

Administration of Justice

Issue: Uniformity of docket fees.

KBA Position: The Kansas Bar Association supports a uniform docket fees as imposed by state government.

Explanation: Since docket fees are placed in the State General Fund, there is a trend among lawmakers to seek higher docket fees to fund a variety of pet projects for which separate general fund appropriations are not made. In recent years those projects have included funding of juvenile jail facilities, law enforcement training center construction, and even rural emergency medical services.

The appropriate use of money collected from docket fees, fines and forfeitures is to partially fund the judicial system. The remainder of the judicial budget should come from the state general fund because of the important role the judicial system plays in government. The KBA believes that since docket fees go to the general fund, the general fund should provide salaries of judges and judicial personnel. Increases for salaries should come from the general fund without a corresponding increase in docket fees.

We oppose use of docket fees for any non-judicial or other purpose not supportive of the judicial branch. We oppose increases in Chapter 61 filing fees for judicial salary purposes, since that would be an indirect tax on the business community for a program all Kansans should support through general taxes. In addition to being a cumbersome means of addressing the need for more state revenue, allowing the judicial branch to levy docket fees and fines as a means of generating revenues to support non-judicial programs may be a delegation of legislative taxing power to the courts in an improper and perhaps unconstitutional manner.

Issue: Diversity jurisdiction.

KBA Position: The Kansas Bar Association opposes modification or abolition of diversity jurisdiction in the federal courts of the United States.

Explanation: Federal diversity jurisdiction is granted pursuant to Article III of the United States Constitution. The sole reason for limiting such jurisdiction is to reduce the case load of the federal courts. The purpose of the constitutional clause, however, and the federal statute, is to promote justice, regardless of how hard the courts must work or how many new judges must be added. Uniformity of the enforcement of law is the polestar of a democratic system of justice.

To expect state courts to uniformly interpret hundreds of laws from other jurisdictions is unreasonable. Proponents of abolishing diversity jurisdiction contend it will save the government \$8.8 million by sending 45,000 cases into state courts. However, overloading the state court systems causes an increase of expenses to state taxpayers and litigants. It requires more judges and more local court expenses. Federal judges in Kansas are often better staffed than state judges. To off-load some of the federal caseload onto state judges works an inequity on the state court system.

Issue: Civil Liability for Shoplifting by Minors.

KBA Position: The Kansas Bar Association opposes creating civil liability for the parents for minors who shoplift.

Explanation: The 1993 legislature enacted a civil penalty law against adult shoplifters, allowing merchants to collect damages, penalties and attorney fees and costs without need of a criminal conviction. It was intended to move shoplifting cases out of prosecutorial arenas and into the civil damages arena because, the business community alleged, shoplifting was not the sort of crime that had a high priority among prosecutors.

The 1998 legislature saw an attempt by the business community to expand 1993 policy by making parents responsible for the civil fines and penalties for the shoplifting of their minor children. This is a well-intentioned law that would be a nightmare on the courts.

First, the law makes a parent responsible for the actions of the child. Most of these children know what they are doing, and unless committing the act at the request of the parent, do so without the parent's knowledge. We do not foster personal responsibility by making parents responsible for shoplifting of teens. In fact, since no criminal action against the minor is required before suing the parent, the merchants can make parents liable without subjecting the whole allegation to the safeguards of the criminal justice system, including proof beyond reasonable doubt.

Second, the law does not define who is a "parent" under the act. Does the phrase include custodial parents only, noncustodial parents, grandparents, or step parents? Are grandparents who are parenting the child in the absence of the real parents be relieved of liability because they are not a biological "parent." What if an uncle is raising the child. Or the child is staying with an uncle in Kansas but actually lives in Missouri? Murphy's law, when applied to legislation, is that it is always the unintended consequences of legislation that finds its way into law books.

Third, the bill is not about parental accountability. Even good kids get caught up with a bad crowd. The key is whether there is a pattern of misconduct. Under the proposal, even model students would sock the parents with the costs, even if a parent takes all suitable precautions. If parental accountability is truly the purpose of the bill (and not merchant reimbursement), then the proposal should allow judges to suspend collection of shoplifting judgments so long as the parent makes sure the child does not shoplift again. Otherwise good, successful parents are treated like everyone else.

Fourth, the law ignores the realities of peer pressure. What if a 17-year-old gets a 14-year-old to shoplift, and the younger teen is caught. Are the parents of the 14-year-old the only ones responsible to the merchant? Do the 14-year-old's parents have the right to cross-claim the other child's parents to set true accountability?

Fifth, under the proposal civil damages can be assessed against the parents even if the merchandise is recovered undamaged, and can still be marketed.

Sixth, the bill allows assignment of the "claim" for shoplifting from the merchant to another entity, probably a collection agency. This would promote a new cottage industry for collection agencies and collection lawyers, but how does that promote parental accountability? Ironically, the less responsible the parent is -- the more the child shoplifts -- the more money the collection industry makes. They have no incentive to work with parents on teen accountability. Nor do they have any reason to compromise a claim. The negative impact of this bill is on our court system.

Current statutes impose penalties and attorney fees on collection of bad checks and allow a similar civil collection system. If history is a guide regarding bad check laws, thousands of new shoplifting civil cases will be thrown onto the court dockets without any additional financial assistance for the system. Even though these cases generate new court costs, most of that goes to the state and is spent on non-judicial budget, even though the state has to pay the court's personnel costs. New judges are not created for implementing this bill or for the thousands of bad check cases already in the system. Courts are simply told to do more with less. A civil shoplifting bill for minors will generate a whole new set of problems.

Finally, these acts can be brought in small claims court, where parents who want to hire attorneys cannot do so. If businesses appear in that court represented by laypersons, they are engaged in the unauthorized practice of law.

Proponents argue that the civil liability for shoplifting of minors is no different than the bad check law implemented several years ago. There are in fact major differences. The bad check law impacts adults, not minors, because most minors do not have checking accounts. Further, the purpose of the civil liability for worthless check law was in part to get away from criminal prosecutions for bad checks where defendants would pay hundreds of dollars for legal representation on small checks. To insure that enforcement was high, while potential defendants avoided criminal

liability for worthless checks, the civil system introduced strong penalties and attorneys fees to the retailer for the check collection process.

This tradeoff is not present in the shoplifting proposal when applied to parental responsibility for their minor children. Ordinarily parents are not criminally liable for the shoplifting of their minor children unless the parent orchestrated the crime. Yet the proposed law imposes civil fines and penalties, and attorneys fees, on the parent, based on the theory that was present in the worthless check statute. The check law and this proposal have dissimilar backgrounds.

For all these reasons, the KBA opposes this sort of legislation.

Issue: Parental Responsibility Laws

KBA Position: The Kansas Bar Association opposes further expansion of the statutory limits on parental responsibility for the willful acts of their children.

Explanation: As a general rule, in the absence of a "special relationship" there is no duty on someone to control the conduct of a third person to prevent harm to others. A special relationship may exist between parent and child, master and servant, the possessor of land and licensees, persons in charge of one with dangerous propensities, and persons with custody of another. *Washington v. State*, 17 Kan.App.2d 518, 839 P.2d 555, 558 (Kan.App. 1992)

KSA 38-120 was originally enacted in 1959 primarily for the benefit of governmental entities in combating acts of vandalism perpetrated against schools and other governmental property. Using the special relationship between parent and child, the original act limited recovery to \$300 but property damage and did not require proof of parental neglect. Over time, amounts increased and the statute was amended to provide for maximum recovery of \$5,000.00 unless the property damage resulted from parental neglect. However, the statute has never allowed damages for pain and suffering damages.

Parental responsibility laws make good discussion, but in reality create more thorny legal problems than they are worth. Should parents be held liable for entrusting a teenager to a negligent uncle and the teen then destroys a third party's property? Who is at fault -- the parents or the uncle? Our court, in 1973, refused to extend the doctrine of imputed negligence to nonparents. That court's wisdom bears repeating here:

We have noted the decisions of this court pointing out that imputed negligence is a fiction of the law not favored by the courts. It seems clear to us that in any situation the only logical basis for the imputation of the negligence of one person to another is the right of the latter to control the acts of the former. If the doctrine of imputed negligence ever had any validity in parent-custodian situations, it should not be applied today in a world of working mothers and the universal use of babysitters. *Schmidt v. Martin*, 212 Kan. 373, 377-378 (1973)

In short, holding parents liable when they are not in direct control of, and capable of supervising and controlling, their children's activities does not make logical sense in an era when the concept of "personal responsibility" is what we try to teach our children. Expanding the ability of plaintiffs to hold parents accountable -- as the proposed bill does -- does not make sense.

The legislature, at the behest of the business community, has done by statute what the common law refused to do -- make parents financially liable for part of a plaintiffs damages caused by the actions of children solely because of the parent-minor child relationship. For this reason, the Court has narrowly interpreted KSA 38-120 to apply only when the plaintiff can prove both the intent of the children and the resulting act of the children are "willful" or "malicious." Ordinary negligence of children is not actionable under the statute. *Hanks v. Booth*, 240 Kan. 30 (1986). Making the statute unlimited as to damages will not necessarily make it easier to make parents liable. Further, many insurance companies currently list children of the parents as "insureds" under homeowner policies and thus reject coverage for intentional acts of the children that damages other persons. This leaves parents statutorily liable for damages caused by their children but without the ability to buy insurance coverage for clearly unintentional "parental neglect" on their part. Such laws are certainly not family-friendly. No other segment of

society is left without such insurance. Employers who are liable for the intentional acts of their employees can at least insure against negligence and punitive damages. KSA 40-2,115 allows punitive damage insurance if the actions arise from the insured's "employees, agents or servants." That does not apply to parent-child situations. Thus parental homeowner insurance need not insure against punitive damages.

These laws are inconsistent with other state policy. Other claims alleging negligent supervision for "other" types of defendants have met with negative results. In *Beshears et al v. USD 305*, 261 Kan. 555 (1997), our Court ruled that a School District is not liable for negligent supervision when one student assaults and injures another student at school. Under KSA 38-120, however, the parents of the attacker could be held liable but the school is absolved of any responsibility for student safety. If the concept of liability of parents comes from the duty parents have to "control" the child, this sort of anomaly makes no sense. Why should parents be held liable for the inability to control their child and schools not be?

The amendments to 1998 HB 2195 make it unclear as to what "damages" can be sought under the statute. Is it intended that pain and suffering be allowed if there is bodily injury? Can the parents be sued for lost time from work?

Finally, parental responsibility laws are anachronisms that were enacted prior to the doctrine of comparative negligence found in KSA 60-258a. KSA 38-120 allows the court to impute the negligence of the child to the parents, while not allowing the parents to compare their negligence with that of the defendant's for perhaps maintaining an attractive nuisance.

The answers to these problems is not to make damages unlimited in these sorts of actions, which due to fractured and narrow insurance laws may leave parents with unpayable debts. The answer lies at society helping parents be better parents in difficult times through a variety of new resources.

Issue: Use of Docket Fees

KBA Position: The Kansas Bar Association supports modification of our distribution system of docket fees to include only court-related funds.

Explanation: In the early 1990s, a small portion of the docket fee was earmarked, statutorily, for use of the Emergency Medical Services fund. Meanwhile, general fund budgets supporting judicial branch programs, judicial education and travel budgets, and other judicial-related programs languished or went unfunded. Most of the docket fees come from residents and businesses in the five largest counties. To "tax" these citizens with a judicial branch user fee to further what clearly is a vital executive branch service and, in this case, may be used for emergency medical service in unrelated areas of the state, is an improper use of the docket fee, and may border on delegation of legislative taxing authority to the judicial branch.

While raising docket fees is more popular than using sales and income tax revenues for various programs, if such programs have statewide appeal but do not significantly impact the judicial branch, the general fund is the appropriate source for funding. Special funds not controlled by the judicial branch or in furtherance of judicial branch operations should not be allowed to share in docket fee revenue.

Issue: Residency Requirements of District Magistrate Judges.

KBA Position: KBA supports legislation that makes the residency requirement of district magistrate judges the same as district judges.

Explanation: Under our law, if a district judge position becomes vacant by death, resignation or retirement and no attorney in the county where the vacancy occurred wanted appointed to the vacancy, attorneys willing to move to that county on or before their date of appointment could take the position. District magistrates, however, are not

subject to this residency requirement. We believe the magistrates vacancies should be treated like other judicial vacancies.

Eleven of the DMJs in Kansas are law-trained. If the DMJ residency requirement were like district judges, then more lawyers may decide to move and take such a position.

Issue: Sales tax on attorney's fees.

KBA Position: The Kansas Bar Association opposes sales or gross receipts tax on professional fees and services unless applied to all professionals.

Explanation: A sales tax historically has been imposed upon the sale of goods, not fees for services or professional services. If public policy deems it desirable that a sales tax be imposed upon fees for services and especially professional services, the KBA believes it should be imposed on all service industries, and as for professionals on all professions allowed to be incorporated as professional associations pursuant to K.S.A. 17-2707(b), not just attorneys. In addition, it should be imposed on all businesses which charge for services performed as barbers, beauty shops, etc., who do not now collect a sales tax.

The regulation of such a tax, we believe, will prove foolhardy. There will be major advantages for larger businesses who hire lawyers and CPAs as employees versus small business which must privately contract such services. Interstate collection of the tax is difficult and with regard to attorneys, attorney-client confidences could be breached by tax audits.

Most legal fees in Kansas come from the small business community, so the tax on lawyers is primarily a business tax collected by lawyers.

Issue: Mandatory Legal Malpractice Insurance.

KBA Position: KBA opposes mandatory insurance for professionals as a condition of licensure.

Explanation: While Kansas health care providers are required to carry malpractice insurance in order to practice medicine, recent problems with medical malpractice insurance available should give legislators reason to consider the problems that arise from mandatory professional liability insurance.

Most Kansas lawyers carry malpractice insurance. Oregon, the only state which currently mandates lawyer malpractice insurance, has a unified bar (as opposed to a voluntary bar association) and a lawyer-owned insurance company. At times Kansas has been a two-company state for legal malpractice insurance. Without other options available for malpractice coverage, a mandated program would leave Kansas lawyers without any commercial insurance coverage. Further, lawyers in a tight private market may have the requisite insurance on a portion of their practice which is a minor portion of their clients, yet be unable to secure insurance on the more important aspect of their practice.

The Kansas Supreme Court, as a condition of maintaining a license to practice law, could make a rule in this arena if it felt it was so justified. We believe leaving this decision to the Judicial Branch is better option, since it affects the terms and conditions under which a person practices law.

Issue: Expansion of small claims jurisdiction.

KBA Position: The Kansas Bar Association opposes further expansion of small claims jurisdiction, both as to jurisdictional amount or the number of times it may be used.

Explanation: Small claims court originally was intended to allow individuals to resolve disputes with a minimum of time and cost. Expansion of jurisdictional amounts and usage of the act has allowed the business community a usage which was not originally intended.

Inequities develop. For example, attorneys use small claims court to sue for attorney fees owed, a situation where the defendant is not represented by law-trained counsel. Or businesses can send full-time employee-attorneys into court to handle collection matters and prohibit defendants from acquiring counsel. Some corporations send non-lawyer representatives into court on the corporation's behalf, which is the unauthorized practice of law. Such illogical unfairness is a natural consequence of expanding the Small Claims Procedure act and therefore should be opposed by the organized bar.

Issue: Judicial Budget Issues.

KBA Position: KBA generally support all judicial branch budgets necessary to protect the right of meaningful access to the courts.

Explanation: The adequacy of judicial budgets is an annual problem and an important issue for all members of the Bar. Inadequate funding in recent years has led to delay in filling positions in district court clerks' offices.

In 1999, legislation was introduced that allowed the Office of Judicial Administration to submit the Judicial Branch budget directly to the legislature without going through the budget division of the Department of Administration. The Judicial Branch is the only branch of government which does not submit its budget directly to the legislature. Thus, it has two hurdles -- the first to the Budget Division and the second to the legislature itself. Instead of making decisions of what is the wisest use of resources at the judicial branch level, the legislature makes decisions based on what will stay within the executive branch recommendations for the judicial branch. We believe enactment of this new legislation would be a better budgeting basis for the Judicial Branch.

In addition, it is constitutionally possible to include an appropriation provision in a policy bill. We believe that internal legislative policy can be amended so that, absent a two-thirds vote, all bills impacting judicial branch operations or affecting crimes, criminal sentencing, criminal procedure, or civil procedure, requires the legislature to include a separate item of appropriation with the policy bill itself. Such a change in procedure is the easiest way of insuring that lawmakers know the cost of new ideas affecting the judicial branch, and forces them to pay as they go.

Additional programs given to the judicial branch to administer without adequate funding for new requirements on that branch end up depleting resources in other areas. A judicial branch inundated with criminal matters cannot expeditiously get to the civil docket either. All citizens, but especially the bar, should support adequate funding of the judicial branch budget.

Administrative Law

Issue: Judicial Enforcement of Agency Actions.

KBA Position: The Kansas Bar Association supports expansion of the Act for Judicial Review and Civil Enforcement of Agency Actions to other local units of government.

Explanation: One of the keys to the proper functioning of the Administrative Procedures Act is the concept of judicial review of such agency actions. Legislation to standardize the appellate process from administrative decisions of local units of government is a logical development of Administrative law in Kansas. The concept only extends to the appellate review procedures of agency actions of local units of government; it does not extend the Administrative Procedures Act itself to local units.

Issue: Central hearing officers, Kansas Administrative Procedures Act.

KBA Position: The Kansas Bar Association supports the creation of a central office for administrative law judges within some state office.

Explanation: When the original Kansas Administrative Procedures Act was enacted, the KBA gave it unqualified support. One of the keys to the proper functioning of the Administrative Procedures Act is the perceived fairness of administrative hearing officers. Many agencies under KAPA jurisdiction have their own procedures and appoint their own hearings officers, many from the staff of the agency itself. It is hard for litigants who have an agency appeal to believe the process is fair when the hearing officer is a paid employee of the Secretary or agency head whose decisions are being appealed. Nevertheless, in 1984, the requirement for a central independent hearing office was removed from the act.

In 1997, in SB 140, late amendments to the bill required creation of a central hearing officer office within the Department of Administration. The requirements take effect July 1, 1998. Legislation to decide where the central facility would be located is under discussion in the 1997 interim and during the 1998 session.

We believe incorporating this new requirement into KAPA would increase the perceived fairness of the act without interfering with the quality of hearing officers employed by the agencies.

While we believe the creation of a centralized entity for hearing officers is desirable, we are not wedded to doing so within the Department of Administration if another agency were better suited for that purpose. We do believe that uniformity of those agencies who fall under KAPA procedures is desirable and that if any agency is allowed by the legislature to be exempt from this centralization requirement that such exemption be allowed only on a showing of highly unusual circumstances and extremely compelling reasons justifying the exemption.

Issue: Judicial review of administrative decisions.

KBA Position: The Kansas Bar Association supports the traditional concept of judicial review of administrative decisions.

Explanation: Our system of government requires checks and balances. The Administrative Procedures Act received unqualified support from the KBA in 1984. It is also necessary to maintain appropriate checks and balances on the executive. This is done in our law through the concept of some level of judicial review of all administrative decisions.

Issue: Competitive bidding for legal services contracts awarded by governmental entities.

KBA Position: The KBA opposes the enactment of laws that require the awarding of legal services contracts by the State of Kansas or any other governmental entity on the basis of the lowest bid.

