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## Damon Key's Enduring Commitment to Community Service & Charitable Legal Work



*Damon Key service to Lyon Arboretum.*

If 2020 taught us one thing, it is that community connections are as vital as ever to the well-being of our society. Even as we learned to live with six feet between us, we have found ways to remain connected with and supportive of one another. At Damon Key, we haven't let the circumstances keep us from continuing to fulfill the firm's long-standing tradition of community service and pro bono work, understanding that times like these are when it matters most.

It began in 1963, when the firm's founders, Frank Damon and Henry Shigekane, established the principles which have guided us ever since. They were two very different people with diverse backgrounds and interests, but both were committed to giving back to the community. They were actively involved with non-profit organizations and service-oriented professional associations. That commitment to community endures today, as the principles, characteristics, values, drive, and spirit of the founders are reflected in a new generation at Damon Key.



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The firm has had a particularly long and fruitful history of active involvement with the Hawaii State Bar Association (HSBA), starting with Frank Damon serving as Bar President in 1968, and partner Charlie Key serving in 1989. Since then, a long list of attorneys in the firm have accepted volunteer leadership positions within the HSBA, including director Mark Murakami who served as Treasurer.

Our participation in HSBA's various programs has served as a conduit for our attorneys to provide important pro bono legal services over the years. "Pro Bono" is short for the Latin phrase "pro bono publico," which means "for the public good." In partnership with other vital community organizations and local attorneys who volunteer their time, HSBA offers numerous programs to provide legal services free of charge to those who need help but are unable to afford it. Damon Key attorneys can be found working on these important HSBA programs throughout the year:

- Legal Line provides free legal information to members of the public. Volunteer attorneys host a telephone hotline every Wednesday, and callers are able to speak with them for up to one hour on a variety of legal topics. Damon Key attorneys are active participants in this essential legal hotline.
- The Access to Justice Room at Honolulu District Court connects self-represented litigants with volunteer attorneys who provide limited legal advice on civil matters related to landlord-tenant cases, collection cases and temporary restraining orders. Prior to the Covid-19 pandemic, attorneys conducted in-person meetings, but this year they were done via telephone conference. Since 2016, Damon Key has taken responsibility for the Access to Justice Room for one full month each year, with the firm's attorneys taking shifts to provide advice.
- The Appellate Pro Bono Program matches volunteer attorneys with self-represented litigants who are parties to an appeal. Prequalified applicants must be involved in cases limited to non-criminal appeals in specific types of civil matters, including foreclosure, summary possession, employment discrimination, workers' compensation, wrongful termination denial of unemployment benefits, state tax appeals, probate matters, and paternity and non-married custody cases. Damon Key is a regular participant in this vital program, taking on pro bono cases where there is a good match with our abilities. Our participation not only provides our pro bono clients with top-level appellate representation, but the program further serves as a valuable opportunity for the firm's younger lawyers to gain experience in our appellate courts.



*Damon Key was honored by the Hawaii Supreme Court for its work at the Access to Justice Room at Honolulu District Court.*



*Damon Key partners Christine Kubota and Michael Yoshida present a check to the Hawaii Food Bank as part of the Hawaii State Bar Association's fundraiser.*





*Damon Key service to Habitat for Humanity*

*...the principles, characteristics, values, drive, and spirit of the founders are reflected in a new generation at Damon Key.*

One such match occurred last year when Damon Key attorney Joanna C. Zeigler volunteered for an HSBA Appellate Pro Bono case. It was an important case that Joanna briefed and argued before the Hawaii Supreme Court. Joanna contended that a Family Court judge on Maui should have wide latitude in facilitating the settlement of a child custody dispute. She argued that such latitude was especially justified when the best interests of a child was at the core of the case. While a written decision from the Supreme Court has not yet been issued, Damon Key is proud to have helped provide access to justice for a citizen in need, and to further development of the law.

"When it comes to pro bono help, the services of an appellate lawyer are not usually available," Joanna noted. "That is why we are frequent participants in this HSBA program which connects our appellate specialists with deserving clients," she added. Damon Key attorney Ross Uehara-Tilton also provided pro bono services to another client in an appeal now pending in the Intermediate Court of Appeals. And attorneys Veronica "Nica" Nordyke and Mark Murakami successfully represented a Big Island voter in a case establishing fair statewide standards about the timing of election challenges.

