise (Nick) Troy and Karen Piane; aunt and uncle Shirley and Roy Heilman; cousins, Billy (Shelly) Heilman, Tommy (Maggie) Heilman, and Jeannie (Jim) Richardson; numerous great-nieces and -nephews; mother-in-law Adele Korth and father-in-law Bill Korth (JJ); brother-in-law Christopher Korth (Lori) and his children; and friends too many to count. Look at the moon, John!
Don’t leave the office without it!

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Supreme Court

Attorney Discipline

ORDER OF INDEFINITE SUSPENSION
IN THE MATTER OF HARRY LOUIS NAJIM
NO. 116,943—DECEMBER 1, 2017

FACTS: This disciplinary matter arose after Najim was caught offering to provide legal services to an undercover agent engaged in a conspiracy to commit wire fraud and contraband cigarette trafficking. Najim’s retainer was paid in cash, and Najim did not notify his law firm about the payment in excess of $10,000 cash so that it could report the payment to the Financial Crimes Enforcement Network. The failure to report is a Class D federal felony, and after a conviction, a hearing panel determined that Najim violated Rule 8.4(b) (commission of a criminal act reflecting adversely on the lawyer’s honesty).

HEARING PANEL: Najim pled guilty to one of the 44 counts that were filed against him in federal court. But after the disciplinary administrator filed its complaint, Najim denied that his conduct violated Rule 8.4(b). The disciplinary administrator asked that Najim’s license be suspended indefinitely, retroactive to a temporary suspension that was entered after criminal charges were first filed. Najim thought that a 2-year suspension was appropriate, retroactive to May 2015. A majority of the hearing panel ultimately recommended that Najim be suspended for three years, with suspension running from the date of the Supreme Court’s opinion.

HELD: Although Najim disputes the idea that he committed a crime, the record of criminal judgment was admitted into evidence during the disciplinary hearing. That judgment is conclusive evidence that a crime was committed. And the crime of which Najim was convicted was one of dishonesty. The evidence before the court warrants an indefinite suspension from the practice of law.

ORDER OF PUBLISHED CENSURE
IN THE MATTER OF LAWRENCE E. SCHNEIDER
NO. 117,361—NOVEMBER 9, 2017

FACTS: A hearing panel determined that Schneider violated KRPC 1.3 (diligence) and 1.4(b) (communication). These violations arose after Schneider failed to list possible federal and state earned income credit exemptions on bankruptcy petitions. Schneider’s inaction resulted in his clients’ inability to respond to orders from the court.

HEARING PANEL: The panel noted that Schneider’s actions were negligent and that he timely made restitution to his clients which ameliorated the consequences of his misconduct. Schneider also fully cooperated with the hearing panel and acknowledged wrongdoing. The disciplinary administrator recommended a 3-month suspension. The hearing panel noted that in the 2 years since the misconduct first arose, there had been no further incidents and that Schneider had taken steps to correct his diligence issues. For those reasons, the hearing panel suggested published censure.

HELD: The court adopted the hearing panel’s conclusions. After following up with the complainant, the disciplinary administrator recommended at the hearing on this matter that Schneider be disciplined by published censure. The court agreed and the sentence was imposed.

ORDER OF THREE-YEAR SUSPENSION
IN THE MATTER OF BRANDY L. SUTTON
NO. 117,395—DECEMBER 1, 2017

FACTS: A hearing panel found that Brandy L. Sutton violated KRPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.) The complaint arose after a former employee accused Sutton of failing to make promised contributions to that employee’s individual retirement account. A review by the employee revealed a shortfall of almost $9,000. Sutton disputed the amount but acknowledged there were some shortfalls which were caused by the law firm’s financial distress. And, Sutton claimed, that distress was caused by the employee’s negligence.