Explanation: One of the long-standing principles of the attorney-client relationship is the ability of either party to freely enter into the relationship and to terminate the relationship. Requiring governmental entities to use competitive bidding and hire low bidders substantially interferes with this principle. Quality work and workers may or may not cost more, but the client should be free to make that choice, including the choice to sacrifice quality for cost. Such a policy change could also lead to situations where the governmental entity is represented by counsel that is not adequately qualified to represent the client but who is the low bidder. Furthermore, normal court process may be interrupted by the need for the governmental entity to go through a lengthy bidding process.

The KBA supports the development of guidelines regarding the hiring of counsel of governmental entities. Criteria for hiring might include consideration for experience or expertise of the attorney of for the immediacy of a given situation. Fees of counsel should always be reasonable under applicable ethical standards. (Adopted 3-3-00)

Alternative Dispute Resolution

Issue: Binding arbitration in tort.

KBA Position: KBA prefers the current law or some form of mandatory ADR prior to litigation, but not binding arbitration in tort law.

Explanation: The Uniform Arbitration Act, KSA 5-401, provides that agreements to arbitrate disputes are binding except for contracts of insurance, employment contracts and provisions of a contract providing for the arbitration of a claim in tort.

Repeal of the exception for tort cases would allow professionals, including lawyers, to require disputes over professional services be submitted to binding arbitration if negligence occurs.

The common-law rule developed in Kansas prior to the enactment of the KUAA is that "either party may revoke the arbitration agreement at any time prior to the making of an award, even where the parties have entered into an express agreement not to revoke." *City of Lenexa v. C.L. Fairley Constr. Co.*, 245 Kan. 316, 321-22, 777 P.2d 851 (1989). In *City of Beverly v. White, Hamele & Hunsley*, 224 Kan. 386, 389, 580 P.2d 1321 (1978), the court held that where "statutory arbitration is not available, arbitration agreements are governed by the common-law rule which permits either party to revoke an agreement to arbitrate at any time prior to the time an award is signed by the appraisers and served on the party."

The Kansas Supreme Court has held the Federal Arbitration Act (FAA) preempts state laws limiting the use of the federal act, including 5-401(c)(3) exemptions, when the subject of the contract involves interstate commerce. In some instances the state exception is abrogated by federal law. *Skewes v. Shearson Lehman Brothers*, 250 Kan. 574, 824 P.2d 874, 879 (1992)

It appears in interstate commerce cases where federal law applies, the state exception already is limited. We do not see utility in having run of the mill tort cases settled by binding arbitration. Some insurance cases would preempt the limitation anyway and it would be applied primarily in professional malpractice actions.

We believe binding arbitration of a tort claim between two competent parties is something better left for a contract.

Issue: Prelitigation ADR

KBA Position: Because of the delicacy of the issues surrounding this topic, the Litigation and ADR Sections of the Bar should review such topics.

Explanation: Obviously such a proposal imposes a new layer of time and expense to all parties to litigation who end up using both ADR and judicial resources. The hope, however, would be that many claims would phase out after an ADR decision and the overall costs would even out. If there is an advantage on speed with which claims can get resolved early, insurance companies believe it costs them less, overall, if disputes are handled this way. One question, unanswered, is whether this program would be cost-effective for insurers, thus holding down overall insurance premium costs. Insurers generally believe that if they can resolve a claim as quickly as possible, by whatever means, they save money overall.

The KBA Litigation Section is exploring an expedited civil case management system, similar to Limited Actions Court, for "small" tort cases. A jurisdictional amount of damages would have to be determined. Discovery would be limited, and trials held to a judge only. On this "fast track," ADR techniques may work. But more study is needed.

Corporations & Business Entities

Issue: CPA balance sheets for business trusts.

Position: KBA supports repeal of the requirement of a certified CPA balance sheet for business trusts.

Explanation: KSA 17-2030 requires the filing of a business trust's balance sheet, certified by a certified public accountant within 60 days prior to the filing, reflecting the trust's assets and liabilities. This 1961 law has seen only one appellate case involving the statute. In it, the stated purpose of the statute was "to regulate business trusts in a manner which parallels in almost every particular the legislative regulation of corporations." If that is the purpose, then the statute needs amending to remove the requirement of the CPA balance sheet submission, since such submissions are not required by law of corporations. It is difficult for business trusts to get a balance sheet certified by a CPA within sixty days before filing the sheet with the Secretary of State's office. Business trusts do not oppose filing the sheet. It is the sixty day CPA-requirement that is the concern. It should be sufficient that the balance sheet be certified by a trustee of the business trust. Foreign corporations must include a balance sheet to register with the secretary of state. They are required to file balance sheets to register with our office.

Issue: Registered Agent filings.

Position: The Kansas Bar Association supports amendment of the registered agent law to eliminate the need for listing a county.

Explanation: KSA 17-6002(a)(2) requires the registered agent's office to be specifically listed on the addresses given in a corporation's articles of incorporation, and the statute requires listing the "county" as well as the street address. Articles which do not make such designation are technically defective and must be returned to the filer for correction, a time consuming process if that is the only technical problem. The listing of a street address of the registered agent is sufficient for the purpose of agent filings. We support such change.

Issue: Fax filings of business documents.

Position: The Kansas Bar Association supports amendment of the Limited Liability Company code to allow fax filings without need of follow-up paperwork.

Explanation: Many areas of Kansas law allow facsimile filings of important corporate or business documents with the Secretary of State's office. Typical of such filings is KSA 17-6003a, which allows the date and time of the fax filing to be effective if the document is appropriately created and filing fees are paid, so long as the original paper instrument is filed with the secretary of state's office by mail within seven days. While this paper follow-up was important in the early days of facsimile filings, technology is moving ahead and in the 21st century when we are rapidly moving to electronic filings of income taxes and other important documents in the business world, the paper follow-up requirement merely serves to waste paper and postage. The Delaware and other corporation codes are now allowing the fax filing itself to be sufficient evidence of the date and time of filing if otherwise meeting the requirements of law and the fees are paid.

We believe Kansas law should be moving in that direction. Providing this change in our law for fax filings of limited liability companies' documents is an important first step.

Issue: A new match-up limited liability company code.

KBA Position: The Kansas Bar Association supports legislation to enact a Delaware-based Limited Liability Company code.

Explanation: Kansas can claim one of the first Limited Liability Company codes in the nation after the concept was approved in Treasury Department regulations. The original Kansas statute was adopted before Delaware took any action and before Delaware became a leader in the effort to obtain wide acceptance of LLCs. Since that early adoption, the limited liability company has developed dramatically. The Internal Revenue Service has recognized the LLC as a viable form of organization with the tax attributes originally sought by its drafters. All 50 states now have an LLC statute. Since adoption by Kansas, our act has been modified on several occasions. Single member LLCs and check-a-box taxation concepts were adopted in 1998. In each case, the provisions tracked the Delaware LLC code, often verbatim.

A KBA study group recommended to the Board, and the Board of Governors adopted, a proposed revamp of the LLC code which tracks the Delaware code for the most part but varies from that code when (1) the policy of Kansas is reflected in its corporate code and varies from Delaware policy; (2) the Kansas civil procedure law varies from Delaware, or (3) the Kansas legislature has previously borrowed and altered a Delaware provision.

The changes the new act include but are not limited to:

- .. New definitions for "majority in interest" and "operating agreement" and keeps the requirement in Kansas that an LLC must use an operating agreement;
- .. Members or managers can enter into credit transactions with the LLC and those transactions remain credit transactions;
- .. managers, members, officers, employees and others may obtain indemnity from the LLC.
- .. Dispute resolution provisions for managers and the LLC;
- .. District courts may hear disputes involving LLCs;
- .. Allowance of certificates of amendment;
- .. Allowance of a one-step dissolution process;
- .. Fax filings of governing documents with the Secretary of State will be effective upon receipt without filing an original of the document.
- .. New member provisions are added;
- .. Multiple classes of ownership interests and voting rights are added;
- .. Proxy voting is allowed;
- .. Bankruptcy provisions for "member interests" are enacted;
- .. New provisions on right of access for members to LLC records, trade secret disclosures, remedies for breach of the LLC obligations, etc; and,
- .. Provides for determination who qualifies as a manager.

While there is a uniform LLC code, it has not been adopted by a majority of states. The Delaware code, being the model for most states, gives Kansas a great deal of case law to help interpret the provisions of the Code, and we thus believe the Delaware code is a better model for Kansas.

Issue: Dual filing requirement of incorporation records.

KBA Position: The Kansas Bar Association supports general legislation that conforms the Kansas corporation code to that of Delaware, and especially to eliminate the requirement of duplicate filing of corporate records in the county register of deeds offices.

Explanation: The 1998 legislature enacted a law that ended dual filing requirements of corporate documents with the Secretary of State and the Register of Deeds of the host county. Further examination of the statutes indicates other statutes which should be changed in that manner for conformity to this 1998 public policy change. We believe duplicate filing requirements should be repealed and one central filing of corporate and other entity documents be all that is statutorily required. The logical central filing agency is the Secretary of State's office.

Issue: Should financial institutions be allowed a statutory attorney fee in collection lawsuits.

KBA Position: The Kansas Bar Association supports limited change to an 1873 statute limiting attorney fees in debt collection matters.

Explanation: Since shortly after statehood, Kansas statutes have denied financial institutions the statutory right to collect a reasonable fee for their attorney when foreclosing mortgages, notes, and other evidences of debt. Kansas law holds that the legislature may allow attorneys fees to be paid by the losing party in such situations as the lawmakers deem just. Otherwise, the American rule is in place. While financial institutions have a point, they do not also desire the law to read that those persons or businesses successfully suing a bank should also have an attorney's fee.

The KBA supports the American Rule regarding attorneys fees, which denies attorney's fees to a prevailing party in a lawsuit unless expressly allowed by statute or contract. The KBA supports the rights of parties to provide by contract that attorney's fees may be recovered in a lawsuit except when the legislature determines for public policy reasons that fees should not be allowed in a particular situation, such as lawsuits over consumer loans and residential mortgages.

If the Legislature considers amendment to KSA 58-2312, the KBA believes that the statute should be amended to limit contracts for the payment of attorneys fees in consumer transactions, and then define consumer transaction to mean "any loan, credit sale or lease where the debt or obligation is incurred primarily for a personal, family or household purpose, or the debt or obligation is secured by a single family dwelling."

Issue: Contemporaneous Notice of Garnishment

KBA Position: The Kansas Bar Association supports contemporaneous notice of garnishments.

Explanation: The collection bar is concerned that litigation may soon require notice to the debtor before garnishment is allowed. This is being raised as a due process issue, allowing the debtor the right to request a hearing after the garnishment has attached but before the garnishment order is given.

The collection bar has recommended legislation, such as 1996 SB 707, to provide for a means of notice to the debtor of the fact of the garnishment sufficient to allow the debtor to validly contest the garnishment, if warranted, but not such notice as to allow the debtor to evade the garnishment. Unresolved issues have focused on who should give the notice - the collection attorney, the court clerk, the garnishee business or employer, or the sheriff's office. KBA supports these general efforts to provide debtors with a contemporaneous notice of garnishments. (Renewed 11-30-01)

Criminal Law

Issue: Expansion of misdemeanors into felonies without requiring criminal intent.

KBA Position: The Kansas Bar Association opposes creating felony crimes without requiring intent.

Explanation: Driving under the Influence of alcohol (DUI) is a problem for society. Various organizations perennially want stiffer controls on the problem. 1999 SB 195, introduced by prosecutors in order to help combat DUIs, would essentially make it aggravated battery to cause great bodily harm to another person while under the influence of alcohol. The offender's intent would not control the severity of the crime. Rather the result of the accident would determine whether the defendants were charged with misdemeanor DUI or the serious felony of aggravated battery.

Serious felonies have always required some proof of intentional or highly reckless activity where the acts were "inherently life threatening." SB 195 would allow "unintentional" acts and "attempted DUI" to be the predicate for a serious felony where a convicted person loses significant civil rights the remainder of his or her life.

This is part of a disturbing trend of making important felony crimes out of the "feelings of the victim" after the act or the results of the act rather than the traditional concept of punishing an accused for an evil act. [See the definition of date rape in KSA 21-3502 (a)(1)(C).]. Adding unintentional conduct crimes into the list of serious felonies will

snare many more persons into the harshness of prison life than ever before. For example, newlyweds on their way to their honeymoon who have had one drink at the reception (attempted DUI) and who are in an accident that disfigures the bride, the husband gets to spend the first five years of their marriage in prison. While prosecutorial discretion is available, with high intensity politics surrounding prosecutorial roles, there is less "discretion" exercised all the time. The legislature should set solid public policy, not leave it to prosecutors to decide when to arbitrarily exercise their authority in highly politically charged incidents.

Issue: Changing the age of adult accountability for crime.

KBA Position: The Kansas Bar Association opposes a blanket lowering of the age of accountability for crime from 18.

Explanation: At common law, children were presumed to be able to distinguish criminal acts at age 14. Kansas cases hold at common law, criminal responsibility for acts committed by children depended upon the age of the offender. Children under the age of 7 were conclusively presumed incapable of crime; those between 7 and 14 were rebuttably presumed incapable; and those 14 or over were presumptively capable. 21 Am.Jur.2d, Criminal Law § 38. Cited in State v. Lowe, 238 Kan. 755, 715 P.2d 404, 407 (1986).

Over the years the common law age of 14 was raised to 18. Some lawmakers want to lower the age to 16, eliminating the need to certify 16 and 17 year olds out of the juvenile system and into the adult system for prosecution. Prosecutors now have the option that if a youth is 16 or 17, charged with a felony, and has been adjudicated in two separate prior juvenile proceedings as having committed an act which would be a felony if committed by an adult, the child can be tried as an adult. Further, children as young as 14 who commit heinous and highly serious crimes can be charged as an adult regardless of prior records, if certified up to adult court by a judge. Such a certification has significant procedural safeguards. Such defendants get benefit of the right to counsel and a jury trial. The standard of proof is greater than a juvenile adjudication, which operates primarily on the civil justice system.

Adults charged with a felony have certain rights that juveniles do not, e.g. right to a trial by jury, the right to counsel in felonies and serious misdemeanors, and their adjudication is concerned criminal in nature while the adjudication in juvenile court is considered "civil." These 16-17 year olds would get those sorts of protections, too. However, they face much more difficult prison environments.

The current certification process assures that only the grossest crimes will see teenagers facing adult charges. Statistics indicate that the vast majority of children who are prosecuted in the juvenile system the first time rarely return for a second. If these persons were convicted of felonies, significant deprivations of civil rights would follow even if they never committed another offense. On balance, the KBA prefers the current system of certification than blanket criminal liability at that age group.

Issue: appeals of grants of motions for judgment of acquittal.

KBA Position: The Kansas Bar Association opposes legislation that strains already scarce judicial resources by allowing appeals of inherently weak criminal cases. Such appeals result in cases that violate double jeopardy.

Explanation: KBA has consistently opposed legislation that tends to bog down the criminal justice system. 1999 HB 2208 seeks to gain permission from a higher court to retry someone for a crime that was so weak the prosecution did not make a prima facie case. Few cases fall in this category. None are typically worthy of retrial.

A judge must insure that in criminal trials the statutory criminal procedure is followed. Due Process is given a defendant in KSA 22-3419 which allows a court on its own motion to make a judgment of acquittal of one or more crimes charged in the complaint. The motion may be granted after the case is submitted to the jury, or even after a jury has decided a case.

Such motions are rarely granted and only in very weak cases where the judge is sure reasonable doubt as to the defendant's guilt plainly exist. Courts must determine based on the evidence and giving full deference to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, that guilt beyond a reasonable doubt is not a possible result. *State v. Ji*, 251 Kan. 3 (1992)

A main component of the judgment of acquittal in state or federal court is its prohibition against subsequent prosecutions for the same offense based upon the Fifth Amendment protection against double jeopardy. *Willhauck v. Flanagan*, 448 U.S. 1323, 1325 (1980) and *State v. Ruden*, 245 Kan. 95 (1989); *U.S. v. Martin Linen Co.*, 430 U.S. 564. There is no second trial after a court determines the evidence in the first trial was insufficient. If the legislature wants to give prosecutors the authority to appeal a trial judge's judgment of acquittal in order to set future case law boundaries in those sorts of cases, we do not object. But HB 2208 would allow a retrial of the defendant after jeopardy has attached in the first trial, and that creates double jeopardy concerns as well as additional expenses to the system for a case that was weak in the first place or it would not have been a candidate for such a motion.

The founding fathers, knowing the strength of government verses the individual, wrote ten amendments to the U.S. Constitution, the declaration of rights that they felt was necessary to protect individuals from government. One of them -- double jeopardy -- is at the heart of our system. The purpose of a legislature is to give life to protect the public welfare, but within framework of the constitution.

Issue: Statute of Limitations for 1507 appeals.

KBA Position: The Kansas Bar Association opposes a one year statute of limitations for bringing 1507 actions. **Explanation:** 1998 legislation would have effectively obliterate the remedy of a 1507 action, which is used to attack an unlawful confinement, not necessarily the underlying judgment. In the appellate courts we have seen a large increase in the filing of these appeals, but not for traditional reasons. The biggest cause for such appeals is the constant legislative tinkering with the sentencing guidelines.

Ironically, while many tort related claims have a statute of limitations which begins running at the discovery of the injury, the proposal would be to begin the running of the statute of limitations at a fixed time period. Thus, the period might have run before a person even knows they have been injured. One reason to oppose the bill is newly discovered evidence. problem. KSA 22-3501 sets two years as the limit for requesting new trials based on newly discovered evidence. If the two years has run and new evidence is discovered, the defendant must use a 1507 motion to raise the issue of wrongful incarceration. A one year statute on 1507s may mean that someone who is innocent would have no means of raising the issue of wrongful incarceration once the two year statute in 3501 has run. While some argue that defendants stay in jail long enough to lose the statute but then raise 1507 claims, that comes from an unreasonable assumption that people LIKE prison and wait a long time to raise such claims, or claims of ineffective assistance. Stale claims of ineffective assistance do not do well on appeal. Inmates with a valid claim of ineffective assistance is not going to sit in Lansing for years in order to raise a 1507 appeal.

If this bill is aimed at the appellate defender's office, the person who drafted it does not know anything about how that system works. The ADO raises any and every issue its attorneys can identify in the direct appeals handled by that office. ADO does not see a 60-1507 proceeding until after it has gone through the trial court. Then it is limited to raising the issues preserved in district court--if any. This amendment will not impact ADO's workload. A 1507 action is the last protection our system provides to correct unconstitutional proceedings for criminals. Currently, there is no statute of limitations for 1507 actions. See KSA 60-1507(a). The importance of the remedy will be made dramatically when the first death penalty is set for execution many years after sentencing. Section 8 of the Kansas Bill of Rights states that "the right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or rebellion." Putting a one year limitation on this procedure may offend the constitution. KBA opposes such limitations.

Issue: Felony fleeing and eluding.

KBA Position: The Kansas Bar Association opposes making this serious misdemeanor into a felony.

