KADC

Summer 2007

Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*

WILLIAMSON V. AMRANI: THE KCPA APPLIES TO THE PRACTICE OF MEDICINE – FOR A LIMITED TIME

Nancy Ogle
Ogle Law Office, LLC

I. Introduction

About the time of the new millennium, claims of violations of the Kansas Consumer Protection Act (KCPA) began to creep into lawsuits that otherwise appeared to be medical malpractice cases. It was as if the plaintiffs bar had attended a CLE where a speaker said, "Hey, I know how you can get your attorney fees in a malpractice action – allege a violation of the KCPA!" KCPA claims were asserted based on a variety of things, such as the content of advertising, only to find out during discovery that the plaintiff could not remember ever seeing the advertising prior to receiving treatment.[1] Defense counsel rose to the challenge by sharing theories and research on why the KCPA should not apply to health care providers.[2] Motions to dismiss and for summary judgment were filed with varying results.[3] The general consensus among defense counsel, which was supported by decisions from other jurisdictions, was that the KCPA did not apply to health care providers when they were engaged in providing care or treatment to their patients, but the Act did apply when the alleged misconduct was entrepreneurial.[4]

Naturally, until a Kansas appellate court issued an opinion addressing the question

(Continued on page 7)

H.B. 2451: THE LEGISLATURE'S RESPONSE TO *WILLIAMSON V. AMRANI*

Rep. Michael R. O'Neal (R)
Hutchinson, Gilliland & Hayes, PC

The 2007 session of the Kansas Legislature convened on Monday, January 8, 2007, with lawmakers comforted by the fact that the school finance litigation was over, at least for the time being. Governor Sebelius started her second term touting the need for legislative action to address the rising costs of health care. For the most part, the Legislature settled in to what many felt would be a fairly routine session focused on the State budget.

Five weeks into the session, however, the Legislature, health care profession and bar were handed a surprise by the Kansas Supreme Court in the form of the *Williamson v. Amrani* decision handed down February 9, 1007. In a *per curiam* decision, the Supreme Court concluded that the Kansas Consumer Protection Act, K.S.A. 50-623 *et seq.*, ("KCPA") can apply to a physician's conduct in providing treatment. *See Amrani,* 283 Kan. 227, 152 P.3d 60 (2007).

Prior to the *Amrani* decision, it was generally understood that the KCPA did not apply to actions for medical negligence. Indeed, most understood the law to be as articulated by the Kansas Supreme Court in its decision in *Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754 (1996), where the Court reiterated the rule set forth in its 1961 decision in *Noel v.*

(Continued on page 20)

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

YOUR "YOUNG LAWYERS" AREN'T "TOO BUSY" FOR THE KADC

Scott Nehrbass
KADC President
Foulston & Siefkin LLP

About a year ago, around Father's Day, I heard a pastor share a poignant poem his father had passed down to him:

> "The world has many ways, it seems, to measure your success, A fancy car, high-paying job, and fashionable address. But God sees things quite differently – a different measurement, It's how your son describes you when he's talking to a friend."

I was cut to the quick. It's good to be reminded of what's important in life.

Fellow KADC member and law school buddy Pat Murphy (of Wallace Saunders in Wichita) and I did something important with our boys this summer – around this Father's Day – camping and fishing in southeast Kansas. It was a wonderful time that will not be forgotten, and we plan to do it again. I hope you're likewise finding quality time this summer with the important people in your lives.

One thing civic organizations around the country are noticing is that younger folks aren't "joiners." Rotary clubs have noticed it. Churches have noticed it. And even legal associations like ours – the ABA, the KBA, and our friends at the KTLA – have noticed it.

Why aren't "young people" joining? A largely held theory is that younger generations are more self-absorbed and no longer ascribe to traditional notions of duty and loyalty. A less cynical theory is that younger people have different priorities than previous generations, being more concerned about meaningfulness and not so much about worldly success. They want to make a life, not just make a living. Saturdays at the soccer field or favorite fishing hole are too significant to them and their families to be lost to Saturdays at the office. It's interesting for someone in my "betweener" generation hear the "older" generations complain about the "younger" generations and genuinely wonder whether the older generations are complaining out of disappointment, concern, jealousy or regret.

Regardless of which theory is correct, the question for organizations like ours is whether we have something sufficiently meaningful to offer younger generations and, if so, how we demonstrate that meaningfulness so that young defense lawyers in our midst can be fully informed and decide for themselves whether the KADC is a place for them. If we don't have anything to offer these younger people, then they shouldn't be wasting their time or resources on us. The KADC is not some end unto itself.

