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Teresa M. Schreffler • Hon. Janice Miller Karlin
P38
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THE JOURNAL OF THE KANSAS BAR ASSOCIATION

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2017-18
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*The tournament is open to those accepted to law school for 2018-19, those currently in law school, as well as practicing and retired attorneys/judges.
I wrote my first column here some eighteen years ago. Most of the topics in those early years was sharing what life was like growing up with four siblings in Barton County during the 1960’s and 70’s. Dad was county attorney in 1960, and his office was on the third floor of the majestic marble courthouse in Great Bend’s town square. As best we could tell, he was the king and we were his jesters.

And life was divine.

The anecdotes that filled this Journal also sprang from our neighborhood and friends. Our house was sandwiched between the Dominican Convent to the south and a large lake to the north. Mona and Larry embraced a parenting style that was austere at home and at St. Pat’s but was pretty much nonexistent everywhere else.

We were the free range kids. In our free time my kid brother Marty tossed the Great Bend Tribune; my older brother, Tim, and I mowed every lawn in town. With our money, we bought pocket knives, Black Cats and candy cigarettes. The rest we wasted. We were devoted viewers of ABC’s Wide World of Sports, Evel Knievel and all things KU....

Most of those experiences seem a world apart from today’s reality.

But there are times when it seems that the change that has occurred in just the time I’ve been writing has been even more dramatic. And yes, you can cite technology and that thing called social media making their contributions, but what shocks me is how civil discourse has all but vanished. This is not a singular opinion. Everywhere you look people are bemoaning the evaporation of polite discussion.

For years, I wrote a column in the Kansas City Star. However, I left that hobby, in part, because the only way to get visibility was to be divisive. To be controversial. To invite ‘clicks’ and reader commentary that almost always was uncivil.
All of this came back to mind the other day when I noticed that one of the popular phrases being used by headline writers to invite clicks is the term: “fire back”—as—return fire.

In just one day, I found these headlines:

- Fans Fire Back After the Duggars Endorse a Controversial ‘Marriage Retreat’
- Senate Dems Fire Back Against Report Claiming Too Much Regulation
- Mayors of Boston, Lawrence Fire Back After Trump’s ‘Sanctuary City’ Comments
- Teachers Fire Back at DeVos for Using Stock Photo in Claim about Classrooms’ Structure
- Ex-FBI Deputy Director Andrew McCabe is Fired—and Fires Back
- Trump Fires Back at Fired FBI Official McCabe Over Memos
- Canada to Fire Back If Hit With U.S. Steel and Aluminum Tariffs
- China is Threatening to Fire Back at the U.S. in Trump’s New Trade War

Out of curiosity, I did a search for those two words conjoined in newspaper headlines extending back fifty years using a program that has scanned thousands of old newspapers. The most common hit—“grass fire. Back on duty.” (In case you wondered, the Bridgeport, Connecticut Post maintained daily fire records in the early 60’s.)

So what is the state of civility in the Kansas Bar? I asked that question of two of our U.S. Magistrates, Teresa James and Jim O’Hara.

“Over the past five years, I would say there have been occasions when I have thought the level of civility has improved and then other occasions when I have thought the opposite,” shared Magistrate James.

“In my opinion, the level of civility varies considerably depending upon the lawyers involved in the case. If opposing lawyers already know each other through Bar Association or other social activities, then, of course, the level of civility is typically higher.”

“Similarly, if opposing lawyers know their paths are likely to cross again in the future, the level of civility is higher. Also, inevitably, the lawyers who request or are willing to come to the courthouse for in-person conferences appear to get along well, after the initial ice-breaking.”

O’Hara’s take: “Both Teresa and I try to do most of our scheduling and pretrial conferences face-to-face instead of by telephone. I think she’d agree with me that’s more conducive to civility—I continue to be a bit disappointed by how frequently counsel haven’t bothered to meet face-to face before my scheduling conference. Even more important than improved civility, meeting in person results in more efficient development of case-management plans through dialogue, and far fewer discovery-related motions later on.

“Incivility I’ve observed in recent years tends to be exhibited by inexperienced lawyers whose fate in life is that they had to hang out a shingle in a solo practice right out of law school. Very frequently I see them trying to show the big-firm defense lawyer how tough they are, picking fights over silly matters or escalating small fights into big ones. My impression is that incivility among less experienced practitioners usually is more due to insecurity than innate rudeness.”

These observations are encouraging but not surprising.

While “fire back” seems to have found a ready home in today’s media—in print, online or otherwise—I doubt we will see any legal pleadings any time soon in which my two least favorite words are conjoined—unless a grass fire in Hamilton or Stanton County becomes a mass tort.

About the Author

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

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During the spring of 2017, The Kansas Bar Association surveyed the legal community on the economics of law practice considering similar studies undertaken in 2012, 2005 and 1997. The objectives of all studies were to derive and report the following:

- Demographics of practicing attorneys, including views on economic sentiment
- Attorney 2016 taxable income arrayed by practice class, gender, field of law, office location, full- vs. part-time status, years in practice and firm size
- Associate, legal assistant, and secretary 2017 annual compensation by years of experience (tenure) and office location
- Prevailing average 2017 hourly billing rates for attorneys arrayed by a variety of indicators, and for legal assistants by years of experience, firm size and office location
- Attorney time allocated to billable and non-billable professional activities in 2017
- Fixed expense and gross revenues per attorney and overhead rates associated with maintaining a private law practice by office location and firm size in 2016, and
- Contemporary law office client and matter management, technology embracing and marketing practices

This information has been organized here to help attorneys plan and manage their professional lives. They can compare themselves and their firms against benchmarks/norms established from aggregating survey data. These benchmarks consider these variables: office location, firm size, practice class, area of legal concentration/primary field of law and years in practice. Attention is also given to analysis of gender-specific factors influencing income gaps. Time series information is also provided to denote trend, given available data.

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Lawyer Well-being Task Force in Kansas

by Anne McDonald

To be a good lawyer one must be a healthy lawyer. Too often, we find ourselves in—and with—unhealthy spaces, mindsets, behaviors and other signs that we may not be as healthy as we want or need to be. In 2016, the American Bar Association (ABA) Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation published its study of nearly 13,000 currently practicing lawyers. It found that between 21 and 36 percent qualify as problem drinkers, and that approximately 28 percent, 19 percent, and 23 percent are struggling with some level of depression, anxiety, and stress, respectively.1 One positive result of this study is showing our community of practice that we are not alone in our unhealthy spaces. While we may not know the struggles others are facing, we can rest assured, based on the percentages found in the study, that others are facing the same battles.

Following the release of the 2016 survey results, a national task force2 was convened to look deeper into what clearly demonstrated a profession in trouble. Task force members believed the sustainability and long term health of the profession was in jeopardy when 20 to 30 percent of its members reported unhealthy behaviors or conditions.

In the January issue of the Kansas Bar Journal, both KBA President Greg Goheen and KALAP Executive Director Anne McDonald wrote about the Report of the National Task Force on Lawyer Well-being.3 While the task force has presented many recommendations, those must be implemented to be effective. And happily, representatives of several stakeholder groups came together to explore how we could do that here in Kansas. An ad hoc committee spontaneously emerged, with representatives from the bar association, the disciplinary office and the Kansas Lawyer Assistance Program. Each party brings a unique perspective along with a broader concern for the profession as a whole.

While the ABA-Hazelden study shows many current trends in the legal profession, it did not tell us the mental health and addiction needs of lawyers in Kansas. A little digging into recent Kansas disciplinary cases reveals that many ethical violations are linked to individual attorney impairments. But the number of disciplinary cases remains relatively low compared to the number of active attorneys in Kansas. Consequently, many questions remain unanswered.

Those of us at KALAP and the KBA who work on these issues and assist attorneys to start and maintain successful, flourishing law practices believe it would be helpful to know the numbers of Kansas attorneys who are facing these issues. Because we want to know more about Kansas attorneys, we are administering our own survey in the summer of 2018. The survey will be anonymous, and your answers will not be traced back to you. What we ask is that you provide honest and reflective responses to the survey, so we are better able to assess the well-being and needs of lawyers in Kansas. We also ask that every lawyer receiving the survey complete and submit it. We thank you in advance for your participation in this important survey. We believe this information will empower us to better address our profession and those serving in it.

When the results are compiled, we will disseminate a report, describing both what the survey showed and how we plan to move forward implementing the task force recommendations to support and strengthen lawyers and the legal profession in Kansas.

About the Authors

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

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2. https://www.americanbar.org/groups/lawyer_assistance.htm
The Festive Month of May

by Greg Goheen

May is a month for holidays and celebrations; this month is simultaneously recognized as National Barbecue Month, National Blood Pressure Month and—apparently—National Salad Month. It will only be recognized as National Barbecue month in my household.

This festive month begins with May Day, celebrated on May 1. Considered as a festival of spring, May Day is known for the traditions of dancing around the maypole, crowning a Queen of May and giving May baskets filled with flowers or treats. In Hawaii, May Day is known as Lei Day and celebrates Native Hawaiian culture.

May 1 is also recognized as Law Day. The idea of Law Day originated with the American Bar Association’s youngest-ever President Charles S. Rhyne, who served as President Dwight D. Eisenhower’s legal counsel, and it envisions a special day for celebrating the United States legal system. In 1958, President Eisenhower established the first Law Day to mark the nation’s commitment to the rule of law and to honor the role of law in the creation of the United States of America. In his Proclamation, President Eisenhower stated that Law Day distinguishes the U.S. “from the type of government that rules by might alone”; it makes the country “an inspiration and a beacon of light for oppressed peoples of the world.” President Eisenhower invited citizens to use Law Day as “an opportunity to better understand and appreciate the manifold virtues” of a government ruled by law, “and to focus the attention of the world upon them.” Three years later, Congress issued a joint resolution designating May 1 as the official date for celebrating Law Day, now codified at 36 U.S.C. § 113 which states, in part:

Law Day, U.S.A., is a special day of celebration by the people of the United States—

(1) in appreciation of their liberties and the reaffirmation of their loyalty to the United States and of their rededication to the ideals of equality and justice under law in their relations with each other and with other countries; and

(2) for the cultivation of the respect for law that is so vital to the democratic way of life.
Every president since then has issued a Law Day proclamation on May 1 to celebrate our nation’s continued commitment to the rule of law, to reflect on the role of the law in the foundation of our country and to recognize the law’s importance for society.

The theme for this year’s Law Day is “Separation of Powers: Framework for Freedom.” This theme is intended to cause us to reflect on the separation of powers as fundamental to our constitutional purpose and to consider how our governmental system is working for ourselves and for posterity. Many local bar associations use Law Day not only as an opportunity to provide educational services to the school children and the general public, but also as a time to recognize and remember local lawyers who have passed away.

May 4th heralds a grassroots holiday, Star Wars day. This galactic celebration is based on a pun: “May the Fourth be with you,” which is credited to a 1979 ad taken out in the London evening news to congratulate the newly elected British Prime Minister Margaret Thatcher. This unique holiday was created and is maintained by fans for the film franchise. The occasion is marked by everything from movie marathons to costume parades and parties to the simple greeting exchanged on that day.

Cinco de Mayo is an annual celebration that commemorates the Mexican Army’s victory over French troops at the Battle of Puebla, on May 5, 1862, during the Franco-Mexican War. Over 6,000 well-armed French troops had advanced on the small town of Puebla de Los Angeles where they were defeated by a force of approximately 2,000 men who had been sent to defend the town by Mexico’s President Benito Juarez, a lawyer and member of the indigenous Zapotec tribe. The unlikely victory by Mexican forces on that day was more important from a symbolic rather than a strategic standpoint, and its commemoration remains a relatively minor holiday in Mexico. However, in the United States, Cinco de Mayo has evolved into a celebration of Mexican culture and heritage.

On the last Monday of May, our nation celebrates Memorial Day. Originally known as Decoration Day, this holiday started as an event to honor the soldiers who had died in the American Civil War. Memorial Day now serves as a day to remember and honor all men and women who have died while serving our country. Common Memorial Day traditions include the decoration of the graves of fallen soldiers with flowers, wreaths and small flags, the wearing of red poppies which are symbolic of the fallen soldier, and parades. Perhaps the most poignant tradition involves the raising of the U.S. flag in the morning quickly to the top of the flagpole then slowly lowering it to half-mast in honor of our fallen soldiers then re-raising the flag to full height at noon to symbolize the resolve of the living to carry on the fight for freedom so that the fallen will not have died in vain.

Finally, on a personal level, both my daughter Gracie and my mother Ruth celebrate their respective birthdays in May. Mother’s Day falls on May 13 this year, providing my mother a much deserved second day of recognition and celebration. Our family gets two additional personal days to celebrate this May as my son Bobby graduates from the Wharton School of the University of Pennsylvania with a double major in finance and philosophy, while my nephew Ryan graduates from high school before he heads off to Kansas State University as part of the 2018 Legal Education Accelerated Degree program. They will not be alone in celebrating graduations this year as our profession will see many new lawyers graduating this May.

I hope everyone takes time to recognize and enjoy the many celebrations this May—and I look forward to seeing each of you next month during our celebration at the Kansas Bar Association’s Annual Meeting.

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.
In the musical *Les Miserables*, Fantine sings of the dreams of her youth.

I dreamed a dream in time gone by,
When hope was high
And life worth living.

Then I was young and unafraid,
And dreams were made and used and wasted.
There was no ransom to be paid,
No song unsung, no wine untasted.

But . . . we all know what happened to Fantine.

Who among us is so wealthy that education did not make the difference between a life of constant difficulty subject to the control of others, and a life of fulfillment and comfort over which we have enormous control? I do not need to worry about food and shelter because I have an education that no one can take from me—no man, no supervisor, no law enforcement officer, no bully, no bureaucrat, no politician, no one.

Education can be a political issue. Obviously. I’m not heading in that direction.

During a recent meeting of the KBA Board and KBF Board, the Young Lawyer representatives said they need to re-evaluate the high school Mock Trial project. It is in danger of dying.

Of course, the members of both boards immediately assumed the problem was lack of interest. Was that it? No. There are more students than ever who are interested. They are competitive. They are interested in the law. The numbers are increasing. The level of the competition is getting tighter and tougher.

Is it that it’s harder to find mentors? No, not that either. There are sponsors and organizers aplenty who have caught the students’ enthusiasm in the Mock Trial program. Bring on the competition! Let’s win Nationals!

Venue? No, not that either.

What, then?

Judges. They can’t find enough judges for the Friday and Saturday rounds of the competition. Two days. No judges.

OK, guys. That’s just not acceptable. Shameful, even. For heaven’s sake, we can find enough lawyers and judges to sit on the bench and call balls and strikes for two days. These students and sponsors have worked their fingers to the proverbial bone. We can be there to judge one or more rounds over the course of two days. Please.

We are not so busy that we don’t have time to remember, celebrate and be thankful for one of our most priceless treasures—our education.

So, let’s celebrate our education. Let’s honor those who gave us this treasure by paying it forward. There are a lot of young people whose dreams could benefit from your efforts.

About the Author

*Hon. Evelyn Z. Wilson* is Chief Judge of Kansas’ Third Judicial District (Shawnee County). Before taking the bench in 2004, she practiced law for 19 years—seven years in northwest Kansas and 12 years in Topeka. Judge Wilson graduated from Bethany College and Washburn Law School.
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Keep It To Yourself
by Clayton Kerbs

In the current time we live in, it seems almost impossible to keep a secret. Social media and instant communication are a part of our lives and of our profession. There seem to be no secrets and everyone knows everything about everybody. As lawyers, we must buck this trend when it comes to keeping matters confidential.

In order to provide some clarity on our ethical duty to clients in regard to confidentiality in this social media crazed world, the American Bar Association recently issued Formal Opinion 480. The opinion focuses on our duty under ABA Model Rules of Professional Conduct 1.6 to keep confidential the information learned while representing a client. The applicable ethical rule in Kansas is KRPC 1.6:

KRPC 1.6. Client-Lawyer Relationship: Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) To prevent the client from committing a crime;
(2) to secure legal advice about the lawyer’s compliance with these Rules;
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
(4) to comply with other law or a court order; or
(5) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Formal Opinion 480 was drafted in response to the increasing amounts of public contact and online content produced by lawyers, such as Twitter accounts, blogs, listervs, and podcasts. But don’t we have a First Amendment right to dazzle people with our war stories? Yes, but we must operate within the ethical rules governing our profession. We must even be cognizant of a third-party discovering the identity of an actual client when we describe the client’s situation in a hypothetical sense.¹

Holding client information confidential might be the most sacred of the ethical rules. As Comment 5 to KRPC 1.6 states in part:

the principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege...in the law of evidence and the rule of confidentiality...attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness...client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Further, the ethical duty of client confidentiality extends to prospective clients as well.²

Another situation in which you may find yourself is when your former client’s situation relating to your representation becomes public. Does that give you the right to discuss the representation with others? No, unless an exception applies. On December 15, 2017, the ABA released Formal Opinion No. 479 to address what is referred to as the “generally known” exception to Model Rule 1.9(c)(1). This portion of the rule addresses what an attorney can do with information learned during the representation of a former client:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Formal Opinion No. 479 does a nice job of distinguishing Model Rule 1.9(c)(1) from 1.9(c)(2). 1.9(c)(1) addresses the use of information against a former client whereas 1.9(c)(2) states attorneys must use the same high level of confidentiality when dealing with former and current clients when it comes to revealing information about representation. One instance in which an attorney can use information learned during representation against a former client is when the information is “generally known.” The opinion concludes that generally known is not the equivalent of publically available. It is better-described as popularly known, widely known or common knowledge in the community. So even though your former client’s situation is a matter of public record, you as the attorney are still bound by confidentiality from discussing with others or using against the former client until the information becomes generally known.