Explanation: Kansas law makes fleeing and eluding a misdemeanor. The 1998 legislature wanted to make several forms of fleeing and eluding a level 9 felony. We oppose this concept. Fleeing and eluding is a crime committed disproportionately by teenage males, many of whom are minors and whose chief crime is that they mistakenly believe they can outrun a police car. Making such a stunt a felony if no harm comes to other persons is misguided and gives certain persons a criminal record when other alternatives exist. If a person injures another party, other felonies exist to charge other than a felony fleeing and eluding. Further, a level 9 felony is presumptive probation, whereas a class "A" misdemeanor usually results in county jail time. Finally, for minors, receipt of a felony on their driving record makes them uninsurable and in some instances may result in cancellation of insurance policies on the parents. That is inappropriate use of our police powers.

Issue: Less than unanimous jury verdicts in criminal actions.

KBA Position: The Kansas Bar Association opposes implementation of a less than unanimous jury verdict in criminal actions.

Explanation: Kansas law has for some time allowed less than unanimous jury verdicts in civil actions. The purpose was to prevent long and expensive civil litigation to be tried again because one or two of the jurors cannot agree with the other ten or eleven.

In response to the O.J. Simpson case, California Governor Pete Wilson requested a law that allows less than unanimous jury verdicts in criminal cases. Wilson's call came early in that marathon trial when many felt the jury would be deadlocked over the Simpson verdict, causing another long and expensive trial. The Simpson jury was certainly not deadlocked.

In *State v. Johnson*, 219 Kan. 847 (1976), the Kansas Supreme Court noted that "*Johnson v. Louisiana*, 406 U.S. 356, and *Apodaca v. Oregon*, 406 U.S. 404, hold that a less than unanimous verdict of guilty is constitutionally permissible in a criminal matter. The court does not hold that a less than unanimous vote of not guilty must be deemed an acquittal."

The jury system dates back 700 years. England, which has abandoned its jury system in civil cases, still uses a unanimous jury in criminal matters. In spite of the dogma that juries favor defendants, the facts are that two thirds of juries convict the defendants. The primary cause of a hung jury is not an eccentric juror but rather a weak case. Once policy makers move away from unanimity, we literally lose our standards. Why is 10 out of 12 better than two-thirds? Could not an even more determined legislature in the future change the law to a majority of 12? The reason we have jury trials in the first place is the founding father's natural suspicion against government power wielded to excess. We lose our moorings in fundamental fairness in criminal cases.

Ironically, a switch to majority rather than unanimous verdicts increases the chance of error both ways. The tradeoff is convicting the innocent and acquittal of the guilty. There is less focus on evidence and more on the vote. Unlike a legislative committee whose purpose often is compromise, a jury's purpose is not to bargain or compromise. Its purpose is to convince each other that the prosecution, or the defense, is right. A requirement of unanimity means individual views cannot simply be ignored or outvoted. Unanimity strengthens the ability of groups of jurors to fight off narrow and sometimes prejudicial arguments that appeal to some groups but not others. Unanimity requires all jurors, even from different social and economic backgrounds, to meet face to face and arrive at a decision together. In life, we relish our national diversity. With juries, for the sake of justice, we want that diversity reviewed and all of that diversity to count in the verdict. With juries, there is virtue in unity, not division. The proposal means majority jurors ignoring the input of two other jurors. This is troubling since at least one study shows that a minority group making up less than ten percent of the population of a county will have three or more representatives on a jury only 11 percent of the time. We have many counties in Kansas where minorities make up less than ten percent of the population. This bill takes minority opinions right out of the equation. That change has social ramifications all its own.

Example: A ten-man, two-woman jury is hearing a case involving an assault by a woman on her husband. During the course of the trial it comes out that the husband had a history of battering the woman. This one time she struck back. Historically, men have been reluctant to recognize the defense of wife-battering. The jury splits 10-2. The women are unwilling to convict. In our current system, the men are required to work towards a consensus. The two women's views could be neither outvoted nor ignored. And the women would have the ability to persuade the men that they are right.

The change is not made for efficiency, since hung juries are a small problem. It attempts to solve the fact that 8 percent of Wyandotte County juries are hung juries. Not all are 10-2 or 11-1. Many of those hung juries, now, are set for retrial but plea out or are dismissed. A few of those hung juries "hang" the second time. So the number of actual retrials actually affected by less than unanimous juries is small.

What is being portrayed as reform is really an attack on the jury system. We see it in the civil law, where some "citizens" believe that their fellow men and women are not competent to sit in judgment of them. Jurors are ridiculed as being too old, unemployed, too gullible. When a jury cannot decide it usually means the case is weak or the evidence was conflicting or confusing. That is not the fault of individual jurors. This bill diminishes the impact ordinary people have on the criminal justice system, but will not make the evidence presented to those juries any better.

Constitutional Impact Kansas has a unique history when it comes to the meaning of our bill of rights. The right to a jury trial came during Bleeding Kansas days, when men were taken through mock court trials and hung or shot for their political beliefs. When vigilante justice was the norm, the right to a jury trial was not viewed as a luxury. In such a system it is doubtful that our founders would want a system where jurors bargained over a man's fate, or less than 12 jurors could decide guilt or innocence. While the minutes of the Wyandotte Convention do not explicitly state whether unanimity was contemplated, unanimity was certainly the custom,

Only two states, Louisiana and Oregon, have this system. Interestingly, since 1972 when the U.S. Supreme Court held such systems did not violate the federal constitution, no other states have rushed to change their system. There is nothing in the Wyandotte Constitutional convention minutes to understand whether the framers meant unanimous juries. However, the original Section 5 to the bill of rights read, "The right of trial by jury shall be inviolate, and extend to persons of every condition; but a jury trial may be waived by the parties in all cases, in the manner prescribed by law."

On July 18, 1859, Delegate McDowell moved to strike "and extend to persons of every condition." Clearly, abolitionists wanted the jury trial to extend to trials involving slaves. Such juries made unanimous decisions, not majority decisions.

By July 29, 1859, when the state constitution was adopted, Sec. 5 was amended to read, "The right of trial by jury shall be inviolate." The word "inviolate" has survived the 1859 amendments. It means "pure, undisturbed, whole, and unbroken." The word not lend itself to a meaning that "part of a jury" can try a man. In *State v. Christensen*, 199 P.2d 475, 166 Kan. 152 (1948) the Supreme Court defined what it meant by "inviolate." The "rights to be held inviolate are rights for the benefit of the accused which no one can take away from him against his will." 199 P.2d. 479. The jury trial right is certainly a benefit to the accused. It is improper to think that by diminishing the need for unanimity, and that excluding a minority of the jury from the deliberation process is not taking or diminishing the right of the jury trial from the defendant. To provide a jury and then weaken its decision making structure in favor of the government provides a hollow shell.

Less than unanimous juries in criminal cases will present some of the same problems as LTU juries in civil cases. In *Hendrix v. Docusort*, 860 P.2d 62, 18 Kan.App.2d 806, (1993) the court ruled that "any ten civil jurors" can decide different elements of the verdict. Ten can decide the defendant was negligent, and another different ten can decide the amount of damages. We may have similar problems when lesser included offenses are part of the decision. For example, if someone is charged with second degree murder and one of the included lesser offenses is involuntary manslaughter, do the same ten jurors who finds the defendant not guilty of second degree murder have to find the defendant guilty of manslaughter? Or must the same ten decide each element? If the "any ten jurors" rule is adopted

in criminal matters, it makes the jury room look like a bargaining pit at the Chicago commodities exchange. The rationale for a less than unanimous jury is that it resolves many situations where new trials are needed because of hung juries. The legal system in our judgment should first seek justice. Only a small percentage of criminal cases result in less than unanimous verdicts (and thereby a hung jury). Retrial is not always used; sometimes there are plea bargains and other dispositions that save the county from retrying these individuals again. We should not let the exception swallow the rule.

Issue: Local prosecutorial authority.

KBA Position: The Kansas Bar Association supports autonomy of local prosecutors to make decisions concerning the type and scope of crime to prosecute, independent of interference by other law enforcement agencies.

Explanation: Some 1997 legislation would allow the Attorney General to have final determination power as to the type of crime to file and punishment to seek in homicides that might invoke a death penalty. The legislation allows the AG to decide whether to intervene, with or without the permission of the local prosecutor.

Ostensibly, the legislation would allow the AG to step in to such cases to benefit smaller counties with less-experience county attorneys. However, current law allows the local prosecutor to voluntarily seek the assistance of the AG's office. Giving the AG unilateral power to decide what crime to charge and penalty to seek in important local cases cuts out of the decision-making authority the local law enforcement officer elected by the people of the county. It also may create new prosecutorial costs on county governments.

Such a unilateral law would allow political embarrassments of local officials by state officials. By keeping the local prosecutor in the decision loop, even for decisions involving whether to impose the Hard 40 sentence or seek a death penalty, it maintains the balance of political power-sharing created by our state and local government system. We believe the current law is adequate.

Issue: Types of fees paid to assigned counsel and defense systems for federal and state indigent defendant cases.

KBA Position: The Kansas Bar Association supports paying an hourly fee for criminal defense work which reflects a more realistic compensation to counsel for legal work performed for indigent defendants, both at the state and federal levels.

Explanation: The United States Constitution is the foundation for the Sixth Amendment right to counsel. The great case of Gideon v. Wainwright requires that before a person accused of a felony can be prosecuted the state must assure they have access to an attorney, and provide one if necessary. More so than any other country, Gideon spells out America's commitment to individual liberties protected by law. Yet the Congress and state legislatures have been reluctant to adequately compensate court-appointed counsel aiding indigent defendants charged with federal crimes, or persons charged with felonies or certain misdemeanors in Kansas district courts.

The state and federal governments do not pay other professionals or government contractors at less than standard rates, nor does government ask other professionals to subsidize government services to the poor at a less than cost basis. No other professionals are required to work for government on a less than cost basis. Federal and county governments pay the attorneys it hires to represent the government's interest in criminal and civil courtrooms considerably more salary than it pays public defenders. As a result, many public defenders do not make careers of state service and go into private practice. There, the discrimination in fees continues.

Government has a moral obligation not to shift the duty to pay for representing indigent defendants onto the private bar by less than adequate compensation of defense lawyers and employed public defenders. The Kansas Supreme Court has determined "assisting the indigent is a legitimate public goal, but it cannot be accomplished at the expense of a particular group of people." State and federal government must insure that adequate and fair rules of compensation and expense reimbursement are promulgated for such legal assistance.

As an alternative, some advocate statewide public defender districts. We think that is unwise unless the caseload justifies such change. Public defenders are cost-efficient only in areas where the felony case load is significant making centralization of services is fiscally feasible. In judicial districts with multiple counties, it is difficult for one public defender office to adequately support the needs in the entire district on a cost-efficient basis without unnecessary duplication of services and time-consuming travel. Further, public defenders driving in from distant cities often do not know the local residents, jurors or the veracity of their own clients or witnesses in the case. In these instances, the use of private counsel from that area is more desirable.

Another alternative is use of fixed fee contracts. Many local units of government think paying attorneys a fixed fee is preferable to paying by the hour. This means of paying for indigent defense costs is appropriate so long as for the fixed fee attorneys are not required to exceed the case loads recommended by the National Legal Aid and Defender Association (NLADA). State regulations covering indigent defense issues already adopt NLADA guidelines. We believe any state contract should incorporate NLADA guidelines in it. And local bar associations working with county commissions on local indigent defense fixed fee contracts should insure that NLADA guidelines are observed as part of the contract itself.

Kansans should support continuation of a mixed system of providing legal aid to indigent defendants. Adequate supervision by the courts is available to insure the experienced private counsel are appointed in major felonies. Merely hiring public defenders in felony cases does not necessarily mean experienced counsel will be employed. (Renewed 11-30-01)

Issue: Sentencing hearings for establishing state reimbursements.

KBA Position: The Kansas Bar Association opposes using sentencing process to order indigent defendants to repay defense costs.

Explanation: 1998 SB 456 would create a requirement that at sentencing, assigned counsel must give the court information by which the court can assess reimbursement costs to the defendant as part of costs in the case. This reimburses the state for indigent defense costs. KBA is concerned that there are better times and ways to assess such costs and give the defendant time to object to the fee, if warranted. Sentencing hearings are not appropriate because many other matters are handled post-sentencing so the amount assessed at sentencing is usually supplemented.

Issue: Court-established cash bond programs.

KBA Position: The Kansas Bar Association supports judicial discretion to create cash bond programs by court rule and opposes prohibitory legislation to abolish court-ordered cash bonding programs.

Explanation: Often the accused or the accused's family is left with the choice of paying the bondsman in order to get out of jail, or paying the attorney. If they cannot afford both, getting out of jail is usually the first priority. Then state policy means taxpayers are paying the attorney while the accused pays the bondsman. The Cash Bond program allows one payment to cover the costs of bonding and the attorney.

The federal government provides for cash bonding programs as do three of the 31 judicial districts in Kansas. This program, if allied with a court employee who reviews indigency cases with accused persons prior to seeing the judge, can result in a better use of an accused's limited resources and limit the outlay of tax money for indigent defense services through higher recoupment of costs.

In these programs, persons charged with nonviolent felonies and misdemeanors can post a cash bond with the court instead of having to hire a bondsman. Of the ten percent of the bond posted with the court, 90% is returned to the defendant if he or she makes all court appearances and otherwise follows the instructions of the cash bond. From the amounts retained, however, courts reimburse the state or county for any tax funds spent to defend the accused. In the other judicial districts, a bondsman charges only ten percent of the bond, but keeps it all. Any reimbursement for the indigent defense costs comes from additional funds of the defendant. Or, courts resort to O.R. ("Own Recognizance") bonds so that defendants who are not risks to flee the city are not required to pay bondsmen. Thus,

the cash bond program has within it the ability to recoup higher proportions of indigent defense costs to state and county government without materially affecting the number of defendants who skip bond.

Implementing a cash bond program statewide would have clear benefits to the indigent defense recoupment efforts. In many instances it reduces jail populations, saving the county some internal costs. Relatives of accused persons might be willing to post a cash bond if they know they can get a portion of it back, whereas they will not post bond if the bondsman gets it all. Getting persons out on bail who are not risks to flee allows them to keep jobs, support their children and avoid additional criminal justice costs while awaiting trial.

We suggest, however, that this program can be mandated by the Supreme Court, simply by requiring each judicial district tailor a plan to its own needs. The Pretrial Services employees mentioned above can be partially funded with this program.

Evidence indicates the rules have worked well in the districts that use them. Several have had no bond forfeitures since installing the court rule. Thus, prohibitory legislation to eliminate these court rules is inappropriate.

Issue: federal preemption of state ethics rules and statutes.

KBA Position: KBA opposes federal preemption of the traditional role of state supreme courts to regulate the ethics of lawyers and the practice of law, including regulation of attorneys employed by the federal government.

Explanation: In recent years, the Department of Justice has claimed that the federal supremacy clause makes it -- or should make it -- exempt from state rules governing ethical conduct of lawyers. DOJ wishes to have executive (whether administrative or otherwise) branch ability to exempt its lawyers from some or all ethical rules of licensing states.

Obviously, such a system would lead to DOJ attorneys having one code of conduct and private lawyers dealing with the government in civil and criminal matters having another. The former might be less restrictive than the latter. Whatever the result it would not be equal justice under law!

In 1994, DOJ attempted to codify that position by issuing Department regulations, allegedly authorized by federal Congressional agency implementation legislation, exempting its attorneys from state ethics rules prohibiting unauthorized contact with represented persons in violation of ABA Model Rule 4.2. The 105th Congress in October, 1998, passed legislation rejecting this position, explicitly making federal prosecutors subject to state laws and ethics rules governing an attorneys' conduct. See P.L. 105-277.

This ABA-backed provision, named after its chief sponsor, Rep. Joseph McDade (R-PA), negates the 1994 DOJ rules. The "McDade provision's" effective date, however, was delayed for six months, until April 19, 1999, ostensibly to allow the Department to amend its rules to comply with the new law. Further, the United States Court of Appeals for the 8th Circuit declared the same DOJ rules invalid in *U.S. v. O'Keefe v. McDonnell Douglas Corporation*, 132 F.3rd 1252 (8th Cir. 1998).

KBA supports the gist of the McDade amendment. There are two problems posed by such attempts to define the extent of ethical rules of attorneys representing the federal government. First, the attorneys are licensed by the states through state court regulated process. Theoretically, the federal government should have no authority to control ethical regulation of lawyers subject to the ethical rules as a Kansas licensed lawyer. DOJ cannot dictate to the Kansas Supreme Court, interpretation of the model rules of professional conduct applicable to licensed Kansas attorneys. If the attorney wishes to obtain another license, so be it. The KBA consistently has supported the exclusive role of the Kansas Supreme Court in regulating ethical conduct of lawyers.

Second, the assertion that an executive branch of government, with or without authorization of a legislative grant of authority, or the legislative branch itself, may relieve its attorney of the ethical obligations established by the Kansas Supreme Court, violates the Kansas Constitution and the separation of powers doctrine.

The Kansas Supreme Court has clearly held that regulation of the practice of law lies peculiarly within the province of the Courts to regulate. *State v. Shumaker*, 210 Kan. 377 (1972); *Martin v. Davis*, 187 Kan. 473, 479 (1960). Indeed, the Supreme Court, in *Martin*, supra, stated, "included in the [judicial] power is the Supreme Court's inherent right to prescribe the conditions for the admission to the bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare." (emphasis added.)

KBA has consistently supported the exclusive role of the Kansas Supreme Court in governing the practice of law to the exclusion of control from the other branches of government.

Issue: Increasing criminal statutes of limitation.

KBA Position: The Kansas Bar Association opposes raising statutes of limitation on general felony criminal activity.

Explanation: Federal law generally has five year statutes of limitation while most state crimes have a two year statute of limitation. Certain sex crimes against children in Kansas carry the longer limitation. KBA supports this policy. However, while statutes of limitation on criminal activity is clearly a function of the crafters of public policy, increasing current two year statutes of limitation to five years for most other felonies raises several procedural problems for prosecutors, defense counsel and judges that, taken as a whole, do not enhance the criminal justice system.

Where fraud statutes and similar business crimes are the subject and the two year limit is insufficient, if the prosecutors suggest changes to this limitation regarding fraud or business crimes, we agree with the change. Generally, however, where a crime is cleared with an arrest by law enforcement officers, the two year statute of limitation is adequate to the needs of the criminal justice system. Further, there are statutory exceptions to the running of the limit if the crime is concealed or the defendant is absent the jurisdiction. What may be gained in prosecutorial efficiency by going to a five year statute is more than offset by further delays in court proceedings and the difficulty of keeping witnesses available for protracted criminal prosecutions that occur long after the crime.

Issue: Guilty But Mentally Ill verdicts

KBA Position: The Kansas Bar Association opposes any attempt to amend our law to allow a guilty but mentally ill verdict.

Explanation: The purpose of Michigan's 1975 Guilty But Mentally Ill verdict system was to reduce the number of successful insanity defenses and force convicted felons to serve time after receive mental health treatment. Empirical studies show it has failed both purposes.

- o Michigan statistics show that GBMI does not reduce the overall number of Not Guilty By Reason of Insanity verdicts.

- o If the goal of GBMI is to get a criminal some psychiatric help yet keep them in prison afterwards, K.S.A. 22-3430 and 3431 already give the trial judge the authority to order a person found guilty of a crime to a state hospital or security hospital for treatment, and when they complete their treatment then bring them back to court and sentence them to prison.

