KADC

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# Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*



## FINDING A WAY TO GET ALONG: JOINT DEFENSE AGREEMENTS AND OTHER IDEAS FOR FORGING A UNITED DEFENSE FRONT

Michael G. Jones,*
*Martin, Pringle, Oliver, Wallace & Bauer, LLP*

As one American who had slightly more than his 15 minutes of fame once put it: "Why can't we all just get along?" Civil defense lawyers should heed the simple wisdom of that often-mocked quote when it comes to multi-defendant litigation. In our instinctive zeal to defend our individual clients, we defense lawyers often immediately start looking at other co-defendants and third parties to point fingers at in order to slough off fault and reduce our client's risk. That understandable approach, however, is short-sighted and should be resisted until thoroughly exploring the longer-term benefits afforded by banding together with co-defendants to defend on a united front.

### I. The Case for a Joint Defense

#### A. Benefits to Defendants Involved in a Pending Lawsuit

Working together with co-defendants to form a unified defense offers a number of advantages over a solo defense.[1] From a practical standpoint, a unified defense allows for the pooling of resources. [2] Each defendant in a complex case will have access to a set of documents unique to that defendant. [3] Likewise, defendants may have varying knowledge concerning nonparty witnesses.[4] Combining these

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## YOUR HOUSE IS MY CASTLE – OR IS IT? A GUIDE TO HOUSING DISCRIMINATION LAW

Shon D. Qualseth,
*Thompson Ramsdell & Qualseth, P.A.*

Fred Matlock was sitting in his office, polishing off a motion for summary judgment that would punt the other side's case. Matlock's phone rang; George Smith on line 1. Smith and his wife are the sole members of a limited liability company that owns several apartment complexes around town. Matlock has done some evictions for them in the past. This time, Smith has a different problem:

> SMITH: I got some papers a couple of weeks ago from the City, or maybe the County or State, I don't know. I'm not sure what it is, but I think my wife and I are being sued for discrimination.
>
> MATLOCK: Who is suing you?
>
> SMITH: Samantha King. Remember her? She's a former tenant that you evicted for me months ago.
>
> MATLOCK: Right, I remember. Now she's suing you? Why?
>
> SMITH: It says here that I discriminated against her when we evicted her, and that my wife knew about the discrimination and let it happen. My wife doesn't have anything to do with the apartments other than being part of our com-

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NEWSLETTER EDITOR
*Kansas Defense Journal* is a quarterly publication of the Kansas Association of Defense Counsel. If you have any questions, comments, or ideas for future articles, please contact the *Journal*'s editor:

Amy E. Morgan
Shughart Thomson & Kilroy, P.C.
32 Corporate Woods
Suite 1100
9225 Indian Creek Parkway
Overland Park, KS 66213
Phone: 913-451-3355
Fax: 913-451-3361
Email: amorgan@stklaw.com

# PLEASE SIGN UP FOR OUR ANNUAL CONFERENCE AND FIRST ANNUAL KADC TRIAL WORKSHOP!

Scott Nehrbass
*KADC President*
*Foulston & Siefkin LLP*

I'm looking forward to seeing many of you at what should be an outstanding 2007 KADC Annual Conference. Board member Dustin Denning of Salina has gone out of his way to help us line up one of the most sought after speakers on trial skills – Jim McElhaney – and we've gone out of our way to advertise. **Unfortunately, as of October 31, 2007, our registrations for the annual conference were no greater than they were at this time last year. Please sign up and show your appreciation for Dustin's hard work! You do not want to miss Jim McElhaney!!**

In my final column as President, I want to focus again on the importance of our organization being relevant and meaningful to younger lawyers. This was a hot topic for discussion during the conclave of state defense organization leaders at last month's DRI annual meeting in Washington, D.C. Every state defense organization is experiencing a problem with the latest generation's tendency to be "non-joiners," and nearly every state defense organization is trying to do something about it.

The state defense organizations having the most success in capturing the attention of younger lawyers are those finding a way to address the problem of young lawyers not having sufficient trial opportunities. As a not-so-old lawyer, I've personally experienced this problem, and I had to come up with creative ways to deal with it – trying pro bono cases and taking on smaller, less risky matters or even an occasional plaintiff's case. There are many lawyers of my generation who find themselves ten or more years into the practice of law having never tried a case to a jury.

A number of state defense organizations are now holding some kind of trial academy or workshop aimed at helping younger lawyers learn jury trial skills. I'm told by the Executive Director of the Alabama defense organization that their workshop has nearly 100 attendees, takes place over 3 days, and includes appellate judges as faculty members. Other organizations have tried a "young litigators' boot camp" in which attendees gather one night a week for 8 weeks.

Your KADC board has determined that it's time for the KADC to try something like this, and it seemed logical to do it in connection with our annual meeting featuring Jim McElhaney. David Cooper of Topeka has done the lion's share of the work getting our first endeavor – The First Annual KADC Trial Skills Workshop – off the ground. It will take place the Thursday afternoon before our annual meeting gets underway. Attendees will get to hear KADC members Gene Balloun, Dick Hite and Wayne Stratton perform a sample opening statement and hear the KTLA's Jerry Palmer give a critique. **This will be invaluable experience for younger lawyers, but I'm disappointed to say we only have six folks registered so far! Would you please encourage the young lawyers in your sphere of influence to sign up?**

It's been a blessing, honor and privilege to serve as KADC president this year. Your KADC board is full of outstanding people, and the KADC's future is bright. Permit me to end with the greatest words of wisdom my father taught me and into which my two boys have been thoroughly and irretrievably indoctrinated: Rock, chalk, Jayhawk, K-U.

## JAMES W. MCELHANEY TO HIGHLIGHT KADC ANNUAL CONFERENCE

Dustin Denning
*Clark, Mize & Linville, Chartered*

*Mr. McElhaney is also regarded as the most widely read author on trial techniques in the United States.*

Do you like to win? Of course you do! But do you always plan to win? Are you prepared to tell your client's story to the jury? Do you have a story? Are you curious how to defend the "invisible injury" case? Ever wonder what tricks you could use against your opponent in Federal Court? Want to learn about potential pitfalls or traps to avoid in Federal Court? You are a trial attorney, you say, but do you really know how to preserve the record and build an appeal from the ground up?

If you answered yes to any of these questions, then you will not want to miss this year's KADC Annual Meeting at the Hyatt Regency in Kansas City, Missouri. Whether you are a seasoned veteran or a first year associate, we have something for everyone this year, so clear your calendar for Friday, November 30, 2007, and Saturday, December 1, 2007, and enjoy a day and a half of CLE from an outstanding line-up of speakers.

This year's KADC Annual Meeting is highlighted with an in-depth presentation by **James. W. McElhaney**, the foremost teacher, writer and speaker on trial techniques in North America. Mr. McElhaney is also regarded as the most widely read author on trial techniques in the United States. Mr. McElhaney's presentation, titled *Planning to Win: The Hunt for the Winning Story*, will be entertaining, thought-provoking, and leave you asking for more.

Other program highlights include a presentation by **Lynn M. Roberson** from Atlanta, Georgia, on the topic of defending the damages

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## NEW TRIAL SKILLS WORKSHOP OFFERED AT ANNUAL MEETING

David Cooper
*Fisher, Patterson, Sayler & Smith, LLP*

The continuing trend of mediation and other means of alternate dispute resolution results in fewer and fewer cases proceeding to trial. The consequence of this trend, while perhaps beneficial to litigants, is less and less opportunity for young lawyers to gain trial experience. Responding to this concern, KADC will sponsor a workshop devoted to trial skills, targeted to young lawyers (under age 36 or five or fewer years of bar admission), in conjunction with the KADC Annual Meeting. The program will take place on Thursday, November 29, 2007, from 1:00 to 5:00 p.m. at the Hyatt Regency Crown Center, in Kansas City, Missouri.

The theme for the workshop is storytelling. This year's workshop will focus on opening statements. Participants will view demonstrations by veteran KADC members, followed by commentary and critique by trial attorney and mediator Jerry Palmer of Palmer, Leatherman, & White. Participants will then break into small groups and present their own opening statements for comment and critique by our veteran "faculty."

For participants not registered for the KADC Annual Meeting, the registration fee is $150. The registration fee is waived for those participants who also register for the KADC Annual Meeting. Because space in the Trial Skills Workshop is limited, registration will be on a first come, first serve basis with priority given to those who also register for the Annual Meeting.

## DRI Seminars 2007 Schedule

**December 13, 2007**
Insurance Coverage and Practice Symposium
New York, NY

**January 24, 2008**
Civil Rights and Governmental Tort Liability
Scottsdale, AZ

**February 6, 2008**
Product Liability
Phoenix, AZ

**February 28, 2008**
Appellate Advocacy
Orlando, FL

**February 28, 2008**
Toxic Torts and Environmental Law
New Orleans, LA

**March 6, 2008**
Sharing Success: A Seminar for Women Lawyers
Phoenix, AZ

**March 13, 2008**
Medical Liability and Health Care Law
San Francisco, CA

**March 26, 2008**
Damages
Las Vegas, NV

***KADC Conference Highlight*** *(Continued from page 3)*

claim in the invisible injury case. Ms. Roberson, a litigator for more than 25 years, has been a frequent speaker at insurance law, trial tactics, and premises liability seminars for DRI, the State Bar of Georgia, the Atlanta Bar and other groups. Ms. Roberson was named as one of the top 50 women lawyers in Georgia in 2007.

**Steven Baicker-McKee**, Pittsburgh, Pennsylvania, will share his tips and tricks that will give you the edge against your opponent in Federal Court. Mr. Baicker-McKee is the author of a leading book on federal practice, the Federal Rules Civil Handbook, now in its thirteenth edition. He is a contributing author to Wright and Miller, and is consulted nationally on federal procedure issues.

I am also thrilled and honored to announce that Kansas Supreme Court Justice, **Lawton R. Nuss**, a former President of the Kansas Association of Defense Counsel and one of my mentors at Clark, Mize & Linville, Chartered, will present an hour CLE on the art of building an appeal from the ground up. In August 2002, Justice Nuss became the first Court member in more than 20 years to move directly from the bar to the bench.

In addition to **Stephen M. Kerwick's** always outstanding and thorough annual Kansas Case Law Update, we will hear from **Jerry D. Hawkins** in a "Hot Topics Combo" that will cover the status of the Bates v. Hogg line of cases, ex-parte communications with treating physicians, and the Kansas Consumer Protection Act and its application to professionals in light of the Williamson v. Amrani decision and the work of the Kansas Legislature.

Finally, you will not want to miss a one-of-a-kind ethics CLE presented by **Tim and Julie Moore**. The title of their presentation is "Hollywood Ethics," and is sure to entertain.

In all, KADC has put together 12 fun and exciting hours of CLE, including 1 hour of ethics.

Don't forget: This year's meeting returns to the Hyatt Regency Hotel situated in Crown Center Plaza in the heart of Kansas City, where you can also take in the Country Club Plaza lights, fine dining and shopping. See you on November 30th!