Damon Key attorneys serve with many different community and professional organizations, in varying capacities. No matter the non-profit name or volunteer title, our goal is to help improve the lives of those in need.

Here is a list of some of the many organizations and programs in which we have been engaged:

Access to Justice  
Aloha United Way  
Blood Bank of Hawaii  
Blue Planet Foundation's Young Professional Ambassador Board  
Catholic Charities Hawaii  
Chinese Chamber of Commerce of Hawaii  
Court Appointed Special Advocates (CASA) volunteer program to help abused & neglected Hawaii children  
Easter Seals Hawaii  
Friends of Lyon Arboretum  
Goodwill Industries of Hawaii  
HSBA Appellate Pro Bono Program  
HSBA Legal Line Hotline  
Hakalau Forest  
Hawaii Baptist Academy Alum Association  
Hawaii Foodbank

Hawaii Low Income Taxpayer Clinic  
Hawaii Public Radio  
Hawaii State Judiciary, Kids First Hawaii Program  
Hawaii Senior Life Enrichment Association  
Honolulu Hiroshima Kenjinkai  
Honolulu Japanese Chamber of Commerce  
I'm A Bright Kid Foundation  
Japan-America Society of Hawaii  
Japanese Cultural Center of Hawaii  
Japanese Women's Society Foundation  
KCCA Preschools of Hawaii  
King Kamehameha V – Judiciary History Center  
Lyon Arboretum  
Make A Wish

Mid Pacific Institute  
Ohu Ohu Koolau  
Pacific Legal Foundation  
Palolo Chinese Home  
Pan Pacific Festival  
Punahou School  
St. Ann School, Kaneohe, School Board of Education  
United Japanese Society of Hawaii  
Volunteer Legal Services Hawaii  
Waiālae Country Club, contributes to charitable causes through the Friends of Hawaii Charities in connection with the Sony Open in Hawaii

# Nicholas (Nick) Ernst Joins the Firm!

## Former School Teacher Brings Passion for Speech & Debate

**N**ick Ernst spent the past 13 years of his life molding young lives as a speech teacher at Kamehameha Schools, his high school alma mater. In that time, he discovered that nothing inspires better or opens more doors than a passionate teacher. Yet, there was always something pulling at him inside, making him wonder if there was something further to pursue in life. A lover of learning, Nick ultimately decided to transition to a career in law.

"I wanted to serve my community with their legal needs because there is probably nothing more intimidating, confusing and challenging as the law," said Nick. "I wanted to be able to provide the relief one feels knowing that they have an advocate fighting on their behalf."

After studying law while continuing to teach full-time, Nick earned his degree from the University of Hawaii, William S. Richardson School of Law. He recently joined the firm as an Associate, practicing in the Trial & Appellate Litigation, Arbitration & Mediation practice groups.



"We are pleased to welcome Nick to the firm as he transitions from a career in service to Hawaii's youth to one that serves the broader community with its complex legal needs," said Damon Key Vice President Michael Yoshida. "Nick's extensive experience and success in the area of speech and debate, including on his law school's moot court team, will serve him well in effectively tackling disputes within the court system, on behalf of our clients."

While in law school, Nick was a member and captain of the Native American Moot Court Team, a teaching assistant for Contracts I & Contracts II, and a member of Phi Delta Phi, an international legal honor society. In 2018, he and his partner were awarded first place for their written brief in the National Native American Law Students Association Moot Court Competition. He and his partners were also semifinalists in the 2018 and 2020 moot court competitions. He also earned a certificate from the Ka Huli Ao Center for Excellence in Native Hawaiian Law.

Nick was a summer associate at Damon Key in 2019, assisting with various legal tasks. Prior to that, he held an externship with Judge Rhonda Nishimura of the First Circuit Court, where he wrote briefs for motions and hearings in personal and commercial civil actions. He also held an externship with a Honolulu law firm, gaining further research experience.