HEARING PANEL: After being notified of these issues, Sutton made whole not only the complaining employee but also other employees whose IRAs were not properly funded. The disciplinary administrator asked that Sutton be indefinitely suspended, although he acknowledged that a shorter term might be appropriate. Sutton asked that she be allowed to continue practicing law, subject to a probation plan. The hearing panel agreed with Sutton that probation was a good option for Sutton.
HELD: The hearing panel’s findings were adopted. The court found that Sutton’s behavior was, essentially, conversion, and that conversion historically warrants a more severe sanction than probation. Accordingly, a majority of the court elected to impose a three-year suspension, subject to lifting the suspension after six months upon application. A minority of the court would have approved the probationary plan suggested by the hearing panel.

ORDER OF PROBATION
IN THE MATTER OF MATTHEW B. WORKS
NO. 117,607—NOVEMBER 17, 2017

FACTS: A hearing panel determined that Works violated KRPC 1.2(c) (scope of representation), 1.3 (diligence), 1.4(a) (communication), 1.16(d) (termination of representation), and 3.2 (expediting litigation). The violations occurred after Works was appointed to represent clients on appeal but failed to docket the cases.

HEARING PANEL: When determining the appropriate discipline, the hearing panel noted that Works was disciplined on five prior occasions. But there were a number of mitigating factors, including Works’ mental health issues and a traumatic house fire. The disciplinary administrator recommended that Works be placed on probation with an underlying suspension of 12 months to two years. After noting that Works provided a workable, substantial probation plan, the hearing panel determined that a term of probation was in the best interests of the legal profession and the general public.

HELD: The court admitted the hearing panel’s final hearing report. A majority of the court agreed with the hearing panel that Works should be suspended for two years, with imposition of that discipline stayed and a three-year term of probation. A minority of the court would have imposed a harsher sanction, including a period of immediate suspension.

ISSUE: Constitutionality of subjecting Hayes to the 1-year statute of limitations

HELD: After Hayes filed his motion, the Legislature amended K.S.A. 60-1507 to more clearly define what constitutes manifest injustice. The question of whether that amendment applies retroactively to Hayes need not be answered because Hayes cannot show manifest justice under any standard.


NEGLIGENCE—TORTS
MCELHANEY V. THOMAS
RILEY DISTRICT COURT—COURT OF APPEALS IS AFFIRMED IN PART AND REVERSED IN PART—DISTRICT COURT IS AFFIRMED IN PART AND REVERSED IN PART—CASE IS REMANDED
NO. 111,590—DECEMBER 1, 2017

FACTS: Thomas was driving a pick-up truck when he ran over McElhaney’s feet in a school parking lot. It is undisputed that Thomas was driving, but there was no agreement about his state of mind at the time. Thomas claimed it was purely an accident. McElhaney testified that Thomas told her that he just meant to “bump” her with the truck. McElhaney brought claims for both negligence and intentional tort theories. She later asked to amend her petition to include a claim for punitive damages, but that request was denied. The district court also dismissed her intentional tort claim, finding there was no evidence of an intent to injure. The Court of Appeals agreed with this assessment. And a majority of the panel upheld the district court’s ruling disallowing a claim for punitive damages. This appeal followed after McElhaney’s petition for review was granted.

ISSUE: Standard for proving tort of civil battery

HELD: An intent to injure is a necessary element of the tort of battery in Kansas. This includes both the intent to do actual harm and the intent to cause an offensive contact. A person may be guilty of civil battery if the defendant intends to make an offensive contact and bodily harm results. In so ruling, the court does away with the concept of “horseplay” as a legal category. And because McElhaney should have been allowed to bring her battery claim, the district court also erred by not permitting McElhaney to amend her petition and claim punitive damages.

STATUTE: K.S.A. 60-3703
Criminal

Constitutional Law—Criminal Procedures—Statutes
State v. Amos
Wyandotte District Court—Affirmed
No. 115,925—December 15, 2017

Facts: Amos’ 1999 convictions of first-degree murder and conspiracy to commit aggravated robbery were affirmed on direct appeal. In 2015, he filed a motion to correct an illegal sentence, seeking relief under 2014 Kansas decisions and under 2013 legislation (now codified at K.S.A. 2016 Supp. 21-6620) enacted in response to Alleyne v. United States, 570 U.S. 99 (2013), to require jury findings before an enhanced mandatory minimum sentence can be imposed for first-degree murder. District court summarily denied the motion. Amos appealed, arguing for the first time that K.S.A. 2016 Supp. 21-6620(f), which makes the 2013 amendment inapplicable to sentences that were final before June 17, 2013, violates the Equal Protection Clause.