So, what does the KADC have to offer "younger" generations? Well, if you're some well-known, hotshot, sophisticated type who already knows it all, then not much. If, on the other hand, you're trying to build a reputation and have the spirit of a "learner," then there is much to be gained and learned through involvement in the KADC. I've learned (and continue to learn) many valuable lessons and gained many wonderful friends in the defense bar from rubbing shoulders with KADC members inside and outside my firm; authoring amicus briefs and dealing with the defense counsel involved in those cases; serving on the amicus committee; reading and drafting articles for the KADC's publications; testifying on proposed legislation; serving on the KADC board; planning and attending KADC annual conferences; participating in DRI national and mid-region meetings with my fellow KADC officers; etc. Most of that time was well-spent and lessons were well-learned, and I didn't have to miss a kid's soccer game or Christmas concert to do it (although I did miss a few opening days of rifle deer season). I'm so thankful to so many – Tom Devore, Judge

(Continued on page 3)

President's Message *(Continued from page 2)*

Lively, Judge Belot, and the rest of those Coffeyville fellows; my former colleagues and mentors Gene Balloun and Bill Sampson; fellow defense lawyers like Tony Rupp and Ken Peirce; and my current colleagues at Foulston – for encouraging my involvement in the KADC. When I look at my law school class from KU and realize that the aforementioned Pat Murphy, Brian Wood (of Hampton & Royce) and I are the only ones who are current KADC members, I regret not doing more to encourage my friends to be part of this wonderful organization and experience what I've been privileged to experience.

It should be one of our personal and organizational goals to invest in younger people.

It should be one of our personal and organizational goals to invest in younger people. Plans are underway to have a joint KADC/KTLA young lawyer training program (whether beginning this year or next) in conjunction with our annual meetings in Kansas City. This should help. Regardless, I'm making it my aim to find and send emails to three "young lawyers" who should join the KADC. Would you please consider making it your aim as well?

WELCOME NEW KADC MEMBERS

Tara Eberline - Foulston Siefkin LLP, Overland Park

Gwynne Birzer - Hite, Fanning & Honeyman, LLP, Wichita

Gregory Lee - Cooper & Lee LLC, Topeka

Janet Mittenfelner - Shughart Thomson & Kilroy PC, Overland Park

Danny Baumgartner - Kansas Dept. of Social and Rehabilitation Services, Topeka

Do You Like to Win?
Of Course You Do!
So Don't Miss:

JAMES W. McELHANEY'S

In-Depth Presentation:
"PLANNING TO WIN: THE HUNT FOR THE WINNING STORY"
November 30 - December 1, 2007
2007 KADC Annual Conference

Returning to Hyatt Regency Crown Center
Kansas City, Missouri
Registration materials to follow

HOW TO STAND OUT IN A CROWD: AN IN-HOUSE LITIGATOR'S VIEW

Kate Hansen
H&R Block Senior Corporate Counsel

I. INTRODUCTION

Litigation is here to stay. In fact, companies are facing a growing number of lawsuits that are increasing in both cost and complexity. At the same time, those companies are facing skyrocketing outside counsel expenses. In response, companies are employing strategies to combat the high cost of litigation. Many companies are reducing the number of outside firms in order to better leverage volume and create efficiencies.

How do you make sure your law firm is one of the firms that stand out and is chosen in this environment of ever-increasing competition? First and foremost, your firm should strive to consistently exceed your client's expectations. This article discusses the challenges facing inside corporate counsel, as well as ways to exceed expectations and stand out in the crowd of law firms competing for business.

II. THE CURRENT WORLD OF IN-HOUSE LITIGATION COUNSEL

A. Convergence

The days of long-term blind allegiance to a single firm or attorney are largely over. Today, companies are focusing on efficient service and cost. One way to increase efficient service and decrease cost is to reduce the number of its partnerships with law firms through convergence. The concept of convergence was pioneered by DuPont in its program of consolidating its legal work on a core group of "primary law firms." Applied properly, convergence can result in a close, collaborative relationship with a company's law department – a partnership between outside and inside counsel for the benefit of their mutual client. The most successful lead outside counsel will act as an extension of the inside legal team.

The most successful lead outside counsel will act as an extension of the inside legal team.

This partnering, by definition, contemplates a team effort. It is more than doing business together. It demands new thinking and a focus on efficiency in delivering legal services through a collaborative approach. Through effective partnering, both the law firms and company can benefit. True partnership can lead to improved revenues and profitability, more efficient legal services, greater commitment, enhanced working relationships with other law firms and legal support providers, and a greater competitive advantage in an increasingly competitive legal services market.

B. All-Star Outside Counsel Teams

Not only are companies reducing the number of outside counsel, but at times companies are requiring law firms to closely coordinate with each other to assist the company in reaching its goals. Some companies are using the strengths of each individual law firm and putting the collective "all stars" together to work with the company to achieve results. For example, key attorneys from various law firms across the country may meet and work together on a case to collectively develop the case strategy and work together as a "virtual law firm."