- o What we can predict what will happen based on Michigan's study. We will see an unforeseen burden of new and expensive psychiatric care placed on the correctional system. Adding new need for psychiatric care in prison settings is going to be a major unanticipated fiscal problem in the Corrections Budget. If the state is unable or unwilling to provide and fund mental treatment for this new class of GBMI inmates, confinement in prison may be unconstitutional, especially to those who plead GBMI. *People v. McLeod*, 288 N.W.2d 909 (Mich., 1980).

o The American Bar Association's Criminal Justice Mental Health Standards Committee, the American Psychiatric Association's Statement on the Insanity Defense and the National Mental Health Association's Commission on the Insanity Defense all have recommended against adoption of the GBMI verdict.

o Michigan, the state model for a GBMI verdict, does not have sentencing guidelines. The GBMI verdict is at odds with the concept behind the proposed new Kansas sentencing guidelines. A successful insanity defense automatically sends someone to the custody of the Larned State Hospital for mental evaluation where they remain until their illness is cured. For prison sentences, the new guidelines make rehabilitation and mental illness secondary to incarceration and punishment. The grids do not consider factors such as mental illness at the time of the crime. Two defendants having committed the same crime, one guilty and one GBMI, if their criminal history backgrounds are similar, will serve the same time. Yet a Guilty but mentally ill jury finding may be a mitigating factor for departure rather than an aggravating factor. Juries who want inmates to serve the time desired under sentencing guidelines should find defendants "guilty," not GBMI.

Michigan statistics show that Not Guilty By Reason of Insanity verdicts do not decrease because of the GBMI option. Thus the GBMI verdict has no better impact on public safety in Michigan's system than a "guilty" finding. The GBMI verdict gives no more better public safety to Kansans than juries who find criminals to be plain, old Guilty.

Finally, the 1994 legislature adopted a change in our insanity law. It essentially allows defendants to show mental disease or defect made it so they are incapable of fomenting the required "intent" to commit an act. This makes Kansas one of only a handful of states without an "insanity defense," but keeping the ability to show that the defendant was incapable of intending the consequences of their act. This change has changed any "need" for a guilty but mentally ill verdict.

Issue: Legislative limits on plea bargaining.

KBA Position: The Kansas Bar Association opposes legislative limits on prosecutorial powers to plea bargain.

Explanation: In our justice system the prosecutor is the publicly-elected official who decides whether evidence exists that would support charging a crime and prosecuting individuals who break our laws. Such power is exercised based on the evidence available and, often, the credibility of the witnesses who testify.

Some legislators dislike the concept of plea bargaining and want to prevent prosecutors from plea bargaining by statute. To do this is a major disservice to the public since, after original charges are entered against an individual, a witness may disappear or key evidence may be unavailable at trial. Prosecutors operate under speedy trial laws which require them to begin a trial within a relatively short time span. To force them to go to trial without the ability to fully prove their case when conviction of a lesser included crime could have been obtained by negotiations may have the unintended effect of putting dangerous persons on the street.

Further, it is the prosecutor's sole power to dismiss charges once filed. To limit plea bargaining will simply mean the prosecutor must go to extra expense to dismiss the original charge and re-file a lesser crime in a new complaint. Prosecutors who do not want to plea bargain can adopt that policy within their own office, and carry it out without need of legislation. Prosecutors who do not prosecute in a manner to which the public prefers can be removed from office; they should not be limited by legislation.

The legislature's role is to define what constitutes a crime and the penalty therefore. It is the prosecutor's unique role - and separate power -- to enforce those laws. They should not be hamstrung by limits on their plea bargaining powers.

Issue: Reciprocal criminal discovery rights.

KBA Position: KBA opposes major changes to the right of criminal discovery.

Explanation: New legislation by the County and District Attorneys association would allow prosecutors to have "reciprocal discovery rights" regarding the information or witnesses a defendant intends to present at pretrial hearings and motions.

This legislation reopens age-old efforts for prosecutors to get access to information regarding defense witnesses and theories prior to trial. It presumes that the current playing field is level. Criminal discovery is not like civil discovery. Unlike civil litigation, where all parties engage in extensive pretrial discovery of their opponents witnesses and files and much of it depends on boundaries set in case law, discovery in criminal cases is tightly controlled by statute. KSA 22-3212 requires the prosecutor let the defendant "inspect and copy" certain statements or confessions, reports of physical or mental examinations, scientific tests, and grand jury testimony. There is a catch. The defendant can have this information only if the defendant permits the prosecution to copy any similar documents the defense intends to introduce at trial.

In civil litigation, the failure to disclose certain information can result in a default judgment against the recalcitrant party. The failure of the state to disclose certain evidence requested by the defendant in a criminal matter does not lead to dismissal of charges or even suppression of evidence. Discovery rights are not nearly as broad in criminal matters as they are in civil cases. Expert witnesses or their reports who are not going to be used at the preliminary hearing need not be turned over to the defendant until trial.

The proposed legislation would change this equation. The state's police and financial resources give it enormous advantages over the defense in investigating crime. There would be a great advantage to the state to follow-up on the information. Witnesses for the defendant - if known at the time of the preliminary hearing - often do not testify and there is no requirement that the defendant contest a preliminary hearing through his or her own witnesses. Yet as a prerequisite to being able to do so, defendant would have to disclose these potential witnesses who, when faced with further out-of-court police interrogation as to "what do you know about this case," may decide not to help anyone. This makes it more difficult for defendants to present a defense at trial. The proposed legislation hardly "levels" any playing field.

Further, early in a criminal case, the defense is just beginning to decide what strategies to use and what defense theories is supported by the evidence. To disclose the information supporting these theories is highly premature. The pretrial maneuvering between defendant and prosecution in a criminal case is where much of the determination takes place as to what sort of crime will be charged, and where the parties explore plea bargains. The prosecutor and defense counsel can informally learn of what each side intends to bring to the table in negotiations or at trial if the matter goes that far.

What is important is the information known to both parties at the time of trial. Both the prosecutor and defense counsel, through pretrial discovery orders, can limit the use of surprise witnesses, documents or other testimony at trial by the other side. This sort of limitation on preliminary hearings and motions is unnecessary.

Issue: Discovery depositions in criminal matters.

KBA Position: The Kansas Bar Association supports limited uses of discovery depositions in criminal matters.

Explanation: Discovery depositions are used in criminal matters in other states. In Kansas, historically, they have not been used because the transcript of the pretrial hearing has been used for the purposes of discovering what key witnesses will say.

With ever growing costs of paying for prosecution and public defense costs for crimes, the pretrial hearing needs review. It is clear that in states with a perfunctory preliminary hearing system, there are many more costly trials than less costly plea bargains. We support a discovery deposition when the defendant waives his right to a pretrial hearing or if the deposition is used solely for impeaching or contradiction of the witness at a subsequent trial. If witnesses are vulnerable or young, judges can preside at such depositions, insuring that appropriate decorum is observed. Or we can consider allowing prosecutors to determine when witnesses are so vulnerable that a full

preliminary hearing is needed. KBA believes the use of discovery depositions regulated by the Courts can speed the administration of criminal justice.

Issue: Should the Sixth Amendment's right of confrontation be statutorily limited in cases involving victims of crime who are mentally retarded?

KBA Position: KBA opposes amendments to current Kansas law allowing "indirect confrontation" by child victims of crime, because of constitutional concerns, unless separate legislation is enacted after a strong showing of statistical need for the change.

Explanation: In *Coy v. Iowa* and then later in *Maryland v. Craig*, the United States Supreme Court held that if the state could show a child under 13 years of age would be traumatized by testifying in open court about an alleged crime against the child, certain limits on the direct right of confrontation could be imposed by state law. Typically, a "screening" system was employed whereby the child testifies away from direct view of the defendant. In *Craig*, extensive case histories of abused and sexually assaulted children were presented as part of the persuasive sociological information provided by amicus briefs to the Court.

The use of hearsay evidence in preliminary hearings should be discouraged as far as possible. While the federal system allows use of hearsay evidence in preliminary hearings, the federal law uses grand juries to indict persons, a system not often employed in Kansas. Further, the federal system sees more trials than plea bargains, which is the norm in Kansas. We believe that requiring the key witnesses to testify in preliminary hearings allows both the prosecutor and defense counsel to judge the strength of their case if the matter should go to trial. The result is more plea bargains and a more efficient judicial system.

Advocates for the mentally impaired argue similar indirect confrontation rights should be extended to the mentally retarded since they, like children, are highly susceptible to being victimized by criminals. While this may be true, other problems exist. For example, while children under 13 can testify, they must generally meet the other tests of reliability, such as competency to testify, in order to avoid hearsay problems. The mentally retarded may not be able to meet this additional burden.

Prosecutors are concerned that by simply amending the existing confrontation law for children with additional allowances for the mentally retarded, the entire law might be held unconstitutional. KBA agrees, and would oppose such amendments to existing law. Drafting an entirely new law, backed up by strong sociological information about crime and the mentally retarded, are our preferred alternatives.

In 1998, prosecutors sought legislation to allow hearsay evidence in criminal actions involving "domestic violence." This allows victims of domestic violence to not have to "confront" the accused. The definition of a victim in the bill would include all sorts of relationships, including former roommates, heterosexual and homosexual partners, persons who have never lived with the defendant, sisters and brothers, etc. The kind of "domination" that would turn these people into "children" is not present in these kinds of cases and important constitutional rights ought not be thrown out in anticipation of the infrequent circumstance. This would also create a trial within a trial to determine who fell within the definition of "victim of domestic violence" as a preliminary showing would have to be made that the defendant intentionally & recklessly caused bodily injury, etc. What would the standard of proof be for this? As a policy matter, equating women (the primary victims of domestic violence) to children, unable to testify because they are too cowering and weak, ought to be offensive to women.

While victims of domestic abuse can be very traumatized, so can witnesses to murder and rape. Confrontation is such a fundamental part of our judicial system. If the accuser is not willing to testify in open court, then the allegations are suspect. There should be many ways to assist the victims of domestic abuse without eliminating the right of confrontation.

Issue: The insanity defense.

KBA Position: The Kansas Bar Association supports a modern Mc'Naughton Rule of "non responsibility for crime because of mental defect," but opposes the shifting of the burden of persuasion from the prosecutor to the defendant. If such burden shifting is done, the KBA supports a "preponderance of the evidence" standards, not "clear and convincing" standards.

Explanation: Kansans can be justly proud that the commission on Uniform State Laws adopted the basics of Kansas' insanity defense code as its model act. Each state should be left to determine its own insanity defense code and under no circumstances should the Congress consider enacting an insanity code with national application.

Current federal law, enacted in October, 1984, requires that the defendant show by "clear and convincing evidence" that as a result of mental disease or defect, the defendant was unable to appreciate the wrongful nature of the defendant's conduct at the time the offense was committed. This places the burden of proof on the defendant. And, we believe, places it erroneously. A defendant should have to meet only a "preponderance" standard.

With the test of insanity based upon a modern Mc'Naughton Rule or cognizance rule, and not the ALI or volitional rule, the KBA believes the burden of proof of sanity at the time of the commission of the crime, when the issue is raised as a defense, is clearly on, and should remain upon, the prosecution.

Issue: Ratification of the Flag desecration constitutional amendment.

KBA Position: The Kansas Bar Association opposes ratification of the flag desecration amendment. It creates a political crime that will divert scarce judicial and law enforcement resources from more pressing criminal investigations.

Explanation: Like other citizens Kansas lawyers have served in this nation's armed forces in all its wars. Lawyers, like most other citizens, dislike the act of desecrating a flag for any reason.

On the Kansas frontier, before statehood, the pro-slavery Lecompton legislature made it a capital offense to publicly discuss the political abolition of slavery. Although often abused, these sorts of "political discussion" laws were rarely enforced. A flag desecration law, coming after a constitutional amendment, would fall into that same category.

Flag desecration is a act based on political viewpoint taken to the extreme. A flag desecration amendment to the constitution is an overreaction by government that would attempt - perhaps the first of many attempts - to dilute the First Amendment by enacting exceptions to it. At the least, such an amendment will create the call for laws that will divert scarce resources of the judiciary, prosecutors and law enforcement to investigating and bring such individuals to justice. If prosecutors look upon the law as a nuisance and do not enforce it, the Amendment will be a great waste of time. If prosecutors spend the time enforcing the law and if there are few prosecutions because there are few desecrations, the impact of the law is meaningless.

We think law enforcement and prosecutorial time is better used pursuing other more important breaches of the public peace.

Employment Law

Issue: Whistle-blowers statute

KBA Position: The Kansas Bar Association supports keeping any statutory expansion of the whistle-blower protections to the equivalent of existing common law.

Explanation: Civil service law was a late 19th Century attempt to create a career government employee service and insulate nonpolitical appointees and positions from the whim of politically-based job terminations. KSA 75-2973

was enacted in 1984 as part of the civil service code to protect classified state employees against job-related retaliation if the employee reported to any legislator, or the legislative post audit committee, any wrongdoing that he saw within the agency. This is the statutory whistle-blower act.

Common law whistle-blower lawsuits, however, are much different. They govern all other types of employees. The purpose behind such lawsuits is found in *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988): "Public policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare. Thus, we have no hesitation in holding termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a co-worker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort. To maintain such action, an employee has the burden of proving by clear and convincing evidence, under the facts of the case, a reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee; and the employee was discharged in retaliation for making the report. However, the whistle-blowing must have been done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy or personal gain." (emphasis added)

We are moving away from larger government, towards smaller government, through downsizing and privatization. As government changes and more functions of state government are privatized or given to local units of government, state auditing agencies lose some of their jurisdiction to discuss with classified state employees the functioning of those private entities or local governments which not have assumed, by contract, the role of state government.

The 1996 legislature considered legislation from the Kansas Association of Public Employees to dramatically change the grounds for bringing a lawsuit for wrongful discharge as a whistle-blower. Instead of requiring lawsuits only in situations involving infractions affecting the health, safety and welfare of the public, the legislation wanted employees to be shielded when discussing any operations of the agency. By extending the statutory whistle-blower action to all employees of any business or profession that contracts with state government, thousands of new employees were brought under the act that have no connection whatsoever with the original intent of the law to protect the civil service employee.

Among the problems created by the bill is a narrow and unclear handling of the attorney-client privilege. The KBA prefers to assure that in such changes attorney-client matters could not be divulged by a law firm employee seeking whistle-blower status.

Other problems identified with the original bill were:

1. In the private practice of law, confidentiality is imposed on lawyers by Supreme Court rules. (Model Rule of Professional Conduct 1.6 of the Kansas Supreme Court.) Since a lawyer is responsible ethically for the adverse conduct of lay employees, Rule 5.3 extends the confidentiality requirement to employees of the lawyer. The bill is a statutory exception to MRPC 1.6 and MRPC 5.3, unless modified to exempt from the statute's application statements made in violation of the Model Rules of Professional Conduct.
2. The bill grants protection for any communication about the agency or the subcontractor regardless whether they rise to the level of "public concerns." This extends whistle-blower protection beyond existing case law.
3. Section (b)(1) protects report of violations of state or federal law, or rules or regulations, permitting the report to any person, regardless of the interests of that person. That would allow disclosure of information to the press rather than supervisors. Again, if conformity to existing case law is desirable, then the bill's protections should be limited to disclosure affecting public safety, health or general welfare.
4. Under common law, plaintiff must prove the discharge under clear and convincing evidence. *Stuart v. Beech Aircraft*, 753 F.Supp. 317, 324 (D. Kan. 1990). The legislation is silent on which level of proof is required.

5. The bill changes the attorney fee shift from one that favors the whistle-blower to one that favors the prevailing party. The whistle-blower that loses a lawsuit against the state agency or the contractor will have to pay the state or local agency's, or the contractor's, legal bills. Fee shifts will discourage legitimate as well as frivolous whistle-blower lawsuits.

We believe if such changes are to be made in the statutory whistle-blower lawsuit and include the employees of private businesses, then we believe the statute should more closely mirror common law whistle-blower causes of action.

(Renewed 11-30-01)

Issue: Competitive bidding of legal services for state and local government.

KBA Position: The Kansas Bar Association opposes the competitive bidding of legal services.

Explanation: Several bills were introduced in the 1997 session to require competitive bidding of legal services be applicable to most state and local government agencies. We believe the bills, while well-intentioned, will not produce the advantages claimed by proponents and will cause attorney-client problems in the bargain. The basis of the attorney-client relationship is the client's trust and faith in the symbiotic relationship between attorney and client. Lawyers take on fiduciary responsibilities for each client they represent, including government clients. To base the attorney-client relationship solely on who bids lower on a contract is to invite financial manipulations by counsel seeking the employment to the detriment of trust and competence. Further, all clients have a right under our Model Rules of Professional Conduct to hire and fire their attorneys without cause. Injecting a "contract" approach based on a competitive bid is a statutory change to a model rule, at least for government agencies seeking legal counsel. See *Crandon v. State of Kansas*, 257 Kan. 727 (1995). The attorney general is usually responsible for hiring attorneys to defend state agencies and employees in civil litigation. While that often results in attorneys being hired who have ties to the AG's office, it also allows an independent review of the qualifications of such attorneys regardless of political affiliation - something the competitive bidding process lacks unless the contracting agency "loads the specs" of the contract. Such action would, in our opinion, defeat the purpose of competitive bidding in the first place. Competitive bidding contract law gives to one government agency the authority to formulate guidelines on how other agencies hire attorneys. When the bill applies to local units of government, the potential for a conflict of interest arises.

We believe the enactment of such law would foster the presentation of artificially low hourly rates and attract only attorneys who have limited demand for their services.

No other state that has such a comprehensive system of bidding on legal services. The cost to government of implementing a pure competitive bidding concept is considerable, and can be more costly than the current system. For example, since all state legal contracts would be based upon competitive bid, it would be necessary to advertise the bid contracts in appropriate trade publications. The state's budget division estimates such advertisements alone would cost the state an additional \$2.0 million per year.

If legal services are capable of being competitively bid, there is no reason why other professional services should not be bid that way. Architectural and engineering services typically are let through negotiated bidding. The fact that such other services are not being bid competitively through open bidding is an indication that competitive bidding in these other professions is unworkable. We do not believe it will benefit government to bid legal services this way, either.

Also part of this issue is a recent attempt in Congress to regulate "pay for play" activities, that is, prevent lawyers and other professionals who contribute money to campaigns from getting government work or contracts. The ABA has by resolution recommended bar associations condemn "pay for play" activities of lawyers in that it violates MRPC 7.2 which prohibits lawyers giving anything of value to other persons to get them to recommend the lawyer's legal services. While this may be a legitimate concern, competitive bidding of legal services is not the recommended ABA alternative.

Certain state agencies already, by law, use competitive negotiation processes to hire attorneys, primarily for collection purposes. {See KSA 22-4523(e), 75-719, 59-2006.} Many such statutes exempt the activity from competitive bidding requirements. To require competitive bidding in these areas would change the dynamics of how legal services are provided and perhaps cost the state more money.

We believe the current system of hiring attorneys, although possibly imperfect, is better than the proposed competitive system.

Adopted 3-3-00

Family Law

Issue: Fault-based divorce

KBA Position: KBA opposes a return to fault-based divorce codes.

Explanation: Some organizations want to return to fault-based divorce codes as a means of saving more marriages. This is especially true when one spouse doesn't want the divorce but feels powerless to stop the divorce because under current law the other spouse need only allege and prove incompatibility.