## CONGRATULATIONS
### TO THE FOLLOWING KADC MEMBERS WHO WILL RECEIVE AWARDS AT THE 2007 ANNUAL CONFERENCE:

**Wayne Stratton**, Goodell, Stratton, Edmonds & Palmer, L.L.P
***Kahrs Award for Lifetime Achievement***

**Jim Robinson**, Hite, Fanning & Honeyman, L.L.P.
***Distinguished Service Award***

**Anne Kindling**, Stormont Vail HealthCare
***Silver Helmet Award***

**Larry Pepperdine**, Fisher, Patterson Sayler & Smith, L.L.P.
***Benedict Arnold Award***

PLEASE JOIN US IN HONORING OUR FELLOW MEMBERS AT THE KADC ANNUAL CONFERENCE!

**Nov. 29 – Dec. 1, 2007**
Hyatt Regency Crown Center
Kansas City

## EXECUTIVE DIRECTOR'S REPORT...HOW WELL DO YOU KNOW YOUR WEBSITE?

Scott Heidner
*Executive Director*

*The KADC website is great "one stop shopping" for a wealth of information.*

As a KADC member, you've already made a decision in your career to invest in your professional association and take advantage of the value and services it offers. KADC offers blue chip educational opportunities at its annual conference, protects your interests with the state legislature, offers a list serve allowing you to solicit your peers for their advice and suggestions, and provides valuable information regularly through e-mails and newsletters. But do you know how much information is available to you simply by going to your association website at www.kadc.org?

In addition to general information about the association, you can find all of the following on the website:

- Copies of archived unpublished opinions under "Court Opinions"
- Copies of amicus briefs filed by KADC under "Amicus Curiae"
- Information about the annual conference and a link to online registration straight from the homepage
- Links to several years of newsletters under "Publications"
- Links to several years of legislative updates, House and Senate rosters, copies of KADC legislative testimony, and political contribution limits under "Legislative"
- A link to a list of fellow KADC members, their employer, and their contact information under "Member Roster"
- A list of all pertinent KADC and DRI meetings and events under "Meetings"

The KADC website is great "one stop shopping" for a wealth of information. The list above only scratches the surface. All standard association information is available as well, including a schedule of board meetings, contact information for staff, membership materials, a list of KADC board members, and a copy of the bylaws.

Parts of the website are password protected. In case you misplaced it, your username is "defense" and your password is "lawyer."

If you haven't already done so, bookmark this page. It's your association website!


President-Elect Anne Kindling (Stormont-Vail), President Scott Nehrbass (Foulston & Seifken), and Secretary-Treasurer David Rameden (Shook Hardy & Bacon) at the DRI Annual Conference


(From left) President Scott Nehrbass (Foulston & Seifkin), President-Elect Anne Kindling (Stormont-Vail), and DRI Representative Dan Diepenbrock (Law Office of Daniel Diepenbrock) at the DRI Annual Conference

*Joint Defense Agreements* *(Continued from page 1)*

resources through a unified strategy enables the defendants to rely on a far more vast array of information than each defendant would have access to if attempting to defend the lawsuit alone.[5] This in turn may provide defendants with a major advantage over the plaintiff from the outset because the plaintiff may still be scrambling to determine all the relevant facts involved in the case.[6]

*Defendants working together will additionally benefit from the combined expertise of each defendant's respective counsel.*

Defendants working together will additionally benefit from the combined expertise of each defendant's respective counsel.[7] Combining attorney insights will allow for the presentation of a much smarter and more effective defense.[8] A greater number of lawyers will allow them to divide up tasks accordingly.[9] Further, such arrangements will ensure that lawyers do not unnecessarily duplicate each other's work.[10] This in turn will make for a more efficient defense as well and pass on significant savings to clients.[11] Attorneys can also save clients money by hiring common experts and joint consultants.[12]

Next, a unified defense approach will usually impress the jury.[13] If each defendant presents a different account of the facts, each defendant will appear less believable to the jury.[14] In contrast, defendants will develop much stronger rapport and credibility with the jury if they assert one, comprehensive story and avoid evidentiary contradictions.[15]

Similarly, a joint defense forces plaintiffs to prove their own cases.[16] In a fractionalized defense scenario, each defendant attempts to shift the blame to another defendant.[17] In a sense, then, each defendant acts as a plaintiff with regard to the other defendants.[18] Stated differently, defendants, by pointing fingers, will help prove the plaintiff's case.[19] The plaintiff can accordingly just sit back and watch as one defendant unravels another.[20] In contrast, if defendants work together, the burden shifts back to the plaintiff to establish each allegation central to the case.[21]

### B. Larger and Long-term Benefits?

A unified effort among multiple defendants may also have larger societal benefits. Conceivably, if plaintiffs know that a lawsuit brought against multiple defendants will compel those defendants to band together, plaintiffs may be discouraged from bringing frivolous suits. This would help unclog the dockets of a sometimes overwhelmed court system.[22] Further, if fewer suits of this nature are brought against corporations, these entities can at least theoretically pass the amount saved from defending these suits down to consumers.[23] As noted, a unified defense also offers savings during the defense of a given lawsuit based on the efficiency promoted.

A trend toward joint defenses would further grease the wheels of corporate expansion. Employers saving money on defending lawsuits could invest the money into the development of their businesses. This would promote greater economic growth in the long-term.

Defense attorneys who band together to defend multiple clients may also experience benefits. Defense attorneys operate in a profession saturated with stress and burnout. The attorney time saved by virtue of the efficiency offered by a joint defense strategy would help to alleviate these problems. Fostering unified defense strategies would further promote much needed harmony among members of the civil defense profession. Working with a team against a common foe is often less stressful than approaching litigation as if it is the attorney and his client against all other parties. This could operate to reduce attorney dissatisfaction with their work.

It is sometimes difficult, however, to identify whether a given case is a good candidate for such alliances. Certainly not all are, but the defense bar should look for more opportunities to work together than they currently do.

## II. History and Development of the Joint Defense Doctrine

### A. Generally

The joint defense doctrine emerged in a criminal law context and spiraled out of the English common law establishment of the

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*All 50 states have established the privilege either statutorily or through common law.*

***Joint Defense Agreements*** *(Continued from page 6)*

attorney-client privilege.[24] The first American case to extend the attorney-client privilege to co-defendants was *Cahoon v. The Commonwealth*.[25] In *Cahoon*, the court recognized the practical benefits of allowing a single attorney to represent multiple defendants.[26] Having acknowledged the potential of such a method of representation, the court noted that an attorney's communications with multiple defendants required some form of protection.[27] In a slightly different context, defendants represented by *different* attorneys historically developed alliances to overcome a common foe.[28] These arrangements were often informal "gentlemen's agreements" and were generally not reduced to writing.[29]

In the 1960s, the Ninth Circuit established the modern version of the joint defense doctrine through two landmark decisions. The first, *Continental Oil Co. v. United States*,[30] involved the attorneys of two major oil companies exchanging information in preparation for a proceeding before a grand jury.[31] The court stressed that these communications were privileged "irrespective of litigation begun or contemplated . . . ."[32] The court further noted, "The privilege . . . is a valuable and important right for the protection of any client at any stage of his dealings with counsel."[33] One year later, in *Hunydee v. United States*,[34] the court reaffirmed its prior holding and explained that communications between multiple parties and their respective attorneys "should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings."[35]

Since the Ninth Circuit's formal establishment of the joint defense privilege, the First, Second, Third, Fifth, Seventh, and Tenth Circuits have all adopted it in various forms and no circuit has denied or rejected it.[36] Additionally, all 50 states have established the privilege either statutorily or through common law.[37] A synthesis of the case law involving the doctrine has led to the following generally recognized elements:

(1) That the otherwise privileged information was disclosed due to actual or

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*Despite the lack of direction from our state's highest court, there is persuasive legal support in Kansas for the existence of the joint defense privilege.*

**Joint Defense Agreements** *(Continued from page 7)*

> anticipated litigation, (2) that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation, (3) that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and (4) that the person disclosing the information has not otherwise waived the attorney-client privilege for the disclosed information.[38]

Today, the joint defense privilege often protects from discovery not only communications between attorneys and their own respective clients in a cooperative arrangement, but some courts also have extended the coverage to protect conversations between unrepresented parties and between attorneys and outside consultants such as accountants.[39] The joint defense privilege is actually not a separate privilege but a derivative of the attorney-client privilege and the work product doctrine.[40] For the joint defense privilege to exist, consequently, a party must first establish one of these other privileges.[41] Nonetheless, in addition to the previously-discussed broad advantages of a unified approach to defending a claim, the joint defense privilege serves as the most important benefit of collaborating with co-defendants.[42]

### B. Kansas Law

The status and effect of the joint defense privilege under Kansas state law remains uncertain.[43] The uncertainty is due in large part to the fact that the Kansas Supreme Court has not squarely addressed the issue. *Associated Wholesale Grocers, Inc. v. Americold Corp.* provided the best opportunity for the court to end the debate.[44] However, the Kansas Supreme Court reserved the issue until such time as it could be fully briefed and presented.[45] Nonetheless, in passing, the court noted that the parties failed to reference Kansas' attorney-client privilege statute[46] and its effect on joint representation agreements,[47] again highlighting the necessity of a separate underlying privilege.

Despite the lack of direction from our state's highest court, there is persuasive legal support in Kansas for the existence of the joint defense privilege.[48] K.S.A. § 60-426 provides the foundation for such existence. K.S.A. § 60-426 generally provides that "communication" between a lawyer and his or her client are privileged and protected from disclosure. Arguably, the statutory definition of "communication" includes communication between co-defendants and co-counsel.[49]

K.S.A. § 60-426 was cited by the Kansas Court of Appeals in its first and only opinion directly addressing the joint defense privilege. In *State v. Maxwell*, the central issue was whether alleged conversations by co-defendants in the presence of one another, and their common counsel, constituted a waiver of the attorney-client privilege.[50] The Kansas Court of Appeals unambiguously held that communication between co-defendants who were represented by common counsel was protected by the "joint defense privilege."[51] The court further concluded, in dicta, that the same privilege should apply to protect communication "in a joint defense of defendants whose attorneys are separately retained . . . ."[52] In other words, privileged information exchanged between an attorney for one defendant and counsel of a co-defendant should remain privileged.[53]

Kansas federal courts have relied upon *Maxwell* as support for the application of the joint defense privilege. For instance, in *Burton v. R.J. Reynolds Tobacco Co.*, the plaintiff filed a motion to compel the production of certain documents related to research conducted by the defendant cigarette manufacturer.[54] In denying the motion to compel, the court recited the dicta in *Maxwell* and reemphasized the applicability of the joint defense privilege to shield from disclosure privileged communication between similarly aligned parties, and their attorneys, who are the subject of actual or potential litigation.[55]

Undoubtedly, the joint defense privilege is alive and well in Kansas federal courts.[56]

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*Joint Defense Agreements* *(Continued from page 8)*

Although there is still a question mark surrounding the joint defense privilege under Kansas state law in Kansas state courts, there is a great weight of authority to suggest that, when ultimately confronted with the issue, the Kansas Supreme Court will similarly uphold the joint defense privilege.