As noted previously, there are exceptions to KRPC 1.6 that you should review, but the focus of this article is to remind all of us of our lofty duty to maintain the confidences of our current and former clients.

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

1. KRPC 1.6, Comment 4.
2. KRPC 1.18.
The Future of Law Includes Math
by Danielle Hall

I remember during my first semester of law school, I was sitting in my torts class and the professor jokingly asked, “How many of you went to law school so you wouldn’t have to do math?” The professor then proceeded to write on the white board the algebraic formula, $B = PL$—the Learned Hand formula. In that moment, confusion most certainly set in; but eventually as a law student, I would come to realize that as a lawyer, I would actually need to do some math, no matter what area of the law I chose to practice. From calculating damages to child support and more, math would be unavoidable. I would also come to realize that lawyers need to have a basic understanding of math for the purpose of running a practice. From reconciling a trust account to calculating cash flow, law practice management also involves math.

When we begin think about the connection of practicing law and law practice management, I can’t help but also mention the use of technology. Technology can help us manage our practice, and it can often aid us in practicing law, but what does implementing the use of technology have to do with math? Well, one answer—artificial intelligence.

Often, when artificial intelligence is mentioned, we think of robots taking over the world, or at the very least we are afraid that robots will take our jobs as lawyers. Personally, I think this mindset is a result of Hollywood glorifying, and often misrepresenting, the term artificial intelligence over the years. Movies such as I, Robot for instance, show a world where humans create the robots, the robots serve the humans, then the robots attempt a takeover of power from the humans. With respect to the practice of law, however, when we discuss technology like artificial intelligence and machine learning, we are not talking about a “robot lawyer;” instead we are talking about things such as document review and generation, legal research, due diligence, compliance, and e-discovery, just to name a few. Essentially, we are talking about using artificial intelligence as a tool in the profession.

While there is a lot of buzz right now in the profession about AI, it is actually nothing new. For instance, AI has a long history at IBM Research, dating back to the 1950’s. Arthur Samuel, often touted as the pioneer of AI research, joined IBM’s Poughkeepsie Laboratory in 1949. There he worked on IBM’s first stored program computer, the 701. Samuel would eventually develop a computer checker player that learned from experience. He completed his first checker program on the 701, although he first thought of his concept...
in 1946 when he was a professor of electrical engineering at the University of Illinois. What you may not know is that this pioneer in the field of AI research has ties to Kansas. He was born in Emporia, Kansas in 1901, and he graduated from the College of Emporia in 1923. Samuel would go on to write what appears to be the first self-learning program, and he would coin the phrase “machine learning” in 1959. Machine learning is just one subfield of AI technology, in a field of many.

While I say that AI is nothing new, however, it has become exciting to talk about it once again. Up until now, the focus in AI research and development has appeared to come and go in cycles. During the 1970’s and 80’s for instance, AI research hit what has been called an “AI winter.” These winters were periods of reduced funding and interest which were often caused by a perceived lack of progress due to higher expectations than what was technologically possible at the time. I think it is now safe to say that winter is over. There is certainly a renewed interest in AI research and development across different fields now that computers are faster, the ways to collect data are more readily available and the amount of data being collected has increased. What is happening now with AI was theorized years ago, but the theories are now becoming a reality at a much quicker pace.

The way AI works is also nothing new. Algorithms are often what power AI. An algorithm, according to Merriam Webster, “is a procedure for solving a mathematical problem in a finite number of steps that frequently involves repetition of an operation.” Simply put, they are the steps the computer has been told to take when given data. Well-constructed algorithms serve as the back bone of AI, and they are what help the machine learn. Data is what feeds the algorithms to generate machine learning.

When the algorithms are capable of learning from data, they can enhance themselves by learning new rules or can themselves write other algorithms. Obviously, math serves as a strong foundation for AI and its capabilities, since the algorithms are essentially mathematical instruction. For instance, machine learning and other forms of AI are built on mathematical principles including calculus, algebra, probability, statistics, and similarity measures. Mathematical calculations are taking place in the background, and the computer analyzes and learns from the data based upon those calculations.

For the purpose of this article, however, I don’t think it is necessary to go through all of the math, but I do think it is necessary for lawyers to have a basic understanding of what powers AI. Lawyers should generally know how AI works, as well as what it can and cannot do. Remember, our rules of professional responsibility tell us that we should maintain a level of competency regarding technology. Specifically, commentary to our rule regarding competence tells us that lawyers, “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” Even if you say to yourself that you aren’t going to use AI in your practice, I recommend that you still have a basic understanding of it, because 1) other lawyers, including your opposing counsel, may implement and use it; and 2) you may just find yourself involved in a case where it is relevant.

When it comes to implementing the use of AI in the law, AI is still in its infancy; however, the discussion about the need for AI’s use in the profession is not. For instance, in 1970, the Stanford Law Review featured the article, “Some Speculation about Artificial Intelligence and the Legal Reasoning.” The authors opined that research suggested that computer science may assist lawyers in both the study and performance of their reasoning processes. They argued that the time had come for serious interdisciplinary work between lawyers and computer scientists to explore the computer’s potential in law. Additionally, in 1987, the first International Conference on AI and Law (ICAIL) was held at Northeastern University. The University had just established a center for Computer Science and Law.

Today, the topics once discussed at the early conferences are now moving from the discussion phase in academia to actual implementation in the profession.

We are just beginning to see the impact that artificial intelligence can have on the profession. For instance, ROSS Intelligence has exploded into the legal research market. The startup was founded in 2015 by Andrew Arruda, Jimoh Ovbiagele and Pargles Dall’Oglio, and just three years later you can’t help but mention the company when talking about AI and the legal profession. Built on IBM’s Watson cognitive computing platform, ROSS allows lawyers to research by asking questions in natural language, as if you are talking to another lawyer. ROSS is then able to sift through over a billion text documents in seconds and return the exact passage the user needs. ROSS is using machine learning to speed up the time it takes to perform legal research and to give lawyers better results when conducting that research. The legal technology company shows no indication of slowing down either, as they recently unveiled a companion tool, EVA. The new product features a drag-and-drop tool that allows for upload of a legal brief in seconds. Using artificial intelligence technology, EVA then sorts through citations within the brief and isolates negatively treated cases. Currently, EVA is available to lawyers to use for free—if you sign up to use the product on the ROSS Intelligence website.

I would be remiss if I didn’t also mention the Fastcase AI Sandbox. According to the Fastcase website, the Sandbox is a private digital environment for you to analyze your firm’s data without ceding control. The Sandbox contains a suite of advanced AI and data analytics tools to help lawyers parse and combine internal data with Fastcase and other external libraries to derive new insights about their own practice. The product allows law firms to analyze Fastcase data or their own
data, or run mash-ups of the two data sets. Some of the AI tools available in the Sandbox include IBM Watson, Neota Logic, LexPredict and Docket Alarm. Imagine the possibilities if you are collecting your own firm data, and you have access to these AI tools in the Sandbox.

Fastcase CEO Ed Walters, Ross Intelligence CEO Andrew Arruda, and IBM Global Chief of Information Security Officer Shamla Naidoo were featured this past March on an artificial intelligence panel at the ABA TECHSHOW in Chicago. The session was titled, “AI in Practice — or, The Robots are Not Your Enemy.” The session was so well attended that, by the time the session started, all the seats were taken and a standing room only section was started in the back of the room. The attendance at this session made it clear that lawyers are becoming increasingly more interested in the topic as they become more aware of the capabilities of AI in practice. During the session, the panel urged lawyers to think of the best ways to work with and harness the potential of software and AI to move their practices forward while bridging the access-to-justice gap.

Speaking of access-to-justice, we are starting to see movement in the profession to develop AI and automation tools to increase access-to-justice. For instance, The IIT Chicago-Kent College of Law Center for Access to Justice offers A2J Author®, which is a Cloud-based software tool. It delivers greater access to justice for self-represented litigants by enabling non-technical authors from the courts, clerks’ offices, legal services organizations, and law schools to build and implement web-based document assembly projects. These document assembly projects are made up of two components: a user-friendly interface, called an A2J Guided Interview®, and a back-end template. The A2J Guided Interviews take complex legal information from legal forms and present it in a straightforward manner to self-represented litigants.

We are also starting to see more access-to-justice labs developed and implemented at law schools. BYU Law School has LawX, for example, where second and third year law students step into the role of entrepreneur to design and build a solution to an access-to-justice problem in Utah. LawX recently developed SoloSuit, a free online tool that helps Utahns who cannot afford legal services to respond to debt collection lawsuits.

While the future of the profession is beginning to look different with the implementation of AI, I don’t think robots will replace human lawyers anytime soon. Instead, AI will begin to change what we do as lawyers, and that is not a bad thing. If we can become better lawyers through AI and provide more people access to justice, then this is technology that we should embrace. Lawyers, the profession, and the public will be better served if we start innovating and use the technology to improve our services. Ultimately, the future will include artificial intelligence and the math behind it—the future of law should as well.

### About the Author

Danielle Hall has served as a Deputy Disciplinary Administrator for the State of Kansas since 2016. Before accepting that position, she was the Law Practice Services Director for the Kansas Bar Association, where she developed the Law Practice Management Assistance Program and served as the organization’s Practice Management Advisor. She regularly speaks on law practice management, ethics, and cybersecurity topics for both national and local organizations. She is a member of the KBA Law Practice Management Committee, and an active member in the ABA Law Practice Division and Kansas Women Attorneys Association. Hall received a B.A. degree in Political Science in 2006 and a J.D. in 2009 all from Washburn University.
Opinion: Impersonation Bots and Kansas Law

by Jay Van Blaricum

I. Introduction

Robots disguised as humans are everywhere online, and many of them are not our friends. Malicious software known as “impersonation bots” pose a serious threat to Kansans, but current law does not prohibit their deployment or require them to disclose their true nature. This article will discuss the existing legal framework and propose additional legal tools for fighting this particularly troublesome form of cyber-crime.

A 2017 report by the security firm Imperva found that online software programs known as “bots” generated an estimated 51.8 percent of all website traffic in 2016.1 Although many bots on the internet are designed to operate in a neutral or benevolent manner (for example, bots used as customer service interfaces, or bots which automatically refresh one’s Facebook feed), a sizeable portion of bots are malicious in nature, or “malbots” for short. Generally, malbots are programs infected with malicious code that autonomously perform work on behalf of their creators. Among the many different types of malbots being deployed are a particularly deceptive and increasingly popular version known as impersonation bots, which appear to have complete and legitimate human credentials. Online, malicious impersonation bots are indistinguishable from human users. In actuality, malicious impersonation bots merely pose as a human by hiding behind one of the estimated 1.9 billion stolen identities available on the internet. Many of these highly advanced, fraudulent programs are equipped...
with artificial intelligence, and are known in computer science as “autonomous intelligent agents,” or simply “intelligent agents,” meaning they can operate independently to do anything technologically possible on the internet. Malicious impersonation bots have been increasingly imitating the intricacies of human online behavior, so even detecting them poses a unique challenge.

In a July 2017 New York Times op-ed article, "Please Prove You Are Not a Robot," Professor Tim Wu of Columbia University School of Law highlighted the mass proliferation of malicious impersonation bots flooding the internet. More recently, Cambridge University released a comprehensive report from an international team of 26 authors from various fields entitled, “Malicious Artificial Intelligence: Forecasting, Prevention, and Mitigation.” Focusing on threats posed by all malicious artificial intelligence systems, including bots, the report called for coordination between the A.I. development community and those within other institutions, including policy and legal institutions, to develop standards, policies and laws to address the potential for chaos which malicious A.I. poses.

To illustrate the scale of the problem of bots alone, malicious impersonation bots used for distributed denial of service (“DDoS”) attacks alone accounted for about 24 percent of overall web traffic in 2016. They also seek to exploit vulnerabilities online to stealthily deliver weaponized software, steal any kind of data, manipulate the market for event ticket sales, spread disinformation, inflate product ratings, self-propagate, and fraudulently manipulate web traffic to generate ad revenue, among other nefarious uses. These bots are capable of defeating the formerly reliable defense of online “Captcha” and Turing tests, those familiar hurdles websites employ to confound robots. The underlying technology of malicious impersonation bots is not new, but the sophistication, effectiveness, pervasiveness, and destructive capabilities of these malware bots are steadily advancing. Artificial intelligence technology is also developing at a breakneck pace and will grow exponentially more powerful as the nascent field of quantum computing improves and becomes widely adopted. A.I. software is already capable of combining video clips to create relatively realistic fakes and creating believable images of people that do not exist. Soon, authentic humans may be unable to determine if text, photos, audio, and video reflect reality or are frauds fabricated by A.I.-operated impersonation bots.

Much malicious impersonator bot activity in recent years has focused on popular social media sites. This was demonstrated in dramatic form in early 2018 with the discovery of a company called Devumi, which allegedly sold celebrities and politicians millions of fake social media followers that often used stolen profiles to appear legitimate and went on to exhibit bizarre, malevolent behavior—malicious impersonation bots. But these bots also are capable of committing serious crimes on their creators’ behalf. For example, working with police and security agencies around the world in 2010, the FBI cracked a major cyber-crime network as part of Operation Trident Breach. The cyber criminals targeted 390 computers of small and medium-sized companies, municipalities, churches, and individuals, infecting them with a version of the ZeuS Botnet. As part of this complex operation, a network of malbots operated covertly for two years, stealing $74 million on behalf of its creators before being detected. In light of advances in technology since 2010, including the increasing refinement and affordability of malicious artificial intelligence, the events uncovered in Operation Trident Breach could be just the tip of the iceberg. Given the large scale of these malicious activities, Kansans are undoubtedly affected by the proliferation of malicious impersonation bots.

II. Limitations with Current Laws

There are limitations to existing laws combating malicious impersonation. For example, the federal Better Online Ticket Sales Act of 2016 addresses the online ticket scalping aspect of bot activity, and provides for enforcement by state attorneys general. Similarly, thirteen states currently prohibit ticket-scalping bots, including California, New York, Oregon, Pennsylvania, and Tennessee. However, those laws do not address the malicious activities beyond online ticket scalping.

Moreover, while certain law enforcement strategies have proven successful in several high-profile cases, and serve as one of several strategies to deter this type of cybercrime, enforcement of prohibitions against bots and botnets at both the federal and state level have generally proven notoriously challenging, considering the difficulty of detection and the massive size, reach and complexity of the criminal networks behind them. Indeed, successful prosecution of bot herders and subsequent cleansing of infected machines are often followed by resurrection of the criminal operation within minutes.

The main problem with existing laws relates to the autonomous feature of the impersonation bots: who is culpable for a criminal act carried out by an unpredictable A.I.-operated bot? To illustrate this problem: the Kansas computer crime statute, K.S.A. 2017 Supp. § 21-5839(a)(2), touches on the problem of fraudulent software. This subsection provides it is unlawful to:

[U]se a computer, computer system, computer network or any other property for the purpose of devising or executing a scheme or artifice with the intent to defraud or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation.

The creation of an impersonation bot with the intent to defraud, by its very nature, seems to meet the statutory definition of the crime. Using a computer to devise or execute a
program with the intent to defraud is also illegal under this statute. However, is the current statutory framework sufficient to address one of the most problematic characteristics of impersonation bots: their advanced intelligence and autonomy? For example, subsections (a)(1), (a)(3), (a)(4), and (a)(5) of K.S.A. 2017 Supp. § 21-5839, deeming certain acts concerning computers unlawful, each require the act be done “knowingly.”¹²¹ The question is, can an autonomous robot, removed from any direct programming but based more on machine learning principles, do anything “knowingly,” or form mens rea, a “guilty mind,” when it lacks a human brain?

