



# THE BAR LETTER

SEPTEMBER 2003

Volume 17, Issue 7

## ISSUES PLAN SPONSORS SHOULD CONSIDER REGARDING INVESTMENT ADVICE FOR DEFINED CONTRIBUTION PLAN PARTICIPANTS

By *Jonathan L. Booze, J.D., M.B.A.*

Employers continue to shift from defined benefit plans, where investments are managed by experts, to defined contribution plans, where investments are usually managed by participants. As this trend has continued, it has become abundantly clear that many participants do not have the time, interest or inclination to handle this responsibility.

With the Department of Labor's approval in ERISA Opinion Letter 2001-09A of an independent investment advice proposal by a large financial services company in late 2001, the regulatory environment is favorably disposed toward investment advice for retirement plan participants. Legislative activity on this issue is also favorable. On April 14, 2003, the House passed the Pension Security Act of 2003, which will allow interested parties (e.g., mutual fund providers whose mutual funds may be plan investment options) to provide investment advice to defined contribution plan participants. The Senate is considering a bill that will only allow only independent advisors to provide investment advice to defined contribution plan participants. Whichever bill is passed, retirement plan sponsors will soon face the decision of selecting investment advisors for their plan participants.

Plan sponsors considering investment advice should ask three important questions. While not exhaustive, the following questions provide a good starting point for a plan sponsor considering investment advice:

1. *Who will be giving the advice and what methodology are they using?*

The plan sponsor's act of choosing an advice provider is a fiduciary act that should be done prudently as required by Employee Retirement Income Security Act of 1974 ("ERISA"). Thus, plan sponsors should develop a procedure to evaluate the advice provider. For example, the qualifications of the advice provider should be carefully reviewed. Also, the plan sponsor should review the advice giver's methodology to make sure that it is based on sound financial principles.

2. *Who pays the bill and how much will they pay?* Professional advice comes with a cost, which will either be paid by the plan sponsor or out of plan assets. Given the tight economic times, most plan sponsors will probably elect to have fees for professional advice paid out of the plan. Fortunately, recent guidance from the Department of Labor in the form of Field Assistance Bulletin 2003-3 clearly reaffirms that it is permissible for professional investment advice fees to be paid out of plan assets.

As the Department of Labor has long been concerned about any fee taken out of plan assets, the plan sponsor and its counsel should review the Department of Labor's guidance regarding fees for professional investment advice in Field Assistance Bulletin 2003-3 and ERISA Opinion Letter 2001-09A. Next, to the extent fees for professional advice are

paid out of plan assets, the plan sponsor should review the fees to determine that they are reasonable in comparison to the service provided. Part of this "reasonableness" review should consider whether such expenses are charged on a pro rata or per capita basis and with or without regard to actual utilization by participants. Third, plan sponsors should inquire as to whether there are any conflicts of interest that could influence fees paid to the advice giver. For example, use of plan assets by the advice

*ADVICE (Continued on page 5)*



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The Next  
*Barletter*  
 Deadline is  
 November 10

**IN THIS ISSUE**

President's Page	4
Appellate	7
Securities	9
Jury Verdicts	14
Step Back	16
Berger	20
Fleeing Motorists	21

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LUNCHEONS**

Wednesday	October 1, 2003	11:45 a.m.
Wednesday	November 5, 2003	11:45 a.m.
Wednesday	December 3, 2003	11:45 a.m.
Wednesday	January 7, 2004	11:45 a.m.
Wednesday	February 4, 2004	11:45 a.m.

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**SEPTEMBER**

**Membership  
 Luncheon  
 Wednesday  
 September 3, 2003  
 11:45 a.m.**

**Program:  
 Highlights of the  
 2004 Budget  
 for Johnson County**

**Presenter:  
 Annabeth Surbaugh  
 Chairman of the Board  
 Johnson County  
 Commissioners**

## PRESIDENT'S PAGE

By Samuel P. Logan, 2003-2004 JCBA President



Samuel P. Logan

I hope this column finds you well rested and energized after summer vacation. September and the fall promise to be exciting times for the Johnson County

Bar Association with lots of opportunities for involvement in fun and worthwhile projects. You will also see a few changes in the Bar Association, mostly designed to strengthen our going-forward ability to provide the services you have come to expect.

**New Bar Headquarters.** After some delays this summer, I am pleased to report that the new Bar headquarters is open for business in Olathe. The facility is located on the second floor of the Norton Hubbard building across from the courthouse. The increased size of the space permits both Linda Coffee and Lori Maher to work together in the same space. We roughly doubled our space, and the conference room contains adaptable conference tables that can accommodate up to 30 persons. We're excited because the new headquarters will increase the efficiency with which we can provide member services and meeting. The conference room is a great facility and is generally available to be reserved by any JCBA member with sufficient notice for client meetings. I would urge all of you to stop by and see our new facility. It is a substantial improvement over the cramped quarters of the previous location and reflects favorably the image our association and its membership, which has grown to over 1300 active members.

**The Barletter is going electronic in October.** Unless you are on the Board of the Johnson County Bar Association, you probably did not realize that the Bar Association loses \$1,500 each month the paper version of the bar letter is sent out. Printing costs continue to rise, and the United States Postal Service did not help matters too much when it increased first class postage rates by \$.03 last summer.

In order to minimize the losses, while keeping the membership informed of the Association's activities, the Association's board of directors voted unanimously to go to four full issues (paper) and six electronic issues for this coming year. Beginning with the October issue, only an e-Barletter will be sent. For those traditionalists among you, we will send out traditional paper versions in December, March and June.

Obviously, if you want to be kept apprised of the latest developments and activities in the Association, it will be critical for you to keep Linda Coffee advised of your current e-mail address. For those of you without e-mail access, I suggest you make friends with another JCBA member who does. You are more than welcome to stop by the Bar Association office and use the computer there to review the e-Barletter. For those of you who are sophisticated e-mail users, please adjust the spam settings on your computers so that any messages you receive from Linda Coffee at the Bar Association (lcoffee@jocobar.org) are not automatically sent to your spam e-mail bucket.

**The Association's finances.** Despite what Alan Greenspan says "deflation" is not something that impacts the Bar Association and its on-going expenses. Bar luncheons and other costs continue to increase. Despite increased costs, your Board plans to continue for the foreseeable future our monthly luncheons at the Ritz Charles without request for any out-of-pocket contributions. We also plan to continue our commitment to provide 12 free CLE credit hours to our members. Chris Reedy has agreed to chair the Johnson County Bar Association's CLE committee for another year and has done a wonderful job in that regard. Compared to other bar associations in this area, the Johnson County Bar Association provides hands down the best value for your Bar Association dues dollar.

In order to maintain the high level benefits you expect, the Bar Association

board is constantly looking for ways to partner with vendors in order to increase non-dues revenue to the Association. With increasing costs, these efforts are essential in order to maintain the level of benefits you expect. Jon Blongewicz, your president-elect, is spearheading the Board's efforts to increase non-dues revenue to the Association. Please feel free to contact him with ideas.

The Board is doing everything possible to maintain services while trying to avoid raising our quite reasonable dues.

**4<sup>th</sup> Annual Habitat Build.** Jim Shetlar and Judge Steve Tatum have graciously agreed to spearhead the Bar Association's effort on behalf of Habitat for Humanity for our fourth year. The building commences Thursday September 4 and continues every weekend through October 4. It is truly satisfying to perform manual labor for such a good cause. I personally look forward to every September and my day working on the habitat project and usually recruit a number of others from the rotary group I belong to help. If you don't have time to work, please consider sending a tax deductible contribution payable to "Habitat for Humanity".

**Golf Tourney.** It is not too late to sign up for the September 18 golf tournament. As always, a portion of your \$100 entry fee goes to benefit projects of the Johnson County Bar Foundation. Even if you are as pathetic a golfer as I am, you will have a good time enjoying a (hopefully) cool fall day. Another big plus is that the tournament this year will be held at Iron Horse.

**2003-2004 Membership directories.** The new membership directory is coming out within the next month or so. We have gone with a new vendor (in order to save costs – notice a theme here?). Please let us know what you think. There is also a handy on-line directory on the Bar Association's website.