### III. Developing a Joint Defense Strategy

The first step in forming a unified defense is deciding whether to enter into a formal, written joint defense agreement,[57] or forge an informal, if even surreptitious pact. This should be accomplished as soon as possible.[58] While a written contract is not required, putting the terms of a joint defense strategy into writing can avoid later confusion and subsequent disputes regarding the extent of the agreement.[59] Moreover, courts generally hold that a written joint defense agreement is not discoverable.[60] Defendants wishing to draft a useful agreement should consider adding a number of important provisions.[61] First, the document should explicitly identify the parties to the joint defense effort.[62] Second, the agreement should clearly outline the scope of the intended coverage.[63] For instance, it should state whether it encompasses such individuals as employees, staff, accountants, and expert witnesses in addition to the actual parties and their counsel.[64] It should also state the type of documents it covers.[65]

*While a written contract is not required, putting the terms of a joint defense strategy into writing can avoid later confusion and subsequent disputes regarding the extent of the agreement.*

Third, the joint defense agreement should have a confidentiality section.[66] This is a particularly important aspect of the agreement.[67] This part should explain that the information contained therein should only be used for the underlying legal matter and should not be disclosed to third parties.[68] In this section, the parties to the agreement may also draft a clause that states that the document itself is not discoverable.[69]

Fourth, the agreement should note that a party is only represented by his attorney and not by an attorney for a cooperating party.[70] Similarly, the document should identify that it will not limit an attorney's ability to provide zealous advocacy and independent advice to his client.[71] At the same time, however, the agreement should serve to bar cross-claims among the participants.[72] The parties should further prepare for the prospect of receiving an adverse judgment and determine contractually a formula for dealing with this possibility. This can include deferring intra-defendant disputes on indemnity or contribution until a later proceeding, whether in litigation or arbitration. In the interest of overall judicial efficiency, if a splitting formula can be agreed upon, interim posturing amongst defendants for future potential litigation can be avoided. Next, the agreement should include a choice of law and/or choice of venue provision and identify the applicable time period it covers.[74] Finally, parties should include a termination clause.[75] This aspect should outline the circumstances that will trigger withdrawal and to what extent parties must return documents or retain documents' confidentiality.[76]

In addition to drafting a formal document, the parties to the agreement should meet to discuss several other strategic facets of the arrangement.[77] Sometimes the parties should select a lead or liaison counsel that provides a voice for all the participants.[78] The parties should likewise agree on a central headquarters in which to meet.[79] These two considerations will allow for the smooth resolution of any major tactical decisions that the participants must make as the case proceeds. Attorneys for the parties must also decide how to allocate the work in a fair and equitable manner.[80]

### IV. The Limitations and Uncertainties of a Joint Defense Approach

Times will inevitably exist where a defendant finds that it is unwise to form an alliance with another defendant. One such instance occurs where one defendant is almost completely responsible for the plaintiff's injury. Obviously, it would be unwise for the less culpable defendant to invest the same amount of resources into the defense of the claim as that of the inherently guiltier defendant.[81] More significantly, this defendant may find itself slapped with a much harsher

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*Joint Defense Agreements* *(Continued from page 9)*

judgment than it would have received if it had pursued a solo defense. Pursuing a unified approach to defending the litigation would accordingly not be economical for this defendant. Likewise, if one defendant has a unique defense not available to the other defendants, that defendant may choose not to join in a unified defense effort.[88]

Another problem exists for participants who have formed a unified defense but are unable to persuade all defendants involved in the litigation to join in the effort.[83] Oftentimes, these so-called "recalcitrants" enjoy a "free rider" effect.[84] Parties should encourage these additional parties to enter into the agreement.[85] One way to provide an incentive to do so is by withholding any joint research or other resources from the obstinate parties.[86] Even if these recalcitrants still refuse to cooperate, members of the unified defense should not abandon the effort, yet should continue to encourage these parties to join.[87]

*Parties should not enter into a joint defense agreement if there is a risk that the parties will oppose each other in subsequent litigation.*

Moreover, parties should not enter into a joint defense agreement if there is a risk that the parties will oppose each other in subsequent litigation. The joint defense privilege will no longer protect communications between participants who later become actual adversaries in litigation.[88] Additionally, if the parties have already entered into the agreement and one of the participant's attorneys identifies that his client's interests have become adverse to the interests of the group, the attorney should know when to withdraw.[89] This will avoid a conflict of interest for the attorney.[90]

In addition to the overt drawbacks, other uncertainties cloud the joint defense approach. For instance, courts have not clearly determined how similar the parties' interests must be for a joint defense agreement to be enforceable.[91] Courts generally hold that parties must have "common interests" as opposed to merely "similar interests."[92] Yet determining exactly what these phrases mean may prove difficult. On another level, a possibility exists that the formation of a joint defense agreement between *competitors* may potentially violate anti-trust laws.[93] Additionally, courts have disagreed over the exact scope of protection offered by the joint defense privilege.[94] Differing case law exists concerning the extent of the parties falling within the doctrine's coverage.[95] For instance, some courts have held that communications with insurance companies, even if during a pending lawsuit, may not be protected by the privilege.[96] Finally, thorny issues may arise regarding which state's laws govern the formal agreement. For instance, in a complex lawsuit involving parties from a number of different states, some risk exists that the forum state may impose its own laws to the agreement while ignoring a choice of law provision that contractually stipulates that another state's laws apply. At the very least, parties to a joint defense should carefully examine the laws of the jurisdiction governing the agreement in an attempt to diminish uncertainties.[97]

### V. A Final Note on Joint Defense Agreements

As seen above, the exact nature and scope of the protections afforded to parties with joint defense agreements is still evolving. Similarly, all the situations where a unified approach may be useful have not been explicitly addressed. For instance, no analysis of the topic appears in the context of litigation involving multi-national defendants. Perhaps in this context, the advantages of a joint defense would be all the more pronounced. Because of the inherent language barriers and the complex nature of such suits, defendants would be able to defend such suits with greater ease if they banded together. As the doctrine continues to develop, it is likely that defense attorneys will continue to find ways to apply it in creative manners. Finally, although concerns linger regarding joint defense agreements; overall, the positives of forming such agreements often still outweigh the negatives.[98]

### VI. Alternatives to the Formal Joint Defense Agreement

While the comprehensive nature of a formal joint defense agreement will usually offer tactical advantages, defendants may wish to

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*Joint Defense Agreements* *(Continued from page 10)*

pursue other less-involved methods of strategically working together. One such approach is merely drafting a judgment sharing agreement.[99] A judgment sharing agreement serves to apportion fault among multiple defendants.[100] All defendants involved in the litigation must arrive at a consensus regarding the amount of liability that each is responsible for.[101] For example, defendants may employ a market share allocation of fault.[102] Once such an agreement is made, the defendants can then offer a lump settlement amount to the plaintiff while each paying their respective percentage of the sum.[103] In the event the plaintiff proves meritorious at trial and the jury awards damages, the defendants will still compensate the plaintiff based on their agreed upon terms. This arrangement is advantageous because it prevents the other defendants from settling piecemeal with the plaintiff while leaving the non-settling defendant to proceed into trial alone.[104]

*In a situation involving multiple tortfeasors, under a typical Mary Carter agreement, one defendant funds the lawsuit for the plaintiff.*

A similar, but related approach is an anti-Mary Carter agreement. In a situation involving multiple tortfeasors, under a typical Mary Carter agreement, one defendant funds the lawsuit for the plaintiff.[105] This defendant usually retains the right to veto any settlement offer made by the other defendants.[106] Accordingly, the defendant that forms the Mary Carter agreement with the plaintiff is able to shift the burden of paying a large settlement amount to the other defendants while minimizing its risks in defending the claim.[107] To prevent this outcome, defendants may wish to draft an anti-Mary Carter agreement early on in the litigation process.[108] Unfortunately, the enforceability of such documents remains unclear.[109]

Finally, in rare instances, one defendant may choose to "take the hit" for another defendant.[110] Assume, for example, that a plaintiff has been injured by a manufacturer's product. The plaintiff sues both the manufacturer and the retailer that sold the product, alleging both product liability and claims of independent negligence of the retailer for improper final assembly. The retailer in this case is a powerful company such as Wal-Mart or Home Depot.[111] The manufacturer, a company of average size, substantially relies on the retailer to market its product. The manufacturer knows that if the retailer refuses to carry its product, the manufacturer will suffer a drastic loss in profit. Further, assume that the manufacturer realizes from the outset that if the case proceeds to trial a jury will likely assign it a substantial portion of the fault, even though there may be grounds for independent negligence by the retailer. Because the manufacturer does not wish to sour its relationship with the retailer, the manufacturer decides to go beyond its common law or contractual indemnity obligation to the retailer and undertake both to defend and indemnify the retailer, not only for the product liability risk which both share, but also for the claims of the retailer's independent negligence.[112] Such an approach not only ensures that the manufacturer does not lose the seller's business but also promotes speedier resolution of litigation because of the reduced number of parties involved.

The scenario of one defendant taking the fall for another defendant will most likely crop up where, as in the situation above, the parties have a previously-established or a prospective business relationship.[113] It also usually occurs where the defendants have unequal bargaining power.[114] In this situation, even if the defendants have no business connection, the weaker party may still choose to indemnify the more powerful party. The weaker party may do so because it fears that the more powerful litigant will help prove the plaintiff's case against it and thus it will suffer greater damage in the long-run.[115] Likewise, one defendant may choose to indemnify the other where the former believes that the latter only minimally contributed to the plaintiff's injury. Allowing the other defendant to remain in the mix might only serve to increase the costs over the outcome that would be achieved if the guiltier defendant simply pursued the lawsuit alone.

### VII. Conclusion

A joint defense strategy offers a number of

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*Joint Defense Agreements* *(Continued from page 11)*

*A unified effort saves money, promotes efficiency, enhances effectiveness, and ensures long-term benefits.*

advantages over a solo defense. A unified effort saves money, promotes efficiency, enhances effectiveness, and ensures long-term benefits. Although drawbacks do exist, participants can often overcome or minimize the risks by carefully drafting a formal joint defense agreement. Defendants reticent of the extensive and controlling nature of a joint defense agreement may wish to pursue a lesser alternative such as a judgment sharing agreement, or even a loose non-aggression pact. Ultimately, to make any unified defense approach successful, participants must focus on coordination, communication, planning, and organization.[116] Defense counsel that employ and master techniques to foster collaboration between co-defendants will maximize the success of their clients.

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* Mike practices in the area of commercial litigation and product liability with the Martin Pringle firm in Wichita. Mike thanks associate Greg Drumright and law clerk David Stucky for their work in researching and helping write this paper. This topic will be the subject of a broader paper and presentation at the DRI Product Liability Conference, February 6-8, 2008 at the Biltmore in Phoenix.