Similar to the Kansas computer crime statute, the federal Computer Fraud and Abuse Act (CFAA) comes close to prohibiting the dissemination of malbots, but does not explicitly do so. Under the CFAA, it is a punishable offense to “knowingly cause… the transmission of a program, information, code, or command, and as a result of such conduct, intentionally cause… damage without authorization, to a protected computer.”²⁵ The term “damage” as used in this subsection is defined as “any impairment to the integrity or availability of data, a program, a system, or information[].”²⁶ By hinging the crime on knowingly causing “damage,” the CFAA provision prohibiting the transmission of a program that causes such “damage” without direct human authorization does not appear to encompass transmission of a program which is designed to hide its identity by impersonating a human for a fraudulent or deceptive purpose.

Another pair of Kansas criminal statutes which may arguably cover malicious impersonation bots are K.S.A. 2017 Supp. 22-2619(a), dealing with crime committed with an electronic device, paired with K.S.A. 2017 Supp. 21-6107, dealing with identity theft and identity fraud. K.S.A. 2017 Supp. 22-2619(a) includes in its list of crimes that may be facilitated by an electronic device “identity theft and identity fraud, as defined in K.S.A. 2017 Supp. 21-6107.” In turn, K.S.A. 2017 Supp. 21-6107 provides, in part:

(a) Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to:

(1) Defraud that person, or anyone else, in order to receive any benefit; or

(2) misrepresent that person in order to subject that person to economic or bodily harm.

(b) Identity fraud is:

(1) Using or supplying information the person knows to be false in order to obtain a document containing any personal identifying information; or

(2) altering, amending, counterfeiting, making, manufacturing or otherwise replicating any document containing personal identifying information with the intent to deceive.

This tandem of statutes could be broad enough to prohibit using an electronic device to transfer or use impersonation bots with the intent to defraud. However, identity theft requires the use of personal identifying information with the intent to defraud, and the crime of identity fraud requires knowledge of the false nature of information or the intent to deceive. Again, an autonomous robot can neither form intent nor know anything in the classic sense. Once an impersonation bot is released and begins acting autonomously through its artificial intelligence programming, the specific intent and knowledge-requiring crimes of identity theft and fraud no longer apply.²⁷

III. Proposed Solutions

Because malicious, autonomous impersonation bots have the capacity to cause great harm to the Kansas public, and current law does not directly address them, I urge the consideration and adoption of two additional legal measures to combat their proliferation. My proposals are adapted from Professor Wu’s suggestions in his New York Times op-ed piece.

A. Proposal #1: Criminalize Deployment of Autonomous Impersonation Bots

First, while K.S.A. 2017 Supp. § 21-5839(a)(2) may cover the creation of a fraudulent impersonation bot using a computer, the statute should be amended so that it would be additionally unlawful to knowingly use or deploy any software that hides its real identity to impersonate a human for a de-
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ceptive or fraudulent purpose. This measure specifically targets the intentional act of deploying an impersonation bot which hides its identity for nefarious purposes. The need for this tool arises because these bots are designed to be what computer scientists categorize as “autonomous intelligent agents.” That means those kinds of bots are so advanced technologically that, although the creator may not intend to commit fraud specifically in the creation of the bot, the bots can make their own decisions after they are deployed, including deciding which information to gather and which targets to deceive and exploit on behalf of their creators. Additionally, the Devumi incident illustrated that shadowy third parties often create the impersonation bots and sell them to the distributor, who then deploys them to the customer’s desired network. Unless the act of deploying the impersonation bots is criminalized, a distributor such as Devumi acting in Kansas could claim innocence under current law by asserting it merely sold its customers a product, and did not have the intent to defraud. The proposed measure would not prohibit bots deployed for benevolent entertainment or business purposes because of the requirement that the bot’s purpose in hiding its identity is to deceive or defraud.

The proposal to criminalize the use or deployment of impersonation bots is analogous to the crime of permitting a dangerous animal to be at large. Similar to an unbound autonomous intelligent agent fraudulently posing as a human to potentially cause harm on the internet, a dangerous animal at large may act on its own volition to cause harm regardless of the owner’s intent, so simply permitting it to be at large is illegal.

The proposed deployment measure’s inclusion of the intent to deploy an impersonation bot is necessary because existing malbots can secretly hijack computers of unsuspecting victims to self-propagate and redeploy into the internet. Of course, unsuspecting victims whose computers are used as incubators for multiplying and re-deploying malbots should be held harmless.

B. Proposal #2: Adoption of “Blade Runner” Law

Second, automated processes posing as humans should be legally required to clearly and conspicuously disclose their true nature to all natural persons with whom the bot communicates or interacts (a “Blade Runner” law), thus allowing the human user to easily identify (and avoid) them. However, there are some constitutional issues to consider in adopting such a law.

This author would argue that this requirement would not run afoul of the First Amendment, because freedom of speech protection does not extend to criminal activity. It could be argued that impersonation bots are a form of commercial speech, which is “expression related solely to the economic interests of the speaker and its audience,” thus affording some protection under the First Amendment. However, the state may limit commercial speech that is fraudulent or deceptive. Put another way, to gain First Amendment protection, commercial speech “at least must concern lawful activity and not be misleading.” Because the creation of an impersonation bot is already illegal under K.S.A. 2017 Supp. § 21-583(2) and the code is deceptive by design, they deserve no First Amendment protection and the proposed “Blade Runner” law would survive an intermediate scrutiny analysis.

To the extent a human programmer may have Fourth Amendment rights in illegal software code stored on a computer, the author believes the additional requirement for the code to disclose its true nature would not be an unreasonable search or seizure, but would be analogous to the implied consent law requiring motorists to submit to a blood alcohol test. The Kansas Supreme Court has consistently held that “compulsory testing for alcohol or drugs through drivers’ implied, even coerced, consent does not violate the Constitution; it is reasonable in light of the state’s compelling interest in safety on the public roads.” In the arena of illegal software code, a similar compelling state interest that would likely survive strict scrutiny is public safety and security. Further, many courts have held there is no expectation of privacy in electronic information when the computer is connected to the internet.

Similarly, the Fifth Amendment privilege against self-incrimination would not be implicated by the proposed disclosure requirement. First, artificial intelligence cannot incriminate itself, because it is not a legal person. Second, the original programmer is already legally prohibited from “devising or
executing a scheme or artifice with the intent to defraud” under K.S.A. 2017 Supp. § 21-5839(a)(2). Requiring the bot to conspicuously disclose its “botness” would merely have the software publicly declaring it complies with the law, analogous to the numerous statutory labeling requirements for goods in Kansas.42

Finally, an additional persuasive comparison in existing law is the statutory requirement to affix drug tax stamps on illegal controlled substances.43 The Kansas Supreme Court has held this statute does not violate the due process provisions of the Fourteenth Amendment.44 In the author’s view, the requirement to disclose a bot’s true nature would be no different.45

IV. Conclusion

The technology on both sides of the arms race against cybercrime, including autonomous, malicious impersonation bots, is well-funded and constantly evolving.46 Institutions should explore the capabilities and adaptability of cyber security services with advanced identity proofing and autonomous impersonation bot detection in mind. Thorough technological discussions of approaches to malicious bot prevention, mitigation, and enforcement may be found in various publications, including both the February 2018 Cambridge University report47 and the article by Benoit Dupont48 referenced above.

However, the risks that autonomous, malicious impersonation bots pose to Kansans are real, dire, and imminent. The phenomenon will spread and expand without both legal and technological measures to proactively address it. Private parties cannot address the problem alone, so state and local governments need to be aware of the particularly complicated risk of malicious impersonation bots and work with industry and academia to take appropriate action to prevent catastrophic losses.

Similar efforts to address the proliferation of malicious impersonation bots have begun in the legislatures of both California49 and Arizona,50 with the introduction of bills which would prohibit the use of digital bots that hide their identity by impersonating a human. California’s proposed measure would make unlawful the use of a bot to communicate or interact online with a natural person, with the intention of misleading and without disclosing that the bot is not a natural person.51 Arizona’s proposed bill does not require disclosure of the bot’s identity, but is broader in that the intent to mislead is replaced with knowingly using or deploying an impersonation bot.52 The author’s proposals take a comprehensive approach in both outlawing the use or deployment of malicious impersonation bots and requiring disclosure of the bot’s true nature.

In the interest of public safety and welfare, I urge Kansas lawmakers and the legal community to consider enacting measures such as the legal tools proposed above to provide an added layer of protection against the threat of autonomous, malicious impersonation bots.

About the Author

Jay Van Blaricum is a Kansas-licensed attorney currently acting as Assistant General Counsel for the Kansas State Board of Healing Arts in Topeka. After graduating from the University of Kansas School of Law in Lawrence, Kan., with a juris doctor degree in 2004, Van Blaricum served as the research attorney for Kansas Court of Appeals judge Richard Greene, and has since worked with several Kansas state agencies as legal counsel. He was an articles editor for the Kansas Journal of Law and Public Policy while at K.U., worked extensively on criminal and constitutional questions for Judge Greene, and has drafted numerous statutory and regulatory amendments for various state agencies.

5. Distributed denial of service (DDoS) attacks use a high volume of compromised computers and Internet connections to flood a targeted online resource with traffic, seeking to disrupt its bandwidth, responsiveness, or the availability of its applications. DDoS attacks are often global attacks, distributed via botnets. https://www.webopedia.com/TERM/D/DDoS_attack.html.
10. Supra note 4.
12. Botnets, like the ones uncovered by Operation Trident Breach, are groups of computers connected in a coordinated fashion for malicious purposes. See https://www.techopedia.com/definition/384/botnet.
17. O.R.S. § 646A.115.
18. 4 P.S. § 212.1.
21. Id.
22. A botnet herder, or bot herder, is an individual who controls and maintains a botnet by installing malicious software in numerous machines, putting these machines into his or her control. https://www.techopedia.com/definition/27746/botnet-herder.

23. Supra note 20.
27. For more analysis on culpability issues for artificial intelligence, see https://theconversation.com/we-could-soon-face-a-robot-crimewave-the-law-needs-to-be-ready-75276
29. See supra note 8.
31. While some see the problem primarily as “how do we demonstrate the intentions of a non-human,” (See https://theconversation.com/robot-law-what-happens-if-intelligent-machines-commit-crimes-44058), which is problematic indeed, Proposal #1 seeks to place the onus on the human deployer of the bot releasing a dangerous and unpredictable product. This is consistent with views on the foreseeability of artificial intelligent systems’ actions in the realm of tort law (See https://texaslawreview.org/foreseeability-human-artificial-intelligence-interactions/).
32. In the 1982 film “Blade Runner,” as well as the novel it is based on, “Do Androids Dream of Electric Sheep?” by Philip K. Dick, agents of the Los Angeles Police Department used several analytical exercises to determine whether a suspect was an Android or human. http://bladerunner.wikia.com/wiki/Voight-Kampff_machine.
33. Such laws have broad public support, with a recent international poll showing 80% of respondents favored a “Blade Runner” law in marketing. See “SYGYZY Digital Insight Report 2017,” https://think.syzygy.net/ai-report/us.
34. Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 513, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (“[T]he Supreme Court has held that violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection.”); Roberts v. United States Jaycees, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); and State v. Whitmore, 270 Kan. 259, 272, 13 P.3d 887, 901 (2000).
38. See, e.g., United States v. Andrus, 483 F.3d 711, 718 (10th Cir. 2007) (“computers should fall into the same category as suitcases, footlockers, or other personal items that command a high degree of privacy”); United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) (holding government agents violated the defendant’s Fourth Amendment rights by compelling his Internet service provider to turn over his emails without first obtaining a search warrant based on probable cause); United States v. Barth, 26 F. Supp. 2d 929, 936-937 (W.D. Tex. 1998); Brackens v. State, 312 S.W.3d 831, 837 (Tex. App. 2009) (“Fourth Amendment protection afforded to closed computer files and hard drives is similar to the protection afforded to a person’s closed containers and closed personal effects”).
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A recent heated argument with my estranged sister-in-law piqued my interest in researching banishment as a form of justice for various cultures. Banishment has been used as a sanction since ancient times, as a form of social control. Historically, political disloyalty often resulted in banishment, permanent exile, or, at times, death. Based on religious beliefs, the Amish practice the doctrine of shunning, a form of banishment, in order to prevent affiliation with individuals who have offended the church or community. Even the Republic of Singapore uses banishment as a national sanction, which has a federal law on the books that authorizes the arrest, detention, and possible expulsion from the country upon grounds that they "would not be conducive to the good of Singapore," under the Singapore Banishment Act.\(^1\)

Certain Native American tribes also practice banishment, such as the Kickapoo Tribe in Kansas. Banishment is used within the Nation’s Tribal Court, established in March 1991, which has jurisdiction over both civil and criminal cases. The Tribe has an intergovernmental agreement with Brown County law enforcement whose officers are cross-deputized to aid with law enforcement on the Kickapoo reservation. The tribe itself has a chief of police and two deputies, and violators of tribal law can be fined, incarcerated (jail space is rented in Brown County, as needed), or banished completely from the reservation.\(^2\)

The use of banishment in contemporary tribal society, however, is carefully (read: sparingly) used. Though the punishment has roots in tradition and historical values, Native American societies are balancing it with modern conceptions of due process, equity, and fairness. Banishment of a tribal member is a difficult decision and is done only after extensive testimony about a person’s conduct and character, as well as discussions within the community (involving formal councils, elders’ councils, or the entire tribal community).\(^3\) Modern forms of banishment examine the gravity of a person’s offense with the punishment so that conditions are placed on a person’s ability to remain on tribal lands (i.e., restitution for financial harm, mandated mental health counseling, restriction of a person’s presence or movement within the community, etc.). Serious offenses committed on tribal lands, such as drug dealing, sexual assault or homicide may result in the complete expulsion of the violator from tribal lands, which includes a prohibition of community members from contacting them.\(^4\)
Within the Native American community, the banishment punishment is applied by various tribal courts and councils. The Cheyenne, who value family and their traditional ceremonies, had a council decide to banish an Indian Health Services [non-Indian] doctor for performing religious ceremonies on their lands, found to be offensive and a “sacrilege” to their culture. After banishment from tribal lands, the Northern Cheyenne Tribal Court later ruled the banishment action illegal, allowing the doctor to return to work on the reservation.5

The Navajo have generally been culturally averse to formal methods of punishment. The Navajo Nation Supreme Court has even noted that “actual coercion or punishment were actions of last resort in Navajo common law.”6 The goal of any punishment, under Navajo law, is to make victims “whole” and punish in ways visible to the larger community, such as requiring extra payments to a victim’s family.7 The Navajo Nation incorporates its customs and traditions of the Tribe into its Navajo Tribal Code, and have also established a Navajo Peacemakers Court (a formal method of mediation) to resolve disputes between members within the community.8 Traditionally, restitution is a common Navajo remedy for the majority of offenses, but banishment is used and reserved for repeat offenders or serious offenders of Navajo law.9

However, tribal authority to banish has been limited with the passage of the Indian Civil Rights Act (ICRA) of 1968, which applies some (though not all) of the guarantees of the Bill of Rights to tribes.10 In 1996, after five members of the Tonawanda Band were permanently banished from Seneca territory by the Council of Chiefs, the Council’s actions were challenged in federal court via a writ of habeas corpus. By the time the petitioners were able to ‘come and go’ as they please, but the banishment orders make clear that at some point they may be compelled to ‘go’, and are no longer welcome to ‘come’.…a severe restraint to which the members of the Tonawanda Band are not generally subject.”11 The court continued to compare banishment proceedings to denaturalization proceedings, quoting Chief Justice Warren: “…It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”14

For many cultures, banishment serves as an important historical, judicial function. The punishment demonstrates how cultural customs can combine with modern notions of fairness to protect the greater community. Courts continue to respect the cultural roots of banishment while balancing basic rights. Banishment is clearly not a punishment to be taken lightly, and much to my sister-in-law’s dismay, I’ll stick to family estrangement. ■

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Katherine Lee Goyette (McBride) is a 2010 graduate of Washburn Law (JD) and a 2012 graduate of the University of Kansas School of Law (LLM). She is currently working for Fendley & Eton in Clarksville, Tennessee; previously, she was a felony prosecutor in southern Colorado. Katherine has been a member of the KBA’s Diversity Committee since 2011, serving as co-chair of the Diversity Committee from 2015-2016. Katherine is the President-Elect of the Military Spouse JD Network, a military spouse bar association, and resides north of Nashville, Tennessee with her active-duty Army husband.

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7. Id.
8. Kunesh, supra note iii, at 97.
9. Id.
12. Id.
13. Id.
Many lawyers asked whether it was acceptable to use credit cards offering rewards like cash back or airline miles back in 2015 as the first county mandated electronic case filing. There was not much guidance at the time but the KBA has since issued Opinion No. 17-01. It is a timely opinion considering the entire state will require electronic filing by July, 2018 and the same question about credit card rewards started popping up again.

The Opinion opens, “In most instances, it is not inappropriate or unethical for a lawyer or law firm to keep and use credit card reward points or miles generated from using the lawyer’s or law firm’s credit card to charge expenses advanced on behalf of a client.” That will be welcome news to lawyers trying to streamline the accounting processes for eFiling.