Issue: Motion to correct illegal sentence

Held: A claim that a sentence is illegal because it violates the constitution cannot be brought via K.S.A. 22-3504(1). Nor can a K.S.A. 22-3504(1) motion to correct an illegal sentence serve as the procedural vehicle for attacking the constitutionality of K.S.A. 2016 Supp. 21-6620(f). Impact of 2017 amendment of K.S.A. 22-3504 is not considered in this case.

Statutes: K.S.A. 2016 Supp. 21-6620, -6620(f); K.S.A. 22-3504(1)

Criminal Procedure—Habeas Corpus—Sentencing
State v. Buford
Wyandotte District Court—Affirmed
No. 114,175—December 1, 2017

Facts: Buford is serving a life sentence imposed for 1990 felony murder conviction. He filed 2014 motion to correct an illegal sentence, arguing the parole board instituted a new sentence each time it denied him parole, and these “sentences” were illegal because the parole board should have classified his pre-1993 crime as a nonperson felony. District court summarily denied the motion. Buford appealed.

Issue: Motion to correct illegal sentence

Held: The denial of parole is not a sentence, so K.S.A. 22-3504 has no application. Claim is not construed as habeas motion because it is not clear Buford has exhausted administrative remedies.

Statutes: K.S.A. 22-3504, 60-1501; K.S.A. 21-5401(a), 22-3717(b) (Ensley 1988)

Criminal Procedure—Sentencing
State v. Campbell
Sedgwick District Court—Affirmed
No. 114,814—December 15, 2017

Facts: Campbell was convicted in 1996 of first-degree murder and multiple crimes. In calculating criminal history for application of the Kansas Sentencing Guidelines Act (KSGA), district court classified several of Campbell’s out-of-state convictions as person felonies. In 2015, Campbell filed motion to correct an illegal sentence, citing State v. Murdock, 299 Kan. 312 (2014). District court summarily denied relief, refusing to apply Murdock retroactively. Murdock was later overruled by State v. Keel, 302 Kan. 560 (2015). Campbell appealed claiming: (1) his sentence was illegal under Murdock; (2) application of Keel to Campbell’s motion violated the Ex Post Facto Clause; (3) KSGA’s person/nonperson classification of pre-KSGA offenses violates the Sixth Amendment; and (4) summary denial of his motion denied him his right under K.S.A. 22-3504(1) to a hearing. Appeal transferred to the Kansas Supreme Court.

Issues: (1) Classification of out-of-state convictions, (2) Ex Post Facto Clause, (3) Sixth Amendment, (4) summary denial

Held: Campbell was not entitled to have his out-of-state convictions classified as nonperson offenses under Murdock which was overruled by Keel, and is not entitled to relief under holding in Keel. Impact of 2017 amendment of K.S.A. 22-3504 is not addressed.

Application of Keel in this case does not violate the Ex Post Facto Clause. The 1993 statutes interpreted in Keel were in
effect when Campbell committed crimes in 1996. They are not laws that increased the potential punishment after Campbell’s crimes were committed.


Campbell mistakenly relies on 2017 amendment to K.S.A. 22-3504 which was not effective until after Campbell’s hearing. Under law that applied at the time of Campbell’s hearing, he had no right to be present for the court’s preliminary review or to demand a hearing at which he could be present.