It is no surprise that close collaboration among firms that view themselves as competitors is not the norm. At times, however, working together will provide better results than any one individual could achieve. For the all-star team concept to work, outside counsel must set ego aside and work together as a team for the good of the

(Continued on page 24)

DRI Seminars 2007 Schedule

September 6-7, 2007
Construction Law
Westin Kierland - Phoenix, AZ

September 6, 2007
Strictly Automotive
Hotel Del Coronado - San Diego, CA

September 25, 2007
Drug and Medical Device Young Lawyer Primer
Chicago, IL

September 27, 2007
Preeminent Lawyer
Westin Michigan Avenue - Chicago, IL

September 27-28, 2007
Nursing Home/ALF Litigation
Bellagio Hotel - Las Vegas, NV

October 10-14, 2007
DRI ANNUAL MEETING
Marriott Wardman Park - Washington, DC

November 1-2, 2007
Complex Commercial Lit. - Smart Strategies for Hard Cases
JW Marriott Desert Ridge, Phoenix, AZ

November 1, 2007
Fire and Casualty
Westin River North - Chicago, IL

November 8-9, 2007
Asbestos Medicine
San Diego Marriott Hotel & Marina, San Diego, CA

December 13, 2007
Insurance Coverage and Practice Symposium
Sheraton New York Hotel & Towers - New York, NY

DRI Update

The Voice of the Defense Bar

Timothy Finnerty
DRI Liaison
Wallace Saunders Austin Brown & Enochs, Chtd.

KADC hosted representatives of the state defense organizations of the DRI's Mid Region (Iowa, Missouri, Kansas, Nebraska, Colorado, Utah) at its semi-annual meeting on May 4 and 5, 2007 at the Great Wolf Lodge in Kansas City, Kansas. Besides being a fairly cool venue for such a meeting for those who brought kids, the meeting itself drew record attendance. Each state was represented and more than 40 officers of those organizations attended. Attendees were treated to a broad set of topics in a participatory setting. Topics included development of membership in state organizations, encouraging diversity in organizations' membership, and DRI's services to state organizations. DRI's and KADC's past president, Bill Sampson, presented an insightful CLE program on trial strategy in his own inimitable way. KADC was represented by its officers, Scott Nehrbass, Anne Kindling, Dave Rameden, Todd Thompson, its newsletter editor, Amy Morgan, and DRI state representative-elect, Dan Diepenbrock. It was my pleasure to organize the meeting with the indispensable help of Scott Nehrbass, Scott Heidner, and, not least, Dale Walden. Thanks to this great team and KADC for making the event such a success!

If you haven't been to a DRI annual meeting, you're missing a great opportunity to put your head into a window on national trends and developments in the kind of litigation we do. Over the past several years, DRI has broadened its CLE offerings into personal-injury-related fields. That diversification is represented by such substantive programs as "The First Year Under the Revised Federal Rules of Civil Procedure—How Electronic Discovery Practice Has Evolved in 2007," "The Emperor's New "Suit"—Liens, Subrogation and Reimbursement Rights," and "When Good Jurors Go Bad—The Future of the Jury Trial in Light of Recent Factors Affecting Jurors' Attitudes." Practical, practice-development programs include "Transitioning Your Practice—Helping Lawyers and Law Firms Prepare for Big Changes." For those of you of a Steve Kerwick-kind of bent, there's "The Intersection of Law and Science—The Unintended Consequences of Judicial Standards for Expert Evidence." A special evening at the Museum of Natural History for DRI attendees' exclusive enjoyment occurs Thursday evening, October 11. If you attended the annual meeting four years ago, you know how incredible it was to have the Air and Space Museum to ourselves for an evening. This time, the experience will be no less exciting! Follow this link for a brochure, http://www.dri.org/dri/event_brochures/2007AM.pdf. The meeting runs from October 10 to October 14. Register at www.dri.org for members. A registration before September 14 gets you $100 off the registration fee and is also the last date to take advantage of a special discounted room rate at the convention hotel.

The National Foundation for Judicial Excellence's third Annual Judicial Symposium, "E-Discovery and Spoliation on Appeal: The Convergence of Law and Technology," was held June 29-30, 2007 at The Renaissance Hotel in Chicago. The event was fully subscribed by members of states' appellate court judges – a third year of remarkable success for the event. This program explored the challenges posed to the appellate courts by a case involving electronic discovery, the computer technology underlying it, and the current state of the law of spoliation. The program included morning presentations from academics and legal practitioners; Prof. Douglas Lind delivered a keynote speech which addressed logic and the law and the afternoon session included mock arguments and judges' counsel surrounding a hypothetical case. KADC has supported NFJE's work financially and I hope it will continue to do so.