The goal is laudable but the means chosen to achieve the goal may not work. If one could lower the divorce rate by making divorce harder to achieve, then Italy and Ireland would have a divorce rate of zero and be filled with long, happy marriages. That is not the case. The concept of Divorce in a marriage dates back to ancient Rome. No fault divorce has its roots in 18th Century Prussia. Even when Church theocracies ran national governments, there was not ever a time when divorce was unknown.

Returning to fault-divorce will not lower divorce rates since we are dealing with different generations and ideas of what lifestyle is permissible. We can strengthen marriages and government should look for means of doing that, but making a divorce harder to obtain does not prolong marriage, it prolongs divorce and increases costs.

A return to fault-based divorce will result in more contested issues, requiring more court time and result in higher attorney fees. It will spur a whole new generation of "migratory divorce" litigation. A migratory divorce, which was quite prevalent in Kansas before the advent of no fault divorce, is a divorce obtained by one spouse in another state and litigation erupts in Kansas as to whether the "other" divorce is legitimate.

Fault-based divorce will not result in stronger marriages. It may result in some women remaining in an abusive relationship, unless one or both spouses are willing to fabricate a reason for the divorce that meets statutory guides. Perjury is a poor way to end a marriage.

Covenant Marriage One wrinkle in the return to fault based divorce is a growing movement towards covenant marriages, which is a statutory contract to use only fault-based divorce options. While the KBA believes there is nothing wrong with strengthening marriages through covenant marriages or other incentives for couples to remain married, the penalty for breaking a covenant marriage should not be a return to fault-based divorce. Longer divorces and heated litigation means higher attorney fees and more costly court trials. If adopted, any legislation implementing fault divorce or covenant marriages should be followed with an expansion of judicial funding to cope with the number and length of new trials, since these changes will result in new costs. Absent a willingness to fund these new costs, KBA opposes the change.

Issue: Child abuse reporting by dual licensed professionals.

KBA Position: KBA supports strengthening the attorney-client privilege by requiring child abuse reporting only by designated professionals who are practicing a non-law related profession.

Explanation: The professionals in social work have worked out a program at the University of Kansas where people can obtain a dual degree in law (J.D.) and a Masters in Social Work. KSA 38-1522, 39-1402 and 39-1431 require that a variety of persons with enumerated degrees are mandated by law to report suspected instances of child abuse. The professions involved include those licensed to practice in various social work fields, including an MSW. There is an exception for attorneys because of the attorney-client privilege, but there is no exception for those professionals with an MSW degree in addition to their Juris Doctor degree, but who practice law rather than social work. However, for those professionals who are listed as "reporters," if a timely report is not filed they may be guilty of a misdemeanor.

Since this law lacks an exception for those with a dual professional license who are practicing law, the reporting statute collides with the important public policy behind attorney-client privilege. In most instances Model Rule of Professional Conduct 1.6 requires attorneys to keep secret all client confidences learned in the representation of a client. A lawyer with an MSW (or other enumerated professional degree) must resign the other license in order to practice law. This could require an attorney-M.D. or an attorney-MSW who is practicing law instead of medicine or social work to report child abuse solely because he or she has obtained a second degree.

The purpose of the child abuse reporting law was to protect children suffering from physical, mental or emotional abuse or neglect by encouraging the reporting of suspected abuse. Professionals most likely to observe abuse were required to report it. Attorneys were exempted because the usual way attorneys might learn of this information would be in the representation of clients. To require attorneys to report this information to state authorities makes them the state's first witness against their own client, precisely what the attorney-client privilege has been designed to protect for centuries. Further, in the situation where attorneys with only a JD can keep the attorney-client privilege but those with dual degrees cannot cheapens those whose academic abilities have allowed them to acquire a second degree.

We prefer the law require reporting by these professions but only if they are practicing that profession, and not the practice of law. Lawyers who are MSWs cannot "switch" back and forth between professions whenever it suits them. There are many safeguards to keep abuse from occurring while at the same time keep the state notified of when child abuse is suspected. The alternative ought not be that in order to practice law one must renounce his or her MSW license.

Issue: Mediation voided for domestic violence.

KBA Position: KBA opposes legislation like 1995 HB 2465 which conditions child visitation on certain intervention programs designed to remedy domestic violence within the divorce or separation.

Explanation: While legislative efforts such as 1995 HB 2465 attempt a laudable goal, we believe such legislation does not adequately take into account that rural Kansas districts would be hard pressed to comply with such legislation. Kansas is fortunate that in larger districts trained counselors are available and affordable. This is not true in all areas of the state. Yet HB 2465, for example, invades the discretion of trial courts and makes mandatory presumptions of sole custody determinations and visitation limitations based on demonstrated histories of violence.

In some respect the statute implies that families involved in domestic abuse never heal, which is an assumption that should be examined before statutes mandate how to handle the situation.

The bar has confidence in the judiciary's ability to meet the challenges of the unending variations that develop in family law. Evidentiary presumptions and statutory mandates regarding custody and visitation cannot be accomplished through local court rules. While the goal of such legislation is laudable, we believe judicial discretion now adequately allows judges to take into account local resources and craft appropriate orders.

Issue: Family Court Systems

KBA Position: KBA opposes the concept of family courts currently being considered by the legislature. The KBA is not opposed to all concepts of family courts.

Explanation: Many "families" are in crisis in Kansas. Yet the court system ostensibly treats them in a compartmentalized way. Juvenile matters go to juvenile court, even though the juvenile issue arises out of domestic disturbances. The legislature is considering a pilot project for three judicial districts to see if consolidated juvenile, criminal and domestic court and combined staffs of such courts can make a difference in the delivery of services to families. However, we are concerned the current concept requires special judges with and special reliance on mediators without any assurance of adequate funding for training of each. The training of mediators was the Achilles' Heel of the proposal, since training is an issue of funding and mediation training has been inadequate in the past.

All of what was contained in the 1994 legislation can be done now through the administrative power of the Judicial District Administrative Judge. The problem is not judicial authority; it is legislative funding. Some legislators have indicated that additional funding through the family court system is the only way the judiciary will get additional funds.

Adding another requirement to the system without funding the entire system is not the answer. Full funding of the judicial branch can allow the judiciary to move towards a family court concept without pilot projects and with the full knowledge that the program should work based on adequate funding levels.

Issue: Investigator's reports to be available to all parties.

KBA Position: KBA supports the requirement that investigator reports be made available to all parties to a divorce.

Explanation: Currently, KSA 60-1615 prohibits lawyers from reviewing an investigator's report on possible child endangerment and divulging the information in the report to their client.

In 1995 HB 2225, the legislature attempted to allow all parties to have access to investigator reports, and prohibits divulging the report when a court finds the interests of the child or the parties requires nondisclosure.

The 1995 amendment ends a conflict of interest between attorneys and clients. We support the gist of this bill but suggest further modifications. We would prefer that anyone interviewed and involved with the report, including the investigator, be subject to deposition and or subpoena to testify in a custody or visitation matter. This elementary due process requirement has been disallowed in some cases by the courts whenever the investigator is determined to be an arm of the state. If there were parts of the report that could create irreparable harm to the children, a guardian ad litem should be appointed to assist the court to make a determination in that rare case and then the court would have the power to exclude that part of the report.

KBA recommends that KSA 60-1615(c) be amended as follows:

(c) Use of report and investigator's testimony. The court shall make the investigator's report available prior to the hearing to counsel or to any party not represented by counsel. Upon motion the report can be disseminated to the parties unless the court finds that distribution would be harmful to the parties, the child or other witnesses. Any party to the proceeding may call the investigator and any person whom the investigator has consulted for cross-examination. In consideration of the mental health or best interests of the child, the court may approve a stipulation that the interview records not be divulged to the parties.

Children need speedy resolutions of custody and visitation matters. Present court services officers and SRS are understaffed, frequently under-trained, and have case loads that generally prevent in-depth investigation. The statute should mandate time limits between the ordering of an investigation and the time the investigation and report should be completed.

Issue: Mandatory mediation prior to litigation.

KBA Position: KBA opposes mandatory mediation of domestic matters, such as those found in 1995 SB 233. However, we take no position on whether mandatory mediation should precede litigation in all matters.

Explanation: The proposed bill requires domestic relations litigants to enter into at least three mediation sessions and try and resolve their conflicts before they are allowed to file a petition for divorce, annulment or separate maintenance. If this bill passes, a spouse who needs a protection from spousal abuse or needs economic protection and therefore a restraining order could not get one until they went through mediation, which takes time. When violence is present in the home, mediation is not always the first or best option.

The bill is not specific as to the issues to be mediated. This form of legislation allows manipulation of children and economic issues which puts the have-not party to a disadvantage. Typically this is the woman.

We also are concerned that mandatory mediation might work in some parts of the state a lot better than other, more rural areas where mediation is not that available. The bill assumes there are qualified mediators in all parts of Kansas, which there are not.

If the intent of such legislation is counseling, courts have sufficient current powers to enter such orders for counseling after a petition is filed and before the final decree. Also, mediation of children issues is usually required by our courts under current law before evidence is taken on such issues.

This position should not be construed as taking a position on mandatory mediation principles used outside the domestic relations context.

Issue: Premarital Agreement act amendments

KBA Position: KBA supports the premarital agreement act generally, and opposes change to the act regarding three specific issues: (1) the time when the parties can challenge the unconscionability of such an agreement, (2) before execution of the agreement, whether either party provided a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party; and (3) whether any party was afforded a reasonable opportunity to consult with independent counsel.

Explanation: Prior to the 1987 act, premarital agreements, if otherwise procedurally fair, could not be challenged for unconscionability. Courts tended to look at the agreement as to whether it was fair and equitable under existing circumstances.

While true that under current law, a premarital agreement leaving one spouse with virtually nothing can be upheld even if the marriage lasted a long time or one spouse contributed a greater share of the marital property than anticipated, the purpose is to achieve some finality to property divisions prior to entering into the marriage. Premarital agreements are favored in the law. They help marriage partners in second or subsequent marriages adequately plan for children of previous marriages or divide existing and known property in case of a subsequent divorce. However, premarital agreements are contracts, and should not be subject to ancillary attack through litigation merely because the consideration for the contract is the marriage act itself.

Current law allows such nonenforceability of such agreements if any party can show the agreement was involuntarily executed. We are concerned that to allow collateral attacks on these agreements whenever the agreement is sought to be enforced whether or not the agreement was involuntarily executed will subject many existing agreements to future litigation and the uncertainty such litigation brings.

As to the recommendation that the UPAA be amended to require before execution of an agreement, the parties must be provided a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party; we believe such is required by current law.

Finally, we believe that whether any party was afforded a reasonable opportunity to consult with independent counsel need not be incorporated into the statute because it may be implied in our current law on involuntary execution of the agreement. Thus we oppose change to the UPAA on these specific grounds.

Issue: Abolishing Emergency Divorces

KBA Position: The Kansas Bar Association opposes abolishing emergency divorces.

Explanation: KSA 60-1608(a) allows an emergency divorce in limited situations. While rare, emergency divorces avoid the 60-day statutory waiting period.

The 60-day waiting period, or "cooling off" period, is misnamed and sometimes misapplied. The period was not created by the legislature to require parties to "cool off" before proceeding with a divorce with the state hoping that instead the period would lead to reconciliation. The period was imposed in our divorce law in the 1870s when the legislature named county attorneys as divorce "proctors" to determine whether divorcing parties (a rarity then) were leaving town with unpaid debts or other "liabilities." The sixty-day period allowed the county attorneys to complete their investigation. It was certainly not intended as a roadblock to a divorce or a cooling off period, nor as a means of thwarting the need for emergency divorces.

There are times and good reasons for allowing emergency divorces, such as tax planning for the parties whose divorce needs to be final by the end of the calendar year, or spouses in the military who are deploying overseas and would be unable to return for a divorce hearing. By definition, emergency divorces are not granted if the parties are not in agreement as to the disposition of property and other issues in the divorce; thus neither party can impose their will on the other using an emergency divorce. Thus eliminating emergency divorces will not get the parties to reconcile.

Issue: The Uniform Child Custody Jurisdiction & Enforcement Act.

KBA Position: The Kansas Bar Association supports enactment of the UCCJEA.

Explanation: This new act from the Uniform Laws Commission replaces the current uniform law governing interstate child support and custody determinations, KSA 38-1301 et seq. The new law makes several minor changes which do not significantly alter the purpose of the original act, which in part is to avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

The primary change is standardization of interstate enforcement of custody orders. We support such change in our law from this Uniform law.

Issue: Should state law require noncustodial parents of a divorce to support their children through college?

KBA Position: Unless the noncustodial parent is taking the tax deduction for a dependent college-aged child, the Kansas Bar Association opposes legislation to require parental support past what is allowed in the current statute, e.g. the age of majority or June 1 of the school year in which the child becomes 18.

Explanation: K.S.A. 60?1610 does not require noncustodial parents to contribute to college education of dependent children. The parties may agree on such support in the divorce decree. This sometimes occurs when the noncustodial parent gets to continue to claim the child as a tax deduction.

Some argue divorced children have a lesser financial ability to go to college than children of intact families and seek the change to remedy this situation. Such a law would grant children of divorced spouses a statutory right of support unavailable to children of intact families. That raises a host of equal protection problems. Further, noncustodial

parents may, or may not, get to help decide where the child will attend college. Further, there is insufficient credible data on the impact of divorce on higher education of children to support the proposal.

Unless tied to some benefit such as a tax deduction, we think mandating the support role for the noncustodial parent would be inappropriate. It is an issue better left to contract between the parties.

Issue: Should child hearsay statements concerning sexual or physical abuse by a parent be available in child custody or divorce actions?

KBA Position: The Kansas Bar Association opposes use of child hearsay statements concerning physical or sexual child abuse unless the action in which such statements are sought to be introduced directly involves the child who made the statement.

Explanation: K.S.A. 1990 Supp. 60-460(dd) allows hearsay evidence of children if the ``action involves children." This statute limits the hearsay to a criminal proceeding where the child is the victim of the crime, a juvenile matter where the child is the offender, or where the child is sought to be declared in need of care. Such hearsay is limited to statements made by the child. Some want to expand the statute to encompass divorce or custody proceedings in which there are allegations of physical or sexual abuse of the parties' child or children committed by one of the parties to the divorce.

We disapprove of this change in public policy. Child physical and sexual abuse occurs, and all citizens should be concerned. However, separating genuine from bogus allegations of abuse is a difficult process. Many such allegations come from parents in the heat of a divorce. Parental physical or sexual abuse of a child is a crime. If a custodial parent who, upon learning of such activity fails for whatever reason to bring criminal charges against a spouse, such spouses should not be allowed to offer hearsay statements of the child in a proceeding that merely decides divorce custody issues. If criminal charges are brought, statutes already allow hearsay evidence of the children.

Issue: The Rights of the Terminally Ill Act.

KBA Position: The Kansas Bar Association supports adoption of amendments of the rights of the Terminally Ill Act recently completed and recommended for state adoption by the Uniform Laws Commission embodied in the Kansas Natural Death Act, KSA 65?28,101 et seq.

Explanation: Since 1976, when California adopted the first "living will" law, thirty-five states including Kansas, have adopted similar legislation. Under this act, a competent adult can execute a declaration specifying the life-sustaining medical treatment may be withheld under certain circumstances.

Amendments to this uniform law have been recommended by the Uniform Laws Commission. KBA believes these amendments should be adopted to replace our existing law. Although Kansas has a Natural Death Act, uniformity in this area of law is desirable.

Health Law

Issue: Prohibition of medical technological causes of action.

KBA Position: The Kansas Bar Association opposes legislation designed to prohibit certain causes of action, such as wrongful life, wrongful birth, etc.

Explanation: Statutory prohibitions against new causes of action, without a strong showing that such causes of action are detrimental to society as a whole, are inappropriate. The court system is fully capable of separating meritorious lawsuits and legal issues from those of questionable origin. Judicially prohibitive statutes, in general, are

often too broadly based to be fair. The court system is designed to litigate individual issues of merit and broad-based exclusions by statute are inappropriate.

Litigation

Issue: Loser Pays Rule

KBA Position: KBA opposes the concept of a loser pays rule, such as 1995 HB 2279.

Explanation: This proposed legislation amends our civil cost statute, KSA 60-2003, to include "reasonable attorneys fees" to be assessed as costs in the case.

While the legislature can adopt this rule of law, called the "English Rule" of fee distribution, such awards may encourage settlement by defendants but also chill plaintiffs who have no access to justice without contingent fee availability and attorneys willing to accept this risk. Plaintiffs who cannot afford to bring suit but for the contingent fee system may be frozen out of the system by the specter of paying staggering defense attorney fees if the plaintiff loses.

KBA has generally opposed fee shifting concepts unless such legislation taken as a whole encourages pretrial settlement by imposing penalties on all parties unwilling to make progress towards a meaningful settlement. The "loser pays" rule, which burst onto the Congressional scene early in 1995, has not passed that body and there is belief it may not pass the 104th Congress.

Fee shifts like HB 2279 in Florida in 1982 was sought by the Medical Society in one year, but repeal was sought a few years later when defendants found they paid fees but rarely collected them because of that state's bankruptcy laws.

Merely adding on a fee penalty based on who "wins" would not only require a large new English-style bureaucracy in the Judicial Branch to determine a "reasonable" fee, we believe a better rule to consider is for a reasonable fee penalty after the parties fail to settle if at trial the winning party does not do somewhat better than what is offered at trial. Such a penalty should come only after full discovery and settlement negotiations. The party seeking such fees should prove the settlement offer was reasonable and was unreasonably rejected.

Issue: Pleading, Proving And Awarding Of Punitive Damages

KBA Position: KBA supports moderate legislation to curb certain practices concerning the pleading and proving of punitive damages in Kansas, but oppose caps on punitive damages.

Explanation: Public sentiment is growing that punitive damages are not always pled or awarded in clearly defined ways. There are calls for radical reform, including the abolition, of common law punitive damages. KBA believes a radical approach is unwise, and could create an improper imbalance in our social fabric. In our judgment the possibility of having to pay punitive damages deters willful, wanton, malicious or reckless conduct.

While KBA believes punitive damages are important ingredients in the law, we do not feel their use is always appropriately justified. Legislative testimony to the 1986 Summer Interim Committee on Tort Liability indicated punitive damages are sometimes alleged without proper evidentiary foundations in order to pressure risk-adverse litigants into settlement of actual damages claims. Kansas law now allows 10/12th of a jury to impose punitive damages where the evidence otherwise warrants. In certain situations, the legal costs to defend punitive damages

claims are not covered by liability insurance, and the defendant is forced to incur additional costs for separate counsel.

While it is important to maintain the deterrence of punitive damages, social justice must insure punitive damages are awarded only in appropriate circumstances. KBA supports punitive damage changes that do the following: allows bifurcation of the civil trial, so that in the first phase the trier of fact determines whether the conduct creates punitive damage liability. Only in the second phase of the trial will the trier of fact determine the appropriate amount of punitive damages after hearing appropriate mitigating evidence, including evidence that the defendant has already been punished. Require claims for punitive damages be proven by clear and convincing evidence the defendant acted with willful or wanton conduct, fraud or malice.

KBA believes punitive damages awarded under these modifications would preserve the importance of punitive damages while curbing any desire to abuse their use in civil litigation.