STATUTES: K.S.A. 2016 Supp. 21-6620(c), -6620(d), -6620(e), -6620(e)(1), -6620(e)(5), -6623, -6624(f), -6625, -6625(a), -6625(a)(4), 22-3405, -3412(c); K.S.A. 2013 Supp. 21-6620, -6624; K.S.A. 22-3424, -3504(3)

CRIMINAL PROCEDURE—JURIES—PROSECUTORS—SENTENCING
STATE V. HILT
JOHNSON DISTRICT COURT—AFFIRMED
NO. 114,682—DECEMBER 15, 2017

FACTS: Hilt was convicted of first-degree murder. Conviction affirmed, but hard-50 sentence vacated and remanded for resentencing in accord with Alleyne v. United States, 570 U.S. 99 (2013). On remand, district court replaced a juror who had consulted a high school yearbook in violation of the court’s repeated admonitions, and was not forthright when questioned. District court imposed hard 50 sentence pursuant to jury’s verdict. Hilt appealed claiming: (1) district court’s removal of the juror during deliberation was error because the juror was not doing internet research on the case, and the juror’s failure to be forthright was not a proper basis for dismissal; (2) prosecutor erred during closing argument by telling jury that its role was to determine whether Hilt would get hard 50 sentence or be eligible for parole in 25 years, and telling jury it did not have to determine which blows to the victim were inflicted by Hilt and which were inflicted by co-defendants; and (3) the district court’s pronouncement of sentence was illegal and violated his right to be present at sentencing.

ISSUES: (1) Removal of juror, (2) prosecutorial error, (3) pronouncement of sentence

HELD: No abuse of district court’s discretion to remove and replace a juror. Under facts in case, juror who consulted the yearbook violated the judge’s admonitions to do no investigation of any matter outside the courtroom. Judge’s express skepticism of the juror’s honesty was not an independent basis for removal and replacement.

Statutory subsections governing Hilt’s crime made a hard-50 sentence mandatory once a jury found beyond a reasonable doubt that an aggravating circumstance existed that was not outweighed by any applicable mitigating circumstances. District judge had no discretion to deviate from the jury’s hard-50 verdict, and prosecutor did not misstate the law. Nor did prosecutor misstate the law by telling jurors they could vote for hard-50 sentence even if State did not prove which co-defendant inflicted specific blows or wounds.

District judge’s statements in open court, that appropriateness of imposing the hard-50 sentence was the jury’s decision which the court was going to follow and impose, did not create an illegal ambiguity in the length of Hilt’s sentence or violate his right to be present at sentencing.

STATUTES: K.S.A. 2016 Supp. 21-6620(c), -6620(d), -6620(e), -6620(e)(1), -6620(e)(5), -6623, -6624(f), -6625, -6625(a), -6625(a)(4), 22-3405, -3412(c); K.S.A. 2013 Supp. 21-6620, -6624; K.S.A. 22-3424, -3504(3)

APPEALS—CRIMINAL PROCEDURE—JURIES
STATE V. MCBRIDE
SHAWNEE DISTRICT COURT—REVERSED—COURT OF APPEALS—REVERSED
NO. 112,277—DECEMBER 1, 2017

FACTS: McBride was convicted of kidnapping. On appeal, he claimed he was denied a fair trial because prosecutor asserted the alleged victim deserved consideration similar to the presumption of innocence constitutionally recognized for criminal defendants. In unpublished opinion, Court of Appeals agreed that this was prosecutorial error but found the error was harmless under State v. Tosh, 278 Kan. 83 (2004). Review granted on this issue.

ISSUE: Prosecutorial error - harmless error

HELD: No cross-petition of panel’s determination that the prosecutor misstated the law, so only issue on appeal is whether this prosecutorial error was harmless. Harmless error inquiry in Tosh was abandoned in State v. Sherman, 305 Kan. 88 (2016). Applying Sherman to facts in this case, where prosecutor improperly tried to bolster victim’s credibility by claiming she deserved a credibility presumption akin to McBride’s presumption of innocence, denied McBride a fair trial. Kidnapping conviction is reversed, and case was remanded to district court.

STATUTES: K.S.A. 2016 Supp. 21-5408(a)(3); K.S.A. 20-3018(b), 60-261, -2101(b)

ATTORNEYS AND CLIENTS—CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCING
STATE V. RICHARDSON
SEDGWICK DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 107,786—NOVEMBER 9, 2017

FACTS: Richardson was convicted in 2003 of sale of cocaine. After he was sentenced, the Kansas Offender Registration Act (KORA) was amended to require registration by those convicted of that drug offense. Richardson thereafter pled guilty to offender registration violations. Prior to
sentencing he filed pro se motions to withdraw his plea and for appointment of new counsel, pursuing an ex post facto challenge to the retroactive application of the amended KORA. District court denied both motions. Richardson appealed claiming he should have been allowed to withdraw his plea, and claiming his attorney failed to advise him of the ex post facto issue. In unpublished opinion, Court of Appeals affirmed. Richardson's petition for review granted.