This is my last column as your DRI state representative and winds up more than 10 years of direct involvement in KADC and DRI. I have truly enjoyed the opportunity to be involved with the great people who have served this organization and to meet lawyers and make friends from across the state. Dan Diepenbrock begins his term as DRI state representative after the first of the year but will enjoy a break-in period in the last quarter of this year. Please welcome him to this position and I know he will serve you enthusiastically and well. So long!

WHY THE "OFF SEASON" IS JUST AS IMPORTANT IN GOVERNMENT AFFAIRS

Scott Heidner
Executive Director

To remain effective, we must also grow our visibility and be proactive in making sure elected officials know who we are and what matters to us.

The legislature has adjourned for 2007. While there will be numerous legislative interim committees reviewing topics between now and the end of the year, they have no authority to pass legislation. They can only make recommendations. This is the political "off-season."

Or is it?

For KADC members, the answer should be a resounding "no." During the legislative session each year, your KADC staff and volunteer leadership scramble on an almost daily basis to stay appraised of new legislation, track the progress of proposed bills, arrange testimony, and much more. For the full KADC membership, however, NOW is the more important time to contribute to the political success of KADC.

Why is this the time for activity? For the vast majority of KADC members, the only action you will be asked to take on behalf of KADC during the legislative session is an infrequent request to contact your legislator to ask for a specific action on a specific item. This infrequent contact is much more effective if it comes from a constituent with whom the legislator is well acquainted. This kind of familiarity is fostered almost exclusively during the months when the legislature is not in session. This is the time to get to know your legislators, and in doing so, make them aware of what KADC is, and how it protects and represents your practice.

What is the best way to accomplish this task? Aggressively seek out your elected officials. Ask them to lunch. Invite them out for a beer after work. Attend town hall meetings, Chamber of Commerce events, and other activities at which your elected official will make it a point to attend. Better yet, volunteer to help. We are all quick to think of financial contributions when we think of supporting our elected officials, and this is certainly a critical component. There are numerous non-monetary ways to offer support, however, and these are just as critical if not more. Offer to walk a neighborhood and hang door flyers. Host a coffee or reception in your neighborhood for your neighbors to meet and talk with their elected official. Stuff envelopes for mailings, offer to help with yard signs . . . there is no limit to the needs of a legislative campaign and of your individual legislator. Those that volunteer to help meet such needs are not soon forgotten.

The number of issues in which KADC is involved in the legislature is growing. To remain effective, we must also grow our visibility and be proactive in making sure elected officials know who we are and what matters to us. If you don't already have a personal relationship with both your Senator and your Representative, the "off-season" is just the time to develop one. Proudly tell them of your involvement with KADC and make sure they know both you and KADC are resources for them when they have questions about legislation. These relationships bear fruit during the legislative session . . . but they are developed now.

Williamson v. Amrani *(Continued from page 1)*

of whether the KCPA applied to health care providers, lawyers and judges in the state were making educated guesses. The Kansas Supreme Court provided its answer to the question through its decision in *Williamson v. Amrani*[5] on February 9, 2007. The good news about the *Williamson v. Amrani* case is that Williamson's only remaining claims on appeal were allegations that Dr. Amrani violated the KCPA. Williamson no longer had a medical malpractice claim and, thus, the question of the KCPA's application was not mired in a discussion of other issues. The bad news is the Court, in a divided decision, reached the unexpected conclusion that the KCPA can apply to a health care provider's conduct when providing treatment.[6] The Court further concluded that expert testimony may be necessary to prove the claim.[7] The majority largely based its decision on the statutory directive that the KCPA "shall be construed liberally" and its finding that the Act's definitions of "consumer," "supplier," and "consumer transaction" encompassed "the providing of medical care and treatment services within a physician-patient relationship."[8]

The Kansas Legislature acted swiftly to respond to the Court's decision. For a thorough discussion of the Legislature's response and the resulting amendment to the KCPA, see Rep. Michael R. O'Neal's article "H.B. 2451: The Legislature's Response to *Williamson v. Amrani*" in this issue. It is sufficient here to say legislation was passed that amended K.S.A. 50-635 to prohibit claims against health care providers, as defined by K.S.A. 65-4915(a)(1), for injuries alleged to result from medical negligence.[9]

This article will provide some background on *Williamson v. Amrani*, a discussion and comparison of the majority and dissenting opinions, possible implications for cases caught between the Court's decision and the amendment to K.S.A. 50-635, and some guidance on the interpretation of the amended statute. The *Williamson v. Amrani* decision may have significance beyond the limited practice area of the KCPA's application to traditionally medical malpractice lawsuits in that it demonstrates a shift in the Kansas Supreme Court's approach to statutory construction. This shift will also be discussed.

II. Factual Background

The majority opinion briefly sets forth the facts.[10] From Dr. Amrani's viewpoint, the Court's statement of the facts is slanted in favor of Williamson. This can be explained by the fact that the case was appealed from the district court's decision to grant Dr. Amrani's request for summary judgment, and the Court was required to view the facts in favor of the nonmoving party. The following is an overview of the facts.

