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When Social Media Becomes an Oxymoron Part II: Student Free Speech and Substantial Disruption

By now everyone should be well aware of the U.S. Supreme Court’s statement that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Ind. Community School District.*

By now everyone should also be well aware that this is far from an absolute statement. In 1969, the Court was addressing a flesh-and-blood controversy with real people in real time. The Supreme Court’s other three free speech cases are pretty much the same—all involve secondary school students on campus or at a school-sponsored event. The Supreme Court has yet to decide a student free speech case involving social media (or any form of electronic communication).

This is a different age. It is not altogether clear anymore where the schoolhouse gate begins or ends. The metaphorical “schoolhouse gate” in *Tinker* is “not constructed solely of the bricks and mortar surrounding the school yard,” especially in the Internet age. “Nevertheless, the concept of the ‘school yard’ is not without boundaries and the reach of school authorities is not without limits.” *Layshock v. Hermitage School District.*

*Part I* in my series addressed one aspect of off-campus student speech, but this aspect is one that is particularly troublesome to the schools: whether the student “speech” constitutes “true threats,” a type of speech that does not enjoy First Amendment protection. In many of the cases discussed, the speech occurred off campus but was reasonably likely to reach the school where it caused or was likely to cause a substantial disruption. The subjective intent of the student did not matter in such cases; rather, the reasonableness of the response by school authorities did. Given the increased emphasis on school security, the courts tend to be more deferential to the schools in such matters.

*Part II* analyzes the other deleterious effects such student speech can have on the orderly operation of the schools, including the protection of their students from bullying, harassment, and intimidation. While these off-campus events do not pose the same immediate concern as a “true threat,” they can nevertheless create a substantial disruption within the school and impinge upon the rights of other students to a safe, secure learning environment. This underscores the Supreme Court’s observation that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Bethel School District v. Fraser.*

Student use of social media has radically changed the public school landscape. Legislative enactments cannot keep pace with the ever-evolving methods for electronic communication that affect school security, curriculum, or impinge upon the rights of students to be educated in a safe and secure environment. This is increasingly drawing attorneys general into the fray, usually to defend the legislative enactment or to prosecute criminal activity beyond school disciplinary measures.

This article will address student use of social media and whether or to what extent public schools may discipline such “speech.” Because speech of some sort is implicated, very often there is a concern that the speech the school seeks to sanction is actually protected by the Free Speech Clause of the First Amendment. Student social media use has resulted in school concerns regarding harassment (particularly cyberbullying), one form of impingement on the rights of other
students, which the Supreme Court cited in *Tinker* as a justification for a school to sanction student speech.8

One of the problems is that much of this speech originates off the school campus and often when school is not in session, which brings us back to the metaphorical “schoolhouse gate” and its reach.9 The First Amendment does not protect certain categories of speech, such as defamatory speech, obscenity, incitements to imminent lawlessness or other criminal activity, true threats, or fighting words. But that leaves a lot of student speech to analyze (and contend with).

There are two tests emerging to assess whether a public school may discipline a student for off-campus electronic speech that does not occur during school hours or through the use of school equipment: the “Nexus” Test and the “Reasonable Foreseeability” Test.

The “Nexus” Test

This test is derived from *Kowalski v. Berkeley County Schools.*10 Under this test, the student speech is not targeted at the school; rather, the analysis looks for a sufficient nexus between speech and the school.11 In *Kowalski*, as discussed more fully below, a high school student created an online discussion group where she and over two dozen students from the high school engaged in a series of increasingly disparaging remarks about another student, including lewd references using the targeted student’s picture. While not directed at the school, it was directed at a fellow student, which negatively affected the student’s ability to enjoy the educational benefits of her school.

The “Reasonable Foreseeability” Test

Unlike the Nexus Test, this test involves student speech that targets the school. The test arises from *S.J.W., et al. v. Lee’s Summit R-7 School District,*12 where twin brothers created a blog directed at the school. This test “asks whether it was reasonably foreseeable that the off-campus speech would reach the school” and “create a risk of a substantial disruption.” The derogatory content of the blog did, indeed, reach the high school campus, which resulted in a substantial disruption, and led to school-based sanctions.

These tests are not bright-line in any sense but depend upon a number of factors, but the speech
always must have the potential to create a substantial disruption, actually did cause a substantial disruption, or have impinged upon the rights of other students.

**The Nexus Test**

*Kowalski v. Berkeley County Schools* is the leading case for this test. Even though the student speech occurred off-campus and was directed at a fellow student—and not the school—it nevertheless had sufficient nexus with the school because the speech violated the school’s Harassment, Bullying, and Intimidation Policy and the Student Code of Conduct, which put Kowalski on notice that harassing another student could have consequences.

The West Virginia school district where the *Kowalski* case unfolded is little different today from other school districts. Most states now have in place statutory or regulatory provisions addressing “bullying” and requiring school boards to develop policies that specifically address bullying in all of its forms. But while a state’s definition for “bullying” may encompass the activity initiated by Kowalski, the reach of pupil discipline rules may not go far enough.

The Nexus Test does require that the off-campus speech actually result in substantial disruption or material interference with school purposes, creates a reasonable likelihood that this will occur, or impinges upon the rights of other students. In *Kowalski*, this occurred.

Kara Kowalski, a high school student, created an online discussion group where she and over two dozen students from the high school engaged in a series of increasingly disparaging remarks about another student, including lewd references using the targeted student’s picture.

Although Kowalski deleted the discussion group after the targeted student discovered it, the damage had been done. The targeted student was mortified that fellow classmates could write such things about her. She filed a harassment complaint with the high school and found it impossible to attend school in the immediate aftermath. Kowalski, who was suspended for this activity, argued her speech was protected from school discipline because it took place at home, after school, through personal means.

The U.S. Court of Appeals for the Fourth Circuit disagreed, finding that there was a sufficient nexus between Kowalski’s speech and the school. It concluded that the participants were mostly high school classmates of the targeted student, the discussion group was named after the targeted student; it was foreseeable the dialogue would and did reach the school; the group thread was understood by the victim to be an attack made in a school context; and there was an impact in the school environment (the impingement on the right of the targeted student to a safe, secure learning environment).

The principal investigated the harassment complaint and determined Kowalski had created a “hate website” that violated the school’s policy against harassment, bullying, and intimidation.

This policy prohibits “any form of . . . sexual . . . harassment . . . or any bullying or intimidation by any student . . . during any school-related activity or during any education-sponsored event, whether in a building or other property owned, use[d] or operated by the Berkeley Board of Education.” “Bullying, harassment, and intimidation” are defined as “any intentional gesture, or any intentional written, verbal or physical act” that would harm a student or staff member and is “sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.” A student violating this policy could be subject to suspension.

In addition, the Student Code of Conduct states that “[a]ll students enrolled in Berkeley County public schools shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal-social development.” Students are also required to “help create an atmosphere free from bullying, intimidation and harassment,” to “treat others with respect,” and to “demonstrate compassion and caring.” Penalties for engaging in bullying, harassment, or intimidation include out-of-school suspension up to 10 days, suspension from school activities, and “social suspension” for up to a semester.

Kowalski argued the School District was not justified in regulating her speech because it did not occur during a “school-related activity”; rather, her speech was “private out-of-school speech” that is beyond the School District’s reach. Her arguments were not persuasive. The district court eventually
granted summary judgment to the School District and its personnel, finding the School District “could legitimately take action for [Kowalski’s] vulgar and offensive speech and her encouragement of other students to follow suit.” The district court also found that her due process rights were not violated. Her state law claims and equal protection claims were also denied.

On appeal, she again argued that her speech occurred off campus and was not related to the school. She added that the U.S. Supreme Court has never found that a school may punish a student for speech that occurred away from school. The School District, on the other hand, asserted it can sanction off-campus student speech where such behavior creates a foreseeable risk of reaching school property and causing a substantial disruption.

The Fourth Circuit’s analysis relied upon *Tinker* and *Fraser*. While it acknowledged the Supreme Court has not dealt with a dispute that has similar factual circumstances where one student’s speech targets a classmate for verbal abuse, *Tinker* did recognize the need for regulation of student speech that interferes with the school’s work and discipline because of a substantial disruption; where there is a reasonable likelihood of a substantial disruption; or where such speech interferes with the rights of other students. “Thus, the language of *Tinker* supports the conclusion that public schools have a ‘compelling interest’ in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.”

The federal government has recognized that student-on-student bullying is a “major concern” and can have a deleterious effect upon targeted students such that they are afraid to go to school and, in some cases, contemplate suicide. “[S]chools have a duty to protect their students from harassment and bullying in the school environment[.]. . . [S]chool administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.”

The Fourth Circuit believed that Kowalski’s speech did cause the type of interference and disruption that *Tinker* found did not merit First Amendment protection. She created a webpage that served as a platform for her and her friends to attack a fellow student, using that student’s photograph along with unsavory descriptions and defamatory content.

This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about “habits and manners
of civility” or the “fundamental values necessary to the maintenance of a democratic political system.”

It was of no import that Kowalski’s conduct took place at home. She knew that, by posting it to the Internet, her work would be published beyond her home. It was reasonable for her to expect that it would reach the high school and impact the high school environment. She also knew that most of the speech taking place in the discussion group would involve students from the high school she and the victim attended.

As noted by the court, “[t]here is surely a limit to the scope of a high school’s interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski’s speech to [the] High School’s pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body’s well-being.”

Kowalski’s speech was aimed at a fellow classmate. “It created actual or reasonably foreseeable substantial disorder and disruption at school.” The victim herself was forced “to miss school in order to avoid further abuse.”

Moreover, had the school not intervened, the potential for continuing and more serious harassment of [the initially targeted student and others] was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in ‘copycat’ efforts by other students or in retaliation for the initial harassment.”

While the prohibition against harassment and bullying were framed in a school-related context, the Policy and Code of Conduct also applied to conduct that adversely affected the school environment.

Thus, while the prohibited conduct had to be related to the school, this is not to say that volatile conduct was only punishable if it physically originated in a school building or during the school day. Rather, the prohibitions are designed to regulate student behavior that would affect the school’s learning environment. Because the Internet-based bullying and harassment in this case could reasonably be expected to interfere with the rights of a student at [the] High School and thus disrupt the school’s learning environment, Kowalski was indeed on notice that [the] High School administrators could regulate and punish the conduct at issue here.

The Fourth Circuit had some parting shots for Kowalski. They characterized her webpage as “mean-spirited and hateful,” especially as she urged fellow students to engage in pack behavior in attacking the victim. Kowalski knew that such activities would be hurtful to the victim and would affect her ability to benefit from the learning experiences at the high school. This conduct is “indisputably harassing and bullying.”

**Nexus Test Not Applied**

For the Nexus Test to justify school sanctions, the off-campus speech has to have some on-campus effect, even though the speech was not directed to the school. Absent this “nexus,” it is unlikely the school district has the authority to discipline the student speaker.

*Sagehorn v. Independent School District No. 728* is such a case. Reid Sagehorn was a high school senior. By all accounts, he was an honor student, active in extracurricular activities, and had no discipline history. He had an early acceptance to a university. In February of his senior year, someone anonymously posted on a somewhat gossipy website a query as to whether Sagehorn had “made out” with a specifically named female teacher at the high school. Sagehorn, perhaps unwisely, responded that same day with “actually, yes.” There was no dispute that Sagehorn did not create or maintain the website, his response did not occur on school grounds or during the school day, and no school property was used in responding to the query.

The school suspended Sagehorn, pending expulsion, claiming he had “damaged a teacher’s reputation” through “threatening, intimidating, or assault of a teacher, administrator, or staff member.” The school would not discuss the matter with Sagehorn’s parents, who eventually withdrew him from school to avoid expulsion (which threatened his early college acceptance).