I am looking forward to my year as president of the Association and greatly  
*PRESIDENT (Continued on page 6)*

SEPTEMBER 2003

## SEPTEMBER CALENDAR OF EVENTS

**TUESDAY, SEPTEMBER 2**

Board of Directors Meeting  
Noon  
Bar Association Office

**WEDNESDAY, SEPTEMBER 3**

Membership Luncheon Meeting  
11:45 a.m.  
Ritz Charles

**SEPTEMBER 4-6**

Habitat for Humanity Build  
1717 Richmond  
Kansas City, KS

**SEPTEMBER 11-13**

Habitat for Humanity Build  
1717 Richmond  
Kansas City, KS

**TUESDAY, SEPTEMBER 16**

Lunchtime CLE  
12:00 - 1:00 p.m.  
Room 222, Johnson County  
Courthouse  
Topic: Employee Benefits Update

**THURSDAY, SEPTEMBER 18**

Golf Tournament  
11:30 a.m. Lunch  
1:00 p.m. Shotgun Start  
Ironhorse Golf Club  
Leawood, KS

**WEDNESDAY, SEPTEMBER 24**

Bar Foundation Trustee Meeting  
11:30 - 1:00 p.m.  
Bar Association Office

**THURSDAY, SEPTEMBER 25**

Probate Law Committee Meeting  
11:30 - 1:00 p.m.  
Room 1055, Johnson County Admin.  
Bldg.

**SEPTEMBER 25-27**

Habitat for Humanity Build  
1717 Richmond  
Kansas City, KS

*ADVICE (Continued from page 1)*

giver to increase the advice giver's fee would be prohibited by ERISA.

3. *How will the advice be given and implemented?* If advice is given without sufficient human support, participant use of such advice will probably be underutilized. Furthermore, even for those participants that do take advantage of web-based electronic advice engines, many of those participants simply will not implement the advice (or implement it only once), thereby significantly reducing the advantages of the advice program. Plan sponsors should determine how advice is given to the participants and if the advice giver will automatically implement the advice over time for the participant.

After three years of negative returns in the markets, many participants want to delegate management of their defined contribution accounts to professional managers. If plan sponsors consider meeting that need, they should start by asking the three questions outlined above.

*Jonathan L. Booze, J.D., M.B.A. is an attorney with Stockton Law Office L.L.C. and a principal of Sanders Booze & Company, a registered investment advisory firm focusing on retirement plans. Mr. Booze will be presenting a CLE entitled "Employee Benefits Update" on September 16, 2003 for the Johnson County Bar Association. ♦*



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*PRESIDENT (Continued from page 4)*

appreciate the honor of serving in that capacity. Throughout the year, do not hesitate to e-mail me your comments at [slogan@foulston.com](mailto:slogan@foulston.com). As Ed Koch used to ask when he was mayor of New York, I want to know "How am I doin'?" I want to hear input from all of our members be it good or bad. There is a lot going on in your Johnson County Bar Association. Get involved! ♦



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## 2003 CLE CALENDAR

### TUESDAY, SEPTEMBER 16

#### Lunchtime CLE

12:00 - 1:00 p.m.

Room 222, Jo Co Courthouse

Topic: *Employee Benefits Update*

Speaker: Jon Booze

Credit: 1.0 CLE Hour

Cost: Free/Members - \$15/Non-members

### TUESDAY, OCTOBER 21

#### Lunchtime CLE

12:00 - 1:00 p.m.

Room 222, Jo Co Courthouse

Topic: *Protection from Abuse and Stalking Orders*

Speaker: Sue Dickey

Credit: 1.0 CLE Hour

Cost: Free/Members - \$15/Non-members

### TUESDAY, NOVEMBER 18

#### Lunchtime CLE

12:00 - 1:00 p.m.

Room 222, Jo Co Courthouse

Topic: *Ethics & Delegation to Assistants*

Speaker: Joyce Yeager

Credit: 1.0 CLE Ethics Hour

Cost: Free/Members - \$15/Non-members

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## APPELLATE CASES OF INTEREST

By Leo L. Logan, Coates & Logan, LLC

### CHILD SUPPORT JUDGMENTS

After a tortuous history of efforts to collect child support since 1980, involving both Kansas and North Carolina, a Kansas court found that the father was in arrears over \$54,000.00, and further, because Kansas maintained continuing exclusive jurisdiction over the Kansas child support orders, North Carolina decisions denying the arrearage were not entitled to full faith and credit to the extent they attempted to modify the Kansas orders.

The father's appeal argued the Kansas court was without jurisdiction to order him to pay the child support arrearage because the mother had submitted the matter to the North Carolina court, which found he was not in arrears. He also argued that even if the Kansas court had jurisdiction to determine the arrearage, the Kansas child support judgments had become dormant and unenforceable. Under the Uniform Interstate Family Support Act ("UIFSA"), a state issuing a support order maintains continuing exclusive jurisdiction over the order as long as a party resides in that state, or until both parties consent for a different state to assume jurisdiction. K.S.A. 2002 Supp. 23-9,205(a).

The North Carolina court had never expressly nullified or vacated the Kansas judgments and the father did not appeal any Kansas order establishing or enforcing his child support obligation and, accordingly, the child support payments became final judgments as they accrued. With the enactment and adoption of UIFSA, the North Carolina court no longer had jurisdiction to vacate the Kansas orders. The Kansas court determination of arrearage was controlling.

The Kansas Court of Appeals concluded that the many Kansas support enforcement proceedings operated to prevent the Kansas support judgments from becoming dormant, as some action to enforce the judgments occurred within each 5-year period since 1980 when the

divorce was granted. The district court's judgment finding \$54,588 in child support arrearage and interest was correct and should be enforceable in Kansas and North Carolina.

*Summitt v. Summitt*, Kansas Court of Appeals, No. 89,137, Opinion filed August 15, 2003.

### PRODUCT LIABILITY/EXPERTS

The Kansas Supreme Court reverses a Court of Appeals decision in this product liability case. In this Case combine litigation, the trial court had found that plaintiffs' negligence and strict liability claims were barred by the economic loss doctrine and that plaintiffs had abandoned their claim for breach of implied warranty of fitness for a particular purpose. The trial court denied summary judgment on plaintiffs' claim for breach of the implied warranty of merchantability, however, finding that genuine issues of material fact existed with respect to that claim. After plaintiffs' obtained a jury verdict, Case appealed and the Court of Appeals reversed, finding plaintiffs' expert opinions were based on conjecture and speculation.

The qualification of an expert witness, as well as the admissibility of expert testimony, are matters within the broad discretion of the trial court. If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience, or training possessed by the witness. K.S.A. 60-456(b).

In a product liability action, it is proper to use expert testimony to prove the cause of a fire, provided the opinion of the expert is based upon adequate facts and is not based upon evidence which is too uncertain or speculative. Circumstantial evidence can serve as proof of the elements of a theory of

liability by a preponderance of the evidence even though other reasonable theories are not excluded by such evidence.

To demonstrate a breach of the implied warranty of merchantability, plaintiff must show that the goods were defective, that the defect was present when the goods left the manufacturer's control, and that the defect caused the injury sustained by plaintiff. Such a claim may be proven inferentially, by either direct or circumstantial evidence. For circumstantial evidence to make out a prima facie case, it must tend to negate other reasonable causes, or there must be an expert opinion that the product was defective. Because liability cannot be based on mere speculation, guess, or conjecture, the circumstances shown must justify an inference of probability as distinguished from mere possibility.

*Dieker v. Case Corp.*, Kansas Supreme Court, No. 86,429, Opinion filed July 25, 2003, reversing *Dieker v. Case Corp.*, 30 Kan. App. 2d \_\_\_, 48 P.3d 5 (2002).

### LEGAL MALPRACTICE

After being convicted of first-degree murder and other crimes and sentenced to life in prison, the accused sued his court-appointed defense attorneys and their legal investigator for legal malpractice. The accused had sought post-conviction relief under K.S.A. 60-1507 and been denied such relief. The district court granted summary judgment for the defendants, ruling that Kansas should require exoneration by post-conviction relief as a prerequisite to a legal malpractice claim arising out of a criminal proceeding.