1. W. Donald McSweeny & Michael L. Brody, *Defending the Multi-Party Civil Conspiracy Case*, LITIG., Spring 1986, note 1, at 8.
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *See id*.
9. *See id*.
10. *See id*.
11. *Cf. id*.
12. *See* Jeffrey R. Parsons & David K. Williams, *Considerations Regarding Consolidated Defense Arrangements in Environmental Litigation*, 455 PLI/LIT 559, 564 (March 1993); *see also* Leigh Jones, *Want to Catch a GC's Eye? Play Nice,* THE NAT'L L.J., March 22, 2002, http://www.law.com/jsp/article.jsp?id=1111412119520 (contending that general counsel for large corporations retain law firms that can work cooperatively with the corporation and other players involved in a lawsuit to save the corporation money).
13. *See* McSweeny, *supra* note 1, at 9.
14. *Id*.
15. *Id*.; Parsons, *supra* note 12, at 563.
16. *See* McSweeny, *supra* note 1, at 9.
17. The Corporate Counsel Section of the New York State Bar Association, *Legal Development: Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263, 308 (1995) (hereinafter New York State Bar Association).
18. *See* McSweeney, *supra* note 1, at 9.
19. *See* New York State Bar Association, *supra* note 17, at 308.
20. *See id*.
21. *See* McSweeney, *supra* note 1, at 9.
22. *See* David R. Marriott, *Managing Complex Litigation: Legal Strategies and Best Practices in "High Stakes" Cases*, 751 PLI/LIT. 273, 275 (Nov. 2006) (noting that [t]he judicial system as a whole benefits from efficiencies resulting from joint agreements"). A joint defense may also promote judicial efficiency through more expedient trials. *See id*. If defendants present consistent defenses during trial, it saves time in sifting through relevant evidence. *See id*. Ultimately, this makes the presentation of the case less confusing to the jury and allows for a speedier decision. *See id*.
23. Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1032, 1048 (2003).
24. *See* Marriott, *supra* note 22, at 275; Marvin Pickholz, *History of Joint Defense/Plaintiffs Agreements*, 21 SEC. CRIMES § 3:21 (2006).
25. 62 Va. 822, 1871 Westlaw 4931, at *11-12 (1871).
26. *Id*.
27. *Id*.
28. *See* Parsons, *supra* note 12, at 562.
29. *Id*.
30. 330 F.2d 347 (9th Cir. 1964).
31. *Id*. at 348.
32. *Id*. at 350.

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33. *Id*.
34. 355 F.2d 183 (9th Cir. 1965). *Hunydee* involved communications made in a meeting between a husband and a wife and their respective counsel. *Id*. at 185.
35. *Id*.
36. *See* Pickholz, *supra* note 24, at § 3:21; *see also United States v. Bay State Ambulance* and *Hosp. Rental Service, Inc.*, 874 F.2d 20 (1st Cir. 1989); *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989); *Matter of Bevill, Bresler & Shulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986); *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981); *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979); *United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985).
37. Joan K. Archer, *Joint Defense/Common Interest Privilege in Kansas*, 75 J. KAN. B.A. 20 (Feb. 2006). About half of the states have adopted statutes to formally codify the privilege. *Id*. at 21.
38. *Id*. at 25. Some courts just require the following three elements: 1) that the statements were made during the course of a joint defense; 2) that the communications were made to further that effort; and 3) that the privilege has not been waived. *See e.g.*, *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *In re Bevill Bresler & Shulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986).
39. *See* Pickholz, *supra* note 24, at § 3:21.
40. Richard M. Dunn & Alfred J. Saikali, *Using a Joint Defense Agreement in Litigation Involving Multiple Defendants*, 35 BRIEF 46 (Spring 2006).
41. *Id*.
42. Marriott, *supra* note 22, at 275. The joint defense privilege serves as an exception to the general rule that information disclosed to third parties waives all privileges. Dunn, *supra* note 40, at 46. The common interest doctrine acts as an additional avenue for making communications between multiple defendants privileged. *See e.g.*, *Broessel v. Triad Guar. Ins. Corp.,* 238 F.R.D. 215, 220 (W.D. Ky. 2006). Unlike the joint defense privilege, the common interest does not require anticipated litigation. *Id*. The joint client doctrine refers to when one attorney represents multiple clients. Dunn, *supra* note 40, at 46.
43. Archer, *supra* note 37, at 21; Chris R. Pace, *The State of Joint Defense Privilege,* K.A.D.C. Legal Letter No. 4, p. 1 (Dec. 1998).
44. *Associated Wholesale Grocers, Inc. v. Americold Corporation,* 266 Kan. 1047, 975 P.2d 231, 239 (1999).
45. *Id.* at 239.
46. K.S.A. § 60-426.
47. 266 Kan. at 1059.
48. *See e.g.,* K.S.A. § 60-426; *State v. Maxwell,* 10 Kan. App. 2d 62, 691 P.2d 1316 (1985); *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.,* No. 05-2164-MLB-DWB, 2007 WL 950282 (D. Kan. Mar. 26, 2007); *In re Grand Jury Proceedings v. U.S.,* 156 F.3d 1038 (10th Cir. (Kan.) 1998); *Burton v. R.J. Reynolds Tobacco Co.,* 167 F.R.D. 134 (D. Kan. 1996).
49. K.S.A. § 60-246(c)(2); Pace, *supra* note 43, at 5.
50. *Maxwell*, 691 P.2d at 1319-20.
51. *Maxwell*, 691 P.2d at 1320. Although the court used the term joint defense privilege, the proper term for the privilege relating to communication amongst two or more persons with common counsel, as opposed to separate counsel, is the "joint client doctrine."
52. *Id.* at 1321. *But see,* Memo. Dec. and Order, *State ex rel Stovall v. Brooke Group, Ltd.,* No. 97-CV-319 (Shawnee County Dist. Ct. Oct. 15, 1997). For a discussion of *Brooke Group, Ltd.,* and its arguable effect on the joint defense privilege in Kansas, see Pace, *supra* note 43, at p. 1.
53. *Id.* at 1321.
54. *Burton,* 167 F.R.D. at 134.
55. *Id.* at 139.
56. *See also, Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.,* No. 05-2164-MLB-DWB, 2007 WL 950282 (D. Kan. Mar. 26, 2007); *In re Grand Jury Proceedings v. U.S.,* 156 F.3d 1038 (10th Cir. (Kan.) 1998).
57. For an excellent sample of a joint defense agreement, see Dunn, *supra* note 40, at 50.
58. *See* New York State Bar Association, *supra* note 17, at 309.
59. *See* Marriott, *supra* note 22, at 278; Douglas R. Richmond, Article, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN

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***Joint Defense Agreements*** *(Continued from page 13)*

ST. L. REV. 381, 421-22 (2005). Indeed, some courts may even explicitly require the agreement to be in writing. *See* United States v. Weissman, No. 94 Cr. 760 S1, 1996 U.S. Dist. LEXIS 19066, at *27 (S.D.N.Y. Apr. 3, 1996).

60. Archer, *supra* note 37, at 28. Even the existence of the agreement may not be discoverable. *Id*. *But see, United States v. Hsia*, 81 F. Supp. 2d 7, 16-18 (D.D.C. 2000) (finding both the terms and the existence of the joint defense agreement discoverable). Courts have generally enforced these agreements as well. Craig S. Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449, 1502 (2002).
61. Most of the pitfalls involved in joint defense efforts, discussed *infra*, can be avoided through careful drafting of the agreement. *See* Archer, *supra* note 37, at 28. The following list of provisions is by no means exhaustive and is only intended to provide the reader with a general sense of the type of considerations to make while drafting a joint defense agreement. For a more extensive list of contractual provisions to possibly include, see Archer, *supra* note 37, at 28-29.
62. *Id*. at 28.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Id*. It should also explain that the privilege is not waived if a document is inadvertently disclosed to a third party. *See* Parsons, *supra* note 12, at 573. Even without such a provision, parties may still face difficulty in attempting to unilaterally waive the privilege. *See IBJ Whitehall Bank & Trust Co. v. Corey & Assoc., Inc.*, No. CIV. A. 97 C 5827, 1999 Westlaw 617842, at *3 (M.D. Ill. Aug. 12, 1999). Another interesting waiver issue arises where one of the attorneys for a party to the joint defense agreement inadvertently releases a privileged document to an outside party. Parsons, *supra* note 12, at 573. Conceivably, one may argue that this information is no longer privileged and perhaps the entire agreement is terminated. *Id*.
69. Archer, *supra* note 37, at 28.
70. *Id*. at 29.
71. *Id*.
72. Parsons, *supra* note 12, at 562.
73. *Id*.
74. Archer, *supra* note 37, at 29. For instance, the document may state whether it relates back to communications made before its execution. *Id*.
75. *Id*.
76. *Id*.
77. Parties may wish to add the following considerations into the written agreement.
78. Parsons, *supra* note 12, at 562.
79. *See* McSweeny, *supra* note 1, at 10. This could be a large conference room in one of the attorney's offices designated solely for work on the case. The parties may alternatively choose to meet at a more neutral location such as at a building situated equidistantly from the offices of each attorney involved in the matter.
80. *See* McSweeny, *supra* note 1, at 9. In some circumstances, for instance, where the attorneys have no prior working relationship, the attorneys may be wise to formally outline the division of tasks in the written joint defense agreement to prevent later bickering over workloads.
81. *See* Parsons, *supra* note 12, at 569-70.
82. New York State Bar Association, *supra* note 17, at 309.
83. Michael Dore, *Cooperative Efforts Among Parties*, 2 L. TOXIC TORTS § 19:4 (2007).
84. *Id*.
85. *Id*. at § 19:5.
86. *Id*. at § 19:6.
87. *Id*. at § 19:4.
88. *See e.g.*, *In re Grand Jury Subpoena*, 406 F. Supp. 381, 394 (S.D.N.Y. 1975); Mark D. Plevin, *Avoiding Problems in Joint Defense Groups*, LITIG., Fall 1996, at 44. Parties might also face problems with disclosure if the privilege was not properly established or waived. *See* Steven A. Weis & Jason Rosenthal, *Joint Defense Agreements: Requirements and Pitfalls*, 17 COM. CORP. COUN., Winter 2003, at 1. Although waiver is unlikely, it is unclear if intense disputes between parties to a joint defense agreement have the potential of waiving the privilege. *See* Parsons, *supra* note 12, at 573.

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***Joint Defense Agreements*** *(Continued from page 14)*

89. *Id*. at 570. As previously implied, the possibility of this scenario existing should be addressed in the written agreement.
90. *See* Marriott, *supra* note 22, at 277. The parties may agree contractually to bar later attempts to disqualify attorneys involved in the joint defense in the event that the parties oppose each other in subsequent litigation. *Id*.; *see also* George S. Mahaffey, Jr., *All for One and One for All? Legal Malpractice Arising from Joint Defense Consortiums and Agreements, The Final Frontier in Professional Liability*, 35 ARIZ. ST. L.J. 21 (Spring 2003) (arguing that legal malpractice claims can be avoided through careful drafting of the joint defense agreement).
91. *See e.g.*, Parsons, *supra* note 12, at 572; *see also Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 8 (N. Dist. Ill. 1980) (requiring showing of identical legal interests).
92. *See e.g.*, *FDIC v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) ("The term 'common interest' typically entails an identical (or nearly identical) interest as opposed to merely a similar interest."); *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1986) (expressing doubts whether corporation and individual defendants shared "common purpose"). Parties should also keep in mind that joint defense agreements must be made pursuant to anticipated litigation and will not protect information disclosed during such transactions as mergers and acquisitions. Archer, *supra* note 37, at 24.
93. *Id*. at 26.
94. *See* Jo S. Kerlinsky, *Beyond the Bounds of the Joint Defense Agreement*, PRAC. LAW., March 1998, at 51.
95. *Id*.
96. *Id*. Similarly, courts have disagreed over the precise scope of the information protected by joint defense agreements. *See id*. It is also unclear whether joint defense agreements prohibit settlement by parties to the agreement. *See id*.
97. *Id*.
98. *Cf*. Parsons, *supra* note 12, at 575.
99. *See* Marriott, *supra* note 22, at 279.
100. *Id*.
101. *See id*. Parties should be careful since such agreements are generally held to be discoverable. *Id*. at 282. *But see* Kerlinsky, *supra* note 94, at 51 (contending that, for policy reasons, judgment sharing agreements should not be discoverable).
102. *See* McSweeney, *supra* note 1, at 10.
103. *See* Marriott, *supra* note 22, at 282.
104. Parsons, *supra* note 12, at 567.
105. Lisa Bernstein & Daniel Klerman, *An Economic Analysis of Mary Carter Settlement Agreements*, 83 GEO. L.J. 2215, 2215-16 (1995). Alternatively, the defendant forming the Mary Carter agreement may guarantee a minimal recovery to the plaintiff. *Id*.
106. *Id*.
107. *Id*. Mary Carter agreements have usually received great disfavor among courts and commentators. *See* Harold Brown, *"Mary Carter" Deals: A Settlement Virus*, MASS. L. WKLY, Feb. 1, 1993, at 11 (describing Mary Carter agreements as "settlement virus[es]"); Larry Bodine, *The Case Against Guaranteed Verdict Agreements*, 29 DEF. L.J. 232, 233 (1980) (labeling Mary Carter agreements "unholy alliance[s]"); Warren Freedman, *The Expected Demise of "Mary Carter": She Never Was Well!*, 633 INS. L.J. 602, 603 (1975) (considering Mary Carter agreements "contractual monstrosit[ies]"). *But see* Bernstein, *supra* note 105, at 2219 (discussing the possible advantages of Mary Carter agreements to plaintiffs).
108. *Id*. at 2232.
109. *See id*. at n. 46.
110. *See* Sachs, *supra* note 23, at 1046-81.
111. In many instances, powerful retailers may even draft indemnity provisions into the contracts formed with manufacturers that obligate the manufacturer to defend and indemnify the retailer for both the product liability risk and the retailer's own negligence. *See id*. at 1066.
112. *See id*. at 1080.
113. *See id*.
114. For examples of situations where the parties may be unequally situated, see Parsons, *supra* note 12, at 568-69.
115. In rare instances, the more powerful party may indemnify the weaker party because the former wishes to control the management of the litigation. *See* Sachs, *supra* note 23, at 1080-81.
116. *See* McSweeney, *supra* note 1, at 9.