He sued the school district and some of its personnel, claiming in part the discipline meted out violated his free speech rights. He argued the school had no authority to discipline him for his off-campus posting, especially where the post was not reasonably calculated to reach the school nor did the posting create any substantial disruption in the school itself.
The court agreed, rejecting the school’s argument that his speech was obscene. The school stated that “make out” means the same as sexual intercourse. The court disagreed, adding that it was not Sagehorn who used the term anyhow. All he wrote was “actually, yes.” School officials may find his post to be inappropriate, ill-advised, or even offensive, but that does not make his off-campus speech obscene. The court also found the school district could not rely on *Fraser* because, even if Sagehorn’s speech could be considered lewd, vulgar, or indecent, it did not occur at school or a school-sponsored event. “Nothing about the Supreme Court’s decision in *Fraser* suggests that the same considerations would extend beyond the boundaries of the schoolyard.”

Nor did Sagehorn’s speech cause any substantial disruption. The “general rule” is that off-campus student speech is protected under the First Amendment unless the speech constitutes a “true threat” or the speech was “reasonably calculated to reach the school environment and [was] so egregious as to pose a serious safety risk or other substantial disruption in that environment.” The court also rejected the school district’s assertion that Sagehorn’s post constituted harassment. Because the school district failed to demonstrate that Sagehorn’s speech caused a substantial disruption, was obscene, was lewd or vulgar, or was harassing, it did not have the authority to sanction him for that speech.

**Other Nexus Test Disputes**

*B.L. v. Mahanoy Area School District* involved a junior varsity cheerleader who used Snapchat to take a “Snap” featuring her and a friend holding up their middle fingers with the text, “fuck school fuck softball fuck cheer fuck everything.” The Snap was taken on the weekend off school grounds. She was not at the time participating in any extracurricular activity (such as cheerleading). There was nothing in the Snap that directly referred to the school district or her high school.

She was later removed from the cheer squad based on the “disrespectful” Snap. When the school would not reconsider its disciplinary action, she obtained injunctive relief. The Court found that she was likely to succeed on the merits because her speech had not caused a substantial disruption and because her off-campus speech was not subject to the school district’s authority under *Fraser*. The court was not condoning the student’s profane gesture but was enjoining the school from overreaching its authority.

*T.V. v. Smith-Green Community School Corporation* is similar to *B.L. v. Mahanoy Area School District*. In *T.V.*, two sophomores were sanctioned based on risqué pictures they took of themselves during summertime sleepovers. The photographs were posted to websites with privacy settings that did not allow anyone but their selected friends to view. A third party (whom the court referred to as a “busybody”) obtained print-outs and brought them to school. The girls were sanctioned for violating a code of conduct for bringing disrespect on themselves and discredit to their school.

However, there is no indication anywhere in the photographs what school they attended, and it is undisputed the photographs were taken off campus when school was not in session. The photographs were never available to the public, much less directed to the school itself.

The court enjoined the school district’s attempt to sanction the girls, noting that *Fraser* cannot be applied to off-campus speech. Although *Tinker* can be applied to off-campus speech, there is no showing of substantial disruption and there is no reasonable likelihood that such would occur, especially as the girls used privacy settings. Even though the photographs were “juvenile and silly,” the First Amendment protects such speech. There are not gradations of protection.
Speech is speech. In this case, Fraser cannot be applied, and the speech at issue does not run afoul of Tinker. The school district was enjoined from punishing the students for their off-campus speech.

The Reasonable Foreseeability Test

Unlike the Nexus Test, the Reasonable Foreseeability Test involves student off-campus speech that is directed at the school. Targeting the school is not enough, however. There still needs to be a substantial disruption, the likelihood of substantial disruption, or the impingement on the rights of other students.

Blogs, Cyberbullying, and Tinker

As noted in Part I, S.J.W. v. Lee’s Summit R-7 School District is often cited as an example of this test. Steven and Sean Wilson were twin brothers who drew 180-day suspensions for disruption in the school occasioned by their blog posts.

In December 2011, when the brothers were high school juniors, they created a website they called NorthPress that contained a blog. The blog was designed to discuss, satirize, and generally “vent” about events at the high school. The site was not password protected. The events at issue all occurred over a four-day span from December 13 to December 16. According to the Eighth Circuit panel, the brothers “posted . . . a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name.” The posts discussed fights at the high school and “mocked black students.” While others apparently added their own comments, it appears that “another racist post” by an unnamed “third student” was the spark that ignited disruption on December 16.

The brothers claimed they intended the blog for only a few friends, but school personnel testified that, as of December 16, it was evident that the posts had become generally known because so many school computers were being used by students to access the site that the school district had to block access. Teachers indicated they experienced difficulty in managing their classes because of distractions caused by the content of NorthPress, including students who were upset. Two teachers testified that this date was one of the more disruptive teaching days of their careers. To top it off, local media arrived on campus and parents began contacting the school, expressing concerns about safety, bullying, and discrimination.

The brothers claim December 16 “was a normal school day free from significant disruptions,” and added “that the third student’s post was the sole cause of any actual disruption,” if any occurred at all. They also complained that the alternative classes they were assigned to were not “academically challenging” and jeopardized their chances for band scholarships since their 180-day suspension would also prevent them from participating as members of the high school band.

The federal district court granted the twins’ Motion for a Preliminary Injunction, finding that they would suffer irreparable harm if injunctive relief were not granted (inadequate educational services, inability to try out for band); they were likely to succeed on the merits of their complaint; and the public interest would be served by issuing the injunction. In reaching its conclusion, the district court accepted that the NorthPress posts caused “considerable disturbance and disruption” at the school on December 16, but that the third person’s post was the primary reason for the disturbance. Nevertheless, a post about a female student by one twin and several racist entries by the other added to the disruption. The district court also found the blog was “targeted at” the high school. The school district appealed.

The school district argued that Tinker should apply, while the twins argued that all off-campus speech should be beyond the disciplinary reach of the school district. But even should Tinker apply, the twins asserted, their speech did not cause a substantial disruption. Relying upon existing case law and the district court’s factual findings, the Eighth Circuit found that the holding in Tinker applied and held that the district court erred in issuing the injunction and allowing the Wilsons to return to school during the period of suspension. Accordingly, the court reversed.
the grant of injunctive relief and remanded the case to the district court. The court did agree with the district court that the twins’ speech “targeted” the school.

In reaching its decision, the court noted that other holdings have refused to grant First Amendment protections to off-campus speech where it is reasonably foreseeable that the expressive conduct would result in a substantial disruption in the school or where the off-campus speech caused a material or substantial disruption and impinged on the rights of others. The Eighth Circuit distinguished these cases from the disputes involving online parodies of school administrators that did not cause a substantial disruption and were, consequently, protected speech.

After reviewing the pertinent cases, the court noted that Tinker would most likely apply in this case. The District Court found that the Wilsons’ speech was targeted at the high school. Although there is a dispute as to the extent the speech was off campus, the lower court’s finding that the target of the speech was the high school is of more importance. Just like the online speech in Kowalski and Doninger, the NorthPress posts “could reasonably be expected to reach the school or impact the environment.” Kowalski. Doninger was a class officer. Unhappy with the school’s decision to cancel an event, she posted a vulgar, lewd, and disrespectful message on her blog, encouraging students to contact central office and harass personnel. Students did just that (and parents as well, trying to find out what was going on). This caused a disruption as office staff had to field calls and placate parents. Because of her activities (which also included a T-shirt critical of the school), the principal prevented her from running for class office because the off-campus speech failed to “display the civility and good citizenship expected of class officers.” The Court upheld the relatively mild sanction because her out-of-school expressive conduct targeted the school and “created a foreseeable risk of substantial disruption to the work and discipline of the school.”

“The specter of cyber-bullying hangs over this case. The repercussions of cyber-bullying are serious and sometimes tragic. The parties focus their argument on the disruption caused by the racist comments, but possibly even more significant is the distress the Wilsons’ return to . . . [the high school] could have caused the female students whom the Wilsons targeted.”

**Reasonable Foreseeability Test Applied**

In its decision, the Eighth Circuit relied substantially on an earlier Second Circuit decision in Doninger v. Niehoff. Doninger was a class officer. Unhappy with the school’s decision to cancel an event, she posted a vulgar, lewd, and disrespectful message on her blog, encouraging students to contact central office and harass personnel. Students did just that (and parents as well, trying to find out what was going on). This caused a disruption as office staff had to field calls and placate parents. Because of her activities (which also included a T-shirt critical of the school), the principal prevented her from running for class office because the off-campus speech failed to “display the civility and good citizenship expected of class officers.” The Court upheld the relatively mild sanction because her out-of-school expressive conduct targeted the school and “created a foreseeable risk of substantial disruption to the work and discipline of the school.”
Reasonable Foreseeability Test Not Applied

There was a period of time where students were creating numerous online personas purporting to be school teachers or administrators. Almost all of these were created off campus when school was not in session. These fake profiles were targeted at school administrators but unlike cases discussed in Part I, the students did not make threats against school personnel. Notwithstanding, they were less than flattering.

Two influential cases in this genre were decided the same day *en banc* by the U.S. Court of Appeals for the Third Circuit: *J.S. v. Blue Mountain School District*[^32] and *Justin Layshock v. Hermitage School District*.[^33]

**J.S. v. Blue Mountain School District** was an 8-6 decision, finding in favor of the eighth-grade student—but just barely. J.S. was an Honor Roll student with no serious discipline history. She and a friend created a fake profile of the middle school principal on a social networking site. The fake profile contained crude, vulgar language, some of which was sexually explicit. It was, as one might suspect, exceedingly juvenile. While the Court found the content “disturbing,” it also noted “the profile was so outrageous that no one took its content seriously.” The fake profile also contained uncomplimentary remarks about the principal’s family, including his wife, who was a guidance counselor at the middle school. The profile did not use the principal’s name but did use his photograph that J.S. and her friend obtained from the school district’s website. The principal was portrayed as “a bisexual Alabama middle school principal named ‘M-Hoe.’”

The fake profile was created on a private computer during the weekend. While the fake profile initially could have been viewed by anyone, J.S. made the profile “private” the next day such that only those who were “friends” could view it (about 22 students were “friended”). The middle school’s computers block access to social networking sites, so no student could have viewed the profile from school. The principal did not learn of the profile until a student informed him. The student then agreed to be an informant. The informant eventually revealed J.S. as one of the authors and brought a print-out of the profile to the principal.

The principal believed J.S. had violated the student disciplinary code by making a false accusation about a staff member (him). She was suspended for 10 days and prohibited from attending any school dances. Both J.S. and her mother apologized to the principal. J.S. later wrote a letter of apology to the principal and his wife. The relationship soured when the principal sought to have J.S. charged with a crime.

J.S. and her parents then sued the School District, claiming the suspension violated J.S.’s free speech rights; the School District’s policies were overbroad and vague; and the School District violated the parents’ Fourteenth Amendment substantive due process rights regarding the rearing of their child.
The School District argued that J.S.’s off-campus “speech” did disrupt the school by creating certain “rumblings” among the students, causing some students to talk about it in classes such that a teacher had to shush them. The resulting disciplinary procedures caused some temporary shifts in personnel. The federal district court granted the School District’s Motion for Summary Judgment, even though it found that no “substantial and material disruption” occurred such that Tinker would apply. Rather, the district court employed a hybrid Fraser-Morse standard that would authorize the School District to act as it did where the speech in question was “vulgar, lewd, and potentially illegal.” The School District, the district court found, had established a sufficient nexus between J.S.’s off-campus speech and an on-campus effect that justified the suspension.

The Third Circuit, en banc, disagreed, concluding the School District violated J.S.’s First Amendment free speech rights when it “suspended her for speech that caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school.” The Court acknowledged “the precise issue . . . is one of first impression,” adding that “courts have struggled to strike a balance between safeguarding students’ First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment.” Public school authorities must have the authority to ensure an environment conducive to learning, but such authority “is not boundless.”