The legislature enacted punitive damage limits in 1987. Legislation has been proposed as recently as 1995 to change the 1987 limits on punitive damages imposed by law. Changing the way limits are calculated has the effect of merely preferring some civil defendants over others. From 1987 through 1996, only five cases affecting state punitive damage statutes have been appealed, and none of the five discuss the limits on the punitive award. We do not believe the case has been made to change punitive damage limits. Unless the legislature wants to repeal such limits altogether, we prefer the 1987 statutory limits on punitive damage awards and oppose any such change. (Renewed 11-30-01)

Issue: Tort reform

KBA Position: The Kansas Bar Association opposes changes in the existing adversarial tort law system including but not limited to

• rules governing residency of expert witnesses;

• creation of dollar caps on nonpecuniary losses in personal injury actions;
• changes in the collateral source rule regarding insurance proceeds or other economic considerations not amounting to post-injury personal mitigation of damages;

• statutes of limitation; or

• overall limits on awards unless proponents of such changes can demonstrate a clear and convincing public need for such change and such change can demonstrate a clearly defined public benefit. Explanation: Fault-based tort law grew from our common law heritage, with some statutory modifications. While the antiquity of a law does not guarantee its reasonableness, it does insure that reasonable minds have discussed the underlying theories and the law.

The purpose of our tort system is to maintain a system of "individual justice." There are two goals: (1) the wrongdoer compensates the victim of wrongdoing so that society in general will not have to provide care; and (2) deter the defendant from repeating such socially undesirable conduct.

While modifications to a pure common law system have been made in the past, none have evolved without strong public involvement and a well-documented search for alternatives. The public must derive some basic and substantial benefit from tort changes before such change is warranted. Changes often involve a tradeoff the public must recognize and understand before such changes will have lasting public acceptance.

While KBA is not unalterably opposed to changes in the common law, we believe it should not happen without an exhaustive legislative process of review which hears all sides and gathers supportive evidence needed to resolve these complex issues.

Issue: Changes to the Kansas Civil Procedure Code to closely mirror federal rules changes regarding expert witnesses.

KBA Position: The Kansas Bar Association is hesitant to support automatic conformity to the recent civil rules changes in federal courts. The Kansas civil practice is less structured than the federal practice. While changes are proposed in 1995 SB 140, there has yet to exist a frame of reference in the Kansas federal courts by which we may test viability of the proposed changes in state courts. We support generally the changes proposed in Sec. 10 of the House floor version of SB 140 regarding how expert witness reports are exchanged and generally the other changes made in that section. Without more input, and at this time, we oppose use of the Daubert rule to control the means by which courts determine competence of expert witnesses.

Explanation: The changes in the Kansas rules do not go as far as federal rule changes. A Kansas change incorporates a new case management conference in lieu of the discovery conference which is not provided under Rule 136. The primary change suggested by the Judicial Council in the discovery statutes result from incorporation of changes from the new federal rules with reference to limitations on discovery, disclosure of expert testimony and duty to supplement disclosures.

Changes such as those amending KSA 60-456(b) found in Section 29 of 1995 SB 140, as amended by the House Committee of the Whole, by requiring "an expert to limit opinions to those a judge finds are based on reasoning or methodology which is scientifically valid which can be properly applied to the facts in issue" attempts to incorporate the findings of Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786, 2795-2800 (1993) into Kansas law. The older Frye test was rejected by the Daubert Court in part to conform to the less restrictive Federal Rules of Evidence, particularly Rule 702 which authorizes the admission of scientific knowledge which will assist the trier of fact. While Daubert may apply in federal civil cases, such application is not automatic to Kansas civil cases and we are not yet convinced Daubert's methodology in federal civil actions is a better rule than the older Frye test. We prefer to see how the Daubert test works in federal courts before requiring Kansas civil litigation to use that rule. Use of experts and the manner and means of arranging for depositions of experts is important in the civil practice arena. Requiring expert reports be "complete" has been proven to hamstring a party at trial or summary judgment if an expert's report is incomplete or the expert deviates from the report in any manner. In some federal jurisdictions, courts have limited or stricken expert testimony which does not comply exactly with affidavits or reports provided by experts under a similar rule. Sometimes adherence to rigid structure causes more problems than it solves. We believe changes to our code of civil procedure which are similar to those appearing in Section 10 of 1995 SB 140 as amended by the House Committee of the Whole, are preferable.

Issue: Strategic Lawsuits Against Public Policy.

KBA Position: KBA supports the general concept that it should be difficult to base a lawsuit on the exercise of the right of petition of government.

Explanation: SLAPP lawsuits are sometimes used as a procedural device to force citizens to forego the exercise of their First Amendment privileges, or punish them with significant legal fees and costs in defending such a suit. Often the origin of the statements which fostered the lawsuit are remarks in a public forum.

Free speech in a public forum attempting to affect government policy is the highest form of protected speech. While we recognize that the right to file meritorious legislation also is protected by the First Amendment, anti-SLAPP legislation in a dozen states has attempted to find a common ground and a means of assuring that meritorious lawsuits can be brought by aggrieved persons or individuals, but that government can also seek to hear from a cross-section of persons on public issues without citizen fears that their remarks will be turned into litigation by those with whom disagreements are found. State law, including the Model Rules of Professional Conduct, require all attorneys to refrain from filing lawsuits which have no purpose other than harass or embarrass citizens or delay justice. Thus the bar has a continuing duty to assure that our procedures allow free speech in a public forum but a right to redress for those aggrieved by such speech if the exercise of such speech is truly egregious and is actionable under law. Sometimes a SLAPP lawsuit is grounded in allegations of slander, libel, or on other tort grounds such as intentional interference with a prospective business advantage.

SLAPP legislation recognizes that public officials doing their public duty are immunized against remarks they might make in a public forum, subject to narrow exceptions. SLAPP legislation is a methodology providing limited immunity for the public when testifying to those public bodies, so long as the remarks can withstand the traditional common law scrutiny. SLAPP legislation also provides a methodology to have judges quickly examine allegations by plaintiffs in such lawsuits to determine whether the lawsuit is appropriately grounded in slander. SLAPP legislation is consistent with our duties as members of the bar, and we support a bonafide effort to provide the state with such protections.

Issue: Business Records Subpoenas.

KBA Position: The Kansas Bar Association supports legislation to require notification of all litigants when business records subpoenas of nonparty businesses are subpoenaed.

Explanation: KSA 60-245a governs when and how businesses which are not parties to litigation (nonparty businesses) can have their business records subpoenaed. The intent of such subpoenas is to help litigants prove or disprove a contested point in the litigation. While the law requires records custodians in these nonparty businesses to seal the records inside an envelope and send them to the court, sometimes such persons send the records to the attorneys who subpoenaed such records. To prevent the possibility that records might inadvertently be opened, thus breaking the chain of custody of such records, the KBA suggests that all parties be notified of the issuance of a subpoena when such subpoena is issued.

1998 SB 551 would leave the 1997 amendments to this statute unchanged but provide that the documents will no longer be "filed" with the clerk at all. This is unacceptable since there is no way to insure that the documents have not been tampered with. Adversaries would allege that the firm subpoenaing the documents and reviewing them in private have made the record incomplete, thus making the documents ineligible for use in court.

Records simply need to be kept by the District court clerk's office in order to assure the integrity of the documents.

Issue: Y2K immunity

KBA Position: The Kansas Bar Association opposes creating immunity from liability based on Y2K computer software problems.

Explanation: The 1999 business community is concerned that there will be many failures in software around the world that will result in business interruptions and loss of profits. Their answer is to create immunity if businesses engage in certain good faith efforts at avoiding such interruptions.

Most of the facts indicate, however, that it is not Kansas litigants and businesses that will be the problem, but rather foreign suppliers of goods and services, many in Pacific Rim countries. Limiting liability in Kansas will not solve these sorts of problems. Thus, Y2K immunity for Kansas businesses in Kansas courts is a solution in search of a problem. Any fix that will work, if any, must be a national solution involving the Congress which in some manner protects American businesses from overseas problems.

Issue: Increases in Jury Compensation.

KBA Position: The Kansas Bar Association supports efforts to review and increase jury compensation where appropriate.

Explanation: The Wichita Bar Association is suggesting changes to Jury compensation statutes. They suggest paying meals, mileage and parking, but no jury fee, for the first three or four days then a substantial per diem cost for those having to serve five or more days. Most jury trials are four days or less, but when a longer one does appear, the financial hardship to the juror can be considerable.

County governments fund the jury compensation budget but the state controls the cost of jury panels. Unless there is a financial wash to this proposal, the counties may consider this issue a form of unfunded state mandate on local governments. KBA supports the effort to pay jurors more daily fees.

(Adopted 3-3-00)

Issue: Advising jurors of statutory limitations on awards.

KBA Position: KBA supports telling the jury the limitation imposed by statute on an award.

Explanation: 1995 HB 2311 recommends in certain personal injury cases involving a statutory limit on awards, the court shall not instruct the jury as to a statutory limit on an award. This raises the issue of whether juries should know of statutory limits on awards.

The purpose of a "blind" jury is to ensure the jury's award is based on the evidence and not an artificial means of filling in a blank on an itemized jury verdict. KBA opposed 1987 efforts at limiting jury awards in civil actions in 1987.

With the advent of itemized verdict forms, we think it improbable that juries will pad some actual damage line items in order to compensate for a limitation on awards they feel is too restrictive. We believe that full and complete knowledge by the jury of the facts and the mechanics of the system of justice, including statutory limits on awards and the means by which such verdicts are adduced, should lead to equitable results.

Issue: predicating workers compensation benefits on release of other liability the worker may have with the company.

KBA Position: The Kansas Bar Association suggests either legislation or administrative reviews to insure that in order for a worker representing himself pro se to obtain workers compensation benefits, the worker should be fully advised before entering into agreements to waive rights in other causes of action.

Explanation: Some workers acting pro se when injured on the job have been asked to give up causes of action in other forms in order to get workers compensation benefits. Sometimes there is a separate consideration for this waiver. Sometimes not. This often occurs when the amounts involved are small and the workers for whatever reason does not want to hire an attorney. Adhesion concerns are manifest in such situations.

KBA believes that either the law or the division of workers compensation, internally, should insure that workers do not have to give up possibly significant rights to litigation in order to obtain statutory workers compensation benefits.

Issue: Subrogation of health insurance companies.

KBA Position: The Kansas Bar Association opposes extending a statutory right of subrogation to third party claims to health insurance companies.

Explanation: K.A.R. 40-1-20 prohibits subrogation clauses applicable to health insurers regulated by the Kansas Department of Insurance. Proponents of statutory subrogation rights contrary to this regulation desire to bring Kansas into conformity with 38 other states which allow such rights of subrogation. Small amounts of savings on health care insurance (from one to possibly four percent) are estimated.

We believe subrogation clauses tend to increase litigation. Further, even if health insurance is allowed to subrogate, in order to be fair to all litigants, many amendments would be required to conform such laws to our existing collateral source rules and comparative negligence acts. Thus the minimal cost savings may prove illusory while at the same time subrogation may produce more litigation.

Issue: Should Congress enact federal legislation governing conduct of product liability litigation?

KBA Position: KBA supports a uniform product liability act by the Congress which implements a balanced law to give litigants in all states a fair and uniform playing field on which to resolve such disputes without changing substantive rules in the states regarding recovery of damages.

Explanation: There was strong consideration in recent Congresses for uniformity in presentation of product liability cases. Much of that consideration concerns "limiting" legislation: ?limits on awards, on contingent fees, and joint liability doctrines.

The focus of the business community, especially its manufacturing sector, on product liability issues is understandable, but perhaps springs more from a business perspective than a legal one. RAND's Steven Garber indicated managers frequently focus on maximum possible losses when engaging in business risk assessment. In such a process, worst case scenarios, no matter how remote, dictate business policy.

Further, the media covers the few civil cases that result in punitive damages for the plaintiffs far more than the many hundreds of jury trials that result in verdicts for the business defendants. Rarely do the media report on post-verdict reductions of jury verdicts or post-trial settlements in lieu of an appeal where plaintiffs receive far less than the jury authorized. This skews public perception, Garber says, allowing businesses to make false assumptions as to their potential liability.

The business community has often turned to the legislative process to seek protections or advantages in law. To seek protection from litigation is not surprising. It is, however, the type of issue that should be truly based on a "crisis," and facts, not simply the wants and desires of an influential special interest.

KBA believes intrusion of federal statutory law into state tort laws is contrary to the purposes of the Tenth Amendment of the U.S. Constitution. It also is unnecessary. The Kansas Legislature already has decided that certain restrictions on noneconomic loss, collateral source rules and punitive damages will apply in product cases filed in Kansas. The proposed congressional acts would add nothing to our own law.

Facts and statistics do not show a need for federal interference in Kansas substantive product liability tort law. A study by the U.S. Department of Justice indicates product claims account for only five percent of all tort lawsuits, and tort claims are just a fraction of all civil lawsuits.

The business community knows that product cases are only a tiny fraction of litigation problems facing them. The Wall Street Journal reported in 1993 stated that "{b}usiness contract disputes with each other constitute the largest single category of lawsuits filed in federal court" and that product liability suits against Fortune 1000 companies have actually dropped from 3,500 in 1985 to 1500 in 1991. Product liability litigation is primarily due to workplace accident and asbestosis cases. In 1985, 4,239 of 13,554 product cases filed in federal districts courts (31% of all federal filings) were asbestosis cases. The numbers of filings are in decline. The so-called "explosion" of product cases appears to be in limited areas.

Much has been made of our need for international competitiveness and the impact of our laws on such competitiveness. The Rand Institute for Civil Justice has estimated that the direct cost of product liability to American businesses represents less than one percent of the value added for most manufacturing firms, even those in reputed "high exposure" sectors, and that total liability risk costs for American manufacturers constitutes "much less than one percent of sales revenue."

To the extent product cases carry punitive damage claims, the General Accounting Office study found only 23 punitive damage verdicts were awarded out of 305 product liability cases studied in 1992. A comprehensive study by Rustad/Koenig showed that for the 25-year period from 1965 to 1990, only 355 punitive damage awards were issued in product cases and of those awards one fourth were reversed or remanded on appeal. The median of such awards was \$565,000. Only one sixth of the punitive awards exceeded more than four times the actual compensatory damages awards.

This is not to say the system cannot be improved. Our litigation system is too expensive and time-consuming. What is needed is uniformity of procedures and presumptions in product liability law. KBA urges the Congress to consider the Kansas Product Liability Act as a model, and adopt similar federal legislation so that product manufacturers in Kansas know with a degree of certainty what evidentiary burdens and standards are imposed on all product manufacturers in all American states.

We reject the need for Congress to change substantive tort laws of the states in order to meet a demonstrated need for uniformity and predictability.

Issue: Experience Rating of Kansas Health Care Providers.

KBA Position: KBA supports experience rating of health care providers.

Explanation: Premiums for malpractice are high. They create a problem for health care providers. However, physicians, commercial insurers and the state's Health Care Stabilization Fund have been reluctant to require experience rating, so that those with more claims pay more premiums. In 1986, the legislature required such experience rating. Before the law was effective in 1987, the 1987 legislature was asked to repeal the section, and they did.

Throughout the 1987 and 1988 sessions, physicians repeatedly said the crisis in rural medicine was acute and that high premiums were driving doctors from the state. Many of these doctors were primary care physicians. To continue a physician-sanctioned system of class ratings within the profession but not experience rating within the classes means that physicians in the same class with dissimilar claims experience pay roughly the same premium. That is unfair to the physician with the better record. Most other lines of insurance are experience rated. So should medical malpractice.

Issue: Prejudgment Interest in personal injury matters.

KBA Position: The Kansas Bar Association opposes the concept of prejudgment interest but would support such legislation if the effect of the bill, taken as a whole, encourages pretrial settlement by imposing penalties on any party unwilling to make progress towards a meaningful settlement.

Explanation: Settlement of legal disputes is preferred in the law, and should be statutorily encouraged. However, it takes all parties with cooperative counsel to effect a settlement. The concept of prejudgment interest as previously introduced penalizes only the defendant for failing to settle. The KBA does not support legislation which gives either side an upper negotiating hand in the process of finding a satisfactory settlement. Such legislation would not be in the best interests of justice.

In such legislation, both parties must be given adequate time for discovery before settlement offers which trigger the penalties are made. A balanced approach to this issue is required with prejudgment interest legislation.

Issue: Jury panels utilizing voter registration lists

KBA Position: The Kansas Bar Association opposes removing a court's ability to utilize voter registration lists when determining jury panels.

Explanation: State officials are concerned that people do not vote because they fear being chosen for a jury. Criminal defense counsel also are concerned that county reliance solely on voter registration lists skews minority representation on jury panels, perhaps unconstitutionally.

Statutes require jurors be chosen from a combination of lists, including county motor vehicle registrations. The KBA opposes removing voter registration lists from the jury panel statute. Such removal would raise serious constitutional questions in the criminal law field. Administrative judges should insure no single list is utilized.

Issue: Contingent fee regulation.

KBA Position: The Kansas Bar Association opposes legislative regulation of contingent fee contracts in legal matters. If such regulation is needed, it should come in a Supreme Court rule which sets guidelines for trial courts to review the attorney fee contracts of all parties, and make determinations of reasonableness based on the difficulties and circumstances of each individual case.

Explanation: The attorney/client relationship is intensely personal. Contingent fee contracts are designed primarily to insure that everyone has access to our judicial system. Contractual arrangements between attorneys and clients should not be abrogated by statute without sound, fundamental reasons of major public policy significance and which have a reciprocal benefit for all persons.

In 1984, a special subcommittee of the Litigation section of the Kansas Bar Association studied the contingent fee contract system of Kansas. The committee had benefit of numerous law review articles, court rules and cases, as well as a 50 state survey of how the several states regulate or abstain from regulation of such contracts. All members of the special study committee were of the opinion that contingent fee contracts provide a positive service to the public in that they are the only way many deserving people can afford a judicial determination of their rights. While there is a general feeling by the public that lawyers benefit too much under contingent fee contracts, or that such contracts somehow cause lawsuits, these perceptions are unfounded. The Rand Corporation's study of contingent fees indicates use of the contingent fee screens some cases out of the system, and, on average, the lawyer using contingent fee contracts will earn about the same as his defense counterpart. The appearance of contingent fee abuse can be eliminated through continuing legal education, and if necessary, court rules.

Since the 1988 adoption of the Model Rules of Professional Conduct regulating attorney's fee contracts, the Kansas Supreme Court has not hesitated to regulate fee contracts it felt was excessive. It has implemented MRPC 1.5 regarding fees, which applies a unique net fee contingent fee requirement. Our law also requires attorneys to advise clients that their contingent fee contract is subject to review by a district judge. In re Tuley, 258 Kan. 762, 907 P.2d 844 (Kan. 1995); In re the Matter of Potter, 263 Kan. 767, 952 P.2d 936 (1998)

Punitive regulation of the contingent fee system by artificial limits not related to the specific facts of each situation may keep otherwise meritorious claims from the judicial system, which would disenfranchise a large sector of our citizens from dispute resolution systems. The negative social implications from such exclusion would be great. Regulation of such contracts is therefore best left with the judicial branch of government.

Issue: Standards for granting immunity or privileges against testifying in court?

KBA Position: The Kansas Bar Association opposes legislation immunizing persons from testifying, or grant privileges against testifying, in court.