**Conflict**

The primary concern in the Kansas Opinion and its predecessor opinions (some of which the Opinion incorporates) is conflict of interest. A lawyer choosing a service that provides a discount to the lawyer (while the client is billed full price) creates a concurrent conflict. Steering the client to that service is less about the client’s needs and more about an alternative profit center for the lawyer.

Such a conflict could be addressed by full disclosure to the client with express, written consent required from the client. In some cases, the client might exercise an option to pay the fee and receive the benefit itself.

**Material Benefit**

Credit card rewards present a notable variation of the conflict analysis on lawyer discounts, however. Most opinions, including the KBA’s, recognize that *de minimis* rewards like those offered by credit card companies are less likely to result in conflict in the lawyer-client relationship. Additionally, a lawyer paying by credit card actually benefits the client by ensuring expenses are paid promptly, eliminating piecemeal...
payment throughout a billing cycle, and giving the client an advance until the next statement. The Opinion notes, “Given the de minimis nature of most rewards, this would appear to be a fair tradeoff.” (The Opinion does not note, as others have, that clients already have constructive notice of credit card rewards as such programs are widespread, public knowledge.)

Exceptions

The Opinion does equivocate, however. “In cases where the advances for a particular client are significant and/or repetitive, it is recommended that disclosure be made with the client, so the client may determine whether to pay the expenses directly, and thereby generate and keep the rewards for itself.”

That hedge makes sense for repetitive expenses like airline travel where a client might easily and reasonably make payment arrangements themselves. The logic does not fit repetitive and/or significant expenses like electronic filing. It is neither practical nor desirable for security reasons to enter multiple clients’ credit card and checking account information into the lawyer’s eFlex wallets and reconcile the messy statements that would result. The benefits to the client noted by the Opinion are actually more pronounced for the client in repetitive situations like eFlex.

The potential argument for a conflict could be a situation in which an attorney opts to use a credit card for payment of an eFlex fee even where the checking account fee would be less. Currently, payment by checking account incurs a $2.00 fee while payment by card is at 4% of the total fee so paying a case initiation fee could be $0.16 to $2.88 more if paid by credit card than by check. A lawyer is not ethically required to always choose the cheapest option on the menu but any lawyer not doing so on eFlex might consider and try to quantify benefits to a client of one choice over another and/or add yet another disclosure at engagement.

Oklahoma’s Opinion 330 (2013) – cited in the Kansas Opinion – commented, “…whether disclosure and discussion with the client is required will depend upon whether the awards likely to be generated by the credit card use create a significant risk to the attorney’s ability to represent the client.”

The Missouri Approach

Lawyers practicing in Missouri should be aware that it has apparently charted out its own course on the issue departing from decades of opinions similar to Kansas’s. Back in 2013, an OCDC staffer giving CLE said, “And you also cannot use a credit card with any type of reward or incentive program – no cash back, no credits for shopping, none of it, no Discover.”

That warning was later backed up by an enforcement action against a lawyer charging:

“Respondent paid client expenses utilizing a credit card (the ‘Credit Card’) that provided Respondent with rewards or monetary benefit for his use of the credit card;” and

“Respondent is guilty of professional misconduct as a result of violating Rule 4-1.15(a)(1) by obtaining earnings or other benefits from client funds by using a credit card that provided Respondent with monetary or other rewards for the payment of client obligations for which he has received advance payment from his clients.”

Efforts to discover the outcome of that case or Missouri’s current opinion on using credit cards offering rewards have been unsuccessful. They are remarkably tight-lipped to a non-Missouri attorney, so beware if it affects you and seek out independent counsel. As for Kansas, proceed, but beware the equivocation in Opinion 17-01 (and always note such opinions are non-binding).

About the Author

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

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Pause to Persuade

by Pamela Keller

As a native New Yorker who grew up enjoying, even admiring, the incessant banter at family gatherings, and as a person who thought she would make a decent lawyer because she could usually come up with something to say, I’m a bit surprised by what I am advocating for in this column: Silence.

For this column I’ve derived a few practice tips from “Talk Less”: Eloquent Silence in the Rhetoric of Lawyering,¹ by Bret Rappaport, a litigation partner and adjunct professor of English. Perhaps my few tips will spur you to read the entire article, as it more fully illustrates how lawyers can effectively employ eloquent silence.² Rappaport defines eloquent silence as the type of silence in which the nonspeaker intends to be communicative.³

Lawyers should think of silence as another means of speaking to an audience. Silence speaks by stimulating thoughts and words in the mind of each person listening.⁴ Silence allows the listener to finish a thought or prepare to receive a thought; it allows the listener to become a participant in whatever is being said.⁵ The listener cannot participate without a little time to think about what is heard. Research has shown that teachers need to wait at least three seconds after asking a question to give students “think time.”⁶ Lawyers, judges, and clients are just like students when hearing new information. They need think time to absorb information and learn, so it stands to reason that think time is needed for persuasion.

You can create rhetorical impact to better persuade your listener by pausing before or after a word or phrase, pausing to create a “chunk of words,” or being entirely silent.

Pausing before or after a word. Master the pregnant pause before key words or phrases and selectively use a dramatic pause after key words or phrases. The pregnant pause is so-called because it “looks forward, as does an expectant mother. This pause precedes the important word or phrase and thus invests the listener—causing that person to pay attention.”⁷ The dramatic pause is, well, more dramatic. It comes after the important word or phrase so that the word or phrase can resonate in the speaker’s mind.⁸

Comedians have mastered the pregnant pause. Watch a few good monologues on late-night TV shows and you will have a host of examples. Or recall the following famous exchange in Blazing Saddles:⁹

Sheriff (Cleavon Little): What’s your name?
Kid (Gene Wilder): Well, my name is Jim. But most people call me [4-second pause] Jim.

The dramatic pause is more difficult to use and should be used less often than the pregnant pause. President Barack Obama gave an eulogy for Reverend Clementa Pinckney—who was killed by Dylann Roof in his church in June of 2015—that is remembered in part because of the President’s dramatic pause. As he was nearing the end of the eulogy, he stopped for a full thirteen seconds. And then, slowly, he began singing Amazing Grace. It’s been called a graceful pause, and one that was “not a dead silence, but a ‘live silence.’ . . . It is a silence that invites us to think of time not as something passed but as something plotted.” Lawyers who can master the dramatic pause will demonstrate full control of their craft.

“Chunking.” You should use a pause before and a pause after key phrases to chunk information. Rappaport cites the Pledge of Allegiance as the “poster child” for the persuasive effect of chunking.


Chunking helps listeners process what you are saying. Our brains need pauses both to process information and to act as a cue for what is important. Our brain takes the information we are listening to and “chunks” it before storing it. (That is why we remember phone numbers as 785-864-4444 and not 7858644444.) Because unprocessed information can never persuade us, we need to help our listeners process and store information by chunking our speech.

Chunking enhances meaning. When you let words and sentences run into one another, what you are saying seems unclear to the listener because the listener’s brain simply cannot digest long strings of words. Also, running the words together may actually be unclear. “Let’s eat, Grandma” and “Let’s eat Grandma” do not mean the same thing, so you must reflect the difference in your speech. Similarly, “One nation under God [pause] indivisible” means something different than “one nation [pause] under God, indivisible [pause].” Controlling pauses around certain words or phrases will make your speech more precise.

Chunking also helps you change the timing and pace of your speech to engage the audience. You may not be speaking too fast or too slow, but if you continually speak with the same pace, you will have trouble engaging your listener for an extended time. To effectively use silence, you should practice pausing: before changing ideas; to emphasize meaningful or important legal phrases or facts; and to force yourself to slow down when communicating critical pieces of information.

What's the magic number of words to chunk? Apparently a wealth of scientific research indicates that the perfect number is seven, plus or minus two.

Being silent. You can also communicate by being purposely silent for longer time periods. For example, being observed silently listening communicates that the listener is interested in what the speaker has to say. Actively listening is good for understanding another’s point of view, but it can also be an ego boost for the speaker. And, as they say, “Flattery will get you everywhere.” You can also use silence in group work or as a member of a team or committee. Remember you can “sign on” without “adding on.” Adding to a point can detract from it. It’s better to remain silent and have the group’s point be clearer than confusing. This takes humility. You must be able to recognize that if the point already stated is close enough, it doesn’t have to be stated exactly your way. How much shorter would committee meetings be if all members recognized this?

So the next time you are preparing your speaker’s notes for an oral argument, presentation, negotiation or meeting, don’t just plan which words to use, plan when to be [pause] eloquently silent.

About the Author

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2. The full article summarizes scholarship on silence as argument, briefly explains the cognitive science behind how the absence of sound persuades the listener’s mind, includes quotes from distinguished judges and lawyers who have used silence effectively, and provides memorable examples and illustrations.
3. Id. at 293.
4. Id. at 289.
5. Id.
6. Id. at 296.
7. Id. at 300.
8. Id.
9. Id. at 304.
10. Id. at 288.
11. See id. at 286.
12. Id. at 307.
13. Id.
14. Id. at 308.
15. Id. at 309.
16. Id. at 308.
17. Id. at 311.
18. Id.
19. Id. at 287.
Walking the Balance Beam of the Bankruptcy Code’s Discharge Injunction

by Teresa M. Schreffler
and
The Honorable Janice Miller Karlin,
Chief Judge U.S. Bankruptcy Court, District of Kansas
When a debtor files bankruptcy, whether represented by counsel or not, the debtor understands that the automatic stay and the discharge injunction are the “good” parts of bankruptcy. Debtors certainly may not understand the exact contours of these legalities, but they know that filing bankruptcy brings them a stay of collection from their creditors and ultimately a discharge of most of their debts. Those are the payoffs.

There is plenty of “bad” that goes along with bankruptcy as well, of course, but practitioners can rest assured that these “good” parts, perhaps the most important benefits, are fiercely protected by the courts. In fact, one local bankruptcy judge has called the discharge injunction “the backbone of an honest but unfortunate debtor’s fresh start.” Obviously, you do what you can to protect your backbone.

For non-bankruptcy practitioners, seeing a notice of bankruptcy can (and should) cause you to immediately freeze. When an attorney is not well versed on the nuances of the automatic stay and the discharge injunction, the contours of the Bankruptcy Code can seem daunting. Especially regarding the discharge injunction, there is a common misconception about what a bankruptcy discharge means for creditor clients. What avenues, if any, remain for communication or even collection? What is prohibited? What is permitted? Two mistakes are often made at opposite ends of the spectrum: 1) the attorney does nothing when he or she could have actually proceeded, or 2) the attorney proceeds and runs afoul of the Bankruptcy Code. And there are a lot of situations in between these extremes as well. This article attempts to provide general practitioners who do not regularly practice in bankruptcy court an overview of the discharge injunction, a review of some recent discharge injunction violations, and the status of the law in the Tenth Circuit on what relief can be granted for violations and which court(s) have jurisdiction to grant the relief. It then provides tips for attorneys representing either debtors or creditors.

I. Bankruptcy’s Discharge Injunction versus the Automatic Stay

A. A Review of the Automatic Stay

As noted above, bankruptcy can seem like a statutory maze and both the discharge injunction and the automatic stay are statutory creatures at heart. This article is focused on the intricacies of the discharge injunction, but to understand the discharge injunction, a practitioner must first understand how it is different from the automatic stay.
Bankruptcy’s automatic stay is governed by 11 U.S.C. § 362. Section 362 “automatically stays the commencement or continuation of a judicial proceeding against the debtor that was or could have been initiated before the filing of a bankruptcy petition.” The stay protects against a host of other things, in addition, and those are listed in the subsections of § 362(a). Essentially, any effort to recover on a claim against a debtor is stayed once the bankruptcy petition is filed.3

Section 362, which establishes the automatic stay, is the central provision of the Bankruptcy Code. When a debtor files for bankruptcy, section 362 prevents creditors from taking further action against him except through the bankruptcy court. The stay protects debtors from harassment and also ensures that the debtor’s assets can be distributed in an orderly fashion, thus preserving the interests of the creditors as a group.4

“Actions taken in violation of the automatic stay are void ab initio; that is, they are without legal effect.”5

The automatic stay, however, does not “extinguish or discharge any debts;” it merely protects the “debtor from various collections efforts”6 while it is in effect. The “while it is in effect” language is important, as the automatic stay is in effect only for a statutorily prescribed time period. The automatic stay terminates upon the occurrence of any of a number of listed items in subsection (c) of § 362. Highly simplified, the most generally applicable are case closure, case dismissal, or the entry of discharge. But even this general rule is not universal because “entry of discharge” does not terminate the stay for actions against debtor’s non-exempt assets, as explained below. So it is admittedly complicated.

Creditors can also seek relief from the automatic stay to prosecute their claims, under § 362(d) if they can show cause or a lack of equity in property that is not necessary to the debtor’s “effective reorganization.” Creditors must be careful to seek relief for any action prohibited by the automatic stay, however. A party who is willfully injured by a violation of the automatic stay can recover “actual damages, including costs and attorneys’ fees; and, in appropriate circumstances, may recover punitive damages.”7

B. How is the Discharge Injunction Different from the Automatic Stay?

The discharge injunction, found statutorily in 11 U.S.C. § 524, “eventually replaces the automatic stay.”8 It applies only after the debtor has received a discharge. A bankruptcy discharge “voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under” the applicable chapter.9 The discharge injunction also ‘operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]”10

The discharge injunction is, therefore, broad. It applies to “any action to collect a discharged debt” against the debtor personally. It is unequivocal: the injunction “unambiguously voids past and future in personam judgments on discharged debts at any time obtained.”11 Small nuances exist, of course. For example, claims that are the subject of a pending adversary proceeding that seeks to have a debt declared nondischargeable are still “presumptively discharged” until the bankruptcy court makes a determination regarding dischargeability.12 This means the creditor should take no steps to collect a debt, even after the debtor has received a general discharge, if there is a pending adversary concerning that debt.

At the same time, because a discharge does not eliminate the right of a creditor to recover on a claim in rem, in other words, to enforce the security instrument that makes its claim secured up to the value of the collateral, the discharge injunction is precise in its application. It applies only to a debtor’s personal liability on a debt; it does not eliminate the underlying debt.13 Generally stated, the discharge injunction “bars efforts to collect personal debts from debtors after they have been discharged in bankruptcy,” but it does not impact a creditor’s in rem rights.14 For example, an action to foreclose a mortgage is not prohibited by the discharge injunction so long as the creditor makes no effort to collect its remaining debt directly against the debtor.16

The discharge injunction also only applies to debts that are statutorily eligible for discharge, and not all debts are dischargeable. For example, 11 U.S.C. § 523(a)(6) prohibits the discharge of debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”17 Another example is student loans that fall within 11 U.S.C. § 523(a)(8)—which excludes many student loans from the automatic discharge unless the debtor can show “undue hardship.”18 In addition, any debt that arises after the date a bankruptcy petition is filed—a post petition liability—is not discharged.19

Creditors must also be aware of the type of discharge a debtor has received, as some debts are dischargeable in a Chapter 13 case but not in a Chapter 7 case. In a Chapter 13 case, a debtor is entitled to a discharge “after full compliance,” meaning the debtor has completed making the payments required by a confirmed plan.20 The full compliance discharge includes the discharge of non-support debts owed in relation to a divorce or property settlement, although these debts would be nondischargeable in a Chapter 7 case.21 Similarly, a full compliance Chapter 13 discharge could discharge a debt under 11 U.S.C. § 523(a)(6) for willful and malicious injury by the debtor to the property of another entity, whereas a debtor who obtains a different type of discharge under Chapter 13—a hardship discharge under 11 U.S.C. § 1328(b)—could still
have to repay that debt if the creditor timely filed and prevailed on an adversary proceeding brought after it was notified that the debtor was seeking a hardship discharge.\textsuperscript{22}

And even if an underlying debt is discharged, a creditor may in limited circumstances still proceed with an action where the debtor is nominally involved. For example, “suits—even those brought to collect on debts a debtor has discharged—that formally name the debtor as a defendant but are brought to collect from a third party” are permitted.\textsuperscript{23} In addition, even if a debtor has been discharged, that will not prevent a party issuing a subpoena to that debtor to testify at a trial or to participate in discovery as a witness. Neither of those actions are prohibited by the discharge injunction.\textsuperscript{24} Simply put, “requiring a debtor to bear such collateral burdens of litigation as those relating to discovery (as opposed to the actual defense of the action and potential liability for the judgment), does not run afoul of” the discharge injunction.\textsuperscript{25}

Other subsections of 11 U.S.C. § 524 also merit discussion. First, § 524(c) governs a process by which a debtor and creditor can agree for the debtor to retain personal liability for a debt that would otherwise be dischargeable in bankruptcy—and therefore subject to the discharge injunction. These agreements are called reaffirmation agreements and typically involve debts secured by collateral the debtor wishes to retain. Creditors must be careful, however. Section 524(c) requires that the reaffirmation agreement be made before the entry of discharge, requires certain, specific disclosures outlined in the statute, and dictates that the debtor either be fully advised by an attorney before the agreement is filed with the court or the court must conduct a hearing on the reaffirmation agreement and give certain additional disclosures. Section 524(c) “provides the sole authority under which a discharged debt may be reaffirmed and collected,” and it must be strictly complied with.\textsuperscript{26} A presumption of undue hardship applies to the agreement, under § 524(m), if a debtor’s “monthly income less the debtor’s monthly expenses” is “less than the scheduled payments on the reaffirmed debt,” although this subsection does not apply when the creditor is a credit union.