Nick joined the teaching staff of Kamehameha Schools in 2007. He was a teacher in the school's Speech Department, teaching Honors Value Debate, Electronic Media and Communication Technology, Honors Interpretation and Public Speaking, and other communication-related courses. Nick is credited with introducing a new broadcast journalism course focused on video and radio broadcasting.

*Continued on page 5*

According to Nick, he remains very passionate about education – particularly for Native Hawaiian children. After spending countless hours motivating, counseling, and inspiring students to chase their dreams and aspirations, he is pleased to have made his dream of becoming a lawyer a reality. “There isn’t a moment that goes by when I’m not learning something new about how marvelously complicated the world is. Now, I’m able to help make someone’s life a little easier by taking those complications head on and fixing things for them,” said Nick.

One of Nick’s most inspiring experiences on his way to becoming an attorney took place in his Environmental Law Clinic class. “Our class went to Wai’oli Valley to assist mahi’ai kalo (taro farmers) with some of the legal challenges they were still facing recovering from the 2018 floods,” explained Nick. “They were so grateful for what we could do for them and it felt so good knowing I could put someone’s mind at ease with research and hard work, especially since they put in so much hard work and aloha into their lo’i.”

Nick’s work in the Native American Moot Court competition also stands out as quite memorable. “I was so lucky to have such amazing partners and teammates – brilliant legal thinkers who I am quite proud to call my friends. It was such a privilege getting to study about the legal issues for other indigenous people in America,” said Nick. Taking on the enormously time-consuming task with his like-minded classmates made it a wonderful experience. “The hard work also felt worth it when we brought trophies back home,” he added blissfully.



*Nick at the National Native American Law Students’ Association’s Native American Moot Court Competition last year at Berkeley.*

Nick remains a volunteer speech and debate coach for Kamehameha Schools and is also active with the Hawaii Speech League (HSL), an organization dedicated to speech activities for public and private school students across the state. He introduced Congressional Debate to the HSL, a type of competition that has students emulate members of the U.S. Congress by debating bills and resolutions which they prepare in advance.

Nick holds a B.S. in Journalism & Mass Communication from the University of Colorado, Boulder. While there, he became a co-Emmy award winner (2006 Student Division), for the documentary *Destination Pluto and Beyond*. He was born in Pampanga, Philippines, and raised in Kailua, where he resides today. Beyond coaching speech and debate, Nick also enjoys watching movies, reading, playing with his dog and enjoying all types of food.



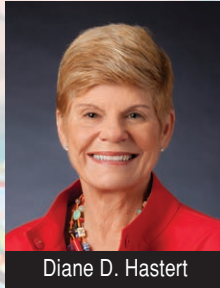
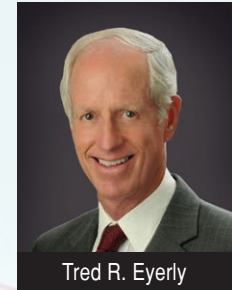
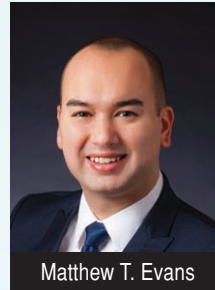
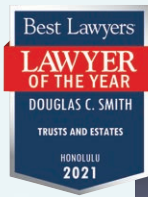
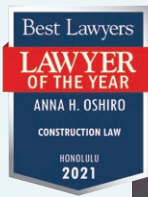
*Nick and wife Keri*



*Mount Pilatus, Switzerland*



# 2021 "Lawyers of the Year" & The Best Lawyers in America®



## Experienced. Innovative. Dedicated.

Congratulations to Anna H. Oshiro and Douglas C. Smith on being selected Lawyers of the Year and our colleagues on being selected to the latest edition of The Best Lawyers in America®. For over 50 years, our firm has provided superior service and innovative solutions assisting individuals, families and businesses with their legal needs.