The Kansas Supreme Court agreed with the district court and found that in order to prevail on a claim of legal malpractice, a plaintiff is required to show (1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal

*APPELLATE* (Continued on page 8)

*APPELLATE* (Continued from page 7)

connection between the breach of duty and the resulting injury, and (4) actual loss or damage. (When there is both a contractual relationship and a relationship that gives rise to a legal duty, such as the attorney-client relationship, the breach of that duty and not of the contract itself gives rise to a tort action.)

Additionally, to prove legal malpractice in the handling of litigation, a plaintiff must establish the validity of the underlying claim by showing that it would have resulted in a favorable judgment in the underlying lawsuit had it not been for the attorney's error.

A person convicted in a criminal action must obtain post-conviction relief before maintaining an action alleging malpractice against his or her former criminal defense attorneys.

*Canaan v. Bartee*, Kansas Supreme Court, No. 89,023, Opinion filed July 18, 2003.

**PREMISES LIABILITY**

In a slip and fall on ice case tried to a jury, the issue was whether the rule of law in *Agnew v. Dillons, Inc.*, 16 Kan. App. 2d 298, 822 P.2d 1049 (1991), as applied to the facts of this case, required a directed verdict for the defendant, or at least required the court to give the defendant's requested jury instruction.

The defendant luxury apartment complex filed a motion for summary judgment and argued that the "winter storm" doctrine, as expressed in *Agnew*, allowed it to wait until the conclusion of a winter storm and a "reasonable time thereafter" before the failure to remove ice from outdoor surfaces could be considered a breach of duty. The Kansas Court of Appeals affirmed the trial court's determination that fact issues precluded summary judgment.

The trial court denied the defendant apartments' request for an *Agnew* jury instruction because, after hearing the evidence, it believed the case was not an *Agnew* case. The court reasoned that the evidence presented an intermittent storm rather than a continuous storm. (The trial court did not err by deferring arguments

on the jury instructions until after the jury had been charged and was deliberating. The Court of Appeals found the defendant was not prejudiced by the decision of the trial court to postpone arguments until after the jury began deliberations. At no time was defendant in jeopardy of being prevented from preserving the record. The trial court did not abuse its discretion by its procedure.)

The *Agnew* "winter storm doctrine" arose in that case from an ice storm which was in progress with ice accumulating in front of a Dillons grocery store at the time plaintiff entered the store. The plaintiff was exiting Dillons when he slipped on a mat leading into the store. The trial court granted a directed verdict in favor of Dillons on the issue of liability. On review, the Kansas Court of Appeals held:

"A business proprietor, absent unusual circumstances, may await the end of a winter storm and a reasonable time thereafter to remove ice and snow from outdoor entrance walks, platforms, or steps because it is impractical to take action earlier." 16 Kan. App. 2d 298, Syl. ¶ 2.

The *Agnew* court reasoned that requiring a business proprietor to continually expend effort during a winter storm to remove precipitation from outdoor surfaces would essentially be a requirement to insure the safety of invitees and is a burden which is beyond that of ordinary care. The Kansas Supreme Court adopted the *Agnew* "winter storm" doctrine in *Jones v. Hansen*, 254 Kan. 499, Syl. ¶ 5, 867 P.2d 303 (1994). The court ruled that *Agnew* is supported by sound public policy and applied the doctrine to licensees and invitees alike. 254 Kan. at 510-11.

The Court of Appeals found this case was distinguishable from the *Agnew* case. Here, the trial court was presented with conflicting testimony regarding the weather conditions as well as evidence tending to show that defendant had voluntarily assumed a responsibility for clearing ice and snow even while a storm

was in progress. There were significant factual disputes on the issue of fault. At the close of the evidence, and resolving all facts and inferences in favor of plaintiff, the trial court could not have granted defendant's motion for directed verdict and did not err by refusing to give an *Agnew*-type jury instruction.

*Worley v. Bradford Pointe Apartments, Inc.*, Kansas Court of Appeals, No. 88,249, Opinion filed July 18, 2003. ♦

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## REPRESENTING INVESTORS IN SECURITIES DISPUTES

By Jeffrey S. Kruske, Esq.

If you pay attention to the news, chances are that you are aware of the numerous controversies and scandals surrounding Wall Street and the nation's financial markets over the past few years. From the accounting scandals at Enron to the blatant fraud uncovered at WorldCom, investors have not had their confidence in the financial markets shaken to such a degree since the early 1930s. To make matters worse, recent settlements with Merrill Lynch and nine other major brokerage firms illustrate that corporate shenanigans knew no bounds. At the heart of this mess is the investor, from the middle-class couple who were counting on retiring in a few years, to the thirty-something parents with three kids who saw their college fund disappear before their very eyes. As the markets declined over the past three years, many investors were left scratching their heads, wondering if they just experienced what their broker referred to as a typical market "correction" or, worse yet, if their

losses were a direct result of their broker's negligence. This article will explain and clarify the various nuances in representing the individual investor in securities disputes and outline the various theories of liability and methods of recovery that are available to Kansas investors, both in the context of broker malfeasance and stock analyst fraud.

When attorneys think of "securities law," most are typically referring to "securities regulation," which deals with the underwriting, registration and distribution of initial public offerings, insider trading and the like. Securities fraud practice, however, is even more specific. Although the number of attorneys who specialize in representing investors has grown over the past several years, there are still less than 750 across the nation, most practicing on the east and west coast.

Kansas attorneys should note that in the vast majority of these cases, maintaining a securities fraud practice is

virtually the same as maintaining an arbitration practice. Prior to 1987, investor claims were primarily pursued in federal court; the securities industry fought long and hard to move the primary forum of dispute resolution away from the public courts to private, industry-sponsored arbitration.

Most customers who maintained an investment account at a national or regional brokerage firm had to sign an opening account agreement prior to depositing funds with their broker. Normally located in the fine print on the back of these agreements is a *pre-dispute arbitration clause*, which binds both the investor and the broker to resolve all disputes by way of arbitration. The New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD), the self-regulatory organizations that police the financial markets, are the forums for resolving these disputes. By forcing the customer

*SECURITIES* (Continued on page 10)

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**SECURITIES** (Continued from page 9)

to arbitration, the typical avenue of filing a civil complaint is eliminated.

NASD arbitration handles the majority of customer complaints in the Kansas City area. Arbitration is binding on the parties with generally no right to an appeal. Depositions and interrogatories are not allowed, and dispositive motions are rarely filed. Although a customer can expect to pay a filing fee approximately of \$1,400 to initiate his or her claim, securities arbitration is relatively inexpensive process that takes 12-16 months to resolve, assuming that it is not settled prior to hearing.

What then, can a customer sue their broker for? Typical cases involve violations of state and federal securities laws, breach of contract, negligent misrepresentation, breach of fiduciary duty and in some cases, common law fraud. Most complaints assert violations of NASD rules, which brokers are bound to follow as part of their membership, which are incorporated into a professional negligence claim. These rules include a "duty of fair dealing" to the customer and a duty to recommend investments that are suitable (given the customer's investment objectives and goals).

If a broker recommended stocks to a client that did not fit his stated investment desires, a potential complaint exists. The same is true if you can prove that the broker misrepresented facts to the client, failed to disclose key information, traded without authority, overconcentrated clients' accounts in technology stocks, did not explain the added risks of margin trading or excessively traded the account to generate commissions for himself.

The Kansas Securities Act is particularly powerful and should receive special mention here. In 1911, Kansas passed the first comprehensive securities laws requiring registration of both securities and promoters. The Kansas law was a response to unwitting investors being taken by salesmen selling worthless interests in fly-by-night companies and gold mines all along the back roads of

the state. It was reportedly said that no assets backed up those securities—nothing but the blue skies of Kansas. Thus the Kansas act was the first of the "blue-sky laws." To this day, state laws regulating securities are known throughout the industry as blue-sky laws.

Not much of the Act has changed since then. The Kansas Securities Act also provides more generous remedies than those that are available under federal securities laws. Notably, the Act imposes liability upon merely negligent actors for selling securities by means of any material misrepresentation. The Act provides for rescissory damages, reasonable attorney fees, punitive damages and 15% prejudgment interest.