J.S.’s speech did not cause a substantial disruption at the school, nor was there a reasonable forecast that her off-campus speech could result in such a substantial disruption. The profile was a crude and vulgar parody. J.S. took steps to restrict access. The profile did not identify the principal by name, school, or location. The profile “was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.” As an example, even though the profile indicates “M-Hoe” liked to engage in inappropriate and criminal activity, the superintendent never considered a need to report any allegations of inappropriate sexual contact. In fact, the principal was never questioned about the validity of any of the content of the profile. The profile was not “accusatory” nor did it arouse suspicions regarding the principal’s sexual proclivities or his fitness to maintain his position. The profile was not directed to the school. In fact, the school blocked access to the site. The print-out of the profile was brought to school at the “express request” of the principal. The court found that the incidents of disruption detailed by the School District were trivial and, if any disruption did occur in the school, it was occasioned primarily by the principal’s responses to the profile than the profile itself.34

The Third Circuit rejected the School District’s hybrid Fraser argument as well. Even though J.S.’s speech may have been lewd, vulgar, and offensive, Fraser does not apply to off-campus speech. The Supreme Court in Morse v. Frederick,35 the “Bong HiTS 4 Jesus” banner dispute, noted that had Frederick given his speech (the display of the contested banner) in a public forum outside the school context, his speech would have been protected. Morse (and the cases it relied upon) “reaffirms that a student’s free speech rights outside the school context are coextensive with the rights of an adult.”36

Under these circumstances, to apply the Fraser standard to justify the School District’s punishment of J.S.’s speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official, and is deemed “offensive” by the prevailing authority. Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark “offensive.” There is no principled way to distinguish this hypothetical from the facts of the instant case.37

The court noted that neither the Supreme Court nor the Third Circuit has ever allowed schools to sanction students for off-campus speech that is not school sponsored or at a school-sponsored event, especially where the speech did not result in a substantial disruption at the school. The judgment in favor of the School District was reversed, while judgment was entered on J.S.’s behalf as to her free speech claims. “An opposite holding would significantly broaden school districts’ authority over student speech and would vest school officials with dangerously overbroad censorship discretion.”38

Unlike J.S., the decision in Layshock v. Hermitage School District was unanimous. There are some similarities between Justin Layshock’s and J.S.’s computer activities. Both used private computers during non-school hours to create fake profiles of their principals on a social networking site. Layshock and J.S. both
appropriated the likenesses of their principals from the websites of their respective school districts. Both were punished by their school districts for doing so, and both claimed—successfully—that the punishment meted out violated their First Amendment rights of expression.

But there are some differences as well. Layshock was a 17-year-old senior when he created the fake profile of his principal. The content of the profile was not nearly as vulgar or profane as the one J.S. created. Layshock also ensured from the outset that the profile would be “private” and available only to those he “friended.” Despite these attempts, however, the profile quickly became common knowledge among the high school students.

Imitation being a form of flattery, three other fake profiles of the same principal soon appeared. These latter profiles were all anonymous and were far more egregious in content. The principal learned about one of these anonymous profiles from his daughter, a student at the high school. He soon learned of the other profiles and attempted, unsuccessfully, to have school-based access to them blocked. Because it was near the end of the first semester, school personnel closely monitored student computer use and actually cancelled computer programming classes. The principal was understandably incensed at the content of the profiles and considered pressing criminal charges.

Eventually, the School District learned that Layshock was the creator of one of the profiles. He admitted his role and apologized to the principal. His parents were upset with his antics. They grounded him and prevented him from using the home computer.

The School District charged Layshock with disruption of the school; disrespect and harassment of a school administrator; gross misbehavior; violation of the computer-use policy (misappropriation of the principal's picture from the School District's website); and the use of obscene, vulgar, and profane language. He was found guilty of all of these charges and suspended from school for 10 days; removed from his AP classes; placed in an alternative program for students with attendance and behavior problems; banned from all extracurricular activities, including foreign language tutoring (he tutored middle school students in French); and prohibited from attending his graduation ceremony.

Layshock sued, alleging, in part, violation of his free speech rights under the First Amendment and asserting the School District's policies were overbroad and vague, both on their face and as applied to him. The district court eventually found in favor of Layshock on his free speech claim.

On appeal, the School District did not challenge the district court's determination that it had failed to establish a sufficient nexus between Layshock's speech and any substantial disruption of the school. Rather, the School District set forth a somewhat convoluted argument, asserting that Layshock's speech did not begin as off-campus speech at all, but should be considered on-campus speech because he accessed the school's website to misappropriate the principal's photograph for his parody profile. The School District also claimed the speech was “aimed” at the School District and the principal.

The Third Circuit relied heavily upon an underground newspaper case from the Second Circuit that arose during the 1970s more so than the Supreme Court's free speech decisions. Thomas v. Board of Education of the Granville Central School District involved a group of students who created a “satirical publication” that had the usual fare for such underground periodicals. Some of the newspaper was actually created on campus using school equipment, although the vast majority of the students’ efforts occurred off campus, after school hours, and in the students’ homes. The eventual product was distributed only after school and off campus. Copies found their way back onto campus, ultimately resulting in five-day suspensions for the students for creating a publication that was “morally offensive, indecent, and obscene.” Although the trial court agreed with the School District that the publication “was potentially destructive of discipline in [the school], and therefore not protected by the First Amendment,” the Second Circuit disagreed, finding that any contact the creation of the publication had with the School District was de minimis such that there was an insufficient nexus between the students’ speech and any disruption with the School District.

The Layshock court concluded:

The [Second Circuit] reached that conclusion even though the students actually stored the offending publication inside a classroom and did some minimal amount of work on the periodical in school using school resources.
Here, the relationship between Justin’s conduct and the school is far more attenuated than in Thomas. We agree with the analysis in Thomas. Accordingly, because the School District conceded that Justin’s profile did not cause disruption in the school, we do not think that the First Amendment can tolerate the School District stretching its authority into Justin’s grandmother’s home and reaching Justin while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.41

The metaphorical “schoolhouse gate” in Tinker is “not constructed solely of the bricks and mortar surrounding the school yard,” especially in today’s Internet age. “Nevertheless, the concept of the ‘school yard’s not without boundaries and the reach of school authorities is not without limits.”42

Finding that it would be “unseemly and dangerous precedent to allow the state, in the guise of school authorities to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school-sponsored activities,” the court held the plaintiff’s First Amendment rights were violated by the district court’s ruling.43

The Third Circuit was likewise unpersuaded that the School District could regulate Layshock’s expressive conduct because it was “aimed” at the School District and the principal. This argument relies in part upon Fraser, but “Fraser does not allow the School District to punish Justin for expressive conduct which occurred outside the school context . . . . Moreover, we have found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school.”44

“Likes” and Student Free Speech

While the public schools (and the courts) continue to wrestle with off-campus Internet speech that may have an on-campus effect, a new wrinkle appeared recently: Can a public school discipline a student—not for any speech of the student—but for “liking” a comment by another student?

This is one of the issues in Shen v. Albany Unified School District,45 a consolidation of four cases challenging the discipline meted out to 10 students for racist and derogatory content posted on an Instagram account, where some of the punished students merely indicated they “liked” a comment or expressed no opinion at all.

In November 2016, a high school student (C.E.) created a private Instagram account with the handle @yungcavage. He invited several other students from the high school to “follow” it. The court noted that only invitees could see the posts or react to them by commenting or “liking” them. Some of the invitees
were close friends of C.E.; others were “passing acquaintances.”

The posts, for the most part, targeted fellow students and school personnel—especially African-Americans—utilizing racist and derogatory comments along with violent imagery (nooses, horse whips) and oftentimes a picture of the targeted student or faculty member. The posts were exceedingly demeaning to African-American females. There were 30 to 40 posts from November 2016 to March 2017 when the posts became “public.”

Ten different students were depicted on the account. Several of the posted photographs were shot on school property. C.E. made all the original posts on the account. The other students either commented or “liked” the posts, while several supplied photographs or other content. One student who had access to the account never contributed anything, not even a “like.” None of the posts occurred during school or on school property.

The privacy of the Instagram account lasted until March 17, 2017, when one of the students who had access showed some of C.E.’s posts to two students who were targets of some of the posts, both African-American females. News of the account spread rapidly over the weekend. On March 20, 2017, a student asked one of the students with access to the account if she could borrow his phone to make a call. Instead, she took the phone into the bathroom where she accessed the Instagram application and took photos of the posts using her own phone.

By lunchtime, students, some of whom were the targets of the posts, gathered in the hallway, visibly agitated, yelling and some in tears. The principal heard the disturbance from his office and brought the students into a conference room. This was the school district’s first awareness of the Instagram account.

Later that afternoon, many more students had copies of the posts. When C.E. learned his account had become public knowledge, he disabled it and, later that day, permanently deleted the account. The only remaining images were from the copies made that morning by the student who had taken photos of the posts.

C.E. was “permanently expelled” from the high school, while the other students who had access to the Instagram account received suspensions of various lengths. The students sued their school district, alleging violations of their First Amendment free speech rights and their due-process rights under the Fourteenth Amendment.

The “primary legal question,” the federal district court noted, is whether the students’ “Instagram activity—their posts, their comments, their likes, and that they followed the @yungcavage account—was protected from school discipline by the First Amendment.”

While “geographic location” may still be a relevant factor in analyzing student speech, “strict tests of locality are not compatible with the online methods of communication in our digital age.” The tests need to be updated to respond “to our internet world, where today’s students are particularly comfortable residents[.]” The court then turned to applying the Nexus and Reasonable Foreseeability tests.

The challenged actions occurred on a social media site, but each of the students interacted with the account in different ways. C.E. created the account and uploaded the original posts, while other students commented on the posts. Some “only liked some posts” while one student had access to the account but did not post a comment or “indicate a like.”

“Without question, the original posts and verbal comments are within the scope of the First Amendment.” Even expressing a “like” for a post without more “is expression covered by the First Amendment.” Expressing a “like” is action that “broadcasts the user’s expression of agreement, approval, or enjoyment of the post, which is clearly speech protected by the First Amendment.”

But what about the student who only read the posts but did not contribute anything or express a “like” for any of the content? Even if one considers this student to be merely a reader of the content, “[t]he First Amendment protects readers as well as speakers.” A “follower of online content . . . is no different for First Amendment purposes than the pre-internet readers” discussed in relevant case law. “It is also worth noting that [the school district] disciplined [this student] for viewing the @yungcavage posts, which is precisely the type of government conduct that these [pre-internet] cases condemned under the First Amendment.” The suspension of this student was “troubling in many respects,” especially as this student “did nothing more
that have access to the posts.” The student could not have been on notice that having online access or viewing online content could result in suspension. “Giving schools the power to control what students are permitted to look at online is a deeply problematic proposition.”

For the other students who either posted comments or content, the question is whether their online speech constitutes “school speech” that is subject to regulation by school officials. Applying the Nexus Test, the speech at issue is “school speech”: the account creator and followers were students at the same high school; the posts were directed at 10 other high school students or school personnel; some of the more offensive posts “depicted school activities” and involved photographs taken on campus; and other content was “directly responsive to events that took place at school.”

The “same result is readily reached” under the “Reasonable Foreseeability” test: “the activity was targeted to the school” with “[p]osts, comments, and likes . . . made by students and about students”; posts and comments “appear to have been related to ongoing social tensions at school, which again increased the likelihood [the] speech would reach and disturb the campus”; and specific students in the high school were targeted by posts and comments. “These circumstances made it reasonably foreseeable that the contents of the account would eventually reach and disrupt [the high school].”

The student Instagram speech was not “private and self-contained,” as they argued. C.E. did not advise the followers of the account not to share any content with anyone else. It was unsurprising that the Instagram account eventually became public. “[I]t is common knowledge that little, if anything, posted online ever stays a secret for very long, even with the use of privacy protections.”

Since the speech at issue is considered “school speech,” the Court applied Tinker, which permits a school to discipline student speech that materially interferes or substantially disrupts the school, is likely to do so, or impinges on the rights of other students. “The reasonable foreseeability test also focuses on the risk of disruption, and does not require a disturbance to erupt before the school may act.”