### Anna H. Oshiro

Arbitration  
Construction Law  
Government Contracts  
Litigation – Construction  
2021 Lawyers of the Year:  
Construction Law

### Douglas C. Smith

Litigation – Trusts & Estates  
Tax Law  
Trusts & Estates  
2021 Lawyer of the Year:  
Trusts & Estates  
2015 Lawyer of the Year:  
Litigation – Trusts & Estates  
2013 Lawyer of the Year:  
Trusts & Estates

### Matthew T. Evans

Litigation – Real Estate

### Tred R. Eyerly

Insurance Law  
Litigation – Insurance

### Diane D. Hastert

Arbitration  
Commercial Litigation  
Litigation – Real Estate

### Christine A. Kubota

Corporate Law  
Employment Law –  
Management  
Real Estate Law  
2013 Lawyer of the Year:  
Corporate Law

### Gregory W. Kugle

Aviation Law  
Commercial Litigation  
Construction Law  
Land Use & Zoning Law  
Litigation – Construction  
Litigation – Land Use & Zoning  
Real Estate Law  
2017 Lawyer of the Year:  
Litigation – Land Use & Zoning  
2013 Lawyer of the Year:  
Land Use & Zoning Law

### Kenneth R. Kupchak

Construction Law  
Corporate Law  
Eminent Domain & Condemnation Law  
Litigation – Construction  
Litigation – Land Use & Zoning  
Real Estate Law  
2017 Lawyer of the Year:  
Eminent Domain  
& Condemnation Law  
2015 Lawyer of the Year:  
Litigation – Land Use & Zoning

### Na Lan

Real Estate Law

### Mark M. Murakami

Commercial Litigation  
Eminent Domain & Condemnation Law  
Land Use & Zoning Law  
Litigation – Real Estate  
Litigation – Trusts & Estates  
Real Estate Law  
Trusts & Estates  
2013 Lawyer of the Year:  
Eminent Domain & Condemnation Law

### Michael A. Yoshida

Business Organizations  
(including LLCs and Partnerships)  
Construction Law  
Mortgage Banking Foreclosure Law  
Real Estate Law

### Madeleine M.V. Young

Litigation – Trusts & Estates



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Alliance of Independent Business  
Law Firms in More Than 80 Countries

# They Are Not “Pets”

## HUD Guidance on Assistance Animals

By Na Lan



**A**ssistance animals include service animals and emotional support animals. They are not “pets” according to the U.S. Department of Housing and Urban Department (“HUD”), which is the agency that oversees the law enforcement and investigates claims of housing discrimination. House rules or community restrictions normally applied to pets cannot be applied to assistance animals.

In recent years, many pet owners have been abusing the system by obtaining phony certifications or letters from online therapists to avoid paying fees or to get permission to bring pets where they won’t normally be allowed. We have also read enough stories in the media regarding owners of various exotic animals pushing the envelope, e.g., an emotional support peacock seeking to board an airplane, a therapy alligator seeking entry into a senior’s center, and a comfort pig seeking admission into a restaurant.

Under the federal and state Fair Housing Act (“FHA”), condominium and community associations are obligated to provide reasonable accommodation for a person with a disability who makes a request for an assistance animal. When considering such a request, the Association Board may ask two questions: (1) Does the person seeking to use and live with the animal have a disability, if it is not apparent; (2) Does the person making the request have a disability-related need for the requested assistance animal?

In other words, does the animal work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or some symptoms or effects of a person’s existing disability? If the answers to both inquiries are “Yes”, the association has to approve the person’s request; otherwise it will face severe legal consequence for violation of the law.

To illustrate, in March of 2019, a federal court imposed a judgment of \$350,000 in compensatory damages, \$285,000 in punitive damages and awarded Mr. & Mrs. Sanzaro’s attorney’s fees and costs against their homeowners association named Ardiente in Las Vegas, Nevada, for the association’s

violation of the Fair Housing Act by denying the plaintiffs the ability to bring a service dog into the clubhouse on three different occasions and subsequently harassing them after denying their request for a reasonable accommodation, including but not limited to assessing fines, sending letters, and placing a lien on their unit for unpaid fines.

The challenge faced by Association directors and property managers on this issue has been the ambiguity on what constitutes proper supporting documentation for assistance animal requests. Over 30% of all FHA complaints are those involving assistance animals. On January 28, 2020, HUD issued new guidance clarifying the step-by-step best practice for FHA compliance when assessing accommodation requests involving animals and when associations can request more information or documentation regarding a disability and disability related need for an assistance animal.