A second subsection—§ 524(e)—states that “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” This provision enables “a creditor to bring or continue an action directly against the debtor for the purpose of establishing the debtor’s liability when establishment of that liability is a prerequisite to recovery from another entity.”\textsuperscript{27} In other words, “[w]hile a discharge in bankruptcy precludes the continuation of an action against the debtor to the extent that the judgment determines the debtor’s personal liability as to any discharged debt, the discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.”\textsuperscript{28} Section 524(e) applies when the creditor seeks “to bring or continue an action directly against the debtor for the purpose of establishing the debtor’s liability when . . . establishment of that liability is a prerequisite to recovery from another entity,”\textsuperscript{29} e.g., to collect from a co-debtor or from the debtor’s insurance company.

Even this statutory exception has its limits, however. Section 524(e) “hinges upon the condition that the debtor would not be personally liable in a way that would interfere with the debtor’s fresh start in economic life.”\textsuperscript{30} One may be tempted to think that the costs of defense would be enough to constitute such “interference,” but courts have generally not so held. “Although defense costs incurred by a debtor could frustrate the fresh start, such costs standing alone have been rejected as a basis to find that the injunction bars such claims, in part because the realities of litigation are likely to compel [a] third party to defend the underlying action.”\textsuperscript{31} And finally, § 524(e) is automatic: a creditor need not seek to reopen a closed bankruptcy in order to file such actions or seek modification of the discharge injunction to proceed with a lawsuit under § 524(e).\textsuperscript{32}

A final subsection of the discharge injunction statute worth mentioning is § 524(i), applicable to long-term lenders, such as mortgage creditors, when the debtor has a confirmed bankruptcy plan. That subsection states:

The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is
in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

Under § 524(i), the “willful failure to credit payments received under a confirmed plan constitutes a violation of the discharge injunction if such failure causes material injury to a debtor.” The remedy found in § 524(i) is “dependent upon the debtor having been granted a discharge,” and provides only a post-discharge remedy. An alleged violation of a loan modification agreement does not give rise to liability under § 524(i), because the loan modification is not a confirmed plan. The purpose of this provision is to sanction creditor activity that occurs pre-discharge, once the discharge injunction is effective. For example, if a mortgage creditor fails to properly credit Chapter 13 plan payments to postpetition mortgage payments, as specified in the plan, then the debtor has a post-discharge remedy if that mortgage creditor does not by the end of the case update its accounting to reflect that payments were applied in accordance with the plan.

Finally, in this lengthy discussion of exceptions and caveats, there is an “overarching exception” to what is allowed: if a debtor “proves the creditor acted in such a way as to coerce or harass the debtor improperly, i.e., so as to obtain payment of the discharged debt,” then a discharge injunction violation may be found. The debtor must show, via an objective test, that “the creditor’s conduct had the practical, concrete effect of coercing payment of a discharged debt.” The creditor’s bad faith is not a required showing. On the other hand, the presence of a “procedural impropriety or error . . . will not give rise to a violation of the discharge injunction violation if the objective effect is not to coerce payment of a discharged debt.”

For this “overarching exception” to apply, the debtor must “establish that a creditor who has taken an action not overtly prohibited by § 524(a)(2) nevertheless violated the discharge injunction, but to do so the debtor must prove not merely that the creditor’s act is not what it appears to be, but that the act in question is one to collect a discharged debt in personam.” For example, if a creditor who held a lien on a worthless vehicle refused to either permit a debtor to junk the vehicle or accept surrender, forcing the debtor to pay a loan the debtor had previously discharged, the creditor may be found to have willfully violated the discharge injunction, even though the creditor’s actions would not have technically violated 11 U.S.C. § 524(a).

Enough of the exceptions! What about enforcement? This will be discussed more in section III, but generally stated, the discharge injunction is automatic. It does not require a debtor to have taken any specific action, or followed any given procedure, to render a judgment void. While this Article repeatedly refers to the statutory nature of the discharge injunction, the remedy for a violation is actually not statutorily based. Rather, § 524 “provides an equitable remedy” under a court’s contempt power. Specifically, bankruptcy courts enforce the discharge injunction using their general enforcement powers under 11 U.S.C. § 105(a), which allows a bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code. This provision grants “bankruptcy courts the power to sanction conduct abusive of the judicial process.”

To summarize, bankruptcy courts want to support a debtor’s fresh start after bankruptcy. But courts are limited in what they police by the contours of § 524—only actions specifically prohibited by that section are violations of the discharge injunction.

II. Examples of Discharge Injunction Violations

Knowing the basics of the discharge injunction, it is helpful to look at a few applications. Recent cases show the importance of the specific language and tactics used to contact a debtor, and range from the run of the mill to the complicated.

For example, in In re Carlson, the debtors received a discharge in their Chapter 7 bankruptcy in 2012. More than five years later, in 2017, the debtors filed a motion to reopen their bankruptcy case for the purpose of filing a contempt motion for a discharge injunction violation. The debtors alleged that their creditor had both received notice of their bankruptcy and participated in an adversary proceeding against them. The creditor had even agreed to entry of a final order that specified the future treatment of certain student loans. Specifically, the parties agreed that $29,157 of the debtors’ student loan debt was not discharged, but the remainder owed to that creditor was discharged, including all interest, if the debtors timely made the agreed $300 monthly payments.

Despite this agreement, the creditor continued to charge the debtors interest, and issued tax forms to the debtors and the IRS showing the same. After the first instance of the charged interest appearing in tax forms, the debtors’ counsel specifically and repeatedly warned the creditor and its attorneys that they were in violation of the agreed order. Despite this, the debtors never re-
ceived a response from the creditor, and the creditor continued to charge interest and submit tax forms so noting.55

The debtors filed a motion seeking a show cause order directed to the creditor, requiring it to show cause why it should not be sanctioned for violation of the agreed order and why it should not be ordered to rectify the violation by filing corrected tax forms with the IRS.56 Finding that the debtors had shown cause, the court issued a show cause order and set the matter for hearing.57 The creditor did not appear. On the proffered facts, and after confirming proper service on the creditor, the bankruptcy court found the creditor in contempt.58 The creditor was ordered to correct and issue three years' worth of tax forms to the appropriate taxing authorities and to provide an accounting of the application of all the debtors' payments under their agreement.59 The debtors were awarded $3000 in actual damages plus reasonable attorney fees.60 While the court awarded no punitive damages, it did order ("as a deterrent") that if the creditor issued any further incorrect tax documents, the creditor would be assessed $5000 for each incorrect document.61

Another example from the District of Kansas is Gray v. Nussbeck (In re Gray).62 In Gray, the debtor received a Chapter 7 discharge and then almost two years later, a creditor who was properly listed in the debtor's case—and thus who received notice of the filing—nevertheless filed a state court petition and received a judgment against the debtor.63 The debtor apparently had entered into some sort of agreement/settlement with the creditor concerning the prepetition debt, but no party had filed a reaffirmation agreement with the court pursuant to 11 U.S.C. § 524(c).64 Despite raising his bankruptcy discharge as a defense in the state court, the state court rejected the defense because the creditor had alleged false representations in the debtor's bankruptcy and a lack of notice—neither of which the bankruptcy court found to be accurate findings in the later contempt proceeding.65

The bankruptcy court ultimately found, when the debtor sued the creditor in bankruptcy court for the claimed violation of the discharge injunction, that the complaint against the creditor stated enough that it could find that the state court judgment against the debtor was void, due to the discharge injunction. The purported agreement did not meet the strict requirements required for a valid reaffirmation agreement, and the court refused to enforce that agreement.66 The bankruptcy court rejected the creditor's reliance on the Rooker-Feldman doctrine ("a jurisdictional prohibition on lower federal courts exercising appellate jurisdiction over state-court judgments") and the full faith and credit statute ("a federal court must give to a state court judgment the same preclusive effect it has under state law unless there exists an express or implied exception") because § 524 clearly rendered the state court action void.67 The bankruptcy court denied the creditor's motion to dismiss and required the creditor to forthwith show cause why it should not enter a judgment for the debtor as to liability and schedule the issue of damages for trial.68

Contrast the Gray case with a Tenth Circuit case: Jester v. Wells Fargo Bank N.A. (In re Jester).69 In Jester, the debtors' Chapter 7 bankruptcy was preceded by state court foreclosure proceedings by the debtors' creditor.70 Post entry of discharge and closing of their bankruptcy case, one of the debtors (now divorced from the co-debtor) entered into a loan modification agreement with the creditor, wherein the debtor acknowledged the creditor's security interest in the real property was valid and that if he failed to make monthly payments the property would be surrendered.71 The debtor ultimately failed to make payments under the new loan agreement, and the creditor filed a new state court foreclosure action against the debtor.72 The debtor attempted to reopen his bankruptcy case to claim, among other things, a discharge injunction violation against the creditor.73

The Tenth Circuit affirmed the bankruptcy court's decision to deny the debtor's motion to reopen, as no relief could be granted to the debtor.74 The Circuit held that a loan modification agreement executed post discharge that does not attempt to make a debtor "personally liable for the discharged debt" is not a violation of the discharge injunction.75 The Circuit summed up its holding by stating that the debtor had: a fundamental misunderstanding of both what happened at the conclusion of the bankruptcy proceeding and what claims can be redressed by the bankruptcy court. He fails to appreciate the difference between the discharge of [the debtors'] personal obligation on the loan secured by the property and [the creditor's] continued interest in the property via the security instrument. The former was discharged, the latter was not.76

As a result, “the parties’ failure to reach a reaffirmation agreement in the bankruptcy proceedings had no effect on [the creditor’s] ability to foreclose on the property, with or without loan modification.”77

The “fundamental misunderstanding” referred to in Jester is the reason for the different outcome in that case versus the Gray case. In Jester, it was clear that the creditor sought only to foreclose its lien rights, not to obtain a personal judgment against the debtor. This distinction is what makes all the difference if creditors are seeking to collect on a discharged debt. And finally, a recent example—but with a much higher damages award than previously discussed—is Ocwen Loan Servicing LLC v. Marino (In re Marino).78 In the Marino case, the debtors filed a Chapter 7 bankruptcy petition and prior to discharge surrendered their real property to their mortgage creditor.79 Following their discharge, the servicer for the debtors’ mortgage holder began calling and mailing correspondence to the debtors—including account statements.
and escrow statements. Admittedly, some of the written correspondence included a disclaimer at the bottom noting that if the debtors were in bankruptcy or had received a discharge, the information contained therein was “for informational purposes only” and “not an attempt to collect a pre-petition or discharged debt.” The debtors reopened their bankruptcy case, and sought damages for each piece of written correspondence they received.

After an evidentiary hearing when the bankruptcy court also heard testimony about the servicer calling the debtors three to five times a day, the bankruptcy court awarded the debtors $119,000 in emotional distress damages. On appeal, the Ninth Circuit BAP confirmed that the loan servicer’s communications were far more than needed to protect or enforce their lien rights, and that even if individual letters were non-violative, the cumulative effect “created the perception” that the debtors needed to pay the debt. The generic disclaimer language on some of the letters was found to be completely ineffectual. The case is currently on appeal to the Ninth Circuit Court of Appeals, but it demonstrates that once a debtor has received a discharge, a creditor must be especially careful in proceeding. The Ninth Circuit BAP was clear that any post-discharge communication must show no intent to collect a discharged debt, and confusing disclaimers do not provide a defense.

III. What Relief Can be Granted for Violations of the Discharge Injunction and which Courts Have Jurisdiction to Grant Relief

What sort of damages can counsel contemplate for potential discharge injunction violations, and where can those causes of action be pursued? There is no express cause of action for damages for a discharge injunction violation, but that does not mean there is no remedy. Rather, as discussed above, a debtor may file a motion to sanction a creditor for violating the discharge injunction under the bankruptcy court’s civil contempt power found in 11 U.S.C. § 105(a). In general, appellate courts review determinations of violations of the discharge injunction as questions of law, reviewed de novo and “[d]amages awarded as sanctions are reviewed for abuse of discretion.”

The cause of action need not be exclusively filed in the bankruptcy court, however. “[A]lthough jurisdiction to determine which debts are excepted from discharge generally resides in the bankruptcy court, other courts, such as the district court, have jurisdiction to consider the effect of the discharge.” In addition, the request to sanction a creditor for a discharge injunction can be made via motion in the main bankruptcy case, or through an adversary proceeding. Regardless of location or procedural choice, the “debtor bears the burden of proving that the creditor willfully violated the discharge injunction by clear and convincing evidence.”

A willful violation is one that is “volitional and deliberate as opposed to unintentional or accidental.” As mentioned above, a creditor’s bad faith is not required for this analysis, although the debtor must show the creditor intended to commit the act in question. The discharge injunction violation “inquiry is objective; the question is whether the creditor’s conduct had the practical, concrete effect of coercing payment of a discharged debt,” and the creditor’s good or bad faith is irrelevant. Certain actions “are facially impermissible,” such as “dunning letters, collection calls, and collection actions.” Other acts, such as a creditor’s failure to update reported information to a credit reporting bureau to reflect a bankruptcy discharge, depends on whether the “act” of failing to update fails the “objective effect” test.

Although the damages awarded are always dependent on the facts of each case, “[b]ankruptcy courts generally award actual damages, attorney fees, and punitive damages as sanctions for willful violations of the discharge injunction.” Actual damages require proof of actual injury. Courts have awarded damages for lost wages while the debtor was meeting with an attorney or attending court hearings, payments made by debtors that were coerced, monetary amounts per day due to delays in marketing and sale of property improperly encumbered by liens, the value of property improperly taken from a debtor, costs of traveling to a court hearing, etc. Attorney fee awards will obviously be dependent on the particular facts of each case as well. Whether to grant an award for attorney’s fees incurred in prosecuting the discharge violation, and the amount awarded, are discretionary decisions of the court awarding them, and are assessed based on what is “just and reasonable.”

Courts are more reluctant to award punitive damages than actual damages. There are two different tests used by courts to determine if a punitive damages award is appropriate for a discharge injunction violation. First, some courts determine that if the “violation is willful or in reckless disregard of the law, punitive damages are proper. A creditor may be assessed punitive damages if it knew of the federally protected right and acted intentionally or with reckless disregard of that right.” A second test is “slightly different,” and “considers (i) the defendant’s conduct, (ii) the defendant’s ability to pay, (iii) the motives for the defendant’s actions, and (iv) any provocation by the debtor.” Punitive damages may be monetary or non-monetary.

Determining if an award of punitive damages is appropriate also requires consideration of procedural and substantive constitutional limitations on punitive damages, because “due process prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” To determine whether these constitutional limitations are met, courts must look at: “1) the degree of reprehensibility of the defendant’s action; 2) the disparity between the actual or potential harm suffered
by the plaintiff and the punitive damage award; and 3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.107 Regarding the second factor, awards must generally be in the single digit ratio between punitive and compensatory damages, although compensatory damages include attorney fees.108 So if actual damages are $1000 for lost wages, and the attorney fee award is $15,000, the total compensatory damages by which to compare punitive damages would be $16,000. Appellate courts review de novo the constitutionality of punitive damage awards.109

**IV. Practice Pointers for Creditors’ Counsel**

The intent of this article is not to paralyze creditors or their counsel; rather, it is to inform of what is permissible. There are ways for a creditor who needs to have some contact with a debtor post discharge to do so without crossing the line of a discharge injunction violation.

First, creditors should remember in all of their correspondence that the intent to collect a discharged debt is what controls when considering violations of the discharge injunction.110 If a creditor tailors its correspondence to the debtor and is explicitly clear that it is not attempting to collect a discharged debt, but is, e.g., only corresponding regarding its in rem rights in a piece of property, then there will be no discharge injunction violation. But vague disclaimers that are inconsistent with other parts of the correspondence that appear to seek repayment directly from the debtor, will not immunize the creditor.