There is no “serious question” regarding the school district’s authority to discipline C.E., “the creator and main content supplier” for the Instagram account. A “cascade of disruptive events immediately followed the public disclosure of C.E.‘s @yungcavage account,” the court observed, referring to the upset students and the school administrator’s report regarding the “intensity of the crying and the yelling,” which was described as “very disturbing and disruptive.” School officials had to call in mental health counselors. They also called the police because the comments and depictions regarding the KKK, lynching, and nooses “could be construed as threats of violence.” Some of the targeted students were too upset to attend school for a while “out of embarrassment and fear.” One student indicated she continued to have difficulties, expressing paranoia “about classmates taking photographs of me and using them in the most offensive ways.” Classes were also disrupted by students wanting to talk about the situation.

The school district, the court found, also properly disciplined the students who “expressed approval of or liked posts that specifically targeted students at [the high school].”

“There is no doubt that these plaintiffs meaningfully contributed to the disruptions at [the high school] by embracing C.E.‘s posts in this fashion. The evidence shows that students were upset precisely because others, namely these plaintiffs, had supported C.E.‘s conduct.”

Finding that, under Tinker, the emotional reaction of the students to the posts and the “likes” was sufficient to overcome the First Amendment claims, the court also noted that the plaintiffs clearly interfered with “the rights of other students to be secure and to be let alone.” Speech that is merely offensive to others is insufficient for Tinker purposes, but “good guidelines exist for determining what constitutes impermissible interference with the rights of other students.” Racist and derogatory comments about one’s peers is speech that addresses others as objects rather than people “violates the targeted student’s right to be secure.”
Kowalski is also instructive. In upholding discipline imposed on a student for online harassment and intimidation of a peer, the court emphasized that personally derogatory speech is “not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about ‘habits and manners of civility’ or the ‘fundamental values necessary to the maintenance of a democratic political system.’”

The court further noted that, even though the “likes” may have been thoughtlessly made, a plaintiff’s subjective state of mind is irrelevant. “[S]tudents have the right to be free of online posts that denigrate their race, ethnicity or physical appearance, or threaten violence. They have an equivalent right to enjoy an education in a civil, secure, and safe school environment.”

While one student did not comment at all or indicate a “like,” three other students made comments that were not specifically targeted at any fellow student. The court found that no reasonable jury could find that these four students interfered with the rights of other students.

Endorsement or encouragement of speech that is offensive or noxious at a general level differs from endorsement or encouragement of speech that specifically targets individual students. The former is much more akin to the “merely” offensive speech that is beyond the scope of Tinker. Although some of these plaintiffs’ conduct may have been experienced as hurtful and unsettling by classmates, the Court cannot say that their involvement affirmatively infringed the rights of other students.

The court thus concluded that these four students are entitled to summary judgment against the school district.

“Fighting Words”

One of the categories of “speech” that is not entitled to First Amendment protection is so-called “Fighting Words.” This category originates from the Court’s decision in Chaplinsky v. New Hampshire, cited briefly in Part I of this series. Chaplinsky was handing out religious tracts on a public sidewalk, but he was apparently also disparaging the religious beliefs of others. A disturbance began to brew. At one point, he chastised a law enforcement officer by calling him a “racketeer” and “a damned Fascist.” New Hampshire had a criminal statute at the time that prohibited the addressing of “any offensive, derisive or annoying word to any other person” or to “call [that person] by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.”

The Supreme Court found there is no free speech protection for “insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

The state statute, the Court found, was narrowly drawn and limited to restrict punishment for specific conduct occurring in a public place using words that are likely to cause a breach of the peace. The statute is not too vague to constitute a denial of due process under the Fourteenth Amendment. “A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.” In addition, “the appellations ‘damned racketeer’ and ‘damned Fascist’ are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”

But this all happened on a public street in Rochester, New Hampshire, in a face-to-face encounter in 1940. Is it possible that a social media exchange could constitute “fighting words”? Would it help if the author used a smiley emoticon or emoji?

In the Interest of R.C. tackles this very issue. As is so often the case in most social-media disputes, a middle school student is involved. In this case, it is R.C., a 14-year-old student who took a picture of his friend, L.P., during class at school and then drew an ejaculating penis over the photo using the mobile application Snapchat, an app that allows a cell phone user to use a finger to draw or write over a photo with what looks like a marker or a crayon. R.C. was giggling when he showed the doctored photo to L.P. and three other friends. The frivolity spilled over to the cafeteria next period, where R.C. shared the photo with a few other friends. The friends were amused; L.P. was not. Two of L.P.’s friends informed R.C. that L.P. was not amused. When R.C. approached to apologize, L.P. pushed him away. L.P. later reported the incident to the principal.

R.C. was charged with “disorderly conduct.” The court found that R.C. knew his drawing would humiliate and shame L.P., and would have tended to
incite an immediate breach of the peace, especially as the drawing implied L.P. was “homosexual or behaves in that kind of behavior or has some sort of demeanor about that.” R.C. was sentenced to three months of probation, therapy, and eight hours of “work crew.”

On appeal, R.C. argued that his drawing was protected speech and not “fighting words,” the only speech prohibited by the criminal statute. In addition, the speech was not likely to provoke an immediate violent response and, in fact, did not do so. The appellate court recited the current standard for determining whether speech is likely to provoke a violent response.

To qualify as speech likely to incite a breach of the peace, it is not enough that words, gestures, or displays “stir[] the public to anger,” “invite dispute,” or “create a disturbance”; they must “produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” The majority rejected the characterization of R.C.’s photo as a form a bullying that was likely to inflict injury on L.P., noting the Supreme Court, post-Chaplinsky, has dropped the “inflict injury” category from the “fighting words” category such that “merely hurtful speech” that does not tend to provoke an immediate breach of the peace is no longer considered unprotected speech.

The question is not whether L.P. suffered reputational injury or might have become upset by the photo; rather, the question is whether R.C.’s display of the doctored photo “tended to incite an immediate breach of the peace; that is, whether the display was, as a matter of common knowledge, inherently likely to provoke a violent reaction from a reasonable person.”

The appellate court (and the trial court) was hampered to a degree because the Snapchat photo was not a part of the record—it was automatically deleted after some number of hours, a function of this app. Nevertheless, there was sufficient testimony as to what the Snapchat photo did depict. The issue is whether the cartoonish drawing of a penis on a photo was likely to incite a reasonable person—“even a reasonable middle schooler”—to immediate violence.

The majority expressed doubt about the continuing viability of a “fighting words” exception to free speech, noting that “words alone, no matter how offensive or cruel, cannot justify violence.” Words that tend to make another feel humiliated or ashamed, or that embarrass or disgrace another, are insufficient to qualify as “fighting words.” “Even vulgar and insulting speech that is likely to arouse animosity or inflame anger, or even to provoke a forceful response from the other person, is not prohibited.”

The majority also rejected the trial court’s position that the photo’s implication that L.P. was gay would have reasonably incited L.P. to violence. However, there is no evidence that R.C. intended to imply L.P. was gay or that L.P. perceived the photo as a commentary on his sexual orientation. In addition, an insinuation that a person is gay does not amount to “fighting words.” A “suggestion of homosexuality or homosexual conduct” is not considered “so shameful and humiliating that it
should be expected to provoke a violent reaction from an ordinary person.”

Here, the circumstances surrounding R.C.'s display of the photograph do not support the finding that the display was likely to lead to immediate violence. To begin, R.C. and L.P. were friends. R.C.'s display was not accompanied by any hostile, aggressive, or threatening language or conduct. When R.C. showed L.P. and the other boys the altered photo, they were in a classroom where, presumably, a teacher was nearby and available to intervene or mediate if tempers flared or feelings were hurt. There was no evidence that R.C.'s display of the photo caused any sort of commotion or that it was even noticed by other children or the teacher. And, the display did not, in fact, arouse an immediate violent response from L.P.; instead, L.P.'s immediate reaction was to shrug off the incident, by pretending to laugh along with his friends.

The court pointed out that its decision does not leave schools without a remedy for such in-school student behavior. Fraser permits discipline of a student who communicates vulgar and offensive speech within the school context. The court further noted that Colorado, like most states, has an anti-bullying statute that specifically authorizes schools to prescribe consequences for conduct deemed bullying under the statute.

What We Can Learn From This

A student's off-campus online expression of opinion that is non-violent, non-threatening, and non-defamatory may not be subject to school authority even when targeted to a school audience.

Fraser cannot be applied to student off-campus electronic communications that may be considered lewd, vulgar, or indecent by school authorities.

“Substantial disruption” means more than mere embarrassment, offense, or inconvenience; the concept is not determined on a subjective basis.

A student's electronic communication that is not accessible to the public is generally protected from sanctions by school authorities, the same as a conventional letter.

The First Amendment protects silly, juvenile speech to the same degree and extent as lofty, thought-provoking speech. There are no gradations of protection.

Off-campus student electronic speech that targets a school is not subject to sanctions by school authorities without accompanying substantial disruption, a likelihood for substantial disruption, or impingement on the rights of other students to a safe, secure environment conducive to educational pursuits.
It is possible that indicating “like” of off-campus speech that has an on-campus negative effect could subject the student approving of the speech to school-based sanctions.

School policies prohibiting harassment, bullying, or intimidation can be applied to off-campus electronic speech that impinges upon the right of another student to a safe, secure school environment conducive to educational pursuits.

It is possible—but unlikely—that student social media speech could be considered “fighting words.”

Endnotes

2 For the time being, courts (and public schools) will need to extrapolate from the Supreme Court’s four decisions, all of which occurred on campus or at a school-sponsored event and involved more traditional concepts of speech: Tinker v. Des Moines Ind. Community Sch. Distr., 393 U.S. 503 (1969) (“pure speech” in a school context cannot be banned absent a substantial disruption or material interference with school function or a reasonable forecast of substantial disruption, or interference with rights of others); Bethel School District v. Fraser, 478 U.S. 675 (1986) (student’s sophomoric speech at assembly—which contained offensive, indecent, and lewd references—was not protected speech and could be regulated because vulgar or indecent speech and lewd conduct in the classroom or school context is inconsistent with the fundamental values of public school education); Hazelwood Sch. Dist.v. Kuhlmeier, 484 U.S. 260 (1988) (school could exercise editorial control over the style and content of student articles in school newspaper because newspaper was part of journalism class experience and, accordingly, was part of a school-sponsored expressive activity; however, such editorial control must be “reasonably related to legitimate pedagogical concerns”); and Morse v. Frederick, 551 U.S. 393 (2007) (a message reasonably viewed as advocating illegal drug use—“Bong HiTS 4 Jesus”—need not result in a substantial disruption before school officials could restrict such speech on school property or at a school event).
3 650 F.3d 205, 216 (3d Cir. 2011) (en banc).
6 See, e.g., People v. M.H., 1 Cal.App.5th 699 (Cal. Ct. App. 2016) (high school student convicted criminal invasion of privacy when he used the video function of his cell phone to surreptitiously record another student in the restroom and then uploaded the video to Snapchat with the suggestion the student was masturbating, with the student eventually committing suicide); See also In the Matter of A.J.B., 910 N.W.2d 491 (Minn. Ct. App. 2018) (high school student convicted of criminal stalking and harassment for posting Tweets to a disabled student’s Twitter account, mocking the student for his disabilities and encouraging him to kill himself, which the targeted student did attempt).
7 “Congress shall make no law . . . abridging the freedom of speech[.]”
8 Tinker, 393 U.S. at 509.
9 Neither this paper nor Part I (“true threats”) addresses searches of electronic devices under the Fourth Amendment. This is a fascinating topic as well. The general consensus among the courts is that the reasonable suspicion/reasonable scope requirements arising under New Jersey v. T.L.O., 469 U.S. 325 (1985) would apply to searches of student cell phones and other electronic devices.
10 652 F.3d 565 (4th Cir. 2011).
11 Id. at 573, 577.
12 696 F.3d 771 (8th Cir. 2012).
13 Kowalski, 652 F. 3d at 572.
14 Id.
15 Id. at 573, quoting Fraser, 478 U.S. at 681 (internal quotation marks and citations omitted).
16 Id. at 573.
17 Id.
18 Id. at 574.
19 Id. at 575-76.
20 Id. at 576.
21 122 F. Supp. 3d 842 (D. Minn. 2015).
22 Id. at 859.
23 Id. at 856, quoting R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist., 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012), a case with even more egregious allegations than this one. R.S. involved a 12-year-old middle-school girl who posted pretty typical middle-school girl stuff at her Facebook account. She also had some racy discussions via email with a male student. All of this occurred off campus and not during the school day. No school devices or equipment were involved. The school officials allegedly required her to provide them her passwords to her Facebook and email accounts so they could peruse them to discover whether she violated any school rules. This constituted a violation of her Fourth Amendment rights, which is not part of this paper.
25 The court advised that a “Snap” is a digital image that may be accompanied by text sent through an application developed by Snapchat. A “Snap” is self-deleting, usually within 10 seconds although the image may be captured by others. 2017 WL 4418290 at *2, n. 1.
26 807 F. Supp. 2d 767 (N.D. Ind. 2011).
27 696 F.3d 771 (8th Cir. 2012).
28 652 F.3d at 573.
29 Id. at 778-79.
30 527 F.3d 41 (2d Cir. 2008).
31 Id. at 53. See also Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), (finding school personnel entitled to qualified immunity from constitutional challenges arising from preventing the student from running for class office and wearing a t-shirt, and finding no equal protection violation). Two other cases that applied the reasonable foreseeability test to off-campus threatening speech were discussed in Part I in the May issue. See Wisniewski v. Board of Education of Weedsport Central School Dist., 494 F.3d 34 (2d
There is an interesting discussion, albeit in a footnote, about the meaning of invasion of the "rights of others," as employed in Tinker and justifying limitations on some student speech. The Supreme Court did refer to the "rights of others" generally, but the Third Circuit felt that may have been dicta. A proper reading would mean the invasion of the rights of "other students to be let alone." Applying this to this dispute, the School District would not be justified in punishing J.S. for her speech even if it did invade the rights of the principal. Tinker was not meant to protect the principal. J.S., 650 F.3d at 931, n.9.