As a general rule, clients want to sue their brokers because they lost money or felt they were charged excessively for services. Since the market bubble burst in 2000, securities attorneys have prevailed on a number of theories, the strongest of which will be outlined here. First and foremost, almost all securities fraud claims involve some sort of "suitability" issue. Put another way, a suitability claim is alleged against a broker for recommending or investing their client in an unsuitable stock or mutual fund. For instance, a broker may violate his duty to invest his clients suitably if he invests his clients' IRA funds in speculative penny stocks or mutual funds that have a volatile track record. Another claim typically associated with retirement funds is overconcentrating clients' money in a particular market sector, such as technology or telecommunications. An absence of fixed income funds, bonds or cash may leave the client unnecessarily exposed to a market downturn. The more egregious cases involve brokers buying and selling a client's holdings for the purpose of generating commissions and fees for himself. Even if a client's account makes money, the broker can still be held liable for churning, where the appropriate remedy is disgorgement of commissions.

Recently, more and more complaints are being brought alleging improper sales of variable annuities, which is a hybrid investment that has insurance qualities

and mutual fund qualities. While the specifics of variable annuities are outside the scope of this article, red flags that attorneys should look for are switching from one variable annuity to another, investing IRA or other qualified funds in variable annuities, or investors over 65 years old having a large portion of their portfolio concentrated in variable annuities.

A large number of investors have been harmed because their otherwise ethical and honest broker recommended stocks or funds that were part of the conflict of interest investigation initiated by Eliot Spitzer, New York Attorney General. In these situations, the investor's broker is likely to be as frustrated and mad as the investor. The Attorney General investigation uncovered the fact that a multitude of stock analysts were issuing false or misleading research reports for companies that had investment banking relationships with the same brokerage firm. This subjective advice ended up costing investors billions as these stocks became overvalued and the scandal was brought to the forefront.

Many investors have sought recourse via class action lawsuits. While these lawsuits are economical for a customer to take part in, the average class action plaintiff recovers less than seven cents on the dollar when the case is ultimately settled. As part of the settlement agreement in New York, thousands and thousands of documents were made available to attorneys to assist individual investors in recovering their investments. If a customer can prove that they did indeed rely on fraudulent research reports issued by analysts, the chances of meaningful recovery in arbitration are far greater than a federal class action.

A type of client that should give an attorney pause is what is known as a "sophisticated" investor. A sophisticated investor, typically defined by defense attorneys, is a well-educated professional who "should have known better" or who should have been paying closer attention. While investor acumen, wealth or education are not affirmative defenses,

**SECURITIES** (Continued on page 11)

**SECURITIES** (Continued from page 10)

it can create problems down the line if it is discovered that your client maintains extensive investment accounts at other firms or has a long history of aggressive trading. A smart securities attorney will obtain as much personal, financial and business background on a potential client before electing representation. Keep in mind that the arbitrators deciding the case likely lost a lot of money in the market downturn as well. Generally speaking, the better claims involve customers who lost 50% or more of their account value as a result of the theories outlined above.

In conclusion, representing investors in securities fraud actions requires an attorney to be well-versed in securities laws and the securities arbitration process, but also well aware of the financial markets and various types of investments. As with other areas of the law, the typical securities client is often distraught when they come to you, suddenly faced with returning to the workforce after retirement or scaling back their lifestyle significantly, so you will

have to be prepared to truly counsel them regarding their well-founded frustrations. More and more securities arbitration cases are being filed each year; while more than 65% of these cases settle, those that are taken all the way to hearing have a better than 50% chance of winning. Given the beneficial nature of many Kansas common law and statutory claims counsel should consider what types of claims can be brought, and whether an investor is advised to forego federal claims or federal class actions. In an area of the law that is relatively new and constantly developing, counsel should consider Kansas rights of recovery to the maximum extent possible.

*Jeff Kruske is a solo practitioner in Overland Park. His practice is dedicated to representing investors with disputes against the securities industry. He is a member of the Kansas Bar Association and the Public Investors Arbitration Bar Association. He has also published an article in the Journal of the Kansas Bar Association (September 2003) on the subject of federal securities laws with Washburn Law Professor Steven Ramirez. ♦*

**IN MEMORY**

**J**ames W. Bouska, a former Johnson County District Judge, died on August 14, 2003. Judge Bouska was involved in the legal profession for over 40 year. He spent eleven years on the Johnson County bench, 1985-1996. Before being appointed by Kansas Governor John Carlin to the district court, Judge Bouska was elected to two terms as county attorney of Republic County, Kansas and served as city attorney in Belleville, Kansas. Judge Bouska also served as Merriam city prosecutor, municipal judge in Overland Park, and Johnson County District Attorney. He was born in Lawrence in 1926 and was a graduate of University of Kansas Law School. ♦

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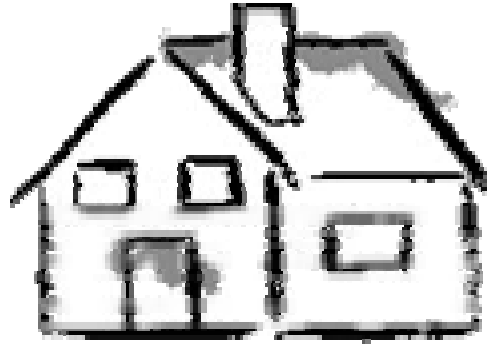
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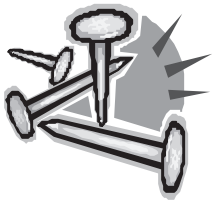
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Yr. Graduated: 1998

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Yr. Graduated: 2000

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Law School: Washburn  
Yr. Graduated: 2002

## UNITED STATES DISTRICT COURT ADOPTS NEW ADR PLAN

The United States District Court for the District of Kansas gives notice of the adoption of an ADR Plan pursuant to Standing Order 2003-6. Copies of the ADR Plan are available to the bar and the public at the offices of the Clerk at Wichita, Topeka, and Kansas City. The ADR Plan is also available on the United States District Court web site at [www.ksd.uscourts.gov](http://www.ksd.uscourts.gov).

Mediators meeting the minimum requirements set forth within section IV of the ADR Plan are invited to submit a Mediator Application Form which is available on the court's web site. ♦



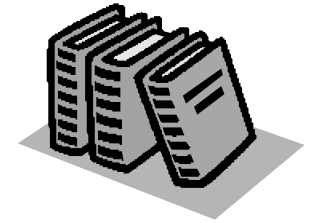
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ABA Standards for Criminal Justice Discovery and Trial Jury  
 ABA Standards for Criminal Justice Electronic Surveillance Section A: Private Communication  
 ABA Standards for Criminal Justice Electronic Surveillance Section B: Physical Surveillance  
 ABA Standards for Criminal Justice Pleas of Guilty  
 ABA Standards for Criminal Justice Prosecution Function and Defense Function  
 ABA Standards for Criminal Justice Special Functions of the Trial Judge  
 Government Contracts. 3<sup>rd</sup> ed. W. Noel Keyes (KF 850 .K49 2000)  
 Damages in Kansas Civil Trial Practice. (CLE KFK 195 .Z9 D35 2002 )  
 Fundamentals of Securities Regulation. Louis Loss (KF 1439 .L68 2001)  
 The Law of Tax-exempt Organizations. Bruce R. Hopkins (KF 6449 .H6 2003)  
 Trust and Asset Protection Alternatives in Kansas (KFK 140 .C37 2002)  
 Drinking/Driving Litigation Criminal and Civil. Trial Notebook (KF 2231 .N532 2002)  
 Contracts, Equity and Statutory Actions Handbook (KFM 7880 .M5 Vol.35 2001)  
 Real Estate Transactions – Tax Planning and Consequences (KF 6540 .I48 2003)  
 Uniform Commercial Code: 2003 edition. (KF 879 .A15 U55 2003)  
 Federal Environmental Laws 2003 (KF 3775 .A31 2003)  
 Evictions and Landlord/Tenant Law in Missouri (CLE KFM 7917 . B53 2003)  
 Media and the Law: 16<sup>th</sup> Annual Seminar (Gift) (CLE KF 2750 .Z9 M44 2003)  
 Manual of Patent Examining Procedure: 8<sup>th</sup> ed. (KF 3120 .A6 U55 2003)  
 Handling a Basic Divorce—Kansas Bar Association (CLE KFK 100 .H34 2003)  
 Conducting an Effective Cross-Examination in Kansas (CLE KF 8920 .Z9 C65 2003)  
 Strategies in Handling DWI and DUI Cases in Kansas: v.1 and v.2 (CLE KFK 539 .T7 G9 2003)  
 HIPAA Implementation: Beyond the Basics in Kansas (CLE KFK 360 .D8 2003)  
 Collection Law in Kansas (CLE KFK 167 .C6 G7 2002)  
 Kansas and Missouri Collection Law for the Health Care Industry (CLE KFK 167 .C6 K33 2002)