*The number of housing discrimination complaints has almost doubled since 1998.*

***Housing Discrimination Law*** *(Continued from page 1)*

pany that owns them.

MATLOCK: What is Ms. King claiming you did wrong?

SMITH: It says that I discriminated against her because of her race, sex, disability, familial status, marital status, and sexual orientation. I mean, I knew she was a biracial single mother who uses a cane, but I had no idea she was gay. If I had known that, I never would have asked her out in the first place.

MATLOCK: You asked her out on a date?

SMITH: Yeah, it was when my wife and I were separated. I had gone over to her apartment to put some rubberized strips down in her tub so she wouldn't slip, and we started talking, and next thing I know I asked her if she would like to go out for dinner with me.

MATLOCK: What did she say?

SMITH: She kind of hemmed and hawed, said she was flattered, then said she'd be out of town – maybe some other time. Which was baloney, because whenever I'd ask, she always said she had something else going on, couldn't get a babysitter, maybe some other time.

MATLOCK (trying to control his voice): How many times did you ask her out?

SMITH: Oh, I don't know, a few. The last time was just a few weeks before you evicted her. She had some other excuse, so I let it go. Anyway, she was behind on her rent, so we had to kick her out.

MATLOCK (reaching for the roll of Tums in his drawer): I better take a look at the papers you got. Come on down to the office, bring the papers, and we'll talk about it.

In defending a housing discrimination complaint, Smith is not alone. There were 10,328 complaints filed with federal, state, and local fair housing agencies last year.[1] The number of housing discrimination complaints has almost doubled since 1998.[2] What's more, a 2002 survey conducted by the Department of Housing and Urban Development ("HUD") found that only 17% of individuals who believed they had experienced housing discrimination took any action in response.[3] Of those 17%, only one percent filed a discrimination complaint with a government agency.[4] The numbers tell us that not only are housing discrimination complaints on the rise, but there is vast potential for the rising tide of complaints to continue.

Smith's problem raises several questions. This article will address many of the issues that may arise in a situation like Smith's – who may be sued, when a complaint must be filed, where a complaint must be filed, and the various bases of housing discrimination complaints. Many landlords, real estate professionals, and developers face similar claims on a daily basis.

## I. Overview of Housing Discrimination Law.

### A. The Fair Housing Act ("FHA") and the Kansas Act Against Discrimination ("KAAD").

Simply put, it is unlawful to discriminate because of race, color, religion, sex, familial status, national origin, or disability when selling or renting homes.[5] Marital status and sexual orientation are also "protected" classes recognized by some states and cities. Those particular classes are discussed below in sections E and F, respectively.

It is also unlawful to discriminate because of race, color, religion, sex, familial status, national origin, or disability in the terms, conditions, or privileges in the sale or rental of a home, or in any advertising in the sale or rental of a home.[6] An example of "terms and conditions" discrimination is a landlord who demands a higher deposit from Asian-Americans than from other tenants. Further, it is unlawful to interfere with a person's right to exercise his or her rights under the FHA.[7] This is sometimes called a "retaliation" claim.

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*Housing Discrimination Law* *(Continued from page 16)*

The framework of proving a housing discrimination case is similar to employment cases. A plaintiff must first establish a prima facie case of discrimination. To do that, a plaintiff must prove:

1. she is a member of a protected class;
2. she applied for and was qualified to rent or purchase certain property or housing;
3. that she was rejected for such housing; and
4. that the housing or rental property remained available.[8]

*In any event, once a plaintiff has established a prima facie case, the burden shifts to the defendant to offer a legitimate, nondiscriminatory reason for its actions.*

When there is a claim of discrimination in the terms, conditions, or privileges of a sale or rental of a home, the elements of a prima facie case change a bit. In those situations, a plaintiff must show:

1. she is a member of a protected class;
2. she was denied rights or benefits connected with a sale or rental; and
3. she would not have been denied the rights or benefits in the absence of unlawful discrimination.[9]

In other words, a plaintiff must make a prima facie showing that she was treated differently than others who were similarly situated, and the treatment was discriminatory.

One bizarre side note regarding proof of a prima facie case involves the display of a fair housing poster.[10] All persons subject to the FHA are required to display a fair housing poster. The fair housing poster "shall be 11 inches by 14 inches" and bear a logo with a house and "Equal Housing Opportunity" printed beneath the house.[11] The poster shall also state that "We do Business in Accordance With the Fair Housing Act," and list illegal bases of discrimination.[12] The poster must be displayed at any place of business (including a real estate agency) where a dwelling is offered for sale or rental.[13] The kicker is contained in 24 C.F.R. § 110.30: "A failure to display the fair housing poster as required by this part shall be deemed prima facie evidence of a discriminatory housing practice." It is difficult to understand how a failure to display a poster has any impact on whether a complainant is in a protected class, is qualified to rent or purchase a dwelling, is rejected or denied benefits connected with a sale or rental, or that the particular complainant suffered discriminatory treatment different than others who were similarly situated.

In any event, once a plaintiff has established a prima facie case, the burden shifts to the defendant to offer a legitimate, nondiscriminatory reason for its actions.[14] If a defendant is able to provide evidence of a legitimate reason, then the plaintiff must continue with her burden of proving that the defendant's reasons were a pretext for discrimination.[15] The overall burden of proof never shifts to the defendant.[16]

In our earlier factual scenario, Ms. King must first show she was a member of a protected class. At first blush, Ms. King, as a "biracial single mother," hits the race, sex, and familial status protected classes. Depending on the jurisdiction, Ms. King may fall under the protected classes of marital status and sexual orientation. By using a cane, she may also qualify as having, or being regarded as having, a disability. Next, Ms. King must show she was denied rights or benefits. This element is met because she was evicted. Third, Ms. King must show some discriminatory motive. If Ms. King is able to provide some evidence of a discriminatory motive, then it is Mr. Smith's job to show a legitimate reason; i.e., the non-payment of rent. Of course, we don't know if Mr. Smith has a fair housing poster displayed at his rental office, or whether the poster is smaller than 11 inches by 14 inches.

### B. The Procedure.

Under the FHA and the KAAD, a person has one year from the date of the alleged discriminatory act to file a complaint with a fair housing agency.[17] If a complaint is filed with HUD, and there is a substantially equivalent state or local fair housing agency having jurisdiction over a complaint, HUD will refer the complaint to the state or local fair housing agency. In Kansas, the cities of Lawrence,

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***Housing Discrimination Law*** *(Continued from page 17)*

Olathe, Salina, and Topeka are listed by HUD as Fair Housing Assistance Programs ("FHAP"). Incidentally, the Kansas Human Rights Commission is not listed as a FHAP to which HUD refers complaints.[18]

Once a complaint is filed and served, the respondent has an opportunity to file an answer. The fair housing agency then will make an investigation of the alleged discriminatory housing practice. The investigation shall be completed within 100 days of the filing of the complaint, unless it is impractical to do so.[19] While the investigation is ongoing, the agency will engage in conciliation between the parties.[20] Conciliation is an informal mediation, with the investigating agency acting as the mediator. If the parties reach a conciliation agreement, the agreement "shall be made public" unless the complainant, respondent, and the agency agree that disclosure is not required.[21] If there is no conciliation agreement, the agency prepares a final investigative report. Within 100 days after the filing of a complaint (unless it's impractical to do so), the agency shall make a determination of whether reasonable cause exists that a discriminatory housing practice occurred. If a "no cause" determination is made, the complaint is dismissed.

*Unlike Title VII governing employment law, the FHA does <u>not</u> require a plaintiff to exhaust his administrative remedies prior to filing suit.*

If there is a determination of reasonable cause, the agency shall issue a charge on behalf of the aggrieved person, and the matter is referred to an administrative law judge for adjudication. If the ALJ finds that the respondent engaged in a discriminatory housing practice, the ALJ may award actual damages, injunctive relief, attorney fees, and a civil penalty of up to $10,000 for a first-time offender, $25,000 for a second-time offender, or $50,000 for a third-time (or more) offender.[22] An ALJ's determination is subject to the HUD Secretary's review, and ultimately judicial review.[23]

In lieu of adjudication before an ALJ, either party may elect to have the claims decided in a civil action in a federal district court.[24] The election must be made within 20 days after service of the charge.[25] If an election is made, the Attorney General shall commence and maintain an action on behalf of the aggrieved person. The aggrieved person has a right to intervene in the action.[26]

But to effectively achieve the goals of the FHA, "the main generating force must be private suits in which … complainants act not only on their own behalf but also 'as private attorneys general.'"[27] A person can file his or her own action for a discriminatory housing practice in federal or state court.[28] The suit must be filed within two years of the discriminatory housing practice.[29] The two-year period does not include the time an administrative complaint is pending.[30]

Unlike Title VII governing employment law, the FHA does <u>not</u> require a plaintiff to exhaust his administrative remedies prior to filing suit. A person may file a civil action whether or not an administrative complaint has been filed, and without regard to the status of the complaint.[31] The only exception is if a hearing before an ALJ has already commenced.[32] Either party is entitled to a jury trial under the Seventh Amendment as long as money damages are sought.[33] As for the KAAD, a plaintiff was previously required to exhaust his administrative remedies.[34] Now, it appears the KAAD is in line with the FHA in that an aggrieved person may file suit regardless of whether an administrative complaint has been filed, but not if the complaint has gone to a hearing.[35]

In the earlier fact pattern, we don't know which agency is pursuing the complaint against Mr. Smith. For all practical purposes, the procedure and law governing the complaint would not differ between a federal, state, or local agency. At this point, it appears Mr. Smith was just served with the complaint, and he has 10 days to file an answer. The investigation is underway, and whatever agency is handling it has a good faith duty to attempt to conciliate the complaint throughout the investigation. It's time for Matlock to gather all the information he can on not only the tenancy of Ms. King, but the tenancies of all other similarly situated tenants.