The Court also rejected the School District's argument that the bringing of the print-out onto campus transformed J.S.'s speech into "school speech." The print-out was brought onto campus at the express request of the principal. 650 F.3d at 932-33.

Layshock and the School District later entered into an agreement that reinstated him to his regular classes, restored his access to certain extracurricular activities, and allowed him to attend his graduation.

Under this state's criminal statutes, a person commits "disorderly conduct" if he or she "intentionally, knowingly, or recklessly . . . makes a coarse and obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace." 2016 WL 6803065 at *1.
Prosecutors and PowerPoints

In the latest decision from Washington, State v. Salas, the court found that the PowerPoints were used to inflame prejudice and impermissibly express the prosecutor’s opinion. In that case, Encarnacion Salas was charged with the second degree murder of an individual who was described in court as Salas’s good friend. Acquaintances considered them “a couple,” but evidence suggested that, although the deceased, Jesus Lopez, was interested in a homosexual relationship, Salas had not yet agreed. On the night of Lopez’s death, Salas had a knife he routinely carried in his backpack when he visited Lopez’s apartment, which the decedent shared with his mother. According to Salas, the pair went out on a balcony to smoke when Lopez attempted to grab Salas’s crotch. After Salas yelled at him, Lopez attacked him with Salas’s own knife. A physical altercation ensued, with Lopez ending up with 15 knife wounds and dying on the kitchen floor. Salas claimed self defense.

At closing, the prosecutor displayed a 22-slide PowerPoint presentation, which had not been previously shared with the court or with the defendant’s counsel. The first slide contained two pictures. The picture on the right was a picture of Lopez at an amusement park. He was photographed crouched down in front of three characters dressed as Smurfs. A caption about the photo reads, “Jesse Lopez: 5’5.5”, Band leader, saxophone player, customer service representative.” The second picture is an unsmiling picture of Salas from his driver’s license. It is captioned “EJ Salas: 5’11”, Football player, fighter, outdoorsman.” The prosecutor then sought to defeat the self defense claim by highlighting the differences between the physical capabilities of the defendant and the deceased.

On appeal, the defense cited previous decisions by Washington courts on the use of PowerPoints by prosecutors, arguing that these decisions required the court to find prosecutorial misconduct. Defense counsel asserted that the PowerPoints at issue communicated to the jury what the prosecutor could not say aloud:
that, because Salas was, by nature, aggressive, and intimidating and Lopez was childlike and submissive, Salas had no reason to fear Lopez.

In the previous Washington court decisions, the prosecutors had displayed PowerPoints of photos of the defendants with captions, such as “Do you believe him?” and “Guilty.” In *State v. Walker*, the picture of the defendant’s booking photo was superimposed in bold red letters with the words “GUILTY BEYOND A REASONABLE DOUBT” and 100 of the 250 slides used were headed with the words “DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER.”

In the *Salas* case, the court acknowledged that the PowerPoints used by the prosecutor were not as egregious as those used in *Walker* and earlier cases. The court also acknowledged that the physical difference in size between Salas and Lopez was legally relevant. Nonetheless, the attempt to evoke stereotypes to influence the jury was deemed to be prosecutorial misconduct.

Courts in other states have also found prosecutorial misconduct in the use of PowerPoints. In the Missouri case of *State v. Walter*, the court held that the act of digitally imposing the word “GUILTY” across the mugshot of the defendant was prejudicial. In Ohio, in *State v. Mercer*, the court reviewed the trial court’s decision in a case in which the defendant was on trial for the rape of a child and gross imposition of a child younger than 13 years old. In summarizing the state’s case, the prosecutor displayed a slide depicting a block-form man with horns holding the hand of a block-form little girl. The court agreed with the defendant that depicting the defendant as the devil was “egregious” and flagrantly overstepped “the bounds of professionalism and decorum.”

Other courts have found prosecutorial misconduct because the PowerPoint presentation conveyed improper legal concepts or instructions to the jury. This was the situation in the Oregon case of *State v. Reineke*. The court found that the prosecutor’s slide presentation constituted a comment upon the defendant’s constitutional right to remain silent. Similarly, in the California case of *People v. Clark*, the court determined that the prosecutor presented erroneous information to the jury on the concept of “reasonable doubt” in the PowerPoint presentation used in the closing argument.

Once finding prosecutorial misconduct in PowerPoint presentations, the majority of courts have overturned the defendant’s conviction. However, this is not always the case. For instance, despite the *Mercer* court’s comment that the prosecutor’s misconduct “would normally result in reversal of the conviction,” the court nevertheless determined that the overwhelming evidence of guilt, the court’s curative instruction directing the jury to disregard the slide, and Mercer’s confession which comported with the testimonial and physical evidence were sufficient to conclude that the trial court did not abuse its discretion in
denying the motion for a mistrial on the grounds of prosecutorial misconduct. In contrast, in Salas and Walker, the courts held that the prosecutorial misconduct required overturning the convictions. The Walker court concluded:

Closing argument . . . does not give a prosecutor the right to present altered versions of admitted evidence to support the State’s theory of the case, to present derogatory depictions of the defendant, or to express personal opinions on the defendant’s guilt.11

The Missouri court in Walter overturned the conviction of the defendant despite acknowledging that the verdict was otherwise reasonable because the use of the altered photograph with “GUILTY” on the defendant’s mugshot impinged upon the presumption of innocence and fairness of the fact-finding process.12

Rule 3.4(e) of the Model Rules states that in a trial, a lawyer shall not:

Allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or innocence of an accused.13

The Comment to Rule 3.8, Special Responsibilities of a Prosecutor,14 reminds prosecutors that they have the responsibility of a minister of justice and not simply that of an advocate. While lawyers are reminded in the preamble to the Rules that they can be zealous advocates, the primary duty of a prosecutor is always to seek justice and act fairly and impartially. Finally, the American Bar Association Prosecution Function Standard 3-6.8(a) clearly delineates the permissible contours of a closing argument.15

With these court decisions in mind and the professional standards guiding prosecutors, advocates should ensure that the PowerPoint images they prepare:

- Provide information which merely summarizes evidence presented;
- Do not demonstrate the prosecutor’s personal opinion;
- Do not have language that obviates the presumption of innocence; and
- Do not misstate the applicable law.16

No prosecutor wants to diligently and zealously prepare for trial and obtain a guilty verdict only to have that verdict overturned on appeal because of prosecutorial misconduct. As a minister of justice, the prosecutor’s duty is to seek and achieve justice, not merely to convict. As the Supreme Court commented in Berger v. United States,

[The prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.17

Proper preparation and use of PowerPoint images will ensure that prosecutors can try cases vigorously yet obtain convictions fairly.

Author’s note: Thank you to Judy Zeprun Kalman with the Massachusetts Attorney General’s Office, and NAGTRI Editorial Advisory Board member, for her assistance in writing this column.
Endnotes


2 See https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html (emphasis added).


5 Hecht, 319 P.3d at 841.
6 Walker, 341 P.3d at 985. The court's decision contains some of the images discussed.
7 479 S.W.3d 118 (Mo. 2016).
8 2103 Ohio App. LEXIS 1414.
11 Walker, 341 P.3d at 991.
12 Walter, 479 S.W.3d at 128.
13 See https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel.html.
14 See https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel/comment_on_rule_3_4.html.
16 For a more complete discussion of the use of PowerPoints by prosecutors and a list of cases that have dealt with this issue, see 28 A.L.R. 7th 3. Prosecutors may also want to review the information provided in ANN BRENDEN and JOHN GOODHUE, PERSUASIVE COMPUTER PRESENTATIONS (ABA 2001).

Training Calendar

A wide variety of courses are available for professional development and management leadership to NAAG membership. Details, including registration, for all courses may be found at www.naag.org/nagtri/nagtri-courses.

National Courses

- Negotiation Skills: Little Rock, Ark. November 6 - 7, 2018
- Protecting Consumers from Overprescription: West Palm Beach, Fla. November 14 - 15, 2018
- CEPI Ethics Summit: Phoenix, Ariz. December 11 - 13, 2018

Mobile Courses

- Overdose Death Investigation and Prosecution Training for OAG-AK: Anchorage, Alaska October 11, 2018
- Overdose Death Investigation and Prosecution Training for OAG-ND: Bismark, N.D. October 25, 2018
- Ethics for OAG-CT: Hartford, Conn. November 15 - 15, 2018
- Paralegal and Legal Assistant Training for OAG-TN: Nashville, Tenn. November 28, 2018
- Overdose Death Investigation and Prosecution Training for OAG-UT: TBA, Utah December 5, 2018
- State Defensive Litigation for OAG-DC: Washington, DC. December 12 - 13, 2018
Protecting Veterans’ Access to Housing

CHALIA STALLINGS-ALA’ILIMA, ASSISTANT ATTORNEY GENERAL, WASHINGTON ATTORNEY GENERAL’S OFFICE

“No veteran should be denied a roof over their head based on how they plan to pay their rent.” Bob Ferguson, Washington Attorney General.

Established in 2015, the Wing Luke Civil Rights Unit (CRU) in the Washington State Attorney General’s Office enforces state and federal anti-discrimination laws for the people of Washington State through investigations and affirmative civil rights litigation. Within a few months of its creation, stakeholders brought a fair housing issue to the CRU’s attention: Veterans with disabilities were being turned away from housing opportunities.

Veterans were not being turned away from housing because they did not meet reasonable rental criteria; they were being rejected because they were attempting to use Veterans Affairs Supportive Housing (VASH) program vouchers to assist with paying rent.

The Veterans Affairs Supportive Housing (VASH) Program

VASH is a joint program between the U.S. Departments of Housing & Urban Development (HUD) and Veterans Affairs (VA). The program combines housing vouchers through HUD with VA support services for veterans who have a disability, including a serious mental illness, a history of substance use disorder, or a physical disability. The purpose of the program is to combat homelessness among veterans. From 2010 to 2016, veterans in Washington State received 2,609 VASH vouchers.

Civil Rights Protection

Turning VASH voucher users away from housing is not just morally and ethically wrong, it is illegal. Though Washington has not historically had general statewide protection against source of income discrimination, people with disabilities have been protected from discrimination under the federal Fair Housing Act (FHA) and the Washington Law Against Discrimination (WLAD) for decades. And Washington specifically protects veterans from discrimination under the WLAD. In addition, unfair or discriminatory conduct in the rental market violating the WLAD may also constitute a violation of the Washington Consumer Protection Act (CPA).