Second, timing is critical. A recent, local example is *In re Ledin.*111 In *Ledin,* a creditor garnished the future bankruptcy debtor’s bank account and attached several hundred dollars.112 The debtor then filed a Chapter 7 bankruptcy petition and received a discharge.113 Post discharge, the debtor sued the creditor in state court to seek a release of the garnished funds.114 When the state court ordered the funds released to the debtor ex parte, the creditor sought an order asking that the funds be returned, and the debtor responded with an allegation that the request was an attempt to collect a discharged, prepetition debt.115

The bankruptcy court found that there was no discharge injunction violation, because the discharge injunction did not prohibit the creditor from enforcing its prepetition garnishment lien that had survived the debtor’s Chapter 7 discharge.116 That is because in Kansas, the creditor’s garnishment order created a lien on the debtor’s deposits that were bankruptcy administration “ride through” the bankruptcy.120 Because nothing in § 524 precluded the creditor from enforcing its surviving prepetition garnishment lien after the asset was abandoned by the trustee, the Court denied the debtor’s motion for a finding of contempt.121

This timing issue is exactly why creditor’s counsel needs to know the exact sequence of events surrounding the debt, the debtor’s bankruptcy, and the debtor’s discharge. If the garnishment had not attached prepetition, or if the creditor had attempted to obtain the garnished funds after discharge but before the trustee had abandoned the asset, the result in the *Ledin* case would have been different.

In a similar vein, failure to understand the timing issues causes some creditor’s counsel to wait longer than the law requires before proceeding post-discharge. To illustrate, take the typical situation of a debtor who exempts a personal residence and receives a discharge after no one objects to the exemption. If a creditor then files a motion for relief from stay to foreclose the mortgage against that home, the motion will likely be denied as moot. The creditor will have needlessly spent $181, the amount currently charged to file a motion for relief from stay, because the discharge eliminated the stay of in rem actions to recover against exempted property under 11 U.S.C. § 362(c)(2)(C). Again, timing is everything.

But how can a creditor protect itself if it is unsure whether it continues to be stayed or enjoined? A creditor can seek either a “comfort order” or a modification of the discharge injunction, if circumstances so warrant. For example, in *Buke, LLC v. Eastburg (In re Eastburg),*122 the creditor filed a state court petition for conversion and fraud, among other things, and the debtors thereafter filed a Chapter 7 bankruptcy petition.123 The creditor responded by timely filing an adversary complaint seeking a finding that its state court claims were not dischargeable under 11 U.S.C. § 523(a)(2) (for debts obtained by “false pretenses, a false representation, or actual fraud”) or under (a)(4) (debts “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny”).124

When the debtors received their general discharge in their
Chapter 7 case, the creditor amended its adversary complaint to also seek both a declaratory judgment that the discharge injunction did not apply to its claims, or, in the alternative, modification of the discharge injunction to permit prosecution of its state court action.125

On appeal, the Tenth Circuit concluded that although the discharge injunction was probably applicable while the nondischargeability proceeding was pending—and thus a comfort order was not appropriate, the bankruptcy court had the discretion to modify the discharge injunction to make clear that the creditor could recommence its state court action against debtors without risk of sanctions.126 Although generally modification of a discharge injunction is done in cases that “involve a creditor’s request to proceed in state court against a debtor nominally with respect to liability, in order to collect or recover damages from a third party, such as an insurer,” it is also appropriate “to give a creditor permission to continue litigation against a debtor in state court.”127 As a result, the Tenth Circuit affirmed the modification in that case.

Creditors should also be aware of the doctrine of recoupment, and how that may impact their options. “[U]nder the doctrine of recoupment, the discharge injunction does not prohibit a creditor’s defensive use of the discharged debt.”128 Generally stated, “recoupment is an equitable doctrine that allows one party to a transaction to withhold funds due an- other party when the debts arise out of the same transaction.”129

The recoupment doctrine is fairly limited, however.130 As stated, the debts must arise out of the same transaction, which means that “both debts must arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations.”131 If the recoupment doctrine applies, “then there is no ‘debt’ as defined in the Bankruptcy Code, and there is no violation of the injunction.”132 Again, however, “courts narrowly construe the doctrine of recoupment because it violates the basic bankruptcy principle of equal distribution to creditors.”133 As a result, a bankruptcy court will “carefully consider the equities involved,” ensure the claims are “close- ly intertwined,” and make sure that “allowing the debtor to escape its obligation would be inequitable.”134 Despite these strictures, the recoupment doctrine may enable a creditor to bypass the discharge injunction under the correct set of facts.

V. Practice Pointers for Debtors’ Counsel

What should debtors’ counsel do when a discharge injunction violation is suspected? There are intermediary steps before involving the court, obviously. First, debtors’ counsel should always notify the creditor as soon as the violation is brought to counsel’s attention by sending a copy of the discharge order attached to a “back off” letter. Courts are reluctant to award (especially) punitive damages when one simple contact could have avoided those damages. Attaching a copy of the written correspondence warning the creditor to cease its actions to a later pleading seeking damages will both demonstrate the debtor’s good faith and potentially show that the creditor’s actions were willful. This could ultimately bolster the debtor’s claim for damages—again, especially punitive damages.

Note that warning a creditor that its conduct constitutes a discharge injunction violation is not a prerequisite to the ultimate award of damages for such violation. In somewhat unusual circumstances in In re Peyrano,135 the creditor and debtor were involved in a state court dispute when the debtor filed bankruptcy and received his discharge.136 The court found that the creditor, either through actual notice or imputed notice, had notice of the debtor’s bankruptcy.137 The debtor did not, however, file a suggestion of bankruptcy notice in the pending state court action.138 The Tenth Circuit BAP found that this was immaterial, holding: “The Code does not require the filing of a suggestion of bankruptcy to effectuate the discharge injunction. The discharge injunction arises by operation of law upon entry of the discharge.”139 Again, however, it is a best practice to inform all actors—the creditor and the state court—of a bankruptcy and/or discharge as soon as possible.

The second practice debtors’ counsel should adopt is to have clients not only retain all written correspondence from the creditor but also separately document—contemporaneously—every oral contact (telephone/text/in-person) from the creditor. These actions will become important when debtors’ counsel is attempting to prove damages for a discharge injunction violation. For example, in one of the cases discussed above, the court discussed at length the number of phone calls placed, the persons receiving those calls, the frequency of the calls, etc.140 The more frequent, and less convenient to a debtor, these contacts are, the easier it will be for debtors’ counsel to prove damages.

Finally, all debtors’ counsel should ensure that notice is properly provided to any creditor served with a motion for an order to show cause why that creditor should not be held in contempt for a violation of the discharge order. Generally stated, civil contempt may be imposed as long as there is “notice and an opportunity to be heard.”141 Federal Rule of Bankruptcy Procedure 9020 governs contempt proceedings, and states that “Rule 9014 governs a motion for an order of contempt made by . . . a party in interest.” In turn, Rule 9014 governs the procedures for contested matters, and requires “reasonable notice and opportunity for hearing” and service as required for service of a complaint under Rule 7004.142 Rule 7004 requires service by the means specified in that rule: for individuals, first class mail is appropriate.143 Domestic or foreign corporations or partnerships, however, must be served by first class mail “to the attention of an officer, a managing
or general agent, or to any other agent authorized by appointment or by law to receive service of process.”164 And insured depository institutions must be served “by certified mail addressed to an officer of the institution.”165 In other words, the price of mailing may later make the difference in proving due process was met by the type of service made, so it is best to ensure proper service at the outset. A “belt and suspenders” approach is recommended. If there is any doubt who to serve, it is cheap insurance to serve the motion at multiple addresses and on multiple persons to later demonstrate that the creditor received due process by the notice received.

VI. Conclusion

Creditor and debtor counsel alike are justifiably concerned with the discharge injunction—and what post discharge interaction with a debtor the Bankruptcy Code permits. The cases indicate that while a creditor’s bad faith may not be dispositive, the creditor’s good faith will certainly go a long way in preventing or minimizing damages from a discharge injunction violation.

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are discharged unless a court determines they should be excepted, “to mean that the described debts are ‘presumptively discharged’ until the bankruptcy court makes a determination regarding dischargeability and finding “little authority” to support the alternate position.

14. See, e.g., Lunt v. The Peoples Bank (In re Lunt), 500 B.R. 9, 15 (D. Kan. 2013) (“A discharge in bankruptcy eradicates the debtor’s personal liability on the obligation, but it does not eliminate the underlying debt.”). 15. Paul v. Iglehart (In re Paul), 534 F.3d 1303, 1304, 1308 n.6 (10th Cir. 2008) (“The discharge injunction prohibits efforts to collect a debt as a personal liability of the debtor, and thus in rem rights are not affected.” (internal quotation omitted)). 16. Jester v. Wells Fargo Bank N.A. (In re Jester), No. EO-15-002, 2015 WL 6389290, at *5 (B.A.P. 10th Cir. Oct. 22, 2015) (“Actions to collect against the debtor personally are enjoined. In contrast, in rem actions, which include actions to enforce a lien against encumbered property, are not prohibited by the discharge injunction.”); see also Sprague v. Williams (In re Van Winkle), ___ B.R. ___, 2018 WL 1659603, at *8 (B.A.P. 10th Cir. Apr. 3, 2018) (reversing the bankruptcy court’s determination that a creditor violated the discharge injunction because the creditor did not seek to hold the debtor personally liable for the judgment lien at issue). 17. Debts that are statutorily ineligible for discharge may require a creditor to file an adversary proceeding to determine dischargeability. See Fed. R. Bankr. P. 4007 (governing procedure and time for filing complaints seeking a determination of the dischargeability of a debt; stating a deadline of 60 days after the first date set for the meeting of creditors in the debtor’s case). Failure to timely file an action may be fatal. See Walker v. Wilde (In re Walker), 927 F.2d 1138, 1145 (10th Cir. 1991) (holding that actual knowledge of a debtor’s bankruptcy barred a creditor from challenging the dischargeability of a claim months after the bar date for such claims). 18. See, e.g., In re Timmons, No. 11-20513-7, 2012 WL 4435522, at *3 (Bankr. D. Kan. Sept. 24, 2012) (stating that “§ 524(a) simply does not apply to any debt that falls within § 523(a)(8).”). The Timmons case went on to state: “although Sallie Mae’s declaration of default and acceleration of the Debtor’s student loan may impair her fresh start, the fact Congress made its debt nondischargeable means that Congress has determined that Sallie Mae’s interest in collecting the debt should override the Debtor’s interest in obtaining a fresh start.” Id. at *4. 19. In re Paul, 534 F.3d at 1306 n.4. 20. In re Okrepko, 533 B.R. 327, 333 (Bankr. D. Kan. 2015). 21. Id. 22. See Fed. R. Bankr. P. 4007(d) (setting time for filing a complaint under 11 U.S.C. § 523(a)(6) in a Chapter 13 case where a debtor has filed a motion for a hardship discharge under 11 U.S.C. § 1328(b)). 23. In re Paul, 534 F.3d at 1307 (holding that a suit by a former business partner against a debtor’s business, which nominally named the debtor, could continue without violating discharge injunction). 24. Id. 25. Id. 26. Gray v. Nusbeck (In re Gray), 573 B.R. 868, 872 (Bankr. D. Kan. 2017) (discussed further below, but holding that informal agreement between creditor and debtor that did not follow the strict requirements of § 524(c) was unenforceable). Leases that are assumed under 11 U.S.C. § 362(p)(2) would not fall under this restriction. 27. In re Robben, 562 B.R. 469, 479 (Bankr. D. Kan. 2017) (internal quotation marks omitted) (holding that modification of the discharge injunction is not required to bring an action nominally against a debtor in order to establish third party liability under § 524(e)). 28. Blackmon v. Crile, No. 05-1030-MLB, 2007 WL 121402, at *2 (D. Kan. Jan. 12, 2007) (internal citation omitted) (permitting suit against discharged debtor for purpose of establishing debtor’s employer’s liability). 29. In re Robben, 562 B.R. at 479 (internal quotation marks omitted). 30. Id. 31. Id. at 479–80. 32. Blackmon, 2007 WL 121402, at *2. 33. Santander Consumer, USA, Inc. v. Houlik (In re Houlik), 481 B.R. 661, 667 (B.A.P. 10th Cir. 2012). 34. Id. at 671. 35. Jester v. Wells Fargo Bank N.A. (In re Jester), No. 15-002, 2015 WL 6389290, at *8 (B.A.P. 10th Cir. Oct. 22, 2015). 36. In re Holikut, 481 B.R. at 671–72. 37. Id. A Chapter 13 debtor may have a remedy to rectify misapplied payments or dispute unnecessary fees in an ongoing case, see Fed. R. Bankr. P. 3002.1 (governing a creditor’s responsibilities with respect to claims secured by a debtor’s principal residence), but that is a different situation from the discharge injunction violation contemplated by § 524(i). 38. Paul v. Iglehart (In re Paul), 534 F.3d 1303, 1308 (10th Cir. 2008) (internal quotation marks omitted). 39. Id. 40. Id. 41. Id. Cf. Sprague v. Williams (In re Van Winkle), ___ B.R. ___, 2018 WL 1659603, at *10 (B.A.P. 10th Cir. Apr. 3, 2018) (finding no discharge injunction violation, but finding a violation of the parties’ joint stipulated order, and concluding that damages may be appropriate because of the creditor’s “unnecessarily relentless pursuit” to collect a judgment lien). 42. In re Paul, 534 F.3d at 1308. 43. Id. at 1308–09 (citing and discussing the facts of Pratt v. Gen. Motors Acceptance Corp. (In re Pratt), 462 F.3d 14 (1st Cir. 2006)). 44. Callier on Bankruptcy ¶ 524.02[1], at 524–20 (Richard Levin & Henry J. Sommer eds., 16th ed.) (“Section 524(a) is meant to operate automatically, with no need for the debtor to assert the discharge to render the judgment void.”). 45. Gray v. Nusbeck (In re Gray), 573 B.R. 868, 872 (Bankr. D. Kan. 2017) (“In sum, § 524 provides an equitable remedy precluding the creditor, on pain of contempt, from taking any actions to enforce the discharged debt.” (internal quotation omitted)). 46. Id. at 877 (“Even though the discharge injunction is created by statute, it is well established that the enforcement of the discharge injunction through its contempt authority requires a bankruptcy court to exercise its equity jurisdiction through § 105(a). Specifically, § 105(a) grants bankruptcy courts the power to sanction conduct abusive of the judicial process.” (internal quotation omitted)). 47. See In re Paul, 534 F.3d at 1306–07 (stating that a bankruptcy court’s equitable power to “enforce and remedy violations of the Bankruptcy Code” is limited to the “substantive Code provision being enforced”). 48. In re Carlson, No. 11-40603, Doc. 45 (Bankr. D. Kan. Mar. 9, 2012) (Karlin, C.J.). 49. Id. at Doc. 51 (June 16, 2017). 50. Id. at Doc. 54 (July 19, 2017). 51. Id. The debtors filed the adversary complaint against the creditor alleging that loans they took out to finance tuition for their child’s private high school were not “qualified student loans” under 11 U.S.C. § 523(a)(8). Carlson v. Nat’l Collegiate Trust, No. 12-7008 (Bankr. D. Kan.). 52. Carlson, supra note 48, Doc. 54. For student loans that are discharged, an admittedly rare occurrence based on the current state of the law, the withholding of transcripts by the discharged debtor’s school would run afoul of the discharge injunction. Lee v. Bd. of Higher Educ, 1 B.R. 781, 787–88 (S.D.N.Y. 1979). 53. Carlson, supra note 48, Doc. 54. 54. Id. 55. Id. 56. Id. 57. Id. at Doc. 60 (Oct. 25, 2017). 58. Id. at Doc. 63 (November 21, 2017); Doc. 66 (January 17, 2018). 59. Id. 60. Id. 61. Id. 62. 573 B.R. 868 (Bankr. D. Kan. 2017) (Berger, J.). 63. Id. at 873. 64. Id. 65. Id. at 874. 66. Id. at 877. 67. Id. at 874–79. 68. Id. at 879. 69. 656 Fed. App’x 425 (10th Cir. 2016). 70. Id. at 427.
bankruptcy code's discharge injunction