*Continued on page 8*



Here is your readers' digest version of the HUD notice FHEO-2020-01:

### **Service Animals**

- When it is readily apparent that a dog is trained to do work or perform tasks for the benefit of an individual with a disability, do not make any further inquiries because the dog is a service animal.
- When it is not readily apparent, the association may only ask two questions: (1) is the animal required because of a disability? (2) What work or task has the animal been trained to perform? Do not ask about the nature or extent of the person's disability, and do not ask for documentation.
- If the answer to question (1) is "yes" and work or a task is identified in response to question (2), grant the requested accommodation because the animal qualifies as a service animal.
- If the answer to either question above is "no" or "none", the animal does not qualify as a service animal but may be a support animal which the association should further assess per the following guidance.

### **Assistance Animals other than Service Animals**

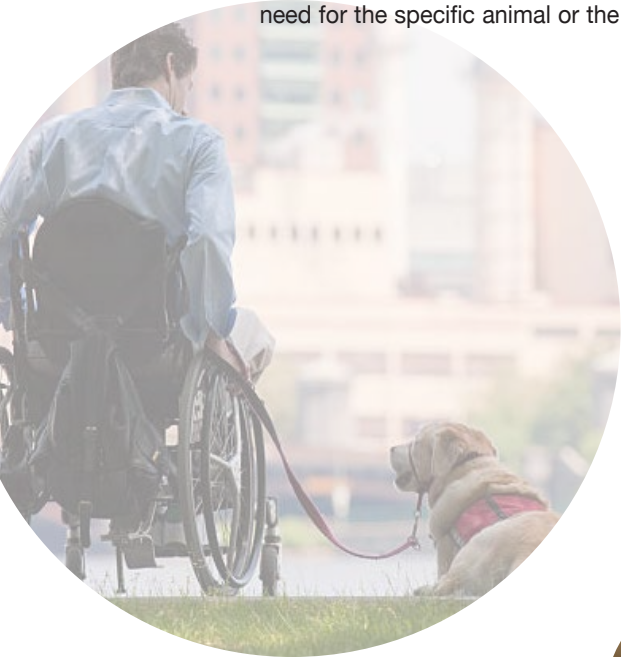
- A request for reasonable accommodation may be oral or written; it may be made by others on behalf of the individual; it may be made either before or after acquiring the assistance animal.
- When the person has an observable disability or the association has information giving it reason to believe that the person has a disability, the association may request that the person requesting the accommodation provide information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to such person's disability. The association is not entitled to know an individual's diagnosis.
- If there is no observable disability or the association has no information giving it reason to believe that the person has a disability, the association is not required to grant the accommodation unless the person requesting the accommodation provides information that reasonably supports that such person has a disability, but the association cannot deny the accommodation until the requester has been given a reasonable opportunity to do so.
- HUD takes the position that documentation from certain websites, which sell certificates, registrations, and licensing documents for assistance animals to anyone who answers certain questions or participates in a short interview and pays a fee, is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal.



*Continued on page 9*



- HUD also acknowledges that many legitimate, licensed health care professionals deliver services remotely, including over the internet. One reliable form of documentation is a note from a person's health care professional that confirms a person's disability and/or need for an animal when the provider has personal knowledge of the individual.
- The association is not required to grant the accommodation unless the person requesting the accommodation provides information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual's disability, but cannot deny the accommodation until the requester has been provided a reasonable opportunity to do so. A relationship or connection between the disability and the need for the assistance animal must be provided. The lack of such documentation in many cases may be reasonable grounds for denying a requested accommodation.
- The association may not insist on specific types of evidence if the information which is provided or actually known to the association meets the requirements of the HUD guidance. The association also may not require a health care professional to use a specific form to provide notarized documents, to make statements under penalty of perjury, or to provide an individual's diagnosis or other detailed information about a person's physical or mental impairments.
- If an individual is requesting to keep a unique type of animal that is not commonly kept in households, e.g., reptiles (other than turtles), barnyard animals, monkeys, kangaroos, or other non-domesticated animals, HUD emphasizes that the requester has the substantial burden of demonstrating a disability related therapeutic need for the specific animal or the specific type of animal.