Disparate Impact

Only veterans with disabilities use VASH vouchers, so a policy of refusing to accept them has a disparate impact on the protected classes of “honorably discharged veteran or military status,” and “the presence of any sensory, mental, or physical disability.”

Blanket prohibitions on any person with a VASH voucher—no matter if the person otherwise meets a housing provider’s rental criteria—discriminates against individuals based on disability and veteran status. It is a prerequisite to qualifying for a VASH voucher that an individual is a member of these protected classes under the FHA and WLAD. The U.S. Supreme Court has recognized that targeting attributes exclusive or predominant to a particular class of people presumes targeting the class itself.

The FHA prohibits housing providers from employing policies that have a disparate impact on protected classes, including people with disabilities. Like its federal counterpart, the WLAD prohibits practices that, though not motivated by discriminatory intent, nonetheless have a disparate impact on a protected group. And, absent a showing of a “legally sufficient justification,” a housing provider employing a blanket policy with a discriminatory effect will be liable for unlawful discrimination.
Taken together, a categorical refusal to accept VASH vouchers implicates the FHA, the WLAD, and the CPA because the impact of that policy falls squarely on disabled veterans.

**Washington Attorney General Investigates**

If this were, in fact, happening in Washington, the CRU was determined to do something about it. To confirm the existence and gauge the scope of this practice, the CRU initiated testing across the state. “Testing” is an investigative tool used to test compliance with civil rights laws, including in the contexts of housing, employment, lending, and in places of public accommodation. Individuals pose as prospective renters, employees, borrowers, or customers for the purpose of collecting evidence about possible discriminatory practices.

Here, testers searched Craigslist for advertisements of available housing rentals, then contacted housing providers by email. The testers confirmed that the advertised unit was available, identified themselves as veterans with a disability who use VASH vouchers to assist with paying a portion of their rent, and then inquired into the provider’s policy for using VASH vouchers. Responses varied, but nine of the 70 housing providers tested responded with statements exposing blanket policies of rejecting VASH vouchers.

Eight companies entered into agreements with the Washington Attorney General’s Office to correct their conduct. They have modified their policies, obtained training for their employees, and paid monetary relief to the Attorney General’s Office. Two companies remain recalcitrant: Utah-based Apartment Management Consultants LLC and Colorado-based Mission Rock Residential LLC.

**Property Managers’ Conduct**

Apartment Management Consultants manages 24 residential rental properties in 10 cities in Washington, including the HighGroove and Wildreed apartments in Everett. Test communications from the CRU responding to rental advertisements for both properties resulted in blanket statements by the properties that they did not accept vouchers of any kind.

Mission Rock’s 13 properties in nine Washington cities includes the Lakeside Landing Apartments in Tacoma and Sierra Sun in Puyallup, both less than an hour from Joint Base Lewis-McChord. Test communications responding to rental advertisements at Lakeside and Sierra Sun resulted in blanket statements by the properties that they did not accept any type of vouchers or they did not participate in the VASH program.

Both companies were told that the voucher assisted a veteran with a disability in paying his or her rent, yet refused to consider accepting the VASH voucher and asked no additional questions about whether the prospective tenant otherwise met the properties’ rental criteria. Both companies advertise their properties with HUD’s fair housing, equal opportunity, and disability accessibility logos on their websites while simultaneously withholding these housing opportunities from the thousands of VASH program participants in Washington.
Current Status

As of April 6, 2018, HUD’s allocation of VASH vouchers for Washington State is now up to 460 vouchers, with a total monetary value of $3,320,535.

On Sept. 30, 2018, Washington’s new law prohibiting discrimination against persons whose source of income is derived from or includes sources other than employment will be fully effective.11 This new protection covers people who use VASH vouchers in addition to other legal forms of housing assistance.

The CRU is prepared to enforce the new law and continues to expect Apartment Management Consultants and Mission Rock Residential to reconcile their policies and practices with the law.

Endnotes

1 42 U.S.C. § 3604.
2 Wash. Rev. Code § 49.60.222.
3 Id. at § 49.60.222(1).
4 Id. at §§ 19.86.020, 49.60.030(3).
5 Id. at § 49.60.222(1).

8 Kumar v. Gate Gourmet Inc., 325 P.3d 193 (Wash. 2014) ("[T]he WLAD creates a cause of action for disparate impact.").
9 See 24 C.F.R. § 100.500(b)(2).
10 Texas Dept Housing & Community Aff. v. Inclusive Communities. Project, 135 S. Ct. 2507, 2523 (2015) (housing providers may maintain a policy that causes a disparate impact only “if they can prove it is necessary to achieve a valid interest”); 24 C.F.R. § 100.500(b)(1) (defining a legally sufficient justification as one that is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests” which “could not be served by another practice that has a less discriminatory effect”); Oliver v. Pac. NW. Bell Telephone. Co., 724 P.2d 1003, 1007 (Wash. 1986) (explaining "business necessity" defense to disparate impact claim under the WLAD).
Recent Powers and Duties Decisions

Kentucky—Attorney General’s Relationship with Governor and Legislature. The Kentucky attorney general sent an unsolicited letter to state legislators, advising them of his views on the constitutional issues raised by a statute known as SB 1. The Democratic members of the legislature also sent out a tweet with a picture of the attorney general and Democratic legislators, with a caption that references a discussion of “legal options.” The governor eventually signed a successor bill into law. The attorney general filed suit against the governor on the grounds, among other things, that the communications with the legislature created an attorney-client relationship and allowing the attorney general to sue creates a conflict of interest under the Kentucky Rules of Professional Conduct.

The court held that “controlling law on this point emphatically provides that the Attorney General’s true clients, to whom he owes his legal and fiduciary duty of loyalty, are the citizens of Kentucky and not any officeholder, department or agency.” Moreover, “[i]t is abundantly clear from the record in this case and others, that the Governor did not seek or accept the legal advice of the Attorney General, nor did he agree with or follow the advice the Attorney General offered to the legislature. For these reasons, the Attorney General could not possibly have a conflict of interest.”

The court concluded:

The Court recognizes there are many important legal issues that can and should be contested in this action. The legitimacy of the Attorney General’s right to challenge the legislation at issue, and to contest the Governor’s legal position, is not one such legal issue. Case law is well established that the Attorney General has both the right and the duty to challenge statutes that he believes are unconstitutional. . . . It would perversely twist the logic and purpose of the Rules of Professional Conduct to hold that the Attorney General is disqualified from challenging a statute because he rendered a legal opinion prior to adoption of the law that counseled against the actions adopted by the legislature. Commonwealth ex rel. Beshear v. Bevin, No. 18-CI-379 (Franklin Cir. Ct. May 1, 2018).

Missouri—Attorney General Cannot Be Removed Except By Impeachment. Missouri statutes provide that “[t]he attorney general shall reside at the seat of government.” The Missouri attorney general maintained a residence in Jefferson City, but also maintained his original residence, outside the city, where he continued to vote. A relator filed suit requesting a writ of mandamus requiring the attorney general to reside in Jefferson City or resign from office. The attorney general argued, among other things, that a challenge to the validity of the attorney general’s service in office and has a “duty of loyalty” to the legislature because he has a statutory obligation to provide state agencies and officers with legal advice. Noting that the governor did not explain how any duty of loyalty to the legislature would extend to him, the court stated, “Governor Bevin, as the person who now occupies the office of Governor, is not the state.” The attorney general’s duties are to the people, as the sovereign. In that capacity, the attorney general has not only an obligation, but also a duty to bring suit “when he believes the public’s legal or constitutional interests are under threat. . . . As such, the Attorney General’s attorney-client relationship is with the citizens of Kentucky and it is to the public, not any office or officeholder, that the duty of loyalty is owed.”
cannot be made through a mandamus action by a private relator. The court agreed with the attorney general and denied the writ.

Past Missouri decisions have held that “the proper method for challenging the constitutional validity of an officer’s service is through a quo warranto action,” which can only be initiated by a government attorney, who has complete discretion as to whether to file the case. The relator thus cannot proceed unless the attorney general or the local prosecutor participates in the case.

The court further held that, even if a government attorney participated in the proceeding, the Missouri Constitution would bar the removal of the attorney general by this means. The sole method provided in the state constitution for removal of statewide elected officers is impeachment. The court concluded “the Court has no constitutional authority to order the Attorney General to resign from office, and . . . the private relator has no authority to seek this extraordinary relief under any circumstances . . .” Mueller v. Hawley, No. 17AC-CC00577 (Mo. Cir. Ct. Cole Cty. June 12, 2018).

New Hampshire—Attorney General’s Parens Patriae Suit Not Subject to Removal Under CAFA. The New Hampshire attorney general filed suit against Purdue Pharma, the manufacturer of opioid pain medications. The complaint alleged that Purdue’s false and misleading claims injured the state, its municipalities, and its consumers in violation of the state’s consumer protection and Medicaid fraud statutes. The complaint sought damages for its own injuries and injunctive relief, civil penalties, restitution, abatement, and attorneys’ fees on behalf of itself and its municipalities and citizens. Purdue Pharma removed the case pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(1)(B), and the state sought remand to state court.

CAFA gives federal courts subject matter jurisdiction over certain class actions that would not otherwise meet diversity jurisdiction requirements. Specifically, CAFA provides that a CAFA class action is an action filed under Federal Rule of Civil Procedure 23 or under a similar state statute or rule authorizing an action to be brought by one or more representative persons as a class action. The state argued that its action was brought to vindicate its own proprietary and quasi-sovereign interests, rather than those of individual consumers. The court held that a parens patriae action is different from a class action because it need not satisfy the required numerosity, commonality, typicality, and adequacy factors of a class action and the court does not have the power to closely supervise the action, including appointing counsel or preventing the state from settling its claims.

The court explained the unique nature of a parens patriae action:

More fundamentally, a parens patriae action is unlike a class action because a state’s power to sue on behalf of others derives from its sovereign power to protect its citizens rather than its status as a member of a class of injured plaintiffs. As the Supreme Court has long recognized, “[t]his prerogative of parens patriae is inherent in the supreme power of every State, whether that power is lodged in a royal person or the legislature and is a most beneficent function often necessary to be exercised in the interests of humanity, and for the protection of those who cannot protect themselves.” Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982).
Purdue also argued that the case was not a traditional parens patriae action because the state sought restitution on behalf of specific individuals rather than seeking to promote the health and welfare of its citizens overall. Following precedent in other courts, the district court held, “[a] state’s action on behalf of its citizens does not become a class action merely because it seeks injunctive relief that benefits individual class members.” The court concluded that Purdue’s argument “fails to sufficiently account for both the State’s sovereign power to sue on behalf of its citizens and its governmental duty to protect the health and welfare of its citizens.” Noting that the opioid crisis costs the lives of the state’s citizens, floods the state’s prisons, and demands vast commitments by the state’s law enforcement and first responders, the court stated, “When the State sues to protect its citizens from such ongoing injuries, it is not acting merely as a member of a class of injured persons seeking to obtain compensation on behalf of others. It is acting in a sovereign capacity to protect its citizens. CAFA does not deprive states of the power to litigate such claims in their own courts.” New Hampshire v. Purdue Pharma, 2018 U.S. Dist. LEXIS 3492 (D.N.H. Jan. 9, 2018).

Northern Mariana Islands—Control of Litigation. The Northern Mariana Islands Supreme Court provided a thorough analysis of the authority and responsibility of the attorney general vis-à-vis the governor in a recent decision.

The Northern Mariana Islands (NMI) governor requested that the attorney general appeal several decisions, and the attorney general declined to do so. The governor also requested that the attorney general file a cert petition in the U.S. Supreme Court on an election law case, and the attorney general declined to do so. The governor, without the consent of the attorney general, directed private counsel to file a cert petition, to which the attorney general objected. The governor and attorney general jointly petitioned the commonwealth’s Supreme Court to resolve two questions: “whether the authority to appeal cases resides with the attorney general; and whether the governor or government agencies may hire an outside counsel to prosecute the appeal without the grant of authority from the attorney general.”