## JURY VERDICTS

by Darrell Smith

### Division #1

**Hon. Peter V. Ruddick**

**Case:** *State of Kansas v. Steve Wicke*

**Case #:** 02 DV 1372

**State:** Jackie Spradling & Patrick Carney

**Defendant:** Sarah Swain & Carol Cline

**Charges:** Domestic Battery; Criminal Threat; Criminal Threat;

**Verdict:** Count I- Guilty; Count II- Not Guilty; Count III- Not Guilty

### Division #1

**Hon. Peter V. Ruddick**

**Case:** *State of Kansas v. Bradley Ise*

**Case #:** 02 CR 465

**State:** Brent Venneman

**Defendant:** Carl Cornwell

**Charges:** Agg. Assault

**Verdict:** Not Guilty

### Division #1

**Hon. Peter V. Ruddick**

**Case:** *State of Kansas v. Richard Owens*

**Case #:** 02 CR 408

**State:** Jennifer Ashford

**Defendant:** John Jenab

**Charges:** Felony DUI; Possession of Paraphernalia

**Verdict:** DUI -Not Guilty; Possession of Paraphernalia- Guilty

### Division #18

**Hon. John Bennett**

**Case:** *State of Kansas v. Marquis Lemonts Manns*

**Case #:** 02 DV 748

**State:** Jackie Spradling

**Defendant:** Carl Cornwell

**Charges:** Attempted First Degree Murder

**Verdict:** Guilty

**Case:** *State of Kansas v. Delores Stewart*

**Case # :** 02 DV 1573

**State:** Erica Froetschner

**Defendant:** Kelli Breer

**Charges:** Agg. Battery; CDTP

**Verdict:** Mistrial

### Division #16

**Hon. Earl Jones**

**Case:** *State of Kansas v. Tracy Anne Dziadura-Burford*

**Case #:** 02 CR 186

**State:** Sara Welch

**Defendant:** John Ivan

**Charges:** Possession of Pseudoephedrine; Unlawful possession w/ intent to use w/ Drug Para; Attempt to commit the crime of manufacture of Meth.; Unlawful use of communication

*VERDICTS (Continued on page*

**SEPTEMBER 2003**

*VERDICTS (Continued from page 14)*

facility in an attempt to manufacture and or sell meth.

**Verdict:** Count I-Guilty; Count II-Guilty; Count III- Guilty; Count IV-Guilty.

**Division #6**

**Hon. James Davis**

**Case:** *State of Kansas v. Billy Ivan Dupress*

**Case #:** 02 CR 3342

**State:** Brent Venneman

**Defendant:** Carol Cline

**Charges:** Agg. Assault; Criminal Damage

**Verdict:** Not Guilty on both Counts

**Division #9**

**Hon. Allen Slater**

**Plaintiff:** Patricia Thomas, M.D. and Martin Hayes

**Defendants:** Angel Berry Realtors, Inc., The Spence Group, Inc. d.b.a. The Spence Group of Angel Berry Realtors, Clifford C. Spence, Sharron Spence.

**Case #:** 01 CV 7656

**Attys-Plaintiff(s):** Jason E. Pepe, David R. Erickson, Chelsi K. Hayden, Brian M. Holland

**Attys-Defendant(s):** Joseph Lee Van Ackeren

**Type of Case (Civil):** Breach of Contract; Negligence; Negligent Misrepresentation; Breach of Fiduciary Duty; Fraud; Mental Anguish

**Verdict:** Breach of Contract; Negligence; Negligent Misrep.; Fraud; Mental Anguish-\$2500.00 to Plaintiffs Breach of Contract - \$5,337.50 to Plaintiffs; Kansas Consumer Protection Violations - \$5,751.38 to plaintiffs; Negligence - \$16,432.50 to Plaintiffs; Intentional Fraud - \$36,973.13 to Plaintiffs; Fraud by Silence - \$4,108.13 to Plaintiffs.

**Division 17**

**Hon. Wm. Isenhour**

**Case:** *Kathleen Zak v. Lawrence Riffel, M.D.*

**Case #:** 01 CV 1682

**Plaintiff:** Pete Brower & Bob Numrich

**Defendant:** Reid Holbrook & Mark Lynch

**Charges:** Tort

**Verdict:** For Plaintiff

**Division 17**

**Hon. Steve Leben**

**Case:** *Maria D. Magin and Ashley Wilson v. Dawn R. Smith*

**Case #:** 01 CV 7136

**Plaintiffs:** Laura Duchart & Michael W. Walker

**Defendant:** Jeffrey Southard

**Charges:** Auto Accident

**Verdict:** Magin- \$200: non-economic to date; medical expenses, \$1,098.07; Economic to date: \$166.50, future non-econ loss 0. Total = \$1,264.57. Wilson: non econ to date: \$12,500; Medical to date: \$3,261; Future medical: \$17,200; Future non econ: \$4,200.

**Division 12**

**Hon. Thomas Bornholdt**

**Case:** *State of Kansas v. Troy Conrad*

**Case #:** 02 CR 2275

**State:** Sara Welch

**Defendant:** John Jenab

**Charges:** Ct. 1- Rape; Ct. 2- unlawful tattooing under 18; Ct. 3- Rape; Ct. 4- unlawful tattooing under 18; Ct. 5- Rape; Ct. 6- unlawful tattooing; Ct. 7- sexual battery; Ct.8-tattooing w/o a license; Ct. 9- Rape; Ct. 10-unlawful tattooing.

**Verdict:** Ct. 1- Guilty; Ct. 2- Guilty; Ct. 3- Guilty; Ct. 4- Guilty; Ct. 5- Guilty lesser sexual battery; Ct. 6, Guilty; Ct. 7- Guilty; Ct. 8- Guilty; Ct. 9-Guilty, Ct. 10- Guilty.

**Division 16**

**Hon. John Anderson**

**Case:** *Special Assistant Attorney General v. Robert A. Ward*

**Case #:** 02CV6992

**Plaintiff:** Scott Toth & Chris McMullin

**Defendant:** Bob Thomas

**Civil Case:** Sexual Predator

**Verdict:** Mistrial, hung jury

**Case:** *State of Kansas v. Sean L. Ensz*

**Case #:** 02 CR 3095

**State:** Pat Carney & Robert Johnson

**Defendant:** John Jenab

**Charges:** Agg. Assault

**Verdict:** Guilty

**Division 11**

**Hon. Thomas Bornholdt**

**Case:** *State of Kansas v. Rupert Perkins*

**Case #:** 03 CR 95

**State:** Kendra Seaton

**Defendant:** Kelli Breer

**Charges:** Felony Theft

**Verdict:** Guilty

**Division 5**

**Hon. Stephen Tatum**

**Case:** *State of Kansas v. Ashley R. Baska*

**Case #:** 02 CR 1709

**State:** Erica Froetschner

**Defendant:** George Mallon

**Charges:** Agg. Battery

**Verdict:** Guilty of lesser battery (M)

**Case:** *State of Kansas v. Carolyn Servos*

**Case #:** 02 CR 3223

**State:** Erica Froetschner

**Defendant:** Veronica Bowden

**Charges:** DUI (F)

**Verdict:** Guilty

**Division 18**

**Hon. John Bennett**

**Case:** *State of Kansas v Larry R. Bailey*

**Case #:** 02 DV1557

**State:** Patrick Carney

**Defendant:** Ryan Dixon

**Charges:** Criminal Damage to Property

**Verdict:** Not Guilty

**Division # 5**

**Hon. Stephen Tatum**

**Case:** *State of Kansas v. Russell Demster*

**Case #:** 02CR3607

**State:** Robert Johnson

**Defendant:** Carl Cornwell

**Charges:** Aggravated Battery

**Verdict:** Hung Jury-Mistrial

## A STEP BACK IN TIME

By Honorable Karen Arnold-Burger

Next year marks the 50<sup>th</sup> anniversary of the United States Supreme Court decision *Brown v. Board of Education of Topeka*, 74 S.Ct. 686 (1954). *Brown* is often cited as one of, if not THE, most influential case of the last century. In *Brown*, the United State Supreme Court held that the Kansas statute that allowed cities of the First Class to establish segregated schools was unconstitutional because it denied black children the equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution. Thus, the phrase, “*separate but equal, is inherently unequal*” was born.