*(Continued on page 19)*

*Housing Discrimination Law (Continued from page 18)*

## II. Proper Defendants.

Mr. Smith stated that his wife was being sued because she is a member of the limited liability company that owns the property. Is she a proper defendant? In *Meyer v. Holley*, 537 U.S. 280 (2003), the Court held that absent special circumstances, it is the corporation, not its owner or officer, that is subject to vicarious liability for the torts of its employees or agents. In our scenario, unless Mr. Smith's wife had a hand in the discriminatory conduct, or approved or ratified it in some way, she would not personally be liable for Mr. Smith's conduct.

There are also narrow exemptions to the application of the FHA. The FHA does not apply to a single-family house sold or rented by the owner, provided that the owner does not own more than three single-family houses at one time.[36] The FHA also does not apply to "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."[37] However, the sale or rental cannot involve a real estate broker or agent, and it cannot be sold or rented pursuant to an advertisement or written notice that is in violation of 42 U.S.C. § 3604(c).[38] Even if those conditions are met for an owner to go ahead and discriminate, 42 U.S.C. § 1982 may step in to prohibit the sale or lease of any property based on race.

In our fact pattern, it is not clear whether Ms. King lived in a single-family house, or in a "four-plex" in which Mr. Smith also lived. We know Mr. Smith's LLC owns several apartment complexes, but we don't know if Ms. King lived in one of them. This is something for Matlock to keep in the back of his mind to see if it comes into play.

*A frequent way to determine whether a defendant is treating people fairly is by using "testers."*

At least Matlock can take some solace that he is not a proper defendant. To the relief of Kansas lawyers everywhere, a plaintiff cannot maintain a claim against a lawyer based on any alleged discriminatory conduct of the client.[39]

## III. Bases of Discrimination.

### A. Race.

#### 1. Proof.

The parties' actions under all the circumstances will determine whether race was a significant factor in a housing decision. A change in policy can show unlawful treatment. In *Steele v. Title Realty Company*, 478 F.2d 380 (10th Cir. 1973), plaintiff was moving from St. Louis to Utah. Plaintiff authorized an agent to find housing for him. When the defendant found out plaintiff was African-American, defendant instituted a "new" policy of not renting to new tenants until he has seen the prospective tenant. The defendant also testified that while he did not have a problem with African-Americans, other tenants might. The court found "it is clear" that the defendant's "new" policy was racially motivated.

Similarly, the court found it persuasive in *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2nd Cir. 1979), when the defendant corporation adopted new policies prior to rejecting plaintiff's bid for a cooperative apartment in New York. The defendant then did not follow the new policies in accepting a white applicant right before rejecting the plaintiff, an African-American. Defendants' reason for rejecting plaintiff was that "he did not get along with most of the people." In holding it was a fact question whether plaintiff was rejected because of his race, the court pointed out that plaintiff had objective evidence of discrimination, while the defendant supplied only subjective evidence.

A frequent way to determine whether a defendant is treating people fairly is by using "testers." For example, if an African-American is told that an apartment is unavailable, a white "tester" or testers will inquire into the availability of the apartment. The use of testers in housing discrimination cases has long been approved by the Tenth Circuit: "It would be difficult indeed to prove discrimination in housing without this means of gathering evidence."[40]

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2. Credibility.

Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973), is a prime example of how credibility, like in every other case, is important in a housing discrimination case. Plaintiff, a black student, inquired about the availability of an apartment. Defendant told plaintiff the apartment was unavailable. Later, two white individuals inquired separately about the same apartment, and they were told it was available. While on the surface it appeared like a no-brainer case of discrimination, the Tenth Circuit affirmed the trial court's determination that the defendant had refuted plaintiff's prima facie case. Defense witnesses testified that plaintiff had been "extremely aggressive, demanding that the apartment be rented to him." The defendants testified that plaintiff's "attitude and mannerisms" caused them to reject him as a tenant, rather than his race. As a side note, one defendant testified he told plaintiff the apartment was unavailable in an attempt to be nice because he "did not wish to personalize the rejection." While not recommended, the "nice guy" approach ended up working out for the landlord; the court still found him credible despite the fact he lied to the plaintiff about the availability of the apartment.

*42 U.S.C. § 1982 should be considered in any claim involving race. Section 1982 applies to all real and personal property; therefore, owner-occupied dwellings are not exempt from 1982.*

3. Racially hostile environment.

Similar to the sexual harassment cases cited below in Section B2, a plaintiff can have a claim for racial harassment in a housing case. In *Smith, et al., v. Mission Associates Limited Partnership*, 225 F. Supp.2d 1293, 1298-99 (D. Kan. 2002), the court set forth the elements to establish a prima facie case of a racially hostile housing environment:

1. plaintiff is a member of a protected class,
2. the conduct was unwelcome,
3. the conduct was based on the race of plaintiff,
4. it was sufficiently severe or pervasive to alter the plaintiff's living conditions and create an abusive environment, and
5. defendant knew or should have known about the harassment.

4. Other issues.

*Mitchell v. Shane*, 350 F.3d 39 (2nd Cir. 2003), involved the sale of a house where the sellers dealt solely with their agents. The African-American plaintiffs alleged their bid for the house was rejected because of their race. The court denied summary judgment for the sellers' agents, but granted summary judgment to the sellers because they did not know the plaintiffs were African-American.

As stated earlier, 42 U.S.C. § 1982 should be considered in any claim involving race. Section 1982 applies to all real and personal property; therefore, owner-occupied dwellings are not exempt from 1982. In addition, the FHA only covers "dwellings." Section 1982 applies to all real and personal property, including commercial property.[41]

An interesting case of so-called "reverse" discrimination is *Miller v. Towne Oaks East Apartments*, 797 F. Supp. 557 (D. E.D. Tex. 1992). In *Miller*, the landlord evicted Miller, a white tenant, because he complained to the landlord about the racist treatment he received from African-American neighbors. Ironically, the landlord believed that she could avoid a discrimination suit from the African-American neighbors if she evicted the plaintiff. The court held that a cognizable claim for race discrimination exists when "a landlord tolerates racist acts of one tenant against another, thereby interfering with the victim tenant's right to enforce and enjoy the lease."[42] The court held Miller was the victim of racial discrimination. The bottom line of *Miller* is that as long as race is a significant factor in a housing decision, there is a violation of the FHA. There's no such thing as "reverse" discrimination – just discrimination.

B. Sex and Sexual Harassment.

1. Sex/gender.

While most cases of housing discrimination on the basis of sex involve sexual harassment, there have been a few cases not in-

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volving harassment. In *Baumgardner v. Sec'y, Dept. of Housing and Urban Development*, 960 F.2d 572 (6th Cir. 1992), a prospective male tenant, on his behalf and three male friends, contacted the landlord about renting a house. Plaintiff testified that the landlord stated: "I'm not interested in renting to males. My past experience has been that males are messy and unclean." Two female testers from the local fair housing agency inquired about the house, and both were told the house was available. A male tester called the landlord, and he was told it was unavailable. The landlord eventually rented the house to a female with children (who, of course, have never been known to be "messy and unclean.") The court had no problem affirming the ALJ's determination that the landlord had discriminated based on gender.

*Similar to the employment context, courts have recognized two types of sexual harassment in housing: "quid pro quo," and hostile housing environment.*

*Bouley v. Young-Sabourin*, 394 F. Supp. 675 (D. Vt. 2005), dealt with discrimination against the victim of domestic violence, but left some unanswered questions. In *Bouley*, plaintiff, her husband, and their two children lived in the apartment upstairs from defendant for 2 ½ months without incident. One night, plaintiff's husband attacked her, and she fled the apartment and called police. The husband was arrested, and the plaintiff obtained a restraining order against him. Three days later, the landlord delivered a 30-day notice to vacate to plaintiff due to "the violence that has been happening in your unit." The notice stated that the landlord and other tenants were "fearful of the violent behaviors expressed." Plaintiff brought suit claiming discrimination on the basis of sex because she was the victim of domestic violence. The court overruled defendant's motion for summary judgment on the issue, stating that plaintiff had a cognizable claim of unlawful discrimination. The court ultimately ruled that whether discrimination occurred was for the jury to decide. Curiously, while the court went on to state that plaintiff had demonstrated a prima facie case of discrimination, the court cited no evidence to show that plaintiff was evicted because of her sex versus violence in the apartment. The court merely stated that the notice was given within 72 hours of the incident, so a jury could infer discrimination. There was no mention of whether the landlord treated this incident differently than other cases of domestic violence, whether the landlord treated male victims of violence differently than female victims of violence, or any other evidence that would indicate the landlord's actions were motivated by the plaintiff's gender. Presumably, a trial was necessary to flesh out those issues.

### 2.Sexual harassment.

Similar to the employment context, courts have recognized two types of sexual harassment in housing: "quid pro quo," and hostile housing environment.[43] "Quid pro quo" occurs when housing benefits are conditioned, explicitly or implicitly, on sexual favors.[44] A hostile housing environment exists when "the offensive behavior unreasonably interferes with use and enjoyment of the premises. The harassment must be 'sufficiently severe or pervasive' to alter the conditions of the housing arrangement."[45]

*Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir. 1985), was one of the first reported sexual harassment cases in housing. In *Shellhammer*, the landlord asked plaintiff if she would pose for nude pictures. She refused. Approximately a month later, the landlord offered plaintiff money for sex. She again refused. A few months later, the plaintiff was evicted. Plaintiff claimed both "quid pro quo" and hostile environment harassment. The court found that plaintiff had proven her claim that she had been evicted because she had rejected the landlord's sexual advances, and she was awarded over $7,000.

As in many employment cases, courts struggle with what constitutes "severe" and/or "pervasive" sexual harassment. Some cases are slam dunks. The court held there was sufficient evidence of harassment of at least ten women in *United States v. Koch*, 352 F. Supp.2d 970 (D. Neb. 2004). The conduct of Koch included the grabbing of breasts, indecent exposure, multiple propositioning of tenants of rent for sex or other sexual acts,

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evictions when propositions were refused, and actual exchanges of sex for rent.

*In* Honce, *the court found that asking a prospective tenant on a date three times prior to her occupancy was not severe or pervasive enough to constitute a hostile housing environment.*

Other cases are not so clear-cut. In *Honce*, the court found that asking a prospective tenant on a date three times prior to her occupancy was not severe or pervasive enough to constitute a hostile housing environment. The court also found no evidence that the plaintiff's rejections of defendant caused her eviction several months later. The defendant apparently was "equally nasty" to all tenants, and not just plaintiff.

The issue in DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996), was whether one incident of harassment was sufficiently egregious to create a hostile environment. In *DiCenso*, while the tenant

> stood at the door, [DiCenso] asked about the rent and simultaneously began caressing her arm and back. He said to her words to the effect that if she could not pay the rent, she could take care of it in other ways. [Brown] slammed the door in his face. [DiCenso] stood outside calling her names – a "bitch" and "whore," and then left.[46]

The court held this incident did not create a hostile housing environment. In so holding, the court found the conduct only "vaguely" invited exchanging sex for rent, no "intimate body part" was touched, and there was no threat of physical harm. While it does not appear the invitation of sex for rent was "vague," the court basically held that it could have been worse.