Explanation: Courtrooms are intended to determine the best possible version of the truth, consistent with civil liberties. To further that goal, the judiciary and juries must hear all relevant evidence. At common law, there were well-understood exceptions to the rule that everyone must testify when called upon. These are privileges such as attorney-client, priest-penitent, doctor-patient, and the like.

Some interest groups seek to go beyond the common law privileges and avoid the duty to testify by expanding privileges against testifying in court, essentially immunizing themselves from disclosing documents under subpoena, or creating statutory ``minimums of what constitutes prima facie evidence.

The Criminal and Civil Procedure codes abolished all common law privileges against testifying. K.S.A. 60-407 states that "except as otherwise provided by statute, no person has a privilege to refuse to be a witness." That code regulates many statutory privileges. While we do not challenge the ability of the legislature to define the parameters of when a person can testify, there must be structure to such changes.

Since the Code of Civil Procedure was adopted after extensive involvement of the Judicial Council and examination of case law the Kansas Bar Association opposes legislation that extends, limits or interprets rules of evidence regarding admissibility of evidence or testimony from otherwise bona fide witnesses, unless

1. there is significant Judicial Council study of such extension, limitation or interpretation,
2. a lesser restrictive method of meeting the identified problem does not exist,
3. case law is unable to speak to the issue in a manner consistent with good public policy,
4. the public interest in the change is compelling, and
5. the public interest is best served by the proposed change.

Issue: Should the size of civil juries be reduced and the less than unanimous jury concept discarded?

KBA Position: The Kansas Bar Association opposes reduction of civil juries to less than twelve without agreement of counsel for the parties. Further, KBA supports retention of the less than unanimous jury concept.

Explanation: Some counties suggest local government expenditures could be saved if the county jury fee were paid to smaller juries. However, there is no evidence that smaller juries render better and well-reasoned verdicts. Thus, the size of juries and the necessity for unanimity in their verdicts should not be mandated by the legislature for solely economic reasons. Such decisions should continue to be based on agreement of opposing counsel, taking into account the interests of their clients in light of the nature and complexity of the issues in controversy.

Issue: Regulating frivolous civil lawsuits.

KBA Position: The Kansas Bar Association supports efforts to eliminate frivolous and groundless lawsuits, claims and arguments through whatever means so long as such means are reasonable and practicable in conjunction with existing law.

Explanation: Frivolous lawsuits, claims and arguments waste court resources and increase costs of litigation for all parties. Increased costs are reflected in insurance premiums. The Bar has a duty in working with the judiciary to insure frivolous claims and defense are not allowed. Strong judicial sanctions are found in Federal Rule 11 and K.S.A. (1991 Supp.) 60?211 and should be enforced whenever appropriate. The Bar will support reasonable and practical legislation in furtherance of these goals.

However, we do not feel litigation should be regulated solely for the sake of regulation. The Judiciary has many needed powers to handle potential problems, and are encouraged to enforce such powers when appropriate. Legislative restraints on filing and litigating claims and counterclaims should be considered whenever they are reasonable and practical. But the primary role of the Courts is to regulate the practice of law and that includes abuses in the system where they are identified.

Miscellaneous

Issue: Appropriate Federal funding for a Legal Services Corporation.

KBA Position: The Kansas Bar Association supports the Legal Services Corporation, and funding of this nonprofit corporation at a level which will provide minimum access to the legal system: two attorneys for each 10,000 poor or disadvantaged people.

Explanation: Equal justice under law first requires equal access to the machinery of justice. Poor and disadvantaged people often are denied access to justice solely because of economic circumstances. A person's legal rights should not depend on whether there are funds available to pay an attorney. The profession's commitment to this problem through its pro bono programs is considerable. But this does not diminish the need for the LSC. Recognizing that this situation exists, and to help remedy this situation, in 1974 Congress created a non-profit Legal

Services Corporation to provide legal services to the poor. Recent efforts to eliminate the LSC or limit its jurisdiction are inconsistent with the demonstrated national need.

Dismay with LSC operations apparently stems from instances where government agencies become the object of LSC lawsuits. This, too, is inconsistent policy. If LSC has found it necessary to sue government agencies on behalf of its clients, such suits recognize that government agencies may not always act in accordance with the law. (Renewed 11-30-01)

Issue: State funding for Legal Services Corporation.

KBA Position: The Kansas Bar Association supports state docket fee funding of Kansas Legal Services Corporation.

Explanation: The 104th Congress has made it clear that future federal funding of the LSC program will be slim or nonexistent. In spite of this federal myopia, Kansas poor persons need civil legal services in record numbers. Without a meaningful system of providing lawyers to low-income Kansans, our courts will grow increasingly clogged with inefficient litigants acting pro se and draining judicial resources. This will impact adversely the remaining civil and criminal dockets.

KLS has recommended legislation imposing a docket fee increase and post-divorce filing fees to partially fund an Access to Justice fund administered by the judicial branch. KBA supports this new funding mechanism as an unfortunate but necessary means of providing low-income Kansans with meaningful access to the justice system.

Issue: Merit selection of judges

KBA Position: The Kansas Bar Association, although aware we have a dual system of electing or appoint judges, supports a merit selection of judges.

Explanation: Should judges be selected by voters in a political system or by Governors on the basis of merit? This question has been part of our judicial selection system since the Presidency of Andrew Jackson. An independent, impartial and qualified judiciary is more important to a republic than one which is popularly elected. The United States Supreme Court and the federal bench are good examples. Public officials elected by constituents are expected to be "representative" of the wishes and desires of the electorate. Such expectations, however, are inconsistent with an independent and impartial judiciary which, if circumstances warrant, must often protect minority interests against the will of the majority. Judges owe their first allegiance to the constitution, statutes enacted by the legislature, and the law, not majoritarian political pressures.

On balance, we believe the merit selection of judges based on qualifications for office rather than political or fiscal abilities to win partisan elections not only is the more desirable system of selecting judges but will result in a better cross-section of judges from our ethnic and gender communities.

As such, the Kansas Bar Association Board of Governors passed the following resolution on December 7th, 2012. It reads as follows:

RESOLVED, that the Kansas Bar Association supports the merit selection system for appellate judges and justices, independent of how merit panel members are selected. The present application, interview, questioning and selection process provides the best available information to identify and select the most qualified appellate judges and justices, independent of political considerations.

Issue: Conflicts between statutes and the Model Rules of Professional Conduct.

KBA Position: KBA supports efforts to conform legislation to the Model Rules of Professional Conduct.

Explanation: Prior to 1908, the regulation of the bar was left to statutory enactments. Fewer members of the legislature, however, are lawyers. And in 1972, the Judicial Article was written so as to give the Supreme Court the overall administrative responsibility for the practice of law and court administration. The Model Rules of Professional Conduct were adopted in Kansas in 1988. Much of their impact is on courtroom behavior and the means by which lawyers ethically represent their clients. Often unintentionally, the legislature enacts laws which parallel regulation of the bar found in the MRPCs, but other times they directly change the way the Court prefers to regulate the bar. An example is workers compensation contingent fees are allowed a statutory gross fee of 25%, while the MRPC 1.5 prefers all contingent fees be "net" fees.

Part of the legislative work of the KBA should be to ensure as much as possible that proposed legislation conforms to the Model Rules when it directly or tangentially regulates the practice of law.

Issue: Compensation of Kansas judges and judicial branch employees, including differentials between the trial and appellate bench.

KBA Position: The Kansas Bar Association supports increases in salaries of district judges to at least the nationwide median for judges and maintaining appropriate salary differentials between the trial and appellate bench. The KBA also supports improved, competitive pay scales for non-judicial personnel in the judicial branch.

Explanation: An independent and impartial judiciary requires one that is compensated for the sacrifices, fiscal and otherwise, required of a judge. Kansas judges currently are paid well below the median amounts for judges in similar positions of responsibility in other states. Such increases should be implemented immediately.

KBA also supports changes in judicial compensation statutes so that judges get cost of living adjustments or step increases in pay plans in a manner consistent with other state employees.

Some lawmakers and judges believe raising docket fees and earmarking the increase for judicial salaries is appropriate. We think that is inappropriate. It is analogous to the old Justice of the Peace system where the judge was paid by the number of cases and fines he was able to conduct and levy. While we do not believe using docket fees would lead to the abuses of the old JP system, philosophically docket fees should be used to offset part of the cost of the judicial branch in toto, not just the salaries of judges. If docket fees are used to offset judicial salary increases, there is no good reason not to extend the concept to paying for the judicial branch entirely. That puts the costs of this branch of government entirely on the backs of the litigants -- except the largest users of state court resources are state, local and county governments -- and by law, government does not pay filing fees. Thus only part of the litigants using the system would be paying for it.

In the process of bringing such salaries to the national median, appropriate salary differentials between district judges and the appellate judiciary should be maintained.

The differentials should be commensurate with differentials in other states. In the past raising the district court salaries has acted to lower the differential between district court salaries and appellate justices. This reduced differential does not take into account financial sacrifice necessary for newly appointed appellate justices to give up their practice and move to Topeka in order to perform their duties.

We further support an increase in the legislative appropriation for judicial salaries direct from the general fund, and if necessary with augmentation by a reasonable increase in Chapter 60 filing fees.

There is also a growing crisis in funding salaries of nonjudicial personnel. While salaries of nonjudicial personnel in our court systems have kept pace with other state employees since it is based on the state pay plan, wide gaps have developed between what is paid to court employees at the county level and other county employees. District Court clerks in some counties are paid far below what other county elected officials are paid. This difference creeps into the pay schedules of deputy court clerks, too. In some Kansas counties near Kansas City, district court personnel are paid less than dealers and other personnel hired by riverboat casinos. Without the ability to attract and retain quality personnel in our district court clerk offices, the vital functions performed in such offices, such as collection and

disbursement of child support, will erode. All persons seeking assistance of the legal system will suffer, especially the business community.

The judicial system benefits all tax payers. All should pay for it. The state general fund should pay for salary increases, not the litigants using the court system.

Issue: Compensation of federal judges.

KBA Position: The Kansas Bar Association supports the objectives of H.R. 875 to insure a more stable compensation system for federal judges.

Explanation: The KBA has long supported adequacy of judicial branch budgets. Recently, Congress has repeatedly failed to adjust judicial salaries, even with cost of living adjustments. The lack of a dependable and secure compensation system for federal judges, and political assaults on federal judges make it difficult to secure and maintain qualified candidates to become judges, and maintain an independent federal bench. Congress should speak to this problem and assure that judicial salaries are not diminished because of inflation, and should help maintain an independent federal judiciary.

Issue: A permanent Independent Citizen's Commission on Judicial Compensation.

KBA Position: The Kansas Bar Association supports the creation of a permanent independent citizen's commission on judicial compensation. A majority of the members of the commission should be lay persons.

Explanation: Keeping judicial salaries attractive is an ongoing problem which should be addressed by a permanent citizens' commission. Historically, the legislature has been reluctant to fund judicial salaries at levels which remain competitive with other key members of the executive branch, and judicial colleagues in other states.

In 1979, similar recommendations from a citizens group were not implemented by the Legislature. The idea of a commission has merit, however, and should be renewed. We see no reason not to expand the concept to include recommendations on legislative and executive branch salaries, too.

Issue: Term limits for Judges

KBA Position: The Kansas Bar Association opposes term limits for judges.

Explanation: In 1787, the founding fathers devised a unique government where a separate judicial branch, not beholden to the passions of the electorate, would make the difficult decisions necessary to dispense justice free, as far as humanly possible, of political influence.

While the founding fathers discussed but did not adopt the concept of "rotation" for Congressmen and Senators, a form of voluntary term limits, this concept was never considered for judges. The founding fathers felt judges should have lifetime tenure during good behavior.

Term limits have become populist means by which people assure that governors and Presidents - and now legislators - do not become career politicians. While it would take a constitutional amendment at the federal level to impose term limits on the federal bench, the Kansas constitution is less certain.

While policy makers can argue over whether the experience that comes from longevity in a public office may or may not be desirable in legislative branch officials, longevity is desirable in the judicial branch where experienced judges must be able to handle strong-willed attorneys with decades of advocacy experience. Term limits for judges

would not strengthen government. A lawyer who gives up a practice to become a judge will not do so if service on the bench, no matter how good that service is, turns out to be for a comparatively short time. Whatever period of time is chosen for the "limit," if imposed on the judiciary, lawyers would not seek judicial office until within that number of years of retirement. No lawyer wants to build a practice, take a term of years on the bench, and then because of a term limit be forced to return to private practice and build a practice all over again. This severely restricts the number of qualified attorneys who would serve on the bench.

All judges in Kansas are subject either to merit retention votes or reelection. If judges are not doing the job in their public service, voters do have recourse. These individual decisions - made with individual judges under local circumstances - are the correct way to handle a judge's length of service.

(Renewed 11-30-01)

Issue: Attorney fee regulation in Workers Compensation matters.

KBA Position: The Kansas Bar Association opposes further statutory restrictions on attorney fees in workers compensation matters, including defense counsel regulation.

Explanation: Prior to 1955, contingent fees in workers compensation matters were not regulated by statute. Then statutes were limiting claimant's fees to no more than 25 percent. In 1987, the law was changed to allow a "reasonable fee set by the director of workers compensation, not to exceed 25 percent" of the total.

In the 1992 session there was a call for further restriction on the attorney's fee in order to hold down costs. Further, by restricting what the comp system would pay for injuries, it was felt that by limiting fees, the net to the workers would be increased. Suggested changes included limiting the 25 percent figure to the excess of the recovery over and above what the company offers the worker prior to the worker seeking assistance of counsel. While some think such an arrangement merely codifies what is currently the practice, we would suggest that under current law the Director has all the authority he or she needs to in fact make that the "reasonable fee" arrangement under workers compensation law.

In addition to the workers compensation statute, Model Rule 1.5 regulates the reasonableness of attorney fee contracts. Further statutory regulation is unnecessary.

Issue: Initiative and referendum

KBA Position: The Kansas Bar Association opposes initiative and referendum.

Explanation: In 1792 as part of his writings on the First Amendment's petitioning clause and noting the lack of a written English constitution on the unchecked powers of Parliament, James Madison wrote of the need for written constitutions and unalterable rights. He felt such written guarantees were needed because the body politic might often produce undesirable results if permitted to govern exclusively by majority rule. He preferred a system of elected lawmakers exercise their best collective judgment, and that those lawmakers not be bound to petitions and instructions from home. In that regard, the federal constitution disallows initiative and referendum, preserving instead a "republican" form of government.

Madison did not oppose petitioning and instruction forms of lawmaking. Petitioning and instruction was a form of initiative and referendum, and was common in the 18th Century colonies. Unlike petitioning, which requires no vote, initiative and referendum puts issues in front of voters for their decision. Initiative is one way of governing a state. We do not believe it is the best way.

States were free to adopt other forms of government. After the civil war, initiative and referendum began in the populist era when legislatures were perceived as being unresponsive to the needs of the time. That is not, and has not been, the situation in Kansas. Generally this state has had a very responsive and responsible legislative system.

While some Kansans believe the legislature may not have always acted in their best interest, they can rarely criticize or point to legislation that was necessary that was not enacted because the legislature was controlled by "special interests." Initiative and referendum is not the answer to those who feel a legislature has not done the right thing. The least valid reason to enact initiative and referendum is the number of other states with the law. In states with initiative and referendum it often makes ballot counting more difficult and leads to ballot confusion. Sometimes contradictory issues are on the same ballot, and pass not on their merits but because voters were confused. The concept also can be lead to extreme positions by the majority of voters who react to fear campaigns.

As was stated by the National Association of Attorneys Generals in a 1988 position paper on individual rights: "It is an unfortunate fact of American history that if the rights of blacks, Indians, women, Hispanics, Italians, or Jewish citizens were put up to a popular vote at particular stages of history, the results would be catastrophic." A deliberative legislative body is not a guarantor against such results, but it is easier to hold legislators accountable for their votes than it is the public reacting to often misleading statements and tactics in media oriented initiative and referendum campaigns. The major beneficiaries of initiative and referendum are newspapers and media who benefit from the pre-election advertising.

Absent a showing that the Kansas Legislature is historically unresponsive to the people it serves, we do not believe initiative and referendum is needed nor is it desirable.

Issue: The Equal Rights Amendment

KBA Position: The Kansas Bar Association supports the submission of an Equal Rights Amendment to the several states for ratification.

Explanation: When the Declaration of Independence was written, it is historically clear that while "all men were created equal," in political fact they were not. Women were not considered equal with men, nor has the constitution always been interpreted to grant equal status to women. The Kansas constitution of 1859 was one of the first state documents to provide for marital property rights of women. This state has a long history of supporting women's rights. While it is true federal legislation now exists which partially guarantees equality of the sexes, we believe statutory changes might be enacted which can dilute the rights of women in our society. The concept of equality of women is so important that the Kansas Bar Association believes it should be included in the United States Constitution.

Issue: Should minimum mandatory automobile insurance coverage be increased?

KBA Position: The Kansas Bar Association supports increasing minimum mandatory automobile insurance coverage.

Explanation: Since implementation of no-fault insurance in Kansas in 1974, the state has required minimum levels of liability coverage as a condition of the privilege of driving in Kansas. That level is currently \$25,000. Proponents of increasing the amount argue inflation, especially medical inflation, has eroded the protective power of such insurance.

Indications from Kansas-based insurers are that only 13% of all automobiles carry the minimum amounts. Most others carry \$50,000 or \$100,000 in liability coverage. Thus a higher requirement will affect only 13% of the automobile insurance policy premiums. The cost of the change, while not insignificant, is manageable. If public policy behind mandatory insurance minimums is to be given meaningful effect, the limits required by law must keep pace with inflation in the cost of bodily injuries and comprehensive damage. KBA supports such an inflationary increase up to \$100,000.

Issue: Automobile no fault insurance at the federal level, so called "choice" proposals.

KBA Position: KBA opposes national no-fault liability laws. State legislatures should determine such issues. Explanation: Congress is considering automobile insurance "choice" proposals. On April 22, 1997, the legislation was introduced that would preempt state automobile no-fault liability laws and create a federally mandated system where consumers would have to choose between two types of coverage.

The first type, personal protection, would permit motorists involved in an accident to recover from their own insurance company on a no-fault basis for economic losses. While the motorist could sue the responsible party on a fault basis for uncompensated economic damages in excess of his or her policy benefits, he or she would not be able to recover for non-economic losses. The second type of coverage, tort maintenance, would allow drivers to cover themselves for whatever level of economic or non-economic damages they want. Motorists with this type of coverage would be able to recover both economic and non-economic damages from their own insurance policies after proving fault if involved in an accident with a motorist who has personal protection coverage. Compensation for accidents involving drivers who each have tort maintenance would not be affected by the legislation. How the two systems work together -- when a "regular" insured has a collision with a "no fault" insured -- makes the system terribly complex and hard to underwrite.

This proposal comes from one major automobile liability insurance company and a few allies, but opponents include many actuarial organizations and other automobile insurance companies. Even organizations like the American Academy of Actuaries has opposed it because they are unsure whether the proposal actually will save premium dollars as proponents allege.

Proponents argue that a few insurance companies oppose the change because they make more money off premiums in the current system. The strongest argument of opponents was that by imposing this option by Congress could adversely affect the existing rates of insurance by some states, including Kansas, which already have no fault automobile liability insurance.

The ABA opposed the system because of their long-standing commitment to state legislatures deciding tort issues. Historically, KBA has opposed federalization of these sorts of issues.