ISSUES: (1) Ex post facto challenge to KORA, (2) conflict of interest—attorney and client

HELD: Lifetime sex offender registration under KORA does not constitute “punishment” for application of the Eighth Amendment or the Ex Post Facto Clause. Non-sex offenders seeking to avoid retroactive application of KORA provisions must satisfy the “effect” prong of test set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), by producing a record that distinguishes—by the “clearest proof”—KORA’s effect on those classes of offenders from KORA's effects on sex offenders as a class. Richardson failed to do so on the record in this case.

Richardson cannot show his attorney provided incorrect legal advice. District courts are reminded that if they become aware of a potential conflict between a defendant and his or her attorney, they abuse their discretion if they fail to conduct an inquiry.

DISSENT (Beier, J., joined by Rosen and Johnson, JJ.): Dissent is consistent with her votes in State v. Petersen-Beard, 304 Kan. 192 (2016); State v. Reed, 306 Kan. 899 (2017); and State v. Meredith, 306 Kan. 906 (2017). Richardson met any burden of proof he bore at this point, and should be permitted to withdraw his plea for good cause shown.


CRIMES AND PUNISHMENT—CRIMINAL PROCEDURE—JURIES—SENTENCING

LYON DISTRICT COURT—CONVICTIONS AFFIRMED—SENTENCE VACATED IN PART—REMANDED NO. 115,343—DECEMBER 15, 2017

FACTS: Ruiz-Ascencio was convicted of attempted first-degree murder, first-degree murder, aggravated assault, and illegal use of a communication facility. District court imposed hard-25 sentence for first-degree murder, prison terms for the other three offenses, and lifetime post-release supervision on all four counts. Ruiz-Ascencio appealed claiming the district court: (1) erred by not instructing jury on voluntary manslaughter for the first-degree murder and attempted first-degree murder charges because both victims were shot during a sudden quarrel; and (2) imposed an illegal sentence by ordering lifetime post-release supervision on each count.

ISSUES: (1) Jury instructions, (2) sentencing

HELD: Kansas cases are reviewed. Under facts in this case, a voluntary manslaughter instruction was not factually appropriate. No facts or reasonable inferences that can be drawn therefrom to suggest a sudden quarrel, or that Ruiz-Ascencio otherwise acted in a heat of passion. One victim's words or gestures were not enough to constitute legally sufficient provocation.


CONCURRENCE (Johnson, J.): Concurs in the result.


CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—SENTENCING—STATUTES

STATE V. SIMMONS

SALINE DISTRICT COURT—AFFIRMED—COURT OF APPEALS—AFFIRMED NO. 108,885—DECEMBER 1, 2017

FACTS: Simmons was convicted of drug offense in 2005. Prior to her release on parole, Kansas Offender Registration Act (KORA) was amended to require registration of drug offenders. When Simmons was charged with failing to register, district court found her guilty and ordered payment of $200 DNA database fee. On appeal Simmons claimed: (1) the retroactive application of the KORA registration requirement violated the Ex Post Facto Clause; (2) it was error to impose the DNA database fee because she would have provided a DNA sample before her release on parole; and (3) even if the KORA registration was not punishment, it was part of her 2005 sentence which could not be modified by the executive branch. Court of Appeals affirmed. 50 Kan.App.2d 448 (2014). Simmons’ petition for review granted.

ISSUES: (1) Ex post facto challenge, (2) modification of sentence, (3) DNA database fee

HELD: Under State v. Petersen-Beard, 304 Kan. 192 (2016), lifetime sex offender registration does not constitute “punishment” for Eighth Amendment and ex post facto challenges. Record in this appeal is insufficient to demonstrate that drug offenders as a class are distinguishable from the class of sex offenders such that KORA registration becomes punitive rather than civil when applied to drug offenders.