However, several courts have found the presence of a hostile housing environment. In *Beliveau v. Caras*, 873 F. Supp. 1393, 1398 (C.D.Cal. 1995), the court had no difficulty finding an actionable sexual harassment claim where plaintiff alleged several incidents of unwelcome remarks, as well as an incident where a defendant grabbed her breast and buttock. A major factor in finding the harassment as "severe" is that the claimed sexual battery occurred in plaintiff's own home "by one whose very role was to provide that safe environment."[47] "Under no circumstances should a woman have to risk further physical jeopardy simply to state a claim for relief under Title VIII."[48]

In *Gnerre v. Massachusetts Comm'n Against Discrimination*, 524 N.E.2d 84 (Mass. 1988), the landlord's conduct consisted of the following instances:

> August 1981 – from across the street, the question called out: "How many times did you get laid this week?"
>
> Dec. 1981 – at the tenant's door while collecting rent, he pointed to the fly of his pants and asked: "I got a big sausage, you want?"
>
> May 1983 – while replastering portion of tenant's bedroom, he asked: "Well, you can get a picture of a naked man there right over your bed -- you can get a nice picture."
>
> Sept. 1983 – again from across the street, the comment: "Nice pair of tits, honey."

Although the four remarks were spread out over more than two years, and there was no physical contact or threats, the court held this conduct constituted a hostile housing environment "from the view of a reasonable person in the plaintiff's position."

The court in *Grieger v. Sheets*, 1989 U.S. Dist. LEXIS 3906 (N.D.Ill. 1989), held it was a fact question and summary judgment was not warranted where plaintiff claimed the landlord demanded sex in exchange for staying in the house. When the tenant rejected the landlord's advances, plaintiff claimed the landlord refused to make repairs in several instances. Plaintiff also claimed that when her husband confronted the landlord about his demands, the landlord threatened to shoot him. The court held that if her claims were proven, plaintiff had a cognizable claim. Regarding the claim that the landlord threatened to shoot plaintiff's husband, the court commented that if believed: "We are not sure how the environment could be much more hostile than that ..."[49]

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In our factual scenario with Smith and Ms. King, it surely doesn't help Smith that he repeatedly asked Ms. King for a date, then evicted her within weeks of her last rejection. On the other hand, while asking a tenant out on a date is certainly not recommended, he might be able to argue that it was unclear if his asking King for a date was "unwelcome." Smith will probably have to be able to show that he treated other non-paying tenants the same way he treated Ms. King. If he can show he treated similarly situated non-payment tenants the same, then King will have a tougher time showing that the rejections were related to the eviction.

**C. Disability.**

The FHA makes it unlawful to discriminate "because of a handicap."[50] The FHA defines "handicap" the same as Title VII: 1) a physical or mental impairment which substantially limits one or more major life activities; 2) a record of having such an impairment; or 3) being regarded as having such an impairment.[51] However, it is not required that a dwelling be made available to someone whose tenancy would constitute a direct threat to the health or safety of others, or cause substantial damage to property.[52]

*It is not required that a dwelling be made available to someone whose tenancy would constitute a direct threat to the health or safety of others, or cause substantial damage to property.*

Discrimination includes the refusal to allow reasonable modifications of existing premises (at the expense of the disabled person) to allow a disabled person full enjoyment of the premises.[53] A landlord may require the renter to restore the premises to its original condition at the end of the tenancy.[54] Section 24 C.F.R. § 100.203 provides examples of what constitute "reasonable modifications": 1) the installation of grab bars in a bathroom at the tenant's expense. The landlord may require the grab bars to be removed at the end of the tenancy. 2) The widening of a bathroom door for a tenant in a wheelchair at the tenant's expense.

It is also unlawful to refuse to make reasonable accommodations in rules and policies to afford a disabled person to use and enjoy the premises.[55] Section 24 C.F.R. § 100.204 provides examples of reasonable accommodations: 1) a blind applicant for a rental apartment has a seeing eye dog, but the landlord has a "no pets" policy. A reasonable accommodation is to allow the blind applicant to have a seeing eye dog. 2) an applicant to an apartment complex is "mobility impaired," but the complex has a "first come first served" policy regarding parking spaces. A reasonable accommodation is to allow the applicant a reserved parking space near his unit because "it is feasible and practical under the circumstances."

**1. Cases of "unreasonable" accommodation.**

*Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995), dealt with the issue of a tenant's use of a service animal. In Bronk, two deaf women alleged that they required the use of a hearing dog, while the landlord had a "no pets" policy. Plaintiffs argued that the dog was trained to hear the doorbell, telephone, smoke alarm, and to carry notes. Apparently, the landlord hated the dog, but argued – and the court agreed – the landlord did not discriminate against plaintiffs because of two things: the dog was not trained as a hearing dog, and plaintiffs didn't need the dog to get by. It turned out that while the dog had received some sort of training, the trainer had no experience in training hearing dogs. No facility had ever certified the dog as a hearing dog. A former roommate of the plaintiffs testified she had observed the dog, and he never demonstrated any special skills. Further, on cross-examination, the plaintiffs admitted "they had lived together on several previous occasions in other apartments, and had never before demanded or had access to a hearing dog." The court found a rational jury could conclude that the accommodation of the dog was not "reasonable," because the dog was a mere pet. The court also held a rational jury could find that the dog's presence was not "necessary to afford [plaintiffs] equal opportunity to use and enjoy a dwelling" under 42 U.S.C. § 3604(f)(2).

In *Solberg v. Majerle Management*, 879 A.2d 1015 (Md. Ct. App. 2005), the plaintiffs claimed they had a medical condition that

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*The typical familial status discrimination case is where a landlord has a rule that either directly discriminates against children, or has a discriminatory impact on children.*

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subjected them to seizures and other complications if they were exposed to trace levels of "irritants, pollutants and petrochemicals." Plaintiffs claimed that as a reasonable accommodation to their disability, before coming to the property for an inspection the landlord should be required to only have his clothes washed in baking soda, conduct the inspection as the first work activity of the day, not put gas in his car prior to the inspection, and to refrain from wearing deodorant, dry-cleaned clothes, polished shoes, or any scented fragrance. The court disagreed, and held these wholesale lifestyle changes were not "reasonable" accommodations.

**2. Financial accommodations to disabled.**

Another issue that has arisen in several cases is whether a landlord is required to accommodate a disability by relaxing financial requirements for a prospective tenant in the face of facially neutral financial guidelines. Some courts have said this type of accommodation is not "reasonable."[56]

However, the court in *Giebeler v. M & B Associates*, 343 F.3d 1143 (9th Cir. 2003), held there are situations where a financial accommodation might be reasonable. In Giebeler, the plaintiff had AIDS, was disabled, and couldn't work. Because of his lowered income, the plaintiff did not meet the minimum financial guidelines to rent at the defendants' apartment complex. However, plaintiff's mother did meet the guidelines, and she offered to co-sign on the lease with the plaintiff. The defendant refused, citing a policy against co-signers. The court held that relaxing the "no co-signers" policy was reasonable to accommodate the plaintiff, noting that the defendant would be in a better financial position with two people responsible for payment of rent rather than just one.

**D. Familial Status.**

Familial status is also a protected class. "Familial status" is defined as one or more individuals who have not reached 18 years old living with a parent, a person with legal custody, or the designee of a parent or other person with legal custody.[57] The typical familial status discrimination case is where a landlord has a rule that either directly discriminates against children, or has a discriminatory impact on children. The landlord in *Morgan v. HUD*, 985 F.2d 1451 (10th Cir. 1993), had a rule that flat-out barred new tenants with children from living in a mobile home park. That violated the FHA. In *Fair Housing Congress v. Weber*, 993 F. Supp. 1286 (D.C.D. Cal. 1997), the court held that two policies of a landlord were facially discriminatory against children. The first policy involved a rule that was distributed to all tenants: "Children will not be allowed to play or run around inside the building area at any time because of disturbance to other tenants or damage to building property." The court held the rule was facially discriminatory because it was a clear limitation on the use of the property by children tenants, and indicated a preference against children to the ordinary reader of the rule. The other policy was the landlord's refusal to rent second-floor apartments to families with children. The landlord's justification was that the second-floor balcony was "dangerous" for children (although she never made any attempt to make the balcony safer in any way).

Other rules may have a discriminatory impact on children. A refusal to rent to all prospective tenants who receive benefits from the Aid to Families with Dependent Children program may violate the FHA because there is a disproportionate impact on families with minor children.[58] In *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243 (10th Cir. 1995), a mobile home park had a limit of three occupants per mobile home lot. A family of five was refused a rental pursuant to the policy. Plaintiffs presented statistics that "at least 71.2% of all U.S. households with four or more persons contain one or more children under the age of 18 years." The court acknowledged the plaintiffs presented a prima facie case of disparate impact discrimination. However, the court held the defendant had legitimate, nondiscriminatory reasons for the rule: 1) sewer systems limitations (perfectly understandable); and 2)

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"concern over the quality of park life" (not quite as readily understandable).

**E. Marital Status.**

While "familial status" is a protected class under the FHA, KAAD, and many local ordinances, "marital status" is not a protected class under the FHA or KAAD. However, several states do have statutes that prohibit discrimination in housing on the basis of a person's marital status (or lack thereof). The most common situation that gives rise to litigation in those states that protect marital status is where an unmarried couple is denied from renting a unit because the owner's religious beliefs prohibit unmarried couples from "living in sin." In those cases, an owner's First Amendment right to free exercise of religion clashes with a tenant's right to be free from discrimination on the basis of marital status.[59]

A check of city ordinances from Topeka, Lawrence, and Overland Park indicate none of those cities treat marital status as a protected class. As social mores change, however, this might become an issue for Kansas lawyers to watch out for.

**F. Sexual Orientation.**

Currently, neither the FHA nor the KAAD prohibit discrimination against individuals based on sexual orientation. However, Kansas Senate Bill 163 proposes to add sexual orientation as an unlawful basis for discrimination. The bill defines "sexual orientation" as "male or female heterosexuality, homosexuality, or bisexuality by inclination, practice or expression; or having a self image or identity not traditionally associated with one's gender." According to Lambda Legal, an organization that pursues civil rights for lesbian, gay, bisexual, and transgendered people, 20 states plus the District of Columbia prohibit discrimination based on sexual orientation.[60]

*In 1995, the City of Lawrence became the first city in Kansas to declare it unlawful to discriminate on the basis of sexual orientation in connection with housing practices.*

In 1995, the City of Lawrence became the first city in Kansas to declare it unlawful to discriminate on the basis of sexual orientation in connection with housing practices. In the 12 years since that enactment, Lawrence remains the only city in Kansas that prohibits discrimination because of sexual orientation.