The Supreme Court first looked at the authorizing language in the NMI constitution for both the governor and the attorney general. Because the plain language did not resolve the questions, the court turned to the legislative history of the provisions. In particular, the court reviewed House Legislative Initiative 17-2, passed in 2012, which amended the constitution to provide for election of the attorney general. The court held that this provision was intended to “create an independent attorney general’s office, free of any political influence or interference.”

Other than changing the manner of selection of the attorney general, the provision retained the same language as to the attorney general’s responsibilities. The court therefore reviewed the “Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands (Analysis),” a memorandum approved by the Constitutional Convention following the adoption of the constitution in 1976 that provides an explanation of each section in the Commonwealth Constitution and summarizes the intent of the convention in approving each section.

Citing Section 1 of the Analysis, the court found “the attorney general has discretion in prosecuting both criminal and civil actions and may decline to prosecute appeals when a court renders an adverse judgment.” Because Section 1 of the Analysis describes the governor’s executive power, the language about the attorney general’s power acts as a limit on the governor’s power, rather than on the attorney general’s power. The Analysis of Section 1 also states, “This section does prevent executive departments from engaging outside counsel to represent the department in any legal matter without a grant of authority from the attorney general.” Based on the Analysis, the court held, “the attorney general may decline to appeal an adverse judgment despite the wishes of the governor or a client government agency, and the governor or client agency may not hire outside counsel to prosecute an appeal without a grant of authority from the attorney general.”

The court also held “nothing in the NMI Constitution suggests the governor has the power to unilaterally override the attorney general’s authority, discretion, or representation.” However, the attorney general does not have unfettered discretion. “[T]he attorney general’s advice must be prompt, competent, and informed. In particular, the attorney general must not engage in delay tactics or gamesmanship when advising the governor or other executive departments regarding appeals.” The court also held that the attorney general has an affirmative duty to defend that Commonwealth, its actors, and the validity of its statutes. This duty to defend is “paramount,” so “the attorney general must, therefore, balance his duty to defend with clear
controlling precedent and lack of good-faith argument. It is only when the attorney general has fulfilled his constitutional duty to defend and the court renders an adverse judgment against the Commonwealth, he or she can then exercise discretion in prosecuting the appeal.” The attorney general is subject to checks and balances by the Public Auditor, the judiciary, and the legislature (through impeachment).

The Supreme Court declined to determine whether the attorney general has common law powers because “the text of the NMI Constitution—not common law powers—bestows the attorney general the power and responsibility to prosecute cases and appeals and to represent the Commonwealth.” Chief Justice Castro, concurring, agreed that the attorney general has absolute discretion in the criminal context, but argued that the attorney general should defer to the governor where the issue threatens the constitution or treaties of the Northern Mariana Islands. Torres v. Manibusan, No. 2017-SCC-0030-CQU (N.Mar.I. June 26, 2018).

Pennsylvania—Qualified Immunity of Attorney General and AGO Employees. Five plaintiffs filed section 1983 claims against Kathleen Kane, former Pennsylvania attorney general and an investigator in her office, alleging defamation and retaliation against the plaintiffs for engaging in First Amendment-protected speech. Plaintiffs were not employed by Kane or under her supervision. Among other actions, plaintiffs alleged that Kane defamed them by implying they had racist motives in investigating certain members of the state legislature. They also alleged that two members of Kane’s staff threatened to reveal e-mails with pornographic content that had been sent to the plaintiffs through their state government accounts unless plaintiffs stopped criticizing Kane. Plaintiffs also alleged that members of Kane’s staff physically threatened plaintiffs in connection with their testimony before a grand jury. The district court dismissed the claims, but the Third Circuit reversed, holding that plaintiffs had made colorable claims that should be subject to full consideration by the district court. The Third Circuit remanded the case for further fact-finding on, among other things, defendants’ claims of qualified immunity.

Qualified immunity is an affirmative defense that protects all executive branch officers performing executive functions from liability for money damages “unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” The court held that defamation claims, involving as they do a claim of harm to reputation, rather than liberty or property interests, do not establish a federal constitutional claim and so cannot give rise to section 1983 claims. Several defendants alleged that they were compelled to resign
their positions as a member of the Pennsylvania Parole Board and as an assistant district attorney in Lancaster County. The court found that the attorney general had no authority over either the Parole Board or the district attorney, and therefore the plaintiffs’ claims do not involve a clearly established constitutional right that can form the basis for a section 1983 action.

The court concluded that the threats to reveal the private e-mails unless plaintiffs ceased criticizing Kane were coercive and were not protected by Kane’s First Amendment rights. Similarly, threats against plaintiffs if they revealed Kane’s wrongdoing to the grand jury were not protected by qualified immunity. The court held that “[a]ny reasonable public official would know that it is clearly established that it is a constitutional violation for a public official to threaten physical or other harm to an individual who is going to testify before the grand jury.” The court concluded by dismissing three of the six claims on grounds of qualified immunity, and allowing the other claims to proceed to trial. Noonan v. Kane, No. 15-6082 (E.D. Pa. Mar. 29, 2018).

Rhode Island—Attorney General’s Power to Control Litigation. The Rhode Island Supreme Court affirmed the attorney general’s power to control state litigation when it held that the attorney general is vested with the “nondelegable, nontransferable legal duty to determine whether the state should provide a defense and indemnification in a civil action brought against a state employee.”

The case involved a traffic stop and subsequent arrest of Lionel Monsanto by State Trooper James Donnelly-Taylor. Trooper Taylor allegedly assaulted Monsanto multiple times after taking him into custody, and there was a video recording of the assaults. A grand jury indicted Taylor, who subsequently entered a nolo plea and was sentenced to 25 hours of community service, which he completed. Monsanto filed a federal suit against the state and Taylor, both individually and in his official capacity, alleging civil rights violations under 42 U.S.C. § 1983 as well as a number of other federal and state claims. Taylor requested representation by the Attorney General’s Office, pursuant to the terms of the Collective Bargaining Agreement (CBA) between the police union and the state. The attorney general declined to represent Taylor because his conduct fell outside the scope of his employment and was willful misconduct (citing the exceptions in R.I. Gen. Laws §9-31-9 to the attorney general’s duty to represent state employees).

The Rhode Island Troopers Association (RITA) filed a grievance with the State Police, which was denied, and RITA then filed a demand for arbitration, arguing that under the terms of the CBA, the state must fund Taylor’s legal defense and indemnify him against damages. The state then filed a complaint for declaratory judgment that the attorney general is the only party who can determine when and whether, in an action against a state employee, to provide a defense and/or indemnification. The trial court agreed with the attorney general and issued a declaratory judgment.
that the grievance was not arbitrable under the CBA. The court held “The Governmental Tort Liability Act tasks the Attorney General with the non-delegable, non-transferable, sole legal duty to determine when and whether, in an action filed against a state employee, to provide a defense and/or indemnification” and “Neither the Governor nor any Department head can bargain away, contract, or otherwise agree to alter the Attorney General’s sole discretion and responsibility as set forth in the Government[al] Tort Liability Act.”

The Supreme Court held that the trial court’s ruling was too broad, and limited its own ruling to the questions of whether the attorney general’s refusal to provide a defense was arbitrable under the CBA and whether the attorney general has the sole authority to determine whether a state employee is entitled to legal representation. Rhode Island case law establishes that applicable state law is superior to contractual provisions or employment practices. In this case, the court held that whether an employee was acting within the scope of his employment is a question that is committed by statute to the attorney general and is, therefore, not subject to arbitration under the CBA. The Supreme Court affirmed the trial court’s permanent injunction blocking the proceedings under the CBA.

Turning to the question of the attorney general’s authority, the Supreme Court described past cases upholding that authority of the attorney general to carry out the functions of his office, citing both the statutory and common law authority of the office. In this case, the Supreme Court found that the express statutory language of the Governmental Tort Liability Act permitted the attorney general to decline to defend Trooper Taylor if his conduct was outside the scope of his employment or was willful misconduct. The attorney general had based his decision on Trooper Taylor’s nolo plea and indictment by a grand jury as well as on the video recording of his assault on Monsanto. This information was ample for the attorney general to determine whether a state employee was entitled to legal representation. The court held that whether an employee was acting within the scope of his employment is a question that is committed by statute to the attorney general and is, therefore, not subject to arbitration under the CBA. The Supreme Court affirmed the trial court’s permanent injunction blocking the proceedings under the CBA.

Washington — Younger Abstention Appropriate in Consumer Protection Case. TVI is a Washington-based for-profit company that operates Value Village stores and works with non-profit organizations to collect used goods from donors and pay charity partners for these goods. The Washington Attorney General’s Office investigated TVI and sought to negotiate a settlement of claims that TVI does not disclose to its customers the portion of sales prices paid to its charity partners. TVI brought a Section 1983 action in federal court, alleging that the attorney general violated its First and Fourteenth Amendment rights by dictating its contractual relationships and mandating disclosure of contractual terms. Nine days later, the attorney general filed suit against TVI in state court asserting claims under the state’s consumer protection and charitable solicitation statutes. The attorney general moved to dismiss the federal suit on grounds of Younger abstention, which provides that “principles of equity, comity, and federalism limit the exercise of federal jurisdiction over matters being litigated in an ongoing state proceeding.” Younger abstention is limited to 1) parallel, pending state criminal proceedings; 2) state civil proceedings akin to criminal prosecutions; and 3) state civil proceedings that implicate a state’s interest in enforcing the orders and judgments of its courts.

The Ninth Circuit has held that the proceedings must be a) ongoing; b) quasi-criminal enforcement actions or involving a state’s interest in enforcing the orders and judgments of its courts; 3) implicate an important state interest; and 4) allow litigants to raise federal challenges. The district court found that the case satisfied the first and second prongs of the test. The court held that there was an important state interest in this case, given the large consumer public and the nature of the attorney general’s consumer protection claims. The court also held that TVI could proceed with its First Amendment challenges to the attorney general’s suit in state court.

Because all the requirements for abstention were satisfied, the court turned to the question of whether the state proceeding “is characterized by bias, bad faith, harassment” or some other action that would make abstention inappropriate. One way to show bad faith is to demonstrate that the attorney general brought the state case without a reasonable expectation of success. TVI argued that the attorney general’s motive in negotiating with TVI was harassment, but the court agreed with the attorney general that “that “[t]he parties nearly settled,” and that it cannot be bad faith to engage in settlement negotiations “that involve a potential voluntary, knowing, and intelligent waiver of constitutional rights by another.” The court dismissed TVI’s action with prejudice. TVI, Inc. v. Ferguson No. C17-1845 (W.D. Wash. April 3, 2018).
Wisconsin—Control of Litigation. Wisconsin’s Regulations from the Executive in Need of Scrutiny (REINS) Act requires an agency to submit a proposed rule to the state Department of Administration, which makes a determination as to the agency’s authority to issue the rule. The governor may then approve or reject the agency rule. The Wisconsin superintendent of public instruction, an elected official, took the position that the REINS Act did not apply to him or his department.

The attorney general brought an action for declaratory judgment that the superintendent must comply with the REINS Act. When the attorney general filed the action, the attorney general notified the Department of Public Instruction (DPI) that it would assert that the REINS Act does apply, a position contrary to that of the superintendent and DPI. Attorneys from DPI entered an appearance in the case. The attorney general then filed a notice of substitution of counsel and informed DPI that the governor had requested that the attorney general represent the agency. The superintendent filed a motion to deny substitution of counsel and to disqualify the attorney general from representing the agency and the attorney general filed a cross motion to strike the appearance by the DPI attorneys.

The Supreme Court first described its supervisory authority over the practice of law in Wisconsin and concluded, “Our superintending authority over the courts and over the practice of law gives this court the power to resolve disputes regarding representation.” The Supreme Court then held that the superintendent and DPI were entitled to counsel of their choice, and were not required to be represented by the attorney general. The court stated that the attorney general’s argument would mean that the agency would be required to use an attorney they have discharged, who is taking a position with which they do not agree. The court noted that this could have ethical implications for attorneys in the Attorney General’s Office, since ethics rules require an attorney to withdraw if the lawyer is discharged.