Either way, with the insurance industry itself divided. With uncertainty as to whether states with current no-fault systems would be adversely affected, now is not the time for automobile insurance consumers to become financial guinea pigs.

It is better to leave such tort system changes to the determination of each state legislature.

Issue: No Fault Medical Malpractice compensation systems.

KBA Position: The Kansas Bar Association is opposed to legislation which purports to create a system of compensation for medical malpractice on a no fault basis.

Explanation: While such concepts are limited to setting up a no fault system of compensation individuals injured by medical care providers rendering services under certain federal health care programs (i.e., Champus, VA Hospital Care, Medicare, Medicaid), implementing such a law would cause a clear and fundamental departure from common law tort compensation. One of the main purposes of our system of tort compensation is to deter the activities of a negligent defendant. The suggested concept tells health care providers there is no legal concept known as "negligence" and injects into our legal system an unwarranted theory. The citizens of this nation are the beneficiaries of the legal system, and there is no broad move on their part to request this system of compensation. They are not assured such compensation will be any fairer or more thorough than the present system.

Issue: Law-related education.

KBA Position: The Kansas Bar Association supports law-related education efforts and funding.

Explanation: Before the Bar can expect better understanding of the legal profession and its role in society, teaching the importance of our legal system must become a part of our school system. Teaching such information is called "Law-Related Education." The State Board of Education and the Kansas Supreme Court have embarked on a joint project to provide LRE efforts in public schools. The Kansas Bar Association supports such efforts.

Issue: Regulation of Campaign Contributions from Corporations, Union and Political Action Committees.

KBA Position: The Kansas Bar Association supports legislation to return Kansas politics to a system where the primary financing element of those campaigns is a natural person with a personal checking account.

Explanation: In 1994, the voters of Kansas and this nation seemed to say they wanted less government spending and less bureaucracy. If we believe in that goal, spending ever increasing amounts on campaigns is contrary to that goal. It is hard to believe that candidates who spend ever-increasing sums on campaigns are going to be frugal with the public's tax dollar.

PACs, corporate and Union contributions have tilted the "dependency" of candidates to large contributors. As campaigns become more expensive, driven up by ever larger numbers of PACs and growing corporate contributions, elections become like warfare. Escalation by one side brings on higher expenditures by the other side. In the 1994 general election, 84 percent of all contested Kansas House races were won by the candidate who spent the most money.

Abolishing direct PAC, corporate and union contributions will impact incumbents and challengers alike. We support legislation which amends current law so that only individual contributions can be sought and directly received by candidates for state public office. The prohibition includes state party contributions, except those given through the national party to the state party.

This concept does not eliminate PACs or prohibit them from making independent contributions to candidate campaigns. Our concept puts a premium on candidates convincing PACs, businesses and unions to raise funds from the individuals in their organizations rather than the organization itself.

We believe that if the legislature is going to prohibit PACs, the legislature must treat Union and corporate contributions the same way. Otherwise an unlevelled playing field results.

Real Estate, Probate & Trust Law

Issue: Trustee non-claim notice.

KBA Position: KBA opposes this unnecessary method of notifying debtors of a deceased.

Explanation: HB 2702 was introduced in the 1998 session by the Trust division of the Kansas Banker's Association. The bill requires trustees of a trust with the duty to pay the debts of a decedent to give legal notice to creditors of such a decedent.

We believe the bill is not needed to protect a trustee since the normal probate non-claim statute cuts off all creditors if a probate is not opened within six months after death even when no actual notice is given to ascertainable creditors. There are U.S. Supreme Court cases upholding this kind of self-executing statute of limitations as being constitutional.

If the six month statute of limitations has a constitutional defect, then there is a number of probate procedures that do not toll the six months and an executor/trustee using one of those procedures would not be covered by the new proposed legislation, thereby creating a gap.

If the notice is not given, which includes both a publication notice and an actual notice to ascertainable creditors, the bill makes the trustee liable for the debts. That changes the current creditor law in Kansas to make it much more unfavorable to be a trustee, and unnecessarily requires trustees (particularly of small trusts) to incur the expense of publication and actual notice when it currently is not necessary.

At the least such a notice provision should run parallel with the non-claim statute in the estate. For example, the requirement of notice applies whether the six months has run or not. In a probate estate, you have the six month provision to cut off claims. Without parallel tracks, the creditor exposure for a trustee of a living trust is in far worse position than an executor of a probate estate.

Issue: notary signatures; out-of-state self-proving wills.

KBA Position: The Kansas Bar Association supports legislation to allow Kansas notaries to witness signatures required for the validity of Kansas testamentary documents but obtained in other states.

Explanation. KSA 59-606 requires a signature for self-proving wills by a notary who is authorized to take acknowledgments "under the laws of this state." Advances in medical science mean that, unlike the early and mid parts of the 20th Century, Kansas residents may spend their last days in another state but yet desire to make valid wills and codicils to dispose of their Kansas property.

While Kansas notaries can witness documents in Kansas, the statutes do not allow witnessing of self-proving wills by notaries from other states. An out-of-state notary's signature would invalidate a Kansas self-proving will. Such technical hair-splitting based on where the Kansan spends their last days is not desirable if it leads to thwarting the valid and coherent desires of a dying citizen.

We believe amendments to KSA 59-606 are warranted and justified.

Issue: imposing on the kin of decedents the funeral expense debt.

KBA Position: The Kansas Bar Association opposes 1995 HB 2515 and similar legislation imposing on next of kin of a decedent the funeral expense debts of the deceased.

Explanation: Such legislation imposes as public policy the requirement that immediate family members of a deceased assume all unpaid funeral expenses. This issue comes about as SRS is being pressured to cut back on funeral expense costs, thus the morticians look elsewhere for full compensation. If statutes allocate such costs in this manner, why not all hospital bills, all unpaid medical and all legal costs, too.

Cutbacks on state funding are an insufficient reason to impose this sort of requirement. It may have Fifth Amendment implications, since the law imposes on private individuals the obligation without due process and one heretofore paid by the state or county government. In many instances, the decedent may have disinherited the next of kin, but they are left with major debts. A different solution to SRS problems must be found.

Issue: Medicaid payments as a fourth class claim.

KBA Position: KBA supports reclassification of Medicaid payments as a fourth class claim.

Explanation: Several years ago, SRS sought approval to reclassify Medicaid claims as a higher level of claim in probate of small estates. New legislation HB 2184 seeks to reclassify such claims as fourth class claims, the same as it was several years ago before amendments to KSA 59-1301. We agree with this proposed change. The change several years ago had the effect of elevating SRS death claims in small estates to a higher class, thus paying more of them. It was uncertain why SRS should be paid when treating physicians and others were not being paid.

Issue: evidentiary proof in probate.

KBA Position: KBA opposes submission of trust or testamentary documents to probate without some independent proof of authenticity.

Explanation: 1995 HB 2110, permits submission of a will as valid without necessity of the proponent of the will to prove the will or make a prima facie case of validity if there is no contest. The proposal may seem attractive in those circumstances where witnesses may be difficult or impossible to find, but we believe that, on balance, the formality of proving a will and the formality of its execution and the requirements of proving a will should remain the same. The Probate Law Advisory Committee of the Kansas Judicial Council considered this concept and opposes it. The advent and wide-spread use of self-proving will clauses will alleviate much of this problem. It is not our belief that our position here conflicts with Chapter 179 of the 1995 session laws.

Issue: Removal of trustees

KBA Position: KBA opposes any concept that trustees named by a grantor in a trust instrument can be removed except for cause.

Explanation: It is the grantor's trust that is being changed. It is the grantor's will that is being followed. And it is the grantor's money or property. Beneficiaries should not have the right to change these designations without some showing of cause.

Issue: The Rights of the Terminally Ill Act.

KBA Position: The Kansas Bar Association supports adoption of amendments of the Rights of the Terminally Ill Act recently completed and recommended for state adoption by the Uniform Laws Commission embodied in the Kansas Natural Death Act, KSA 65-28,101 et seq.

Explanation: Since 1976, when California adopted the first "living will" law, thirty-five states including Kansas, have adopted similar legislation. Under this act, a competent adult can execute a declaration specifying the life-sustaining medical treatment may be withheld under certain circumstances.

Recent amendments to these laws were recommended by the Uniform Laws Commission, which KBA believes should replace our existing law. Although Kansas has a Natural Death Act, uniformity in this area of law is desirable.

Taxation

Issue: Kansas Pick Up Tax Policy

KBA Position: The Kansas Bar Association supports Judicial Council legislation make modifications to the pick up tax.

Explanation: In 1998, the legislature repealed the state's inheritance tax in favor of a pick up tax approach. Only decedents with a taxable estate exceeding \$625,000 are subject to the state's pick up estate tax. Several issues were left over for resolution in the 1999 session. In the past, to enforce payment of the tax, the state placed a lien against real estate in Kansas. Now, the federal lien is felt to be sufficient and there no longer needs to be a state lien. Instead of the lien, the Judicial Council recommends a concept known as "transferee liability." A recipient of property from an estate becomes personally liable for payment of the estate tax to the extent of the value of the property received. Other issues recommended by the Council include:

.. That the requirement the district court make a finding that all taxes have been settled prior to allowing a final accounting be repealed.

.. Remove the requirement that a closing document be sent either to the court or the register of deeds. Like the IRS, the closing document will only be sent to the personal representative and any tax preparer.

We believe these changes make our estate tax more responsive and a better law.

Issue: federal taxation of nonprofit association interest as Unrelated Business Income.

KBA Position: The Kansas Bar Association opposes Clinton Administration proposals to tax the idle invested funds of nonprofit associations.

Explanation: The Clinton Administration announced in 1999 they would like IRK 501(c)(6) nonprofit associations such as Bar Associations to have their idle funds taxed as unrelated business income tax (BIT). The long-standing BIT tax was initiated several decades ago to tax certain income of nonprofit associates where those nonprofits were engaged in activities that directly compete with for-profit businesses.

The taxation of nonprofits that compete with for-profit enterprises makes sense, since the for-profits must pay an income tax and nonprofits do not, even when selling the same goods or services. However, having the government tax investment income of nonprofits on the "UBIT theory" does not make sense. Interest on idle funds allows nonprofits to defray part of the operating expenses of the organization, and that organization then is able to provide goods and services that for-profit corporations cannot or will not provide.

Society gains from the work of nonprofit associations. Taxing this revenue will only incrementally weaken nonprofits around the country. The KBA opposes this new federal revenue source.

Issue: tax liens on personal property.

KBA Position: The Kansas Bar Association opposes extending tax liens to personal property of our citizens.

Explanation: Current statutes allow liens against a taxpayer's real estate if there is a failure to pay personal property taxes. The legislature is considering a bill that would impose the same sort of lien process on personal property. The bill is largely in response to the holding in *High Plains Oil v. National City Bank of Cleveland, Ohio*, 22 Kan.App.2d 968, 925 P.2d 846, (1996). This case involved a county's tax lien against oil and gas leases. Because such leases are personal property rather than real property, the statute imposing a lien on realty does not apply. Placing tax liens by statute against real property when the taxes are unpaid makes sense, since real estate cannot easily leave the state and county officials know when real estate title changes hands. While in the abstract it sounds like good policy to place such liens on personal property too, in practice it would cause enforcement problems. Persons and corporations that buy real property have elaborate title opinions or get title insurance which review the tax status of the property, almost always assuring that taxes have been paid before or as the sale is completed. This is not easily done with mobile personal property.

Current law allows a lien on personal property if the personal property is sold between the date of assessment of the tax and taxes remain unpaid by the date of sale. The lien does not attach if there is a change of status in the character of the property but it is not "sold." For the statute to apply, the owner of the personal property at the time of the tax assessment must also be the seller of the property. The case which prompts the legislation involves taxes on an oil and gas lease that, between the date of assessment and before the tax is paid becomes part of a bankrupt estate, but was never "sold" in the classic sense. In such situations, the lien on personal property does not apply.

Further, January 1st is the date of assessment for personal property taxes. If an automobile owner "O" transfers title on December 29th to "B" and property taxes are assessed on January 1st but "O" is notified but "B" is not, if "B" sells the automobile to "C" on January 10th, who owes the tax? Putting a lien on the automobile would place the

onus on "C" to pay the tax even though it more rightly should be paid by "O" or "B." Such liens without an instant means of determining whether automobile taxes had been paid would require a major and perhaps expensive change in our tracking bureaucracy.

In our example, the county can still require "B" to pay the tax by placing a lien against any real estate owned by "B". If "B" does not own real estate, the county can collect the tax by means of an ordinary civil lawsuit against "B." Considering that many automobile taxes are rather small, these remedies are adequate. For these reasons, KBA opposes expanding our lien laws.

Employment Law

Issue: Whistle-blowers statute

KBA Position: The Kansas Bar Association supports keeping any statutory expansion of the whistle-blower protections to the equivalent of existing common law.

Explanation: Civil service law was a late 19th Century attempt to create a career government employee service and insulate nonpolitical appointees and positions from the whim of politically-based job terminations. KSA 75-2973 was enacted in 1984 as part of the civil service code to protect classified state employees against job-related retaliation if the employee reported to any legislator, or the legislative post audit committee, any wrongdoing that he saw within the agency. This is the statutory whistle-blower act.

Common law whistle-blower lawsuits, however, are much different. They govern all other types of employees. The purpose behind such lawsuits is found in *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988): "Public policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare. Thus, we have no hesitation in holding termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a co-worker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort. To maintain such action, an employee has the burden of proving by clear and convincing evidence, under the facts of the case, a reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee; and the employee was discharged in retaliation for making the report. However, the whistle-blowing must have been done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy or personal gain." (emphasis added)

We are moving away from larger government, towards smaller government, through downsizing and privatization. As government changes and more functions of state government are privatized or given to local units of government, state auditing agencies lose some of their jurisdiction to discuss with classified state employees the functioning of those private entities or local governments which not have assumed, by contract, the role of state government.

The 1996 legislature considered legislation from the Kansas Association of Public Employees to dramatically change the grounds for bringing a lawsuit for wrongful discharge as a whistle-blower. Instead of requiring lawsuits only in situations involving infractions affecting the health, safety and welfare of the public, the legislation wanted employees to be shielded when discussing any operations of the agency. By extending the statutory whistle-blower action to all employees of any business or profession that contracts with state government, thousands of new

employees were brought under the act that have no connection whatsoever with the original intent of the law to protect the civil service employee.

Among the problems created by the bill is a narrow and unclear handling of the attorney-client privilege. The KBA prefers to assure that in such changes attorney-client matters could not be divulged by a law firm employee seeking whistle-blower status.

Other problems identified with the original bill were:

1. In the private practice of law, confidentiality is imposed on lawyers by Supreme Court rules. (Model Rule of Professional Conduct 1.6 of the Kansas Supreme Court.) Since a lawyer is responsible ethically for the adverse conduct of lay employees, Rule 5.3 extends the confidentiality requirement to employees of the lawyer. The bill is a statutory exception to MRPC 1.6 and MRPC 5.3, unless modified to exempt from the statute's application statements made in violation of the Model Rules of Professional Conduct.
2. The bill grants protection for any communication about the agency or the subcontractor regardless whether they rise to the level of "public concerns." This extends whistle-blower protection beyond existing case law.
3. Section (b)(1) protects report of violations of state or federal law, or rules or regulations, permitting the report to any person, regardless of the interests of that person. That would allow disclosure of information to the press rather than supervisors. Again, if conformity to existing case law is desirable, then the bill's protections should be limited to disclosure affecting public safety, health or general welfare.
4. Under common law, plaintiff must prove the discharge under clear and convincing evidence. *Stuart v. Beech Aircraft*, 753 F.Supp. 317, 324 (D. Kan. 1990). The legislation is silent on which level of proof is required.
5. The bill changes the attorney fee shift from one that favors the whistle-blower to one that favors the prevailing party. The whistle-blower that loses a lawsuit against the state agency or the contractor will have to pay the state or local agency's, or the contractor's, legal bills. Fee shifts will discourage legitimate as well as frivolous whistle-blower lawsuits.

We believe if such changes are to be made in the statutory whistle-blower lawsuit and include the employees of private businesses, then we believe the statute should more closely mirror common law whistle-blower causes of action.

(Renewed 11-30-01)

Issue: Competitive bidding of legal services for state and local government.

KBA Position: The Kansas Bar Association opposes the competitive bidding of legal services.

Explanation: Several bills were introduced in the 1997 session to require competitive bidding of legal services be applicable to most state and local government agencies. We believe the bills, while well-intentioned, will not produce the advantages claimed by proponents and will cause attorney-client problems in the bargain. The basis of the attorney-client relationship is the client's trust and faith in the symbiotic relationship between attorney and client. Lawyers take on fiduciary responsibilities for each client they represent, including government clients. To base the attorney-client relationship solely on who bids lower on a contract is to invite financial manipulations by counsel seeking the employment to the detriment of trust and competence. Further, all clients have a right under our Model Rules of Professional Conduct to hire and fire their attorneys without cause. Injecting a "contract" approach based on a competitive bid is a statutory change to a model rule, at least for government agencies seeking legal counsel. See *Crandon v. State of Kansas*, 257 Kan. 727 (1995).

The attorney general is usually responsible for hiring attorneys to defend state agencies and employees in civil litigation. While that often results in attorneys being hired who have ties to the AG's office, it also allows an independent review of the qualifications of such attorneys regardless of political affiliation - something the competitive bidding process lacks unless the contracting agency "loads the specs" of the contract. Such action would, in our opinion, defeat the purpose of competitive bidding in the first place. Competitive bidding contract law gives to one government agency the authority to formulate guidelines on how other agencies hire attorneys. When the bill applies to local units of government, the potential for a conflict of interest arises.

We believe the enactment of such law would foster the presentation of artificially low hourly rates and attract only attorneys who have limited demand for their services.

No other state that has such a comprehensive system of bidding on legal services. The cost to government of implementing a pure competitive bidding concept is considerable, and can be more costly than the current system. For example, since all state legal contracts would be based upon competitive bid, it would be necessary to advertise the bid contracts in appropriate trade publications. The state's budget division estimates such advertisements alone would cost the state an additional \$2.0 million per year.

If legal services are capable of being competitively bid, there is no reason why other professional services should not be bid that way. Architectural and engineering services typically are let through negotiated bidding. The fact that such other services are not being bid competitively through open bidding is an indication that competitive bidding in these other professions is unworkable. We do not believe it will benefit government to bid legal services this way, either.

Also part of this issue is a recent attempt in Congress to regulate "pay for play" activities, that is, prevents lawyers and other professionals who contribute money to campaigns from getting government work or contracts. The ABA has by resolution recommended bar associations condemn "pay for play" activities of lawyers in that it violates MRPC 7.2 which prohibits lawyers giving anything of value to other persons to get them to recommend the lawyer's legal services. While this may be a legitimate concern, competitive bidding of legal services is not the recommended ABA alternative.

Certain state agencies already, by law, use competitive negotiation processes to hire attorneys, primarily for collection purposes. {See KSA 22-4523(e), 75-719, 59-2006.} Many such statutes exempt the activity from competitive bidding requirements. To require competitive bidding in these areas would change the dynamics of how legal services are provided and perhaps cost the state more money.

We believe the current system of hiring attorneys, although possibly imperfect, is better than the proposed competitive system.

(Adopted 3-3-00)