In 1985, plaintiff Tracy Williamson injured her back while on the job, and Williamson had not worked outside the home since sustaining that injury.[11] Williamson underwent diskectomies at L-4 and L5-S1. Williamson's back pain increased over time, and she was first examined by Dr. Amrani in March 1999. Dr. Amrani suggested Williamson consider undergoing surgery for L4-5 and L5-S1 fusion with BAK cages (a surgical device) and an iliac crest bone graft. Dr. Amrani performed this surgery on Williamson in May 1999. Prior to the surgery, Williamson signed a consent which described the procedure and by signing Williamson acknowledged that no guarantees had been made to her as to the results. The consent form also stated Williamson was aware that the practice of medicine is not an exact science. Dr. Amrani saw Williamson again in August 1999, and

(Continued on page 8)

Prior to the surgery, Williamson signed a consent which described the procedure and by signing Williamson acknowledged that no guarantees had been made to her as to the results.

Williamson v. Amrani *(Continued from page 7)*

she was still experiencing pain in her lower back and left leg. Dr. Amrani recommended a second surgery involving removal of the BAK cage at L4-5, and he performed that surgery in October 1999.

At her deposition, Williamson testified that prior to the first surgery Dr. Amrani told her that she would no longer have pain and she would not need to take any medicine for pain. At his deposition, Dr. Amrani testified that he did not guarantee that the first surgery would leave Williamson pain-free. Instead, he stated that it was the only option he knew of that might help her back pain.

A year after Williamson's surgery, in May 2000, Dr. Amrani had performed approximately 30 surgeries using the BAK cage device. At that time, Dr. Amrani and his medical assistant reviewed the files of his patients on whom he had utilized the device and determined that about 50 percent of those patients received pain relief. Dr. Amrani also determined that the success rate on fusion was about 75 percent. Dr. Amrani did not feel that the amount of success in relieving pain was sufficiently high, so he stopped using BAK cage devices. At his deposition, Dr. Amrani testified that he was not aware of these facts and the surgical procedure's success rate at the time he treated Williamson.

In Williamson's amended petition she alleged Dr. Amrani engaged in deceptive acts and practices in violation of K.S.A. 50-526 and unconscionable acts and practices in violation of K.S.A. 50-627.[12]

Dr. Amrani's deposition testimony and other evidence related to the BAK cage device, including his decision to discontinue its use, were not significant to the Supreme Court's decision. That evidence, however, was significant to Williamson's KCPA claim. In Williamson's amended petition she alleged Dr. Amrani engaged in deceptive acts and practices in violation of K.S.A. 50-526 and unconscionable acts and practices in violation of K.S.A. 50-627.[12] Williamson contended Dr. Amrani "represented that the surgery he was recommending had a high likelihood of successfully relieving Williamson's pain when, in fact, in the majority of cases in which this procedure had been utilized by the defendant, the surgery was unsuccessful."[13]

III. Procedural Background

In her initial petition, Williamson asserted claims of medical malpractice and violations of the KCPA.[14] Williamson failed to identify any expert witness to offer testimony that Dr. Amrani deviated from the standard of care when performing her surgery or to offer testimony that he failed to provide appropriate, reasonable informed consent regarding the surgery. Due to the complete absence of expert testimony, Williamson abandoned her medical malpractice claims. Williamson then filed an amended petition asserting only claims based on violations of the KCPA.[15]

Dr. Amrani filed two motions for summary judgment. In the first motion, Dr. Amrani argued the KCPA did not apply to a physician's conduct when providing care or treatment to patients. District Judge Timothy G. Lahey found the KCPA did apply to physicians in that situation and noted K.S.A. 50-623 required that the Act be liberally construed.[16] Dr. Amrani filed a second motion for partial summary judgment in which he argued that, assuming the KCPA does apply, Williamson could not avoid the obligation of producing expert testimony to establish Dr. Amrani should have determined earlier that he did not have a significantly high success rate with BAK cage device and Dr. Amrani should have disclosed to Williamson his personal track record with the surgical procedure prior to her surgery. Judge Lahey granted the motion for partial summary judgment and stated in part:

> While plaintiff may make a KCPA claim based on concealment of a material fact, such claim must be based on information which the physician has a duty to disclose. In the absence of expert testimony establishing a duty on the part of the doctor to disclose his experience to a patient, plaintiff does not establish a deceptive act.
>
> Accordingly, at trial, Plaintiff may not proceed with her contention "Plaintiff claims that defendant willfully failed to state a material fact and willfully concealed from the plaintiff that he had bad results in over half of the cases he had operated on in using this procedure."[17]

(Continued on page 9)

Williamson v. Amrani *(Continued from page 8)*

Following Judge Lahey's decision on his motion for partial summary judgment, Dr. Amrani filed an application to take an interlocutory appeal.[18] The Kansas Court of Appeals denied his application.