Challenge to authority of executive branch to order Simmons to register is issue of first impression. Simmons’ 2005 criminal sentence is not illegal, and has not been “modified” by the post-sentencing registration obligation.

District court did not err by imposing the DNA database
fee required by K.S.A. 2012 Supp. 75-724. Simmons failed to show that she previously paid a DNA database fee or that she did not submit a DNA sample for the current offense.

DISSENT (Beier, J., joined by Rosen and Johnson, JJ.): Consistent with dissent in Petersen-Beard, Kansas offender registration requirement is punishment for sex or violent offender, and no less so for drug offender. Simmons met burden of showing an ex post facto violation in this case.

STATUTES: K.S.A. 2012 Supp. 75-724, -724(a)-(b); K.S.A. 22-4901 et seq.

**Court of Appeals**

**Civil**

**Immunity; Reasonable Suspicion; Tort Claims**

Schreiner v. Hodge

Johnson District Court - Affirmed

No. 117,034 – November 9, 2017

FACTS: Police officers in the City of Mission received two reports of a suspicious truck. Both callers reported seeing a man park the truck and then walk into the woods. While Officer Hodge was investigating the second report, Schreiner walked out of the woods and back to his truck. Schreiner refused to answer Officer Hodge’s questions and attempted to leave the scene in the truck. Officer Hodge temporarily detained Schreiner until he could finish the investigation. After the investigation did not disclose any illegal activity, Schreiner was allowed to leave. The entire encounter took between 20 and 25 minutes. Schreiner filed a pro se action against Officer Hodge seeking damages for assault, battery, false arrest, and false imprisonment. Officer Hodge moved for summary judgment claiming discretionary function immunity. The district court agreed and granted the motion. Schreiner appealed.

ISSUES: (1) Application of discretionary function immunity

HELD: A police officer may detain a citizen if the officer reasonably suspects that criminal activity is occurring. This is a discretionary act based on the officer’s training and experience. Schreiner’s actions were suspicious, and his actions in dealing with Officer Hodge provided justification for the subsequent investigation. For this reason, Officer Hodge is entitled to discretionary function immunity and summary judgment was appropriate.

CONCURRENCE AND DISSENT (Atcheson, J.) Because Officer Hodge’s action was unreasonable under the Fourth Amendment, his behavior cannot be excused by the discretionary function exception.

STATUTES: K.S.A. 2016 Supp. 75-6104(e); K.S.A. 22-2402(1)

**Contracts—Settlements**

James Colburn Revocable Trust v. Hummon Corporation

Barber District Court—Affirmed

No. 117,584—December 8, 2017

FACTS: Hummon Corporation leased a saltwater disposal well. The Trust owned a two-thirds interest in the land on which the well was located. In 2015, Trust administrators sued Hummon, alleging that it failed to pay for its use of the well after the lease expired. Hummon admitted that it owed some compensation to the Trust for using the well beyond the lease term, but it disputed the amount requested by the Trust. All parties agreed to mediation. That process produced a mediation agreement which required Hummon to pay $42,500 and to remove certain equipment from the site. In exchange, the Trust agreed to assign to Hummon any interest owned in a steel pipeline and to assign Hummon an easement for pipeline access. A dispute arose over the extent of that easement. After the Trust filed suit to enforce the mediation agreement, the district court agreed that the mediation agreement was specific and enforceable. Hummon appealed.

ISSUES: (1) Adequacy of consideration; (2) existence of condition precedent; (3) validity of mediation agreement; (4) reasonableness of mediation agreement

HELD: The text of the mediation agreement shows sufficient consideration. The record shows that Hummon did not raise the issue of a condition precedent before the district court. For that reason, and in the absence of any compelling reason for the court to consider the issue, the panel declines to address the merits of Hummon’s complaint about the performance of a condition precedent. The mediation agreement was not so vague or indefinite to be unenforceable. The district court’s interpretation of the mediation agreement was consistent with its plain language.