**For more information on this article, please call Na at 531-8031, or email her at [nl@hawaiilawyer.com](mailto:nl@hawaiilawyer.com).**

# Attorney Cheyne Yonemori Joins the Firm!

## Joint Degree Holder Brings MBA Skills to Legal Practice

**W**hile growing up, Cheyne Yonemori always held the idea of becoming an attorney in the back of his mind. His maternal grandmother, who raised a family in the deep countryside of South Korea, had dreamed of having a lawyer in the family. As a result, Cheyne recalls a distinct generosity and sense of compassion that was engendered in his mother and the rest of his family. In Cheyne's gap year between high school and college, he spent time in Korea. While there, he befriended an attorney from Singapore who became a mentor, leading to Cheyne's commitment to the idea of becoming an attorney.

Today, Cheyne is Damon Key's newest Associate, practicing in the firm's Business & Commercial Law, Trusts & Estates, Condominium & Community Association Law, and Insurance Coverage Litigation practice groups. He earned his Juris Doctor (J.D.) degree from the University of Hawaii, William S. Richardson School of Law, while simultaneously earning his Master of Business Administration (MBA) from the University of Hawaii, Shidler College of Business. It seems that Cheyne has more than fulfilled his grandmother's dream.

"We are pleased to welcome Cheyne to the firm and trust that the combination of his legal and business management skills will serve our clients well," said Damon Key Vice President Michael Yoshida. "Also, his working proficiency in Korean is a welcomed addition to the spectrum of languages already represented among our diverse attorneys."

While in law school, Cheyne received the CALI Excellence for the Future Award, given for the highest score achieved in the class Organizing for Social Change. He was an intern with the Department of Commerce and Consumer Affairs, Division of Financial Institutions, where he researched and wrote on a range of legal issues and created the first draft of an excel spreadsheet tool for Hawaii's small dollar lenders.

Cheyne was also a summer law clerk at a top-10 South Korean law firm. He worked in the international transaction and cross-border dispute resolution department, where he conducted research for international litigations, wrote memoranda for complex cross-border legal issues, and assisted in the drafting and reviewing of contracts between multinational corporations. He also served as a volunteer law clerk with the Legal Aid Society of Hawaii, where he assisted with legal research in support of low-income clients and created educational materials.

After receiving his law degree, Cheyne was an Associate Attorney at a Honolulu law firm. During his time there, he managed all aspects of pre-trial litigation, including discovery, litigation strategy, legal research, drafting of motions and other pleadings, and advising clients of their legal rights. Prior to that, he was a Bank Secrecy Act Analyst at Central Pacific Bank, conducting regular investigations into suspicious customer activity and working to ensure compliance with strict legal standards.



*Continued on page 11*

*"I enjoy tackling new challenges, learning new things and providing valuable legal services to clients."*



*Weekend hike at Wiliwilinui Ridge Trail*



*A day off at Kahala Beach*

While pursuing his degrees, Cheyne was also a freelance Online Marketing Manager for Tripsola, a Hong Kong based startup. In just over one year, he doubled the company's online following by facilitating cross-marketing opportunities. He also developed marketing campaigns to enhance customer interaction with the company through its social media platforms.

Cheyne looks fondly upon his time at the William S. Richardson School of Law (WSRSL). "Many of the most prominent lawyers in our state have graduated from the WSRSL. The school has a long history of diversity and inclusiveness that I wished to be a part of," said Cheyne. When he learned about the JD/MBA Joint Degree Program offered at UH, he jumped at the chance to not only better understand the world of business, but to obtain a degree that would complement his future legal practice.

"My parents were small business owners, and the world of business operations had simultaneously fascinated and confused me," explained Cheyne. He believes that the knowledge he gained in the MBA program will help him provide important perspectives to the firm's clients. "In law school, you're taught all about being a zealous advocate for your clients. Very often, the success of a zealous

advocate is measured as a win in the short term. The business-oriented perspective that I've gained from my MBA allows me to understand that 'winning' for business clients isn't always about getting the best deal or the most money, but about maintaining friendly and mutually beneficial business relationships for the long term."