The matter was scheduled for trial in May 2005 and was to be heard by District Judge Warren Wilbert. Dr. Amrani filed several motions in limine to exclude evidence. For example, Dr. Amrani moved to exclude the evidence that he stopped performing surgeries using the BAK cage device after determining that roughly 50 percent of his patients obtained good pain relief as a result of the procedure because that evidence was in the nature of a subsequent remedial measure and inadmissible under K.S.A. 60-451. Dr. Amrani also filed a trial brief that discussed the law applicable to both medical malpractice and KCPA claims and essentially asked Judge Wilbert to reconsider his motion for summary judgment. Dr. Amrani argued, *inter alia*, that because Williamson did not have expert testimony she could not assert any claim of wrong doing or improper conduct by Dr. Amrani which would require expert testimony for proof. In other words, Williamson's KCPA claims were based on assertions that Dr. Amrani engaged in improper conduct and expert testimony was needed to prove those assertions.[19]

Dr. Amrani argued, inter alia, that because Williamson did not have expert testimony she could not assert any claim of wrong doing or improper conduct by Dr. Amrani which would require expert testimony for proof.

Judge Wilbert granted the motion for reconsideration and found Dr. Amrani was entitled to judgment as a matter of law.[20] Judge Wilbert concluded as a matter of law: The issue of what a surgeon should disclose regarding proposed surgery fell within the area of medical malpractice known as informed consent; the KCPA may apply to a physician in the limited area of the proprietary and business aspects of a physician's practice, but did not apply to providing treatment to a patient; and as to this particular case, the question of whether Dr. Amrani should have been less optimistic about the likelihood of good results "'is a subject intrinsically associated with professional judgment and the standard of care of such nature as to, first, necessitate expert testimony and, second, be of a type the Kansas Legislature did not intend to have adjudicated under the terms of the Kansas Consumer Protection Act.'"[21]

Williamson appealed Judge Wilbert's decision. The matter was transferred to the Supreme Court on the Court's own motion. After the Court handed down its decision affirming in part and reversing in part,[22] Dr. Amrani moved for rehearing or modification.[23] Dr. Amrani's motion was denied, and the matter was "remanded with directions"[24] to the Sedgwick County District Court.[25] The district court has scheduled the matter for a three-day trial beginning September 11, 2007.

IV. The Supreme Court's Decision

Before delving into the majority and dissenting opinions, it is worth noting the division of the Court. Unlike the United States Supreme Court, it is the exception, not the rule, for the Kansas Supreme Court to issue a decision that is not unanimous. The *Williamson v. Amrani* majority opinion was issued *per curiam*. However, those in the majority were: Justice Allegrucci; Justice Nuss; Justice Beier; and Justice Rosen.[26] Justice Luckert did not participate, and retired Justice Tyler Lockett was assigned to hear the matter in her place.[27] The minority was made up of the two most senior members who remain on the Court after Justice Alle-

(Continued on page 10)

Williamson v. Amrani *(Continued from page 9)*

grucci's retirement, which occurred after the oral arguments in *Williamson v. Amrani*. Justice Davis wrote the dissenting opinion, and Chief Justice McFarland joined.[28]

A. The Majority Opinion

As mentioned above, the majority based its decision, in part, on the directive found in K.S.A. 50-623 that the KCPA "shall be liberally construed" to promote the policies behind the Act's adoption. The majority also pointed to the Act's terms of "consumer," "supplier," and "consumer transaction" that are defined "broad enough to encompass the providing of medical care and treatment services within a physician-patient relationship."[29] The Act's statutory language provided further support for the majority opinion. For example, the Legislature exempted from the KCPA "insurance contracts regulated under state law"[30] and banks, trust companies, and lending institutions that are "subject to state or federal regulation with regard to disposition of repossessed collateral."[31] Thus, the majority noted the Legislature knows how to exclude categories of persons and transactions from the KCPA and could have excluded physicians if it so intended.[32]

The majority looked to the sparse guidance provided by prior Kansas appellate decisions that involved KCPA claims and physicians or other learned professionals. The Court briefly mentioned three prior decisions involving actions brought by the Attorney General under the KCPA against physicians and companies that sold prescription drugs over the Internet without a physical examination of the patient.[33] The majority found these cases did not address the issue presented in *Williamson v. Amrani*.[34]

The Court specifically distinguished other states' consumer protection schemes that contain the phrase "conduct of any trade or commerce" from the KCPA that does not contain that language.