71. Id.
72. Id.
73. Id.
74. Id. at 428.
75. Id.
76. Id.
77. Id. In addition, 11 U.S.C. § 524(j) provides a safe harbor of sorts for creditors holding a secured claim on real property that is the principal residence of a debtor. In those situations, there is no injunction against acts in the ordinary course of business between the creditor and debtor when the creditor is merely "seeking or obtaining periodic payments" associated with the creditor's security interest "in lieu of" the credit seeking in rem relief to enforce the lien." 11 U.S.C. § 524(j)(1)–(3).
78. 577 B.R. 772 (B.A.P. 9th Cir. 2017).
79. Id. at 777.
80. Id.
81. Id. at 780.
82. Id. at 784.
83. Id. at 785.
84. 2091199, at *4 (B.A.P. 10th Cir. July 24, 2006).
86. 11 U.S.C. § 524(j)(1)–(3).
87. holds that, under § 105(a), bankruptcy courts have the equitable power to enforce and remedy violations of substantive provisions of the [Code], including the discharge injunction in § 524(a)(2). (internal quotation marks omitted).
88. In re Peytono, 2017 WL 2731299, at *3 (B.A.P. 10th Cir. June 26, 2017) ("Although § 524 does not expressly create a cause of action for damages, the Tenth Circuit has held that, under § 105(a), bankruptcy courts have the equitable power to enforce and remedy violations of substantive provisions of the [Code], including the discharge injunction in § 524(a)(2). (internal quotation marks omitted)).
89. Id.
92. Otero v. Green Tree Servicing, LLC (In re Otero), 498 B.R. 313, 320 (Bankr. D.N.M. 2013) (stating that while discharge injunction violation claims are generally brought as contested matters, an adversary proceeding is also an acceptable choice).
95. Paul v. Iglehart (In re Paul), 534 F.3d 1303, 1306–07 (10th Cir. 2008).
98. Otero v. Green Tree Servicing, LLC (In re Otero), 498 B.R. 313, 320 (Bankr. D.N.M. 2013) (stating that while discharge injunction violation claims are generally brought as contested matters, an adversary proceeding is also an acceptable choice).
101. 2091199, at *4 (B.A.P. 10th Cir. July 24, 2006).
102. 577 B.R. 772 (B.A.P. 9th Cir. 2017).
106. Id. at *5–6.
107. Id. at *5.
110. Id. at *1.
111. Id.
112. Id. at *2.
113. Id. at *2–3.
114. Id. at *3.
115. Id. (citing Kan. Stat. Ann. § 60-732(c)(1)). Substantive state law on property rights is often the key to bankruptcy decisions, Butner v. United States, 440 U.S. 48, 59 (1979), so counsel should always be familiar with the underlying state law at issue.
116. 586 F.3d 776, 781 (10th Cir. 2009) (no discharge injunction violation occurred when Department of Veteran Affairs reduced a monthly benefit because of the doctrine of recoupment).
118. Id.
119. Id. at *4.
120. Id.
121. Id. at 627–28.
122. Id. at 632.
123. Id. at 633.
124. Id.
130. Id.
136. Id. at *1–2.
137. Id. at *4.
138. Id. at *5.
139. Id.
144. Fed. R. Bankr. P. 7004(b)(3). The "majority conservative interpretation" of Rule 7004(b)(3) requires more than simply addressing the mail to "Officer," but that, rather, an actual named individual must be addressed. In re Franchi, 451 B.R. 604, 606 (Bankr. S.D. Fla. 2011) (discussing cases). No circuit court has specifically addressed the issue, but obviously, the safest approach is to find an "officer" to name.
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Banking to make a difference
Introducing the Partner in Justice IOLTA program
by Anne Woods, KBA Public Services Director

Last year, the Kansas Bar Foundation IOLTA Committee and the Kansas Bar Foundation Board of Trustees committed to establishing a Partners in Justice program to encourage financial institutions to further embrace the purpose of IOLTA by agreeing to pay supportive interest rates. The KBF Partners in Justice program guidelines require financial institutions to pay at least 70% of the maximum value of the Federal Funds Target Rate range (with a minimum of 0.7%) on all IOLTA deposits. In support of IOLTA’s charitable purpose, most banks throughout the U.S. routinely waive fees on IOLTA accounts. The Partners in Justice program requires partners to waive fees.

The Foundation is proud to welcome CoreFirst Bank & Trust of Topeka as its first Partner in Justice.

CoreFirst Bank & Trust is a long-time partner and embraced the opportunity.

“CoreFirst Bank & Trust has participated in the IOLTA program since 1985. We proudly support the Kansas Bar Foundation’s mission of awarding grants to organizations that provide justice and legal education. The Partners in Justice program gives us the ability to provide extra funding so families in need can get the judicial access and support they deserve and don’t always receive,” stated Kurt Kuta, President & CEO, CoreFirst Bank & Trust.

There are close to 4,000 Interest on Lawyer Trust Accounts at Kansas financial institutions that generate interest that ultimately benefit Kansans in need of civil legal services and law related education. These accounts are held by attorneys and firms committed to the reason IOLTA was established in Kansas almost 35 years ago.

The IOLTA program is a unique way to increase access to justice for individuals and families living in poverty. It basically works like this:

**Lawyer acts as a fiduciary to hold client funds**

Depending on the amount and how long the funds will be held will determine if an IOLTA account is suitable. When funds are relatively small in amount or won't be held for a time period long enough to earn interest, an IOLTA account is appropriate.

**Funds are deposited into an IOLTA**

Money is deposited into the lawyer or firm’s IOLTA.
Interest is transferred to the KBF

On a monthly or quarterly basis, the financial institution transfers interest earned to the Kansas Bar Foundation. Some accounts may only earn pennies in a month, but when pooled with remittances from all participating banks, they create a significant amount. During the last five years, the average amount of funds for grants is approximately $75,000 a year. **The IOLTA Committee selects grant recipients**

In September, the KBF IOLTA Committee will review grant requests. The Foundation has an 11 member IOLTA Committee composed of 1) three appointees of the Foundation; 2) three appointees from the Kansas Bar Association; and 3) five others, one each appointed by the Governor, the Kansas Supreme Court, the Kansas Trial Lawyers Association, the Kansas Association of Defense Counsel, and the Kansas Bankers Association.

The amount of IOLTA grant funds distributed each year depends on interest rates paid on the accounts and the number of attorneys participating in the program. This year, seven organizations received funds to provide things like, advice and representation to victims of domestic violence; low-cost immigration services; training for CASA volunteers; and training for public service attorneys.

Florida was the first state in the U.S. to launch an IOLTA program. Today, all 50 states, the District of Columbia, and the US Virgin Islands have IOLTA. Forty-four of these programs require lawyers to participate. Kansas does not. In 2009, the US IOLTA programs generated over $124 million nationwide.

The Foundation has invited all Kansas IOLTA banking partners to join the Partners in Justice program. You can help by participating in IOLTA and encouraging your financial institution to participate in IOLTA as a Partner in Justice. Please contact the KBF at 785-234-5696 to discover how easy it is to open an IOLTA account and ask your bank to join in making a big difference to Kansans in need!

**About the Author**

Anne Woods serves as the public services director at the Kansas Bar Association and the state director of the Kansas IOLTA program for the Kansas Bar Foundation in Topeka. She has been with the KBA/KBF for five years and is the staff liaison for the KBA Access to Justice Committee, KBA Law Related Education Committee, and KBF IOLTA Committee. She provides program support for KBA pro bono programs, KBF scholarships and grants, and the KBF Board of Trustees.

This pretty girl is Magnolia. She and her handler, Daniel Casement, came to the KBA in April to participate in a Brown Bag Ethics Series CLE called Building That Core Body Strength of Competence. Magnolia was a big hit with all who had the opportunity to meet her. Daniel is a licensed Specialist Social Worker with Stormont Vail. Magnolia is very involved in his work; she is a certified facility dog from KSDS, Inc. in Washington, Kan.
Compassion Fatigue: An Occupational Hazard for Lawyers

**Anne McDonald**

Kansas Lawyer Assistance Program

Topeka

**Anne McDonald** graduated from the University of Kansas School of Law in 1982. She was in private practice before being appointed Court Trustee in Wyandotte County. She retired from there in 2006 and served as a judge pro tem in District and Municipal Court in Wyandotte County. She was appointed to the Lawyers Assistance Program Commission when it began in 2001, and she has served as the Executive Director of KALAP since 2009. McDonald has also served as a CLE presenter on child support and lawyers assistance topics around the state.  
*Approved for 1.0 hour of ethics and professionalism credit in Kansas and Missouri.*

Ethically Using Technology in Your Law Practice

**Danielle Hall**

Office of the Disciplinary Administrator

Topeka

**Danielle Hall** serves as a Deputy Disciplinary Administrator for the State of Kansas. Prior to joining the Office of the Disciplinary Administrator, she was the Law Practice Services Director for the Kansas Bar Association, where she provided members with an array of information and services to assist in practice management and career development. Hall received a B.A. degree in Political Science in 2006 and a J.D. in 2009 all from Washburn University. Additionally, she is also an Adjunct Professor at Washburn University and Washburn School of Law, teaching trial advocacy and coaching the advocacy competition teams.  
*Approved for 1.0 hour of ethics and professionalism credit in Kansas and Missouri.*
Members in the News

New Positions

**Klenda Austerman**, Wichita, has been engaged by Kingman Co. to handle the county’s tax sale. The county currently has more than 100 properties eligible for the sale which will take place sometime in August or September. Austerman already handles tax sales for Sedgwick County and Chautauqua County.

**Kurt C. Benecke** has joined the Cherokee County Attorney’s office as an Assistant County Attorney. He will handle juvenile cases, among others.

**Lisa Brown** has joined the Topeka office of Foulston Siefkin LLP as an associate. She will focus in the areas of health care law and related matters. Brown is a graduate of the Washburn University School of Law.

**Michael Fleming and Associates** and the Spigarelli Law Firm have been retained by Montgomery County for representation in any litigation against opioid drug manufacturers.

**Katherine Goyette** has joined Fendley & Etson, Attorneys at Law, of Clarksville, Tennessee, as an associate.

**Judge Scott McPherson** has announced his filing for election to a full four-year term as District Judge in the 20th Judicial District which includes Barton, Ellsworth, Rice, Russell and Stafford Counties. McPherson was appointed by the Governor in Dec. 2017 to fill the unexpired term of Judge Ron Svaty who retired. McPherson was Rice Co. Attorney for 11 years and had previous experience as an assistant county attorney in Barton Co., and as an Assistant District Attorney in Douglas Co.

New Locations

**Frischer & Schaffer** has changed its name to reflect **Kenneth J. Morton**’s position as a named partner. Morton contributes more than 25 years of litigation experience. **Schaffer & Morton** will continue to focus its practice on insurance and personal injury defense, motor vehicle liability, fraud and arson investigation litigation, insurance coverage analysis and complex property claims.

Notables

The **Deportation Defense Legal Network** (DDLNKC.org) has been working in Kansas City to assist undocumented immigrants in the U.S. who have been targeted for deportation. More than 50 lawyers had stepped up to join the effort at the time the article appeared in the March 13 edition of the KC Star.

**Harry Hardy Jr.**, Senior Civilian Attorney in the Judge Advocate General’s Office at Fort Riley, was recently profiled in the Ft. Riley Post newspaper for his 38 years at Ft. Riley.

**Roger McEowen** was the keynote speaker for the Key to Farming SUCCESSion Conference in March. McEowen is the Kansas Farm Bureau Professor of Agriculture Law and Taxation at Washburn University Law School. The conference, presented by Harvey County, Marion County and McPherson County K-State Research and Extension offices was focused on keeping family farms in the family. McEowen was previously the Leonard Dolezal Professor in Agricultural Law at Iowa State University in Ames, Iowa, where he was also the Director of the ISU Center for Agricultural Law and Taxation—which he founded.

The **Polsinelli** law firm of Kansas City has joined the legal battle to free Syed Jamal, the Lawrence professor and family man who has been detained for deportation back to his native Bangladesh. Jamal has been in the U.S. more than 30 years. His wife is Angela Zaynum Chowdhury; they have three U.S.-born children. Polsinelli’s pro bono effort in this case has been lead by Alan Anderson, a neighbor of Jamal’s and vice chair of the firm’s Energy Practice Group.
Obituaries

Thomas R. Stanton, Reno County District Attorney, received the Kansas Narcotics Officer Association 2017 Drug Prosecutor of the Year Award. The award was presented on March 6 in Topeka. Stanton has been with Reno County since 2001, following 10 years with the Saline County Attorney’s Office. Stanton is a 1990 graduate of the University of Kansas School of Law and a past recipient of the Kansas County and District Attorney’s Association Prosecutor of the Year.

Michelle De La Isla, Mayor of Topeka, and Congresswoman Lynn Jenkins recently spoke to a meeting of the Women Attorneys Association of Topeka at the Robert L. Gernon Law Center. Others participants included Natalie Haag, the Hon. Evelyn Wilson.

William C. Nulton, Prairie Village, Kan., passed on March 16, 2018, at his home in Claridge Court, surrounded by his family. Bill was born to P.E. and Mary Nulton on Feb. 22, 1931, in Pittsburg, Kan. In high school, Bill was elected to Boys State, Boy Governor of Kansas and attended Washington, D.C. Assembly with President Truman. A graduate of KU with degrees in economics and law, Bill was a Summerfield Scholar, a Phi Beta Kappa, Order of the Coif and was a proud member of Beta Theta Pi fraternity. He also attended NYU Law School on a Root-Tilden scholarship. Bill served his country for two years in the Army and then married the love of his life, Vicki Smith on Aug. 11, 1956. Bill and Vicki settled in Kansas City where he practiced law for 37 years, first with Great Lakes Pipe Line Co. and later as a partner with the Blackwell Sanders and the Shughart Thomson law firms. He was a member of the Missouri and Kansas Bars, a committee chair of the ABA Labor Law Section and chair of the MBA Labor Law Committee. Throughout life, Bill valued serving others. He had been a member of the KS Advisory Committee of the U.S. Civil Rights Commission, the KC Civil Rights Consortium and chaired a Full Employment Council task group. A volunteer at various employment centers, he was a member of LINC Works, served as a board member of Marillac Academy, Prairie Village Municipal Foundation and Faith Friends. Bill was elected to the first Shawnee Mission Unified Board of Education and prior to that, the Corinth Elementary Board of Education. For many years, Bill was privileged to serve the Kansas City Ivanhoe community as a board member of the Front Porch Alliance and the Neighborhood Council. At Village Presbyterian Church, Bill was an usher for more than 50 years, elder, trustee and Endowment Trust board member. He was a president of the KC Beta Theta Pi Alumni Assn. and was named asBeta of the Year. Members for 35 years, Bill and Vicki shared great times with family and many friends at Mission Hills Country Club. Bill was a life long tennis player, world traveler with Vicki, an off-tune whistler and an avid St. Louis Cardinals baseball fan. Bill’s greatest love of life was his family. He is survived by his wife, Vicki; son, Carrie Nulton, M.D. (Maura) Kansas City, MO: his daughter, Erica Brautman, Ocean Springs, MS; 10 grandchildren, Mary Stuckey (Brad), Sally, Will (Jordan), Meg, Charlie, Anne, Sam and Michael Nulton, and David and Jessica Brautman; and great granddaughter, Palmer Stuckey. All who knew Bill will remember him as a loving husband, father, grandfather and as a true gentleman with impeccable honesty, sincere kindness and a strong sense of fairness. Bill requested his body be donated to benefit medical research. A memorial service will be 10 a.m. Saturday, April 7, at the Village Presbyterian Church, 6641 Mission Rd, Prairie Village. In lieu of flowers, memorial contributions can be made to Ivanhoe Neighborhood Council, 3700 Woodland Ave., KC MO 64109 or to a favorite charity. We will miss your happy whistling, the loud "HayHo" from the stands at sporting events, your entertaining readings of The Night before Christmas and the loving example of devoted husband to your Vicki Sue. You are home, Papa Bill.

Russell Brian Cloon, 62, of Baldwin City, Kan., passed away March 31, 2018, in Ottawa, KS. He was born Nov. 10, 1955 in Colorado Springs, Co., the son of Russell Cloon and Mildred (Kibbee) Cloon.

Russ grew up in the Overland Park area and graduated from Shawnee Mission Northwest High School with the Class of 1973.

Russ graduated from the University of Kansas with a Bachelor of Science in Business Administration in 1986 and then graduated from University of Kansas School of Law in 1990.

During law school Russ moved to the Baldwin City area and has lived there since. He began his law practice in Baldwin City and then expanded into Ottawa. Russ first worked as a public defender and practiced family and business law, but spent most of his career as a bankruptcy attorney.

Russ served his country in the United States Army for seven years, attaining the rank of SPEC-4.

Russ was a member of the Kansas Bar Association and the Baldwin City Lloyd Beacon Post 228 of the American Legion.

On June 24, 1989, Russ was united in marriage to Denise Young. They have shared twenty-eight years of loving marriage.

Russ is survived by his wife, Denise Cloon, Baldwin City; son, Russell Cloon II, Baldwin City; three brothers, Ted Cloon, Gardner, KS, Bryson Cloon, Leawood, KS, Brett Cloon, Columbia, MO; and close cousin, Jo McCarthy, Lenexa, KS.

Mr. Cloon is preceded in death by his parents and his close cousin, Ed McCarthy.

Funeral services were held Wednesday April 4, 2018 at Lamb-Roberts Funeral Home, Baldwin City. Interment followed at Eudora Cemetery, Eudora, Kan. Memorial contributions may be made to University of Kansas Athletic Department and sent in c/o Lamb-Roberts Funeral Home, P.O. Box 64, Baldwin City, KS 66006. Condolences may be sent to the family through lamb-roberts.com.
ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN THE MATTER OF JUSTIN K. HOLSTIN
NO. 20,382—MARCH 20, 2018

FACTS: In a letter signed March 14, 2018, Justin K. Holstin, an attorney licensed to practice law in Kansas, voluntarily surrendered his license. At the time of surrender, there was a complaint pending alleging several violations of the Kansas Rules of Professional Conduct. Holstin had been through a hearing panel proceeding, where panel members became concerned that Holstin was under the influence of alcohol. Testing confirmed the presence of alcohol on Holstin’s breath. At the time of surrender, Holstin’s license was temporarily suspended.