Cheyne was born and raised in Hilo, Hawaii, and earned his B.A. in Linguistics, Communication, with a minor in English, from the University of Hawaii at Hilo. While there, he received certificates in Chinese Studies, Global Engagement, and Teaching English as a Second Language. Cheyne has a working proficiency of the Korean language, with the ability to speak, read and write at an intermediate skill level. In his spare time, he enjoys hiking, photography, and trying new places to eat.

According to Cheyne, he looks forward to the fast-paced environment of the Damon Key law office, which he says suits his personality well. "I enjoy tackling new challenges, learning new things and providing valuable legal services to clients." We're certain that Cheyne will find his fit at Damon Key.



# Do Schools have the Authority to Address Off-Campus Speech?

By Nicholas Ernst



Cautious parents and schools may still prefer that students remain in the safety of their home rather than gather in classrooms on campus. And while I have not been a teacher in a classroom since March 2020, I can say confidently that even with the most vigilant supervision, ensuring that students are staying socially distanced or utilizing the best COVID hygiene practices will never prevent the occasional, but certain, student sneaking a hug from her best friend or sharing just a bite of a snack with a starving pal. After all, as the *Federalist Papers* famously penned, if all students were angels, no school would be necessary – I may have taken some liberties with that quote.

As schools were forced to move into virtual spaces, we may see a restructuring of how students learn after the pandemic – long after the dangers presented by the close quarters of a classroom in the time of COVID have subsided. But as students increasingly conduct their school business online, teachers and administrators are left struggling with how to manage misbehavior. And, one Pennsylvania school district is requesting guidance from the U.S. Supreme Court.

In 2017, Mahanoy Area High School had a ninth grade student who did not advance to the varsity cheer team and had to stay in junior varsity the next school year. She did not take it well. Upset, the ninth-grader took to Snapchat, where she made an expletive filled post with matching gestures which was visible to about 250 other “friends” many of whom were fellow cheerleaders. When word got back to her coaches, particularly since “cheer” was the target of one of the expletives, she was suspended from the team for the upcoming school year – a decision the high school’s administrators supported.

The student took the school to court under 42 U.S.C. § 1983 saying her suspension violated her First Amendment rights, and she prevailed at the District Court and the Court of Appeals for the Third Circuit. And on January 8, 2021, the Supreme Court granted Mahanoy Area School District’s petition to be heard before the highest court in the country.

As the Third Circuit Court of Appeals stated, the First Amendment’s “deceptively simple words have spun off a complex doctrinal web,” particularly for students. In their decision, the Third Circuit visited the landmark school-speech cases of *Tinker v. Des Moines Independent Community School District*, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* as well as “canvassed” their sister circuits for recent cases involving student speech and social media.

Ultimately, the Third Circuit decided that suspending the ninth-grade cheerleader from the cheer team infringed upon her First Amendment right to free speech because her conduct occurred “off-campus” and the school had no right to control her there. She was not at a school sponsored event, she did not post her comments on a school-sponsored forum, and she did not use school resources to make the post. Her speech did not encourage drug use, and, despite her posts ultimately making their way back to campus officials, the teenager’s message was posted on Snapchat for temporary viewing and brought to school by another student, not the originally posting teen. By punishing her for this post, the school unnecessarily reached beyond the schoolhouse gates and into her home to control her behavior, ruled the Third Circuit Court.



Continued on page 13



This can leave school officials with a level of unease. A sad reality of education has been managing students' digital conduct, and cyberbullying remains a pervasive and harmful issue schools are forced to confront. Teachers and administrators may see decisions like the Third Circuit's as a hand-tying of much needed authority to regulate student conduct, particularly since the boundaries of bullying have blurred online. After all, schools are in a unique position to reach out to children to provide both guidance and consequences for cyberbullying. But those who would oppose such school intervention (like the Third Circuit) could see issues like this more appropriately handled by parents, and by allowing the school to punish the cheerleader, courts could potentially give school administrators too much discretion to "quash student expression."