Probably the most damaging Kansas precedent from the defense viewpoint that was examined by the majority is *Moore v. Bird Engineering Co.*[35] In *Moore*, the plaintiff hired the defendant, an engineer, to design a bridge to be built on the plaintiff's residential property. The plaintiff specifically requested the bridge be designed to hold a load of 32,000 pounds, but the bridge was designed and built to hold only 8,000 pounds.[36] The plaintiff sued the defendant on several theories of recovery, including violation of the KCPA.[37] The district court found in favor of the plaintiff, and the matter was reviewed by the Court of Appeals and then the Supreme Court. The defendant argued the KCPA should not apply to the transaction at issue, but the Court disagreed for the reasons just mentioned – the statutory directive to construe the Act liberally and the broad definitions contained in K.S.A. 50-624.[38] The *Moore* court stated:

> The narrow issue before this court is whether the engineering services rendered in the present case are covered by the KCPA. We make no determination here as to application of the KCPA to other professional services.[39]

The majority devoted several pages to discussing court decisions from other jurisdictions that addressed the question of whether consumer protection acts should be applied to physicians and other learned professionals.[40] The Court noted, "Most states, like Kansas, have left to the courts to determine whether attorneys, physicians, and other learned professionals fall within the coverage of their consumer protection or deceptive trade practices acts."[41] The majority acknowledged that many courts have interpreted the applicable statutory language as exempting the professional conduct within the practice of medicine, but not exempting the entrepreneurial aspects of medicine. The majority distinguished many of the opinions discussed by pointing out the foreign jurisdiction's statutory language was different than the KCPA. The Court specifically distinguished other states' consumer protection schemes that contain the phrase "conduct of any trade or commerce" from the KCPA that does not contain that language.[42] Despite this lengthy examination of the law of other jurisdictions, the majority harkened back to the "clear and unambiguous" language of the KCPA. The Court saw some merit in the policy arguments contained in cases from outside Kansas, but rejected them and stated:

(Continued on page 11)

Williamson v. Amrani *(Continued from page 10)*

> However, it is not our role to determine public policies; that is the role of the legislature. We must interpret the statute as it is plainly worded and, thus, do not find the authorities from other jurisdictions persuasive.[43]

The majority rejected Dr. Amrani's arguments that Williamson's KCPA claims were an attempt to creatively plead what are really claims for medical malpractice.

The majority rejected Dr. Amrani's arguments that Williamson's KCPA claims were an attempt to creatively plead what are really claims for medical malpractice. The Court found there was nothing barring the Legislature from creating a cause of action and statutory remedy even where a common-law remedy is available.[44] Dr. Amrani also argued the Legislature did not intend the KCPA to apply as evidenced by its 30-year effort to reform medical malpractice and tort law which resulted in specific statutes, such as the establishment of the Health Care Stabilization Fund, changes to the collateral source rule, and damages caps. The Court rejected this argument by pointing out "that there is no single act or all-encompassing statutory scheme concerning medical malpractice."[45] Because no single statutory scheme barred the application of the KCPA to physicians when providing medical care or treatment services, the majority concluded the Act applied to physicians while providing medical care and reversed Judge Wilbert's order granting summary judgment in favor of Dr. Amrani.

Next, the majority turned its attention to Williamson's argument regarding Judge Lahey's ruling that expert testimony was required to prove Dr. Amrani's alleged failure to make an affirmative disclosure of his level of experience or success rate constituted a deceptive or unconscionable act or practice under the KCPA. Williamson asserted that no expert testimony was required because "an action under the KCPA can focus on the material expectations of the consumer, *i.e.*, what information a reasonable patient would consider important."[46]

To answer this question, the majority first noted that the test of whether expert testimony is required turns on "whether the subject matter is too complex to fall within the common knowledge of the jury to decide."[47] The answer to the question of whether expert testimony is required will depend on what point the plaintiff is trying to prove. In the case presented, Williamson alleged that Dr. Amrani should have affirmatively disclosed the surgical procedure's success rate and his level of experience. Proving this allegation requires evidence that Dr. Amrani had a duty to disclose these facts.[48] Ironically, in analyzing this issue, the majority cited a medical malpractice case based on informed consent for its statement that "[e]xpert testimony is *ordinarily necessary* to establish the standard of what a reasonable medical practitioner would disclose."[49] The majority concluded that Judge Lahey had "correctly ruled that expert testimony would be *helpful* in determining whether the disclosure is one that would be made by a reasonable medical practitioner under the same or like circumstances."[50]

Despite the Court's use of the word helpful, rather than necessary, it is probably safe to assume Williamson is required to present expert testimony to prove Dr. Amrani had a duty to disclose more information about the success rate of the surgical procedure. This assumption is in keeping with Judge Lahey's decision which the majority affirmed.[51] The majority's decision to "remand with directions" is somewhat confusing in that Williamson had not disclosed any

(Continued on page 12)

Williamson v. Amrani *(Continued from page 11)*

expert testimony prior to trial. Williamson had dismissed her medical malpractice claims because she did not have the expert testimony required to prove them. Based on the majority's finding that expert testimony was required to prove at least some of her KCPA claims, it is unclear which, if any, of her KCPA claims she could provide without expert testimony.