HELD: The court accepted the surrender from Holstin, and he is disbarred.

JUDICIAL QUALIFICATION

IN THE MATTER OF LINDA S. TRIGG,
DISTRICT MAGISTRATE JUDGE
NO. 118,527—APRIL 6, 2018

FACTS: The Kansas Commission on Judicial Qualifications received complaints regarding Judge Trigg and docketed a notice of formal proceedings. Judge Trigg did not file an answer and did not attend the hearing. At the hearing, the panel determined that Judge Trigg violated judicial canons that require independence, integrity, and impartiality of the judiciary.

DISCUSSION: Judge Trigg is no longer on the bench. But because the conduct occurred while she was still a judge, the court still has jurisdiction to review it. The court concluded that Judge Trigg violated multiple rules on Canons 1 and 2 of the Kansas Code of Judicial Conduct. Because Judge Trigg is no longer on the bench, there is no need to discuss the appropriate sanction. But the court concludes that the misconduct undermined the public’s faith in the judiciary.

CIVIL

DAMAGES—WRONGFUL DEATH
HEIMERMAN V. ROSE
ALLEN DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 114,890—APRIL 6, 2018

FACTS: Daniel Rose was killed in a traffic accident while acting in the course of his employment. He was survived by his wife, Pamela, and son, Lucas. Pamela filed a wrongful death action in state court and Lucas, who did not live in Kansas, filed suit in federal court. Pamela also received workers compensation benefits, which were subject to subrogation rights and a lien against any third-party recovery. The federal action was settled, with each party receiving a lump-sum payment. There was no categorization of damages in the federal settlement. After that settlement, Pamela filed a motion in the state case in which she argued that her federal recovery was for loss of consortium and loss of spousal services—recovery that would be exempt from the workers compensation subrogation and lien. The district court granted a motion to dismiss Pamela’s action, finding that the federal settlement did not allow for the kind of action Pamela sought in state court because it was barred by the one-action rule. The Court of Appeals affirmed that ruling, and the petition for review was granted.

ISSUE: (1) Ability of a court to categorize damages

HELD: The Kansas Workers Compensation Act prevents a windfall for a deceased worker’s dependents by allowing for subrogation for payments received other than for loss of consortium or loss of spousal services. In addition, Kansas law only allows one action for the wrongful death of one person. Once the federal case was settled, the Kansas case was properly dismissed.

STATUTES: K.S.A. 2016 Supp. 44-510b, 60-1901(a); K.S.A. 44-504, -504(b), 60-1902
FACTS: In exchange for $200, Arnett loaned her mother's car to two others who burglarized houses causing damage and theft. Arnett entered guilty plea to conspiracy to commit burglary. State requested restitution of $33,248.83—for property loss from the theft, damage to one of the homes, and homeowners’ expenses. Arnett argued she should only be ordered to pay $200 she received as payment for loaning out the car. District court ordered restitution as requested by the State. Arnett appealed, arguing this violated Apprendi and Section 5 of Kansas Constitution Bill of Rights, and that the State failed to submit evidence to support amount of restitution ordered. After briefs were submitted but prior to oral argument, Arnett submitted a Rule 6.09(b) letter to Court of Appeals to argue a person convicted of conspiracy to commit burglary cannot be held liable for losses or damages resulting from any burglaries or thefts that occur. In unpublished opinion, court of appeals reversed and vacated the restitution order by deciding the case on the argument raised in the Rule 6.09(b) letter, and finding Arnett was not liable for the entire restitution amount because her crime of conspiracy to commit burglary did not cause the damages. State's petition for review granted.

ISSUES: (1) Preservation of issue, (2) restitution statute

HELD: Under facts in this case, Arnett abandoned any argument whether her crime of conspiracy caused the alleged damages, and appellate review of this issue was precluded by Arnett’s failure to brief the issue because an appellate court will not consider an issue raised for the first time in a Rule 6.09(b) letter. Nonetheless, citing State v. Bell, 258 Kan. 123 (1995), an analogous scenario where court of appeals reviewed sua sponte an issue and review was granted with supplemental briefing to Kansas Supreme Court, Arnett’s issue is considered on the merits.

K.S.A. 2016 Supp. 21-6607(c) is interpreted. Panel erred in reading the statute as requiring that the crime of conviction have a direct causal link to any damages. The causal link between a defendant's crime and the restitution damages for which the defendant is held liable must satisfy the traditional elements of proximate cause: cause-in-fact and legal causation. Court of appeals decision holding that restitution statute requires a direct causal connection between the crime and the damages, and vacating of the district court's order of restitution, is reversed. Case is remanded to court of appeals to consider and decide the issues raised in Arnett’s brief to the court of Appeals.

STATUTES: K.S.A. 2016 Supp. 21-6607(c); K.S.A. 2014 Supp. 21-6607(c), -6607(c)(2)

FACTS: Brown was convicted of aggravated robbery and murder. On appeal he claimed autopsy photos of the victim that were displayed during trial but never formally admitted into evidence were improperly included in the exhibits before the jury during its deliberation, and argued the contemporaneous objection requirement in K.S.A. 60-404 for preserving an issue for appellate review applied only to admitted evidence.

ISSUE: Publication of autopsy photographs to jury

HELD: Subsequent to State v. King, 288 Kan. 333 (2009), the three judicially recognized exceptions for allowing appellate review of issues not raised below have not been applied to absolve a party of K.S.A. 60-404 violations. Under facts in this case, where exhibits were identified and treated by court and counsel as if admitted into evidence, despite no formal admission, on appeal the exhibits are regarded as admitted and K.S.A. 60-404 applies.

STATUTE: K.S.A. 60-404

FACTS: Chandler convicted of the 2002 premeditated murders of her ex-husband (Sisco) and his girlfriend. Chandler appealed, raising in part multiple claims of prosecutorial error, and challenging the sufficiency of the evidence linking her to the murders. During the appeal, Kansas Supreme Court granted Chandler’s unopposed motion for new counsel, allowed supplemental briefing, and heard second oral arguments.

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

HELD: State’s evidence in this case is examined in detail. Noting the low bar set by the standard of review and the caselaw applying it under similar facts, the evidence viewed in the light most favorable to the State is sufficient for a rational factfinder to find Chandler guilty beyond a reasonable doubt.
State belatedly concedes the prosecutor erred by falsely claiming Sisco got a protection from abuse (PFA) order against Chandler from the district court. Court examines the testimony about the PFA, the prosecutor’s statements, and the lack of any evidence of the PFA in the record, and explains how this error prejudiced Chandler’s due process right to a fair trial. State failed to show there was no reasonable possibility that this error contributed to the verdict. Applying distinction in State v. Sherman, 305 Kan. 88 (2016), prosecutor’s conduct in this case constituted misconduct rather than just error. Chandler’s convictions are reversed and case is remanded for further proceedings.

To avoid reoccurrence on remand, additional claims of prosecutorial error are examined.

- There was no reasonable good-faith basis for prosecutor to believe there was substantive evidence to tell jury in opening statement that Chandler drove directly up to Nebraska in returning to Denver from Topeka, and to repeat this theme in closing.

- It was error for prosecutor to tell jury in opening statement that a KBI computer analyst would testify that Chandler searched online for information about how to defend against murder charges or sentencing in murder cases.

- Prosecutor’s comments about Chandler outsmarting others were error. These comments were unsupported by the evidence, and conveyed the prosecutor’s unfounded, gratuitous belief that Chandler thought the jury was not smart enough to figure out the crime.

- Prosecutor error to expressly urge the jury to convict Chandler because Chandler “robbed her own children of their father and his fiancée.”

- Prosecutor violated the district court’s order to not refer to people in the gallery.

- Claim that prosecutor improperly commented during closing argument on Chandler’s post-arrest silence is discussed. Split of authority in federal courts is noted as to whether using a defendant’s post-arrest, pre-Miranda silence as evidence of guilt violates the right against self-incrimination when the silence is not preceded by police questioning. Kansas Supreme Court has not addressed this exact question and does not do so on the record in this case. But given the lack of foundation, prosecutor’s remark about Chandler’s silence was at best cavalier as to Chandler’s right to a fair trial.


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**CRIMINAL**

**CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EVIDENCE—JURIES**

**STATE V. SULLIVAN**

**WYANDOTTE DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED**

**NO. 112,638—APRIL 6, 2018**

**FACTS:** Sullivan was convicted in consolidated trial of charges including multiple counts of rape and aggravated criminal sodomy. District court granted Sullivan’s request to be absent while two law enforcement audio-recorded statements were played to jury in open court, and during sentencing while anyone was speaking on behalf of the State. DVDs containing law enforcement videos of six hours of Sullivan in the interrogation room—admitted into evidence but not played in open court—went to the jury room during their deliberations. Sullivan appealed, claiming the admission of the video-recorded statements without publication in open court violated his right to be present at all critical stages of his trial, and his right to a public trial with an impartial judge. He also claimed the district court unconstitutionally considered Sullivan’s prior convictions to enhance the sentence. Court of Appeals affirmed in unpublished opinion. Sullivan’s petition for review granted.

**ISSUES:** (1) Right to be present at critical stages of trial, (2) right to public trial with Judge present, (3) sentencing

**HELD:** Any error in district court’s handling of the DVDs was harmless beyond a reasonable doubt. The critical evidence for the State’s case was played to the jury, and Sullivan demonstrated both during trial and at sentencing that he would not have exercised his right to be present if the DVDs had been played in open court. Moreover, secret jury deliberations are not a critical stage of the proceeding at which a defendant is entitled to be present. The Legislature’s subsequent amendment of K.S.A. 22-3420(c) is noted.

The proceedings related to admitting the DVDs were conducted in open court; the parties were aware of their content; the detectives testified generally in open court about their content; and Sullivan had the opportunity to cross-examine the detectives. Sullivan got the public trial to which he was entitled, and he had no right for the judge to be present during jury deliberations.


**STATUTES:** K.S.A. 22-3405(1), -3420(c)
OPEN RECORDS—STATUTORY CONSTRUCTION
BAKER V. HAYDEN
JOHNSON DISTRICT COURT—REVERSED
NO. 117,989—APRIL 6, 2018
FACTS: The Johnson County Sheriff’s Department served a PFA at Baker’s residence for his adult daughter. After that occurred, Baker submitted an open records request to the Johnson County District Court asking to inspect and copy audio files from two open court hearings that occurred in the PFA case. Baker was neither a party to nor counsel to a party in the PFA. Baker was told on multiple occasions that he was entitled to request the transcripts from the hearings but that the actual audio files were exempt from disclosure under the Kansas Open Records Act. The district court granted the county’s motion to dismiss on grounds that Baker was not entitled to the audio recordings, and Baker appealed.

ISSUES: (1) Mootness; (2) validity of Baker’s claim; (3) attorney fees

HELD: Baker was ultimately given the audio recordings before this case was heard on appeal. But this case is one that is capable of repetition and which involves an issue of public importance. There is a public interest in answering the question of whether the audio recordings were exempt from KORA disclosure. The district court misinterpreted the meaning of Supreme Court Rule 362. There is nothing in the plain language of the rule which bars access to electronically recorded hearings of open court proceedings. And there is no provision of KORA which bars release of the requested audio files. Because there is no evidence of any bad faith action, Baker is not entitled to attorney fees.

STATUTES: K.S.A. 2017 Supp. 45-219(a), -221(a), -221(a)(1), -221(a)(20), -222(d); K.S.A. 20-101, 45-218(a)

DUTY—NEGLIGENCE—SUMMARY JUDGMENT
MONTGOMERY V. SALEH
SHAWNEE DISTRICT COURT—AFFIRMED IN PART, REVERSED IN PART, REMANDED
NO. 117,518—MARCH 30, 2018
FACTS: Montgomery and another plaintiff were injured after their vehicle was struck by a criminal defendant who was involved in a high-speed chase that was initiated by Trooper Saleh. Montgomery sued both Trooper Saleh and the State of Kansas, claiming that Trooper Saleh initiated and continued the chase with reckless disregard for the safety of others. After discovery, Trooper Saleh moved for summary judgment, claiming that Montgomery failed to state claims that were entitled to relief. The district court granted summary judgment to all defendants, and Montgomery appealed.

ISSUES: (1) Existence of a duty; (2) breach of duty; (3) causation; (4) statutory immunity

HELD: The public duty doctrine does not apply to law enforcement pursuits. Because of that fact, an officer involved in a chase owes a duty to an injured party. Trooper Saleh’s actions did not satisfy the standard of care as a matter of law. Because a jury could have concluded that Trooper Saleh acted with reckless disregard, summary judgment was inappropriate. There were issues of genuine material fact surrounding causation, as both sides put forth evidence regarding the proximate cause of the accident. Because there is disputed evidence that needs to be weighed, summary judgment was inappropriate. Neither the discretionary function exception nor the method of providing police protection exception of the Kansas Tort Claims Act apply to excuse Trooper Saleh from liability.

DISSENT: (Gardner, J.) Judge Gardner would affirm the grant of summary judgment due to an inability of Montgomery to prove causation.

STATUTES: K.S.A. 2016 Supp. 60-256(c)(2), 75-6103(a), -6104, -6104(e), -6104(n); K.S.A. 8-1506, -1506(a), -1506(b), -1506(c), -1506(d), -1573

CRIMINAL LAW—JURY INSTRUCTIONS—STATUTES
STATE V. LINDEMUTH
SHAWNEE DISTRICT COURT—REVERSED AND REMANDED
NO. 116,937—MARCH 30, 2018
FACTS: Lindemuth threatened Matthews during two phone calls regarding a truck owned by Matthews which was parked on Lindemuth’s Topeka property. One call made while Matthews was in Oklahoma, and the second call made after Matthews had flown to Topeka. During each call, Lindemuth was in his office, and Matthews was not on or near Lindemuth’s property. State charged Lindemuth with two counts of making a criminal threat. Lindemuth requested jury instruc-
ISSUE: Defense of the workplace

HELD: K.S.A. 2017 Supp. 21-5521(a)(1)-(2), the statutes defining "use of force" and "use of deadly force," are examined and considered with K.S.A. 2017 Supp. 21-5523, the statute permitting the defense of the workplace. Under these statutes, the lack of an immediate threat to Lindemuth by Matthews is irrelevant because the defense of the workplace statute limits the use of deadly force only to prevent "imminent death or great bodily harm," which was not the case here. Lindemuth was entitled to a defense of the workplace instruction, and the reasonableness of Lindemuth’s threat was a question for a properly instructed jury. Reversed and remanded.

STATUTE: K.S.A. 2017 Supp. 21-5221(a)(1), -5221(a)(2), -5223, 60-251

CRIMINAL LAW—CRIMINAL PROCEDURE—JURY INSTRUCTIONS

STATE V. ROBINSON
PAWNEE DISTRICT COURT—AFFIRMED
NO. 116,763—APRIL 6, 2018

FACTS: Robinson charged and convicted of aggravated burglary. He filed an unsuccessful pretrial motion to dismiss the case, claiming selective prosecution because the charge against the other man in the burglary was reduced to criminal trespass. Robinson appealed on the selective-prosecution claim and argued the instructions given to the jury did not allow sufficient consideration of his selective-prosecution defense. Robinson also claimed insufficient evidence supported the conviction.

ISSUES: (1) Selective-prosecution claim, (2) jury instructions, (3) sufficiency of the evidence

HELD: Robinson failed to show the State singled him out based on some arbitrary or invidious criteria. Under facts in case, district court fairly assessed the victim’s testimony as focused on Robinson as the primary actor, and it was undisputed that the criminal records of the two men were substantially different.

The selective-prosecution defense is a question to be decided by the judge on a pretrial motion. It is not a defense that should have been presented to the jury. Any error in the instructions in this case had no impact on the jury’s consideration of Robinson’s actual guilt or innocence.

State presented enough evidence for jury to conclude, beyond a reasonable doubt, that Robinson entered the home intending to commit a theft.

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From the Appellate Court Clerk's Office

"MAY"hem Follies, Part II

This is the second edition of the comical use of some words by pro se litigants and even attorneys. See if you can pick out the incorrect word usage in the following phrases.

1. Poor writing reeks havoc. (actually the point of both of these funny articles).
2. I sighted that case in my brief.
3. Your Honor, those statements are heresy.
4. They should hand over the reigns to co-counsel.
5. This doesn’t phase some people.
6. It’s a waist of time.
7. The pro se litigant will fair better with an attorney.
8. The appeal is a crap chute.
9. In this physical year, the number of filings increased.
10. It doesn’t bare a resemblance to the arguments discussed in the district court.

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