STATUTES: No statutes cited.
FACTS: Wasinger was hired to design and construct a parish rectory for a church in Russell. The contract included a requirement that the parties submit to "binding mediation" if disputes arose during the construction process. A dispute arose early during the process. Under the terms of the contract, the parties went to mediation and received a decision. Wasinger did not agree with that decision, and as a result he filed a mechanic's lien on the property. Wasinger followed up by filing a motion to foreclose on the lien. The Diocese filed a motion for summary judgment in which it claimed that the clause requiring "binding mediation" was actually an arbitration provision, meaning that the mediator's decision was binding. The district court granted the motion, and this appeal followed.

ISSUES: (1) Whether mediator's decision was binding; (2) lack of cross-appeal

HELD: Kansas case law does not recognize "binding mediation." The mediation set out in the contract was a voluntary, out-of-court alternate dispute resolution procedure. By statute, a mediator in Kansas has no decision-making authority. It was a mistake to use the terms "mediation" and "arbitration" interchangeably. Under the plain language of the contract, Wasinger was free to seek judicial resolution of issues not resolved by mediation. The Diocese did not cross-appeal the district court's ruling on arbitration which means that this issue cannot be considered on appeal. And the argument fails on the merits because the district court erred when finding that interstate commerce was implicated.

STATUTE: K.S.A. 5-405(a), -405(b), -405(c), -502(e), -502(f), -502(g), -502(h), -502(m)

LIMITATION OF ACTIONS; TORTS
BONNETTE V. TRIPLE D AUTO PARTS
HAMILTON DISTRICT COURT—AFFIRMED
NO. 116,578—DECEMBER 15, 2017

FACTS: Triple D Auto Parts purchased its store in 1990. At that time, the building's exterior had not changed since its construction in 1925. One feature of the exterior was a step down from the entrance/exit door to the sidewalk. Bonnette, who was a regular customer, fell when leaving the store and badly broke her wrist. Although she had navigated the step, and the danger was open and obvious. There is no evidence that Bonnette was distracted when leaving the store. Because Triple D did not have a duty to warn, it is entitled to judgment as a matter of law.

ISSUES: (1) Applicability of the statute of repose; (2) duty to warn

HELD: The facts show that Triple D failed to warn Bonnette about the dangerous step. Because the duty to warn is an ongoing duty, that duty was breached on the day Bonnette was injured. This ongoing duty prevents application of the statute of repose. But, Bonnette had actual knowledge of the step, and the danger was open and obvious. There is no evidence that Bonnette was distracted when leaving the store. Because Triple D did not have a duty to warn, it is entitled to judgment as a matter of law.

FORUM SELECTION; JURISDICTION; VENUE
AKESOGENX COR V. ZAVALA
JOHNSON DISTRICT COURT—AFFIRMED
NO. 116,896—NOVEMBER 9, 2017

FACTS: AkesoGenX Corporation (AKG) is a Delaware corporation with its principal place of business in Kansas. Zavala was AKG's CEO. He was terminated after money was found to be missing from the company's accounts. AKG sued both Zavala and Kunkle, the company's Secretary/Treasurer, for breach of fiduciary duty and conversion. After Zavala failed to appear at a scheduling conference, the district court granted default judgment to AKG. Zavala then moved to set aside the default, claiming that he was never served with the petition. That motion was denied. Zavala responded by filing a motion to reconsider. In that motion, Zavala claimed, for the first time, that the judgment was void because AKG's articles of incorporation included a forum selection clause that required all proceedings to be in Delaware. That motion was denied and Zavala appealed.

ISSUES: (1) Denial of the motion to reconsider; (2) whether the forum selection clause was mandatory or permissive; (3) denial of motion to set aside default judgment

HELD: Forum selection clauses are valid in Kansas as long as certain criteria are met. But the existence of a forum selection clause does not divest a court of subject matter jurisdiction. In this case, Zavala's complaint was really about venue. And complaints about venue can be waived. In order to preserve the complaint an objection to venue must be timely raised in a responsive pleading. While Zavala did raise the issue in a pleading it was not timely. Because AKG could consent to venue outside of Delaware, the forum selection clause in its articles of incorporation was permissive rather than mandatory. And the evidence shows that AKG waived venue in Delaware when it initiated this legal action in Kansas. Zavala failed to include the transcript from the hearing on the motion to set aside default judgment. In the absence of that transcript, the district court's decision could not be evaluated. Since Zavala had the burden to designate the appellate record, his argument failed. Because service was properly obtained
on Zavala in California, it does not matter if service was not perfected in Texas.