However, not many people are aware that the Kansas courts addressed the issue of segregated schools years before 1954. Although Kansas will go down in history as the state that fought for segregated schools, it is really an unfortunate label because the history of school segregation in Kansas is really a history of a court that boldly stood against school segregation on account of race in an era when such a position was not very popular.

The first reported case in Kansas, *Board of Education v. Tinnon*, 26 Kan. 1 (1881) actually proved to be very prophetic. In *Tinnon*, a writ of mandamus was sought against the Ottawa public schools and its principal to admit Leslie Tinnon, “*a colored boy of school age*” to the public school in Ottawa. Apparently, the classrooms in the Ottawa schools were becoming over crowded. So, on May 19, 1880 the Ottawa School Board voted to move all the “*colored children*” to a building two blocks from the main school building and ordered that a “*colored*” teacher be employed to teach them. The Board made it clear that the “*colored*” children were to have an equal quality of education as the white children in the main building. Tinnon brought an action to prohibit his move into the “*colored*” school. After a trial to the court, the Circuit Judge agreed with Tinnon and

issued the order. The Board then appealed to the Kansas Supreme Court.

The Board argued that a school board has the inherent and statutory authority to dictate the management of the schools, the classification of pupils, and the distribution of teachers. As long as the facilities and quality of education was equal, there was nothing unlawful about placing the “*colored*” children in a separate school. “*Colored*” children, it argued, have a statutory right to an education. They do not have a “*right*”, either statutorily or otherwise, to go to school in the company of white children. Tinnon argued that there was no statutory authority for the Board’s action, and even if there was, its action was a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The Kansas Supreme Court agreed with Tinnon and the Circuit Court. It held that the law governing school boards (Laws of 1876, ch. 122, art. 11, §§ 2, 9; Comp. Laws of 1879, pp. 846-847) required that the Board “*maintain a system of free common schools...free to all children residing in the City.*” Elsewhere in the statutes, the legislature, in 1862, had expressly given cities of the First Class the ability to establish separate schools for whites and “*colored.*” At the time of passage, the legislation only

applied to the City of Leavenworth and was a hold over from Leavenworth’s territorial days. It was a “*mere matter of local concern and adopted at a time when the prevailing opinions of men were very different from the prevailing opinions of men at the present day.*” *Tinnon* at 19. By the time of *Tinnon*, in 1881, two more cities had been brought under the purview of the legislation as cities of the First Class. (Statute is referred to throughout the years as 72-1724).

Although not asked to rule on the constitutionality of the statute that allowed certain cities to segregate their schools, the Court opined:

“*The question of whether the legislatures of states have the power to pass laws making distinctions between white and colored citizens; and the extent of such power, if it exists, is a question which can finally be determined only by the supreme court of the United States...*” *Tinnon* at 18. Instead, for purposes of its opinion, the Court assumed that such a law could be passed and since this authority was not *expressly* given to cities of the Second Class, as was Ottawa, nor was it *expressly* given to school boards, the Court found that the Board had no authority to segregate the schools.

*STEP BACK* (Continued on page 17)

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*STEP BACK* (Continued from page 16)

The Court wrote as follows:

*The tendency of the present age is not to make any distinctions with regard to school children, except to classify them with reference to their studies and place them in the classes in which they properly belong. All kinds of children are usually allowed to go to the same schools, and all kinds of children are usually placed in the same classes. Boys and girls are allowed not only to go to the same schools, but are also placed in the same classes, and even colleges are now opening their doors for the education of both sexes; and is it not better that this should be so? Is it not better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other? At the common schools, where both sexes and all kinds of children mingle together, we have the great world in miniature; its emotions, passions and feelings, its loves and hates, its hopes and fears, its impulses and sensibilities; there they may learn the secret springs of human actions, and the attractions and repulsions, which lead with irresistible force to particular lines of conduct. But on the other hand, persons by isolation may become strangers even in their own country; and by becoming strangers, will be of but little benefit either to themselves or to society. As a rule, people cannot afford to be ignorant of the society which surrounds them; and as all kinds of people must live together in the same society, it would seem to be better that all should be taught in the same schools.”* *Tinnon* at 19.

These hardly sound like the musings of the court of a state that was to become the poster child for school segregation, let alone that these words were written over 60 years before the *Brown* decision!

Ten years later, on virtually identical facts, the Court reached the same conclusion in *Knox v. Board of Education of Independence*, 45 Kan. 152 (1891). It wasn't until 1903 that a case presented itself involving a city of the First Class. In *Reynolds v. Board of Education of the City of Topeka*, 66 Kan. 672 (1903),

the Kansas Supreme Court held that the 14<sup>th</sup> Amendment to the United States Constitution did not require that the statute allowing cities of the first class to segregate schools be struck down. “The fact that laws of this character have been in force for many years in many states and in the District of Columbia, and no question as to their validity has ever been presented to the supreme court of the United States, discloses a remarkable consensus of opinion on the part of the bar of the country as to the result of such an appeal.” It went on to cite the famous case from Louisiana in which the Supreme Court opined that it was acceptable for states to pass statutes requiring that coaches in passenger trains be divided based on race (*Plessy v. Ferguson*, 163 U.S. 537 (1896)) as support for the similar segregation of schools. In fact, in *Plessy*, the U.S. Supreme Court uses school segregation as an example of a valid exercise of the legislative powers of the states. *Plessy* stood for the principle that as long as facilities and services were equal in kind and quality, separation based on race was not unconstitutional. In other words, the principle of “*separate but equal*” was born. The Kansas statute was, and always had been, very clear that there that the education provided to all children of Kansas was to be provided equally without regard to color. Therefore, the Court always examined the quality of the “*colored*” schools as compared to the white schools to make sure the education was of equal quality, in equal facilities, etc. Likewise, based on *Reynolds* and *Plessy*, in 1906, the City of Kansas City Kansas was allowed to segregate its schools by having the white children attend in the morning and the “*colored*” children attend in the afternoon. *Richardson v. Board of Education of Kansas City, Kansas*, 72 Kan 629 (1906).

However, two years later, again focusing on the fact that even if a city can segregate the schools (in this case *Parsons*, a city of the First Class), facilities and education must be “*equal*”, the Court held that “*where the locations*

*of a school is such as substantially to deprive some of the children of the district of any educational facilities it is manifest that this equality is not maintained and the refusal to furnish such privileges, where it is practicable to do so, is an abuse of discretion for which the courts will afford a remedy.”* *Williams v. Board of Education of the City of Parsons*, 79 Kan. 202 (1908). In *Williams*, the “*colored*” school was put next to a railroad yard. In order to attend school, black children had to cross over thirteen tracks of the main line of the Missouri, Texas & Kansas Railway Company over which more than 100 trains passed daily, and an additional three tracks of the St. Louis and San Francisco Railroad Company. In addition, the noise from the bells, whistles and passing trains made it impossible for the children to study and learn.