And while this scenario presents facts that may make siding with the ninth grade cheerleader understandable, the lines delineating regulated school speech could easily blur with simple tweaks to the story. What if the student posted the information from home using a school-issued laptop? What if the messages were on a more permanent platform like Tik Tok or Instagram instead of Snapchat? What if the student posted a message away from school on the weekend but in a shirt with the school mascot on it? What if instead of suspension, the coaches kept the student from stunts involving other teammates out of fear the team might "accidentally" hurt their disparaging peer? What if the student's message was through a Zoom chat, intended for only one other student while they were working on a school project? As the Third Circuit pointed out, different courts have turned out different results.

Which is probably why the Supreme Court decided to take on this matter. As a former high school speech teacher, I am familiar with the trouble in which students find themselves regarding technology and social media. On a few occasions, students required discipline and it was almost always an uncomfortable conversation, but one very specifically designed to make sure students learned from their actions. The Supreme Court now has the opportunity to shape the way these conversations will look by answering the question of whether schools have the authority to address off-campus speech.

In the meantime, schools can learn from this example to bolster their own digital education programs. It is essential for schools to stay as current as possible. Many students cycle through apps fluidly, and the list of which apps are popular and which are not is constantly changing. Student dialog is constantly changing at an increasing rate as well. Teachers and administrators who invest time learning digital lingo can help identify cyberbullying or other digital threats efficiently and before consequences become too severe.

As for parents, supervision is key. There is so much information out there adults can't even get it right. Children cannot be expected to discern between what is appropriate and inappropriate without guidance. Next, parents can communicate with teachers. Good teachers are never too busy to engage in dialog with parents. Teachers are in the trenches and have access to information about students that parents do not. Some parents get defensive when students receive poor progress reports, but if teachers feel comfortable engaging in conversations with parents, information can flow more freely regarding student discipline and success.

As for students, particularly my former students who might be reading this right now, digital identities are very much a part of your actual identities. And just like everyone is allowed to form impressions about you when they see you on the street, they are allowed to do so when you post things online. I know students know this much already because so many have commodified their popular online personalities with dance moves or live video game feeds. But having an impression of someone you encounter in person is naturally impermanent, unlike a digital impression which can be saved, screenshot, and shared to anyone for however long the person holding the information desires.

The Supreme Court's guidance may be decided narrowly, giving rise to an analysis of very specific facts on a case-by-case basis. However, a more general decision could have lasting effects on the way we understand free speech and the power it wields when it's amplified online. Ultimately, the goal for schools remains the same. Ensure the safety of students to allow them to flourish while they learn.

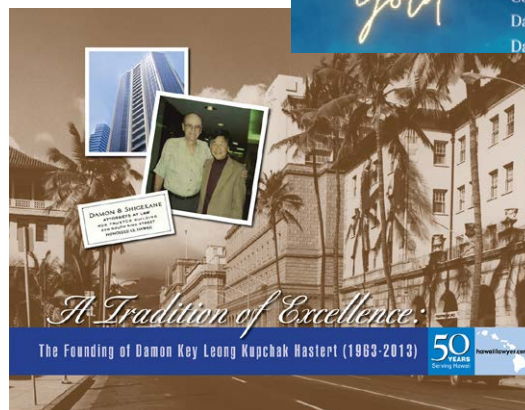
**For more information on this article, please call Nick at 531-8031, or email him at [ne@hawaiilawyer.com](mailto:ne@hawaiilawyer.com).**



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**Nicholas Ernst** sworn in as an attorney.

**Christine A. Kubota** was on the webinar panel East Meets West: A Cross-Cultural Journey. As part of the US-Japan Council's "Regional Women in Leadership" series, this panel dove into topics such as differences in market expectations and leadership styles between the United States and Japan, and discussed mentorship and insights on women's issues.



Top left: Christine Kubota, top right: Deidre Tegarden, moderator, bottom left: Kyoko Kimura (Director of Owner Relations at Marriott Vacations Worldwide), bottom right: Yolanda Tsuda (Professor of Global Studies Program at Kobe College in Japan).