STATUTES: K.S.A. 2016 Supp. 60-205, -205(b)(2)(B)(ii), -205(e), -212(b)(3), -255(b), -258, -259(f), -260(b)(1), -308(a); K.S.A. 60-260(b)(6)

**Criminal**

**MOOTNESS—PROBATION—SENTENCING**

**STATE V. ALLEN**

**GEARY DISTRICT COURT—VACATED**

NO. 116,886—NOVEMBER 17, 2017

FACTS: Allen was serving an 18-month term of probation when he committed two new offenses. He served a 30-day term in custody for violating his probation and received a sentence of probation for the new offenses. Allen then violated his probation for a second time. A judge in the first case imposed a 60-day jail sanction. A different judge in the second case also imposed a 60-day jail sanction to be served consecutively to the first sanction. Allen objected but the district court overruled the objection and Allen appealed.

ISSUE: Ability to sentence terms consecutively

HELD: K.S.A. 2016 Supp. 22-3716(c)(10) requires that any intermediate sanctions must be imposed concurrently. There is nothing in the statute suggesting that this language does not apply to cases heard before different judges. Although Allen has served his entire sentence, this case is capable of repetition, and is of public importance, so it is not moot.

STATUTE: K.S.A. 2016 Supp. 22-3716(c)(1)(B), -3716(c)(1)(C), -3716(c)(1)(D), -3716(c)(10), -3716(c)(11)

**APPEALS—CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—STATUTES**

**STATE V. DAWSON**

**SEDGWICK DISTRICT COURT—AFFIRMED**

NO. 116,530—DECEMBER 8, 2017

FACTS: Dawson was convicted in 1997 of rape. After unsuccessful challenges to conversion of his misdemeanor convictions to calculate criminal history, the convictions and sentence became final in March 2000. After State v. Dickey, 301 Kan. 1018 (2015), Dawson filed motion to correct an illegal sentence. District court summarily denied the motion, stating Apprendi and Dickey did not apply retroactively to a final sentence. Dawson appealed, arguing an incorrect criminal history classification can be challenged at any time. At panel’s request, parties addressed impact of 2017 amendment to K.S.A. 22-3504 which became effective after briefs had been filed.

ISSUES: (1) 2017 Amendment to K.S.A. 22-3504, (2) criminal history calculation

HELD: Dickey and subsequent cases were discussed. K.S.A. 22-3504(3), as amended in 2017, clarified the intended application of the term “illegal sentence” used in K.S.A. 22-3504(1). The amendment is procedural in nature and applies retroactively. A sentence is not an illegal sentence based on holding in Dickey if that sentence was final prior to Apprendi. Dawson’s sentence was legal when pronounced, and was not rendered illegal by the subsequent change in the law. District court’s summary denial of the motion to correct an illegal sentence was not error.

Any right to appellate review of claim concerning the conversion of Dawson’s misdemeanor convictions has been exhausted and is barred by res judicata.

STATUTES: K.S.A. 2017 Supp. 22-3504(3); K.S.A. 22-3504, -3504(1), -3504(3), 60-150

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Attorney/Administrator – Disability Crime Victims Unit
Help obtain justice for victims of crime with disabilities. Licensed attorney sought by Disability Rights Center of Kansas to provide legal services to crime victims with disabilities & to administer the federal grant. Experience administering grant programs a plus. Salary approx. $62,500, but depends on experience. Great benefits. Employer-paid BCBS health insurance, KPERS retirement, etc. Questions? Need an alternative format? Contact DRC: 1-877-776-1541 or info@drckansas.org. Get the full job description & application at www.drckansas.org/about-us/jobapp

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