**IV. Damages.**

Finally, everyone's favorite subject – money. In an administrative complaint, as stated above an ALJ who finds a discriminatory housing practice may award actual damages, injunctive relief, attorney's fees, and a civil penalty of up to $10,000 for a first-time offender, $25,000 for a second-time offender, or $50,000 for a third-time (or more) offender.[61] The civil penalty is intended to be a maximum, not a minimum, and in awarding a penalty, an ALJ should weigh the "nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require."[62]

In a civil action, a court may award actual damages, injunctive relief, attorney's fees, and punitive damages.[63] Actual damages usually involve economic loss, as well as embarrassment, humiliation, and emotional distress.[64]

The imposition of punitive damages is similar to the imposition of a civil penalty. Punitive damages may be awarded when there is evil motive or intent, or if there is a reckless or callous indifference to federally protected rights.[65] However, punitive damages are not mandatory where there is no motivation of "ill will, malice, or a desire to injure."[66]

Rather than the statutory caps in an administrative setting, a court is bound by the constitutional guidelines on punitive damages set forth in *BMW of North America, Inc., v. Gore*, 517 U.S. 559 (1996), *Cooper Indus., Inc., v. Leatherman Toolgroup, Inc.*, 532 U.S. 424 (2001), and *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). One factor in awarding punitive damages is the ratio of compensatory damages to punitive damages. However, one court has acknowledged that because victims of housing discrimination typically suffer much lower actual damages in comparison to employment cases, a high compensatory/punitive damage ratio is

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"far less troubling" in a fair housing case.[67] Nonetheless, the Lincoln court lowered a punitive damages award from $100,000 to $55,000 where the compensatory damage award was $500.[68]

In *United States v. Big D Enterprises, Inc.*, 184 F.3d 924 (1999), the court upheld a total punitive damages award of $100,000 where compensatory damages were $1,000. In doing so, the court put particular emphasis on the reprehensibility of the defendants' conduct: specific instructions to property managers that the defendants "did not want any niggers or people that had ugly cars" or "anyone that was handicapped [who would] drag[] their feet across and ruin her carpet."[69]

## V. Conclusion.

"[T]his society's goal of providing housing free of ... bias has yet to be achieved."[70] In the meantime, landlords, real estate professionals, and developers will continue to deal with housing discrimination claims, real or imagined. Just like in almost every other area of the law, what's reasonable under all the circumstances is a very fact-driven question. The thing to always keep in mind when dealing with these claims is: What will the landlord's, real estate professional's, or developer's actions look like to 12 people in a jury box? And don't forget your fair housing poster.

*Just like in almost every other area of the law, what's reasonable under all the circumstances is a very fact-driven question.*

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1. United States Department of Housing and Urban Development's Fiscal Year 2006 Annual Report on Fair Housing.
2. Id.
3. Id.
4. Id.
5. 42 U.S.C. § 3604; K.S.A. § 44-1016.
6. 42 U.S.C. § 3604(b) and (c).
7. 42 U.S.C. § 3617.
8. Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989); Mencer v. Princeton Square Apartments, 228 F.3d 631 (6th Cir. 2000).
9. Zhu v. Countrywide Realty, Co., Inc., 165 F. Supp. 2d 1181 (D. Kan. 2001).
10. 24 C.F.R. § 110.10(a).
11. 24 C.F.R. § 110.25(a).
12. Id.
13. 24 C.F.R. § 110.10(a).
14. Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989).
15. Woods v. Midwest Conveyor Co., Inc., 231 Kan. 763, 767, 648 P.2d 234, 239 (1982).
16. Id.
17. 42 U.S.C. § 3610(a)(1)(A)(i); K.S.A. § 44-1019(a).
18. A representative of HUD's Regional Office in Kansas City, Kansas, indicated that if a complaint is received from those cities with a FHAP, the complaint is referred to that FHAP. All other complaints are processed and investigated by HUD's Kansas City office pursuant to the FHA. A representative of the KHRC stated that if a complaint is received from a city with which they have a work-sharing agreement, the complaint is referred to that city's fair housing agency. All other complaints are processed and investigated by the KHRC pursuant to the KAAD.
19. 42 U.S.C. § 3610(a)(1)(B)(iv).
20. 42 U.S.C. § 3610(b)(1).
21. 42 U.S.C. § 3610(b)(4).
22. 42 U.S.C. § 3612(g)(3).
23. 42 U.S.C. § 3612(h) and (i).
24. 42 U.S.C. § 3612(a).
25. Id.
26. 42 U.S.C. § 3612(o).
27. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).
28. 42 U.S.C. § 3613(a)(1)(A).
29. Id.
30. 42 U.S.C. § 3613(a)(1)(B).
31. 42 U.S.C. § 3613(a)(2).
32. 42 U.S.C. § 3613(a)(3).
33. See Curtis v. Loether, 415 U.S. 189 (1974).
34. Jarvis v. Kansas Commission on Civil Rights, 215 Kan. 902, 528 P.2d 1232 (1974).
35. K.S.A. § 1021(d)(1) and (3).
36. 42 U.S.C. § 3603(b)(1).
37. 42 U.S.C. § 3603(b)(2).
38. Id.

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39. Zhu v. Fisher, Cavanaugh, Smith & Lemon, P.A., 151 F. Supp. 2d 1254, 1258 (D. Kan. 2001) ("Mere legal representation of a third party who allegedly violated plaintiff's fair housing rights, however, does not give rise to an actionable claim against defendants.")
40. Hamilton v. Miller, 477 F.2d 908, 909, n. 1 (10th Cir. 1973).
41. See Phiffer v. Proud Parrott Motor Hotel, Inc., 648 F.2d 548 (9th Cir. 1980) (although the FHA did not apply to racial discrimination in the rental of office space, plaintiffs were able to proceed (and ultimately prevail) under Section 1982).
42. Miller, 797 F. Supp. at 561.
43. Honce v. Vigil, 1 F.3d 1085, 1089 (10th Cir. 1993).
44. Id.
45. Honce, 1 F.3d at 1090. See also Reeves v. Carrollsburg Condominium Unit Owners Association, 1997 U.S. Dist. LEXIS 21762 (D.C.D.C. 1997) (for a prima facie case, plaintiff must show: "(1) the conduct was unwelcome; (2) it was based on the sex or other protected characteristic of the plaintiff ...; (3) it was sufficiently severe or pervasive to alter the plaintiff's living conditions and to create an abusive environment; and (4) the defendant 'knew or should have known of the harassment, and took no effectual action to correct the situation.'")
46. DiCenso, 96 F.3d at 1006.
47. Id.
48. Id.
49. Grieger, 1989 U.S. Dist. LEXIS 3906, p. 9.
50. 42 U.S.C. § 3604(f)(1).
51. 42 U.S.C. § 3602(h).
52. 42 U.S.C. § 3604(f)(9).
53. 42 U.S.C. § 3604(f)(3)(A).
54. Id.
55. 42 U.S.C. § 3604(f)(3)(B).
56. See Schanz v. The Village Apartments, 998 F. Supp. 784 (E.D. Mich. 1998) (" ... while plaintiff argues that his financial situation is directly attributable to his handicap, such a contention is nothing more than an attempt by him to transform his "financial status" into a "handicap" in order to secure relief under the FHAA. This court cannot accept this argument because it clearly stretches the FHAA beyond its intended bounds."); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301, 302 (2nd Cir. 1998) ("What stands between these plaintiffs and the apartments at Stratford Greens is a shortage of money, and nothing else. In this respect, impecunious people with disabilities stand on the same footing as everyone else."); Ryan v. Ramsey, 936 F. Supp. 417 (S.D. Tex. 1996) ("There is no requirement that welfare recipients, or any other individuals, secure apartments without regard to their ability to pay.").
57. 42 U.S.C. § 3602(k).
58. Gilligan v. Jamco Development Corp., 108 F.3d 246 (9th Cir. 1997).
59. See Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); Cooper v. French, 460 N.W.2d 2 (Minn. 1990); Smith v. Fair Employment and Housing Commission, 913 P.2d 909 (Cal. 1996); Thomas v. Anchorage Equal Rights Commission, 102 P.3d 937 (Alaska 2004); Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994). Other cases dealing with marital status as a protected class include North Dakota Fair Housing Council v. Peterson, 625 N.W.2d 551 (N.D. 2001); and County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993).
60. Article, "From Celebrating Recent LGBT Legislative Advances," Jon W. Davidson, May 30, 2007.
61. 42 U.S.C. § 3612(g)(3) and (p).
62. Morgan v. HUD, 985 F.2d 1451 (10th Cir. 1993) (citation omitted).
63. 42 U.S.C. § 3613(c).
64. See HUD v. Blackwell, 908 F.2d 864 (11th Cir. 1990); and Morgan v. HUD, 985 F.2d 1451 (10th Cir. 1993) ("We have recognized that emotional distress damages are available in Fair Housing Act cases for distress which exceeds the normal transient and trivial aggravation attendant to securing suitable housing").
65. Asbury v. Brougham, 866 F.2d 1276, 1282 (10th Cir. 1989) (citation omitted).
66. Steele v. Title Realty Company, 478 F.3d 380 (10th Cir. 1973).
67. Lincoln v. Case, 340 F.3d 283, 293-94 (5th Cir. 2003).
68. Id.
69. Big D Enterprises, Inc., 184 F.3d at 930.
70. United States v. Big D Enterprises, Inc., 184 F.3d 924, 934 (1999).

# Kansas Association of Defense Counsel
# Application for Membership

The undersigned hereby makes application for membership in the Kansas Association of Defense Counsel and submits the following information in connection therewith (membership restricted to an individual)

1. Name _____
   (Last Name) (First Name) (Middle Initial)
2. Firm Name _____ Years Associated _____
3. Address: Office _____
   (Street or Building)
   _____
   (City/State/Zip) (Phone)
   _____
   (FAX) (Email)
   Residence _____
   (Street)
   _____
   (City/State/Zip) (Phone)
4. Send correspondence to: ☐ Office ☐ Residence
5. Date admitted to the Bar in the State of Kansas _____
6. Are you a member of the Defense Research Institute (DRI)? ☐ Yes ☐ No
7. List names of and year of admission of all courts of last resort in which you are admitted to practice: _____
8. List all bar associations and all other professional organizations and law societies to which you belong:_____
9. State all legal and public offices held: _____
   _____
10. List any articles and books you have written:_____
    _____
11. Are you in private practice? If so, state number of years: _____
12. Is your interest in litigation principally defense oriented? _____
13. I have enclosed annual dues for the following membership category:
    ☐ Admitted to the Bar 5 years or more $175.00
    ☐ Admitted to the Bar less than 5 years $85.00
    ☐ Governmental attorney $85.00

Dated this_____ day of_____, 20_____

_____
(Signature of Applicant)

**Proposed by:**

_____
(Name)

_____
(City and State)

## Membership Benefits

***Being a member of KADC allows you to take advantage of benefits such as:***

- **Continuing legal education**
- **Legislative liaison**
- **A quarterly newsletter to keep you abreast of legal changes and events in Kansas**
- **Amicus Briefs**
- **Weekly emails with hotlinks to Supreme Court and Court of Appeals published opinions**
- **Weekly posting on the KADC website of unpublished Supreme Court and Court of Appeals opinions**
- **Representation to the Defense Research Institute (DRI)**
- **One year free membership in DRI for new KADC members who have not previously been a member of DRI**
- **With both KADC and DRI membership you have the opportunity for exchange of ideas with some of the best attorneys in the state, region and nation**

When completed, this application, together with admission and initiation fee, should be mailed to the Kansas Association of Defense Counsel,
825 S. Kansas Ave., Suite 500
Topeka, KS 66612
Phone (785) 232-9091