The court also described the attorney general’s position as giving him “breathtaking power” as a gatekeeper for legal positions taken by constitutional officers, including the governor and justices of the Supreme Court. “DOJ’s position would not allow a constitutional officer to take a litigation position contrary to the position of the attorney general. We decline to adopt this view.” Finally, the court noted that the case is about the scope of the superintendent’s constitutional power. If the attorney general will not argue the superintendent’s position, the situation “would essentially leave the attorney general, and not this court, to decide the scope of the superintendent’s constitutional authority.” Koschkee v. Evers, 2018 WI 82 (Wis. June 27, 2018).
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Interested? Email Emily Myers, emyers@naag.org with your article idea. Thank you!
Domestic and Global Expansion Remains a NAGTRI Priority

JEANETTE MANNING, NAGTRI PROGRAM COUNSEL

The National Association of Attorneys General (NAAG) remains committed to endeavors that seek to expand its international reach and contacts, introduce the organization to larger audiences, provide opportunities abroad for attorneys general and their staff, and enhance its existing relationship with the U.S. Department of State. These objectives are accomplished in myriad ways, including hosting delegations, deploying abroad, attending international conferences, and offering and attending training for both domestic and international audiences. Each of these efforts has been extended to benefit state and territory AG offices and to note some of the less commonly known aspects of NAAG’s work through its branch, the National Attorneys General Training and Research Institute (NAGTRI). A few are described in this article to promote some of NAGTRI’s interesting projects while detailing additional, unique experiences for attorneys general and their staff.

Training Assistance Deployments

NAAG continues to liaise with various justice advisors from the U.S. Department of State’s Bureau of International Narcotics and Law Enforcement Affairs (INL) via its existing memorandum of understanding. In May 2018, assistant attorneys general and communications staff working in AG offices in Maryland, New York, and Wisconsin, participated in deployments to Armenia and Macedonia. Each of these deployments provided special opportunities for attorneys general staff to engage and dialogue with practitioners on improving critical aspects of the legal and justice systems that ultimately benefit key legal stakeholders and the public.

Two attorneys from the New York and Maryland AG offices traveled to Armenia and offered training assistance to approximately 50 judges, prosecutors, defense attorneys, investigators, analysts, and Ministry of Justice officials on different components involving the interpretation, critical analysis, and utilization of forensic reports. The assistant attorneys general and Armenian officials discussed similar challenges facing them in their respective jurisdictions and how the legal system can be improved for vulnerable populations. Both assistant attorneys general noted how participating in this deployment helped them to have a greater appreciation of the many hurdles facing individuals in the legal and criminal justice arenas across the world. NAGTRI would like to specially thank Kristen Bitetto, assistant attorney general from the New York Attorney’s General Office and Robert Taylor, former assistant attorney general from the Maryland Attorney’s General Office. NAGTRI also would like to thank Gail Heatherly, senior counsel, in the New York Attorney’s General Office for her assistance with pre-planning and program development.

An assistant attorney general and communications consultant with the Wisconsin Department of Justice (who previously served as its communications director) traveled to Macedonia and offered training assistance to approximately 70 public relations officers, judges, prosecutors, and Minister of Justice officials on promoting transparency and strengthening public
relations and media communications among legal professionals. The pair participated in workshops focusing on, *inter alia*, the importance of building relationships among justice sector partners and improving public relations, and the manner by which prosecutors and public relations staff work jointly on issuing press releases, holding press conferences, and properly handling social media platforms, while simultaneously protecting sensitive case information. Upon return home, both faculty members commented on the progress and engagement of the participants and noted that the deployment was a valuable learning experience for them as well. NAGTRI sends a special thanks to Christopher Leigel, assistant attorney general, from the Wisconsin Department of Justice, and Anne Schwartz, principal consultant with Schwartz Public Strategies, for their commitment and work during this deployment.

NAGTRI welcomes its relationship with INL. It especially would like to thank the INL team in the Office of Criminal Justice Assistance and Partnership who assisted with every aspect of organizing and structuring the Armenia and Macedonia visits, including Roushani Mansoor, Judith Welling, and Bryan Grulkowski. Their assistance was invaluable and properly prepared each group for their deployments.

**NAGTRI International Fellows**

Annually, NAGTRI hosts a group of elite domestic and global attorneys in its International Fellows Program. NAGTRI selects candidates from a pool of hundreds interested in participating in this popular program to explore an important, common legal issue together. The 2018 International Fellows class consisted of 23 fellows from diverse countries who focused exclusively on consumer protection issues. Specifically, the government attorneys studied how they can become empowered leaders to protect consumers against sophisticated tech scams and dangerous products that threaten the safety and security of consumers.

Government attorneys from Australia, Brazil, Denmark, England, Jamaica, Mauritius, Mongolia, Nigeria, Rwanda, South Africa, Taiwan, Thailand, and the United States, participated in the eight-day program where fellows visited in Washington, D.C., and New York. While in Washington, the fellows had the opportunity to meet and learn from an esteemed group of presenters, including U.S. Attorney General Jeff Sessions and experts such as Frank Abagnale and Daniel Marti, among other accomplished speakers. They also had the unique opportunity to learn about our U.S. government with a meeting with the clerk of the U.S. Supreme Court and a tour of the courtroom, a meeting with a congressional member and a tour of the
U.S. Capitol, and a meeting with officials at the Federal Bureau of Investigation and a tour of its museum.

The intensive learning experience culminated with the fellows collaborating in small groups to produce papers and present them before an esteemed panel in New York. Their papers and presentations provided legal and policy recommendations on subjects involving the identification of consumer scams that cross borders; prosecutorial and corporate collaboration to improve global standards; global approaches to investigate and prosecute cases; and methods to reduce the infiltration of counterfeit and dangerous products and practices.

**International Training and Engagement**

Following a competitive application process, NAGTRI selected three assistant attorneys general from AG offices in Arizona, New Mexico, and New York to travel abroad and participate in a junior prosecutor training, enabling them to develop international contacts while working on complex cases that have international elements involving organized and financial crimes. For one week in June, NAGTRI partnered with The Siracusa International Institute for Criminal Justice and Human Rights’ International Criminal Justice and International Cooperation in Criminal Matters specialization course. This was NAGTRI’s second year participating in this program, and NAGTRI Criminal Justice Instructor for Latin American Programs Gina Cabrejo accompanied the group during the training course. Participating assistant attorneys general focused on core issues concerning international and transnational crimes and worked in collaborative groups to identify problems, gaps in the law, responses to complicated legal scenarios, and develop solutions. Participation in the program has already produced results where an attending assistant attorney general noted to NAGTRI that he has already contacted an international Siracusa Institute colleague regarding a current case.
PODCASTS FOR PARALEGALS

Free NAGTRI Podcasts for Paralegals posted on the NAAG website. One set of podcasts details the intricacies of Bluebooking. Listeners will download a worksheet and hear Bluebooking Guru Kathy Carlson, legal review administrator for the Wyoming Attorney General’s Office, go through the worksheet to correct and explain proper citation methods. The Bluebooking podcast is divided into two parts. The second set of podcasts deals with Boolean research techniques. In that series of three podcasts, Kathy uses various examples of the type of research paralegals might do and describes in detail how Boolean techniques can take the researcher to the right area of a legal database.

Editorial Advisory Board Established for NAGTRI Journal

The NAGTRI Journal is the premier legal publication for attorneys, prosecutors, law enforcement, and others interested in issues addressed by and the work of state and territory attorneys general.

The NAGTRI Journal staff is pleased to welcome this month the members of a newly-formed Editorial Advisory Board, which will provide expert content advice, identify topics and special issue themes for which they may guest write, and review articles as requested, among other things. Each is serving one term, lasting three years. They are:

- **Suzanne Gage**, director of communications, Nebraska Attorney General’s Office
- **Dawn Jordan**, senior counsel, Tennessee Attorney General’s Office
- **Judy Zeprun Kalman**, general counsel and director of the AG Institute, Massachusetts Attorney General’s Office
- **Brian Kane**, assistant chief deputy attorney general, Idaho Attorney General’s Office

Thank you for your guidance, assistance and work to inform NAGTRI Journal subscribers.
About the Authors

Jeanette Manning is NAGTRI program counsel. She is responsible for initiating, coordinating, and conducting NAGTRI trainings on an array of topics, and assists with organizing many of NAGTRI’s international programs. Additionally, Jeanette currently serves as the staff liaison to NAAG’s Energy and the Environment and Civil Rights Committees and Midwestern Region. Prior to joining NAAG, Jeanette served eight years in the D.C. Attorney General’s Office as an assistant attorney general in the Family and Public Safety Divisions. She served as chief of the Neighborhood and Victim Services Section, addressing issues involving urban blight and decay to include nuisance abatement, brothel closures, and drug and firearm nuisances. Jeanette graduated from Western Connecticut State University with a degree in Justice and Law Administration and her Juris Doctor degree from American University, Washington College of Law. She is a member of the Pennsylvania and District of Columbia bars.

Kevin C. McDowell is the assistant chief counsel in the Advisory Division of the Indiana Attorney General’s Office (AGO). Kevin has been with the AGO since 2009. He served previously as the general counsel and director of the Office for Legal Affairs for the Indiana Department of Education. He was also a litigation attorney for nearly five years before assuming his responsibilities at the Department of Education. He graduated from Butler University in 1972 (B.S., Journalism/Mass Communications) and received his M.S. in Education from Butler in 1977, with an endorsement for teaching students with emotional disabilities. He received his J.D. from the Indiana University School of Law (Indianapolis) in 1981. He served in the U.S. Army from 1972 through 1974, receiving the Army Commendation Medal. He is a member of the Board of Visitors for the College of Education, Butler University, and is an adjunct professor at the University of Indianapolis, teaching School Law for Principals. He also teaches Education Law and Ethics as part of the MBA in Educational Leadership Program at the University of Indianapolis.

Judy McKee was NAGTRI program counsel and chief editor. For 10 years she oversaw the more than 95 training programs per year that NAGTRI conducts. She either facilitated the planning for new programs or designed the agendas and curricula and/or trainings with input from experienced assistant and deputy attorneys general throughout the country. She also served as an instructor at numerous NAGTRI trainings, and was the NAAG staff liaison to the Human Trafficking Committee. Judy received her JD degree, magna cum laude, from Washburn University in Topeka, Kan., a master’s degree in English from Brown University, Providence, R.I., and a BA degree in English from Dickinson College in Carlisle, Pa.

Emily Myers is NAAG antitrust and powers and duties chief counsel as well as NAGTRI program counsel. She has been with NAAG since 1993. She is the editor of NAAG’s third edition book, *State Attorneys General Powers and Responsibilities*, with the fourth edition expected in 2019. Emily is also the author of chapters on state antitrust enforcement in American Bar Association and state bar publications. As antitrust counsel, she assists states in their multistate activities and maintains the NAAG Multistate Litigation Database, a comprehensive database of state antitrust cases since 1990.

Chalia Stallings-Ala’ilima is an assistant attorney general with the Washington Attorney General’s Office (AGO) Wing Luke Civil Rights Unit. The AGO is the chief legal office with attorneys and staff in 27 divisions across Washington state providing legal services to roughly 200 state agencies, boards and commissions. The Wing Luke Civil Rights Unit works to protect the rights of all Washington residents by enforcing state and federal anti-discrimination laws. Chalia’s work involves litigating attorney general-initiated matters; representing the Washington State Human Rights Commission in enforcement cases; contributing to the AGO’s Guidance Concerning Immigration Enforcement publication and acting as a statewide resource on this issue; working on AGO amicus briefs in state and federal courts; and co-chairing the AGO Diversity Advisory Committee. Chalia is a past president of the Loren Miller Bar Association, Washington’s affiliate to the National Bar Association. Chalia volunteers pro bono legal clinic services through the King County Bar Association/LMBA. She litigated child welfare cases at the AGO for seven years before moving to the Civil Rights Unit. Chalia obtained her J.D. from the University of Washington School of Law in 2008.