In 1906, in *Cartwright v. Board of Education of the City of Coffeyville*, 73 Kan. 32 (1906), the Kansas court again followed *Tinnon* and *Knox* and again held that Coffeyville's Board of Education (Coffeyville being a city of the Second Class) had no authority to segregate schools without a specific statutory mandate like the one that existed for cities of the First Class. The following year, the City of Wichita was arguing that, as a city of the First Class, it was allowed by statute to segregate its schools pursuant to the same legislation relied on in *Reynolds*, 66 Kan. 672. However, in 1889 the city of Wichita got some special legislation passed by the legislature that did not contain the same language regarding the segregation of schools as the general legislation. Therefore, in *Rowles v. Board of Education of the City of Wichita*, 76 Kan. 361 (1907), the Court held that the city could **not** segregate its schools. In 1916, the city of Galena, a second class city which segregated schools, was again ordered to cease said segregation based on *Tinnon*, *Knox* and *Cartwright*. See *Woolridge v. Board of Education of the City of Galena*, 98 Kan. 397 (1916).

*STEP BACK* (Continued on page 19)

## HEARTLAND MEDIATORS “PRESIDENT’S AWARD” GOES TO JUDGE FARLEY



Michael H. Farley

Magistrate Judge Michael H. Farley was presented with the Heartland Mediators Association’s President Award during ceremonies at the banquet

meeting this spring at the Four Points-Sheraton Hotel in Kansas City, MO.

In presenting the award, outgoing HMA President Curt Straub recalled Judge Farley’s early support of the use of mediation. “Fourteen years ago, a trio of compassionate individuals joined together to initiate the Kansas Tenth Judicial District Small Claims Mediation Program.

Two members of that trio, the late Judge Herbert W. Walton and Helen Wahl, were Heartland Mediators Association members and have been honored with Heartland’s Acorn award, indeed, the award was established to honor the work of the late Judge Walton.

Tonight Heartland wants to honor Judge Michael H. Farley, the third member of that pioneer group, with Heartland’s President’s Award.

In the fourteen intervening years, the program has grown in reputation and in stature, largely due to the continued support of Judge Farley.

Mediation is unfamiliar territory for many people. Reluctant or timid litigants in Small Claims court were encouraged by Judge Farley to participate in mediation. “Why don’t you give it a try?” was his firm suggestion.

Judge Farley always listened to the recommendations of the mediators, but he was also quite alert to what was happening in his courtroom. When he made the initial roll call of the cases he was very observant of the responses, and if it appeared that a plaintiff and a defendant were sitting close to each other, he would sense, usually with great accuracy, that the parties’ dispute was ripe for mediation.

When Johnson County Community College began offering mediation courses, Johnson County Small Claims Court provided the perfect venue for allowing beginning mediators the opportunity to gain experience under the guidance of seasoned veteran mediators. When Judge Farley was introduced to the rookie mediators, his attitude was always one of encouragement.

Judge Farley continues to serve as a member of the JCCC mediation advisory group.

What Judge Farley helped set in motion fourteen years ago continues to flourish today, and in recognition of his unfaltering support, Heartland wants to honor his commitment to mediation with the President’s Award.”

Judge Farley began studies for a Juris Doctor degree at the University of Kansas in 1967, and was able to complete his work for a law degree in 1974, following his return from active duty in the U.S. Navy. He earned an MBA degree at K.U. in 1980.

While engaged in the general practice of civil law, he also began serving the courts in 1980 as the Small Claims Judge, and in 1996 added the Misdemeanor Bad Check Docket. He also served for fourteen years as Municipal Judge for the city of Leawood, KS. Appointed Magistrate Judge in 1999, his responsibilities grew to include Traffic Court, the Juvenile Offender Docket, the Truancy Docket and Probate cases.

In his time away from court, Judge Farley follows his interests in vintage car racing and photography.

The President’s Award was established in 2002. Previous recipients are John Holt, Fox 4, and Lana Oleen, Kansas Senate. ♦

## COUNTRY CAVALCADE FOR CASA

**The Johnson County Bar Association is Proud to Partner with Johnson County CASA in Raising Funds for Children of Abuse and Neglect.**

To help alleviate abuse and neglect of Johnson County’s children, the Bar Association has partnered with Johnson County CASA in co-sponsoring the *Country Cavalcade for CASA’s Kids* held on *Friday, September 19th* at the Sheraton Overland Park Hotel. Proceeds from the event will ensure that children caught in the Johnson County Court System will continue to have advocates who step up to represent their best interests.

Always an advocate for children, Congressman Dennis Moore is pleased to serve as Honorary Chair for the event. In 1985, Dennis was a founding member of Johnson County CASA serving on CASA’s first Advisory Board. Through his vision, and that of other CASA pioneers, CASA now serves over 400 children each year, giving them an opportunity to live in a safe and loving home. During the evening event, Dennis Moore and the original CASA pioneers will be honored for their commitment to the children of Johnson County.

In addition to the program, the Country Cavalcade for CASA’s Kids includes a home-style dinner, silent and live auctions, western comedy show, live music and dancing. Tickets to the event are \$125 per person and are available by calling Johnson County CASA at (913) 715-4040. For more information on Johnson County CASA and the Country Cavalcade event, visit their website at [www.jococasa.org](http://www.jococasa.org). ♦



A POWERFUL VOICE IN A CHILD’S LIFE.™

*STEP BACK* (Continued from page 17)

By 1945, school districts were getting cagey. In *Webb et al. v. School District No. 90 of Johnson County*, 167 Kan. 395 (1945), a case in which Thurgood Marshall appears as one of the attorneys for the plaintiffs, the school board, by a process of gerrymandering, divided the districts up streets and alleys so that all the Negro children would be within one district and all the white children in another. It did this in apparent recognition that *Timmons* and its prodigy did not allow the district to establish segregated schools. "Thus we have a clear case of the school board doing by subterfuge, that is by the arbitrary creation of an attendance district within the district itself and thereby segregating the colored children from the white children, what it could not do directly." *Id.* at 403. The Court recognized that the school district could divide districts, but stated that it must do so "upon a reasonable basis without any regard as to color or race of the pupils within any particular territory. The standards and facilities for each school must be comparable. Colored and white pupils must be permitted to attend either school, depending on convenience, or some other reasonable basis." It should be noted that the Court in *Tinnon*, way back in 1881, foreshadowed that a board of education may try to skirt the issue by dividing the city territorially into districts according to race and expressly rejected such attempts as unlawful. 25 Kan. at 21.

The Court in *Webb* also specifically found that the two schools were not even close to being comparable in facilities and services, so it further held that "In the meantime, pending such action, the colored pupils and all pupils in District No. 90 must be permitted to attend the South Park District School ...until any other building is brought up to the required standard" *Id.* at 404

So by 1951, when the plaintiff's first filed the *Brown* case in federal district court, the stage was set. Kansas had a long history of allowing segregation only in those cases where the legislature

specifically allowed it (i.e. cities of the First Class) and only when it was clear that facilities and educational opportunities were equal. This was sound legal reasoning based on the law of the time, most importantly the *Plessy v. Ferguson* case. Knowing what the outcome in the Kansas Supreme Court would be, based on the cases cited above, the plaintiffs in *Brown* sought relief from the federal courts. Among other things, they asked the Court to strike down the Kansas statute that allowed cities of the first class to segregate their schools on the basis that it violated the equal protection clause of the Fourteenth Amendment, the same issue raised 60 years earlier in the *Tinnons* case.

What happened next is described by Prof. Paul Wilson in his book, *A Time to Lose; Representing Kansas in Brown v. Board of Education*, University Press of Kansas, 1995. This book, an insiders view of the legal juggling that transpired, is a must read for anyone interested in the *Brown* case and the role Kansas played in it. The lower federal courts followed *Plessy* and denied the plaintiff's their requested relief. By the time it got to the United States Supreme Court, the Kansas case was consolidated for decision with cases from Virginia, Georgia, South Carolina, Delaware and the District of Columbia. The southern states took the position that desegregation would destroy the public schools in their respective states. The Virginians asserted that "blood would flow in the streets of Richmond" before black children would attend school with whites. Prof. Wilson tells us that Kansans had no sympathy for such views. It was only in the case from Topeka that the issue of separate but equal clearly presented itself. Only in the Kansas case had the Court found that the segregated schools were equal in quality and facilities, faculty and curriculum. In fact, the books used were identical and both schools were of about equal age and properly maintained. Transportation costs were paid by the State, therefore there was no monetary impact. The sole issue, as framed by the plaintiff's, was whether separate was inherently unequal.

Phrased differently, should *Plessy v. Ferguson* be overruled?

While the southern states vigorously defended segregation, much to their dismay, Kansas ended up being dragged kicking and screaming into defending its position. One month before oral arguments, the Topeka Board of Education announced that it would neither file a brief or present oral argument in the case. The Board apparently wanted to be in a position of saying it helped abolish segregation by not defending the suit. The suit was becoming increasingly "politically incorrect" among citizens of the state. The Attorney General personally felt segregation to be a moral outrage and was in the case for the sole reason that the statute was being challenged as unconstitutional. The Governor, in the midst of a re-election campaign, did not want to be seen as supporting segregation. Kansas decided to default.

Then, in a shocking development, the United States Supreme Court, *sua sponte*, directed an order to the Attorney General of the State of Kansas which noted the fact that the Topeka Board of Education had declined to respond to the appeal and that the State of Kansas had not yet filed a brief.

"Because of the national importance of the issue presented and because of its importance to the State of Kansas, we request that the State present its views at oral argument. If the State does not desire to appear, we request the Attorney General to advise whether the State's default shall be construed as a concession of invalidity."

The Attorney General could not concede the unconstitutionality of a state statute. The AG must assume that all enactments of the legislature are constitutional until declared otherwise by a court of last resort. The Supreme Court knew this and it is believed that it did not want to see Kansas default in the case because it was only in the Kansas case that the issue of separate but equal was clearly presented. So it "prodded" the Attorney General into filing a brief by the above communiqué. The Attorney  
*STEP BACK* (Continued on page 20)

*STEP BACK (Continued from page 19)*

General responded that a brief was being prepared and that every effort would be made to have it filed by December 8 (the date of oral argument!). Paul Wilson hand carried 50 copies of his brief to Washington.

So there you have it. Although Kansas has gone down in history as the state that fought to keep schools segregated, its real role was to present the issue clearly to the Supreme Court so that the Court could overrule *Plessy v. Ferguson* by declaring that separate was inherently unequal. As Prof. Wilson pointed out, it was a time to lose. ♦

## BERGER TO BENCH

By Anita Tebbe

The 10<sup>th</sup> U.S. Circuit Court of Appeals has selected Robert D. Berger to take the bankruptcy bench in Kansas City, Kansas to fill a vacancy to be filled when Judge John Flannagan retires in October. Robert Berger is a shareholder in the firm of Lentz & Clark PA, a bankruptcy boutique law firm in Overland Park. He is the chairman of the Johnson County Bar Association Bankruptcy Committee and is dual certified in both business and consumer bankruptcy by the American Board of Certifications. For a number of years, he has written indepth articles on bankruptcy for the Johnson County Barletter. Robert Berger received his bachelor's degree from the University of Kansas in 1983 and his JD from Washburn Law School in 1986.

The federal appointment is for fourteen years and can be renewed. Mr. Berger went through several steps before receiving this appointment. After completing a lengthy application, he was interviewed by a five person Merit

Selection Committee, consisting of two United States District Court Judges, The Hon. Kathryn H. Vratil and The Hon. Julie A. Robinson. The three attorney members of the Committee were Mr. Thomas Mullinix, Johnson County; Mr. Gary Hanson, Topeka; and Mr. Michael Lasater, Wichita.

After receiving several names from the Committee, the 10<sup>th</sup> U.S. Circuit Court of Appeals named Robert Berger and Dale Somers to fill the upcoming vacancies. (Mr. Somers fills the vacancy left by the retirement several months ago of Chief Bankruptcy Judge James Pusateri and will take the bench in Topeka.) Mr. Berger anticipates that he will be sworn in by Judge Flannagan this fall. Once the federal background checks are completed, an official investiture ceremony will take place.

When asked why he wanted to be a bankruptcy judge, Mr. Berger commented, "This position is a calling to public service. For many individuals, bankruptcy is the only experience he/she will have with the Federal Court. Each person, debtor or creditor alike, should be treated with respect and dignity through this challenging process."

Besides Mr. Berger and Mr Somers serving on the bankruptcy bench, the other two judges for Kansas are Judge Jan Karlin and Judge Robert Nugent. Mr. Berger is looking forward to working with these outstanding individuals. He said that he has been well-prepared for serving on the bench by his nine years of association with Lentz & Clark. During his employment there, he has worked almost exclusively on bankruptcy matters and is grateful for the many opportunities that he was given during his tenure there. ♦

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## NON-FLEEING MOTORISTS ARE CONSIDERED SEIZED WHEN POLICE ACTIVATE EMERGENCY LIGHTS

By *Steve Obermeier*

Roger Morris was driving his pickup truck around Lawrence, Kansas with the makings of a methamphetamine lab. He parked at a jetty-breaker area of Douglas County State Lake and turned off his engine. An undersheriff activated his patrol car's red lights and used spotlights to illuminate Morris' truck. The undersheriff noticed the chemical odor associated with meth labs emanating from the truck. Morris was convicted of attempted manufacture of methamphetamine. The district court had found nothing wrong with the seizure and denied Morris' motion to suppress. The Court of Appeals affirmed. But the Kansas Supreme Court recently reversed his conviction in *State v. Morris*, 276 Kan. \_\_\_, 72 P.3d 570 (2003).

The deciding factor was what the undersheriff knew at the time he seized Morris. Writing one of her first opinions, Justice Marla Luckert observed the key to applying these Fourth-Amendment protections from unreasonable seizures involved determining "when the seizure of his person occurred, because it 'is at that critical time' that the officers must have had knowledge of facts giving rise to a reasonable and articulable suspicion that the defendant had committed, was committing, or was about to commit a crime." 72 P.3d at 576.

A person is seized, thereby triggering a Fourth Amendment analysis of the police action, "when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." [Citing *Terry v. Ohio*, 392 U.S. 1 (1968)]. A different statement of the test was articulated in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980): a seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

Justice Luckert surveyed 10 other states that had considered the issue of whether a seizure occurs when the officer activates emergency lights. Kansas joined these states in holding that

Morris complied with the officer's show of authority enjoining him to remain.

We hold that Morris' encounter was not voluntary, but rather occurred under a show of authority. The officers' conduct, the activation of the emergency lights in a remote area off a roadway, was a show of authority which would communicate to a reasonable person that there was an intent to intrude upon freedom of movement. "Few, if any, reasonable citizens, while parked, would simply drive away and assume that the police, in turning on the emergency flashers, would be communicating something other than for them to remain." 72 P.3d at 577.

Had Morris fled and not complied with the undersheriff's show of authority, then any observations and traffic violations the undersheriff observed during the ensuing pursuit could be factored into the analysis of whether a reasonable suspicion of criminal activity existed to make the *Terry* stop. The fact that Morris complied with the undersheriff's show of authority distinguished his case from *State v. Weaver*, 259 Kan. 844, 849, 915 P.2d 746 (1996). Weaver did not submit to the officer's show of authority when the emergency lights were activated; he sped away and a chase ensued. The officer's observations during the intervening chase could provide the basis for his reasonable suspicion of criminal activity.

The issue then turned to whether police had a reasonable suspicion at the time Morris was seized. The undersheriff and other officers were conducting surveillance of an apartment while waiting for a search warrant. When a woman left her apartment and drove to Lawrence, the undersheriff and other officers followed her. They saw her stop and speak briefly to Morris before driving away. The undersheriff articulated no other reason for contacting Morris other than having seen Morris in that truck

earlier talking to a woman who was the target of a search warrant. The undersheriff admitted that he had not seen Morris engage in any illegal conduct.

The *Morris* Court held the undersheriff lacked reasonable suspicion that Morris had committed or was about to commit a crime at the time they seized him – at the moment when they pulled up behind him and activated their emergency lights. "A person's mere propinquity to others independently suspected of criminal activity does not, without more, authorize a *Terry* stop unless the officer has reasonable suspicion directed specifically at that person." 72 P.3d at 580. It held the evidence obtained as a direct result of that illegal seizure should have been suppressed. ♦

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