B. The Dissenting Opinion

Justice Davis summed up his dissenting opinion as follows:

> In my opinion, the majority's narrow reading of Kansas law – limiting its consideration to the KCPA alone, without seriously considering the statutes which specifically cover the health care professions – leads to the unreasonable result of "forcing" medical care or treatment into an uncomfortable and unintended KCPA action, thereby undermining Kansas' public policy of providing acceptable health care for its citizens as expressed by our elected representatives.[52]

The dissent's position was that the resolution of the issue presented does not stop with a review of the KCPA and, instead, the Court should also consider statutes governing medical and health care professions found in Chapter 65 of the Kansas statutes.

The dissent noted that the majority correctly recited the rule of statutory construction that legislative intent is the keystone. The dissent, however, pointed out the majority's failure

> to give credence to the prior opinions of this court which do not require the court, when interpreting one statute or act, to view the entire act with blinders as to other statutes that also deal with a subject. This court has explained that "[i]n construing statutes or acts and determining legislative intent, several provisions of an act *or acts*, in pari materia, must be construed together with a view of reconciling and bringing them into workable harmony if possible."[53]

The dissent pointed out several rules of statutory construction used to determine the Legislature's intent, to which Justice Davis believed the majority turned a blind eye. For example, the majority refused to consider the various acts the Legislature has adopted to address specific concerns about medical malpractice and providing health care in this state, because the Legislature did not put all those statutory schemes in a single act. However, the majority relied upon the construction rule that a "complete" act is applied over the KCPA, as the Kansas Residential Landlord and Tenant Act was applied in *Chelsea Plaza Homes, Inc. v. Moore*, and that rule is merely one device for carrying out the Legislature's intent by applying the most specific statute.[54] The dissent also contended the majority overlooked the statutory construction rules that statutes should be construed to avoid unreasonable results and it is presumed that the Legislature does not intend to enact useless or meaningless legislation.[55]

The dissent's position was that the resolution of the issue presented does not stop with a review of the KCPA and, instead, the Court should also consider statutes governing medical and health care professions found in Chapter 65 of the Kansas statutes. As a counter to the majority's frequent reference to the directive that the KCPA shall be liberally construed, the dissent pointed to the public policy statement contained in K.S.A. 65-4914, which is contained in an act governing health care and peer review. That statute provides:

> It is the declared public policy of the state of Kansas that the provision of health care is essential to the well-being of its citizens as is the achievement of an acceptable quality of health care. Such goals may be achieved by requiring a system which combines a reasonable means to monitor the quality of health care with the provision of a reasonable means to compensate patients for the risks related to receiving health care rendered by health care providers licensed by the state of Kansas.[56]

The dissent also referenced the statutory scheme found in the Kansas Healing Arts Act,[57] which contains another public policy statement regarding protecting the public from the unprofessional and unauthorized practice of medicine.[58] Yet another act provides a comprehensive treatment of health

(Continued on page 13)

Williamson v. Amrani *(Continued from page 12)*

care provider's liability and requires health care professionals to carry malpractice liability insurance.[59] According to the dissent, the Court is required to construe the KCPA and other acts and statutory schemes governing the practice of medicine, "in pari materia, reconciling and bringing them into a workable harmony."[60] In order to attain a workable harmony, Justice Davis stated the Court must conclude the Legislature did not intend for a physician to be liable under the KCPA for the rendering of care or treatment to his or her patients.[61]

The KCPA provides two bases for making private claims.[68] A plaintiffs may allege a defendant committed "deceptive acts and practices" or "unconscionable acts and practices."

Likewise, the dissent was persuaded by decisions from other jurisdictions where courts found the consumer protection statutes only apply to health care professionals when they are involved in the entrepreneurial aspects of the medical profession.[62] Counter to the majority's finding that there is a significant difference between the KCPA and other states' consumer protection statutes that use the phrase "trade or commerce," the dissent noted the definitions of that phrase in Connecticut, Illinois, and Michigan "did not differ greatly from the definition of a 'consumer transaction'" in the KCPA.[63]

The dissent concluded that the Legislature's treatment of health care professions in Kansas statutes makes clear that the KCPA does not include the "actual practice of medicine."[64] The dissent went on to discuss the consequences of the majority's decision and focused on the possibility it will undermine the Legislature's efforts to provide good health care in the state while keeping medical malpractice insurance affordable.[65]

V. An Overview of the KCPA

In order to analyze and understand the potential consequences of the *Williamson v. Amrani* decision, a basic understanding of the KCPA is necessary. KCPA claims are subject to a three-year statute of limitations,[66] which the majority in *Williamson v. Amrani* recognized.[67] The KCPA provides two bases for making private claims.[68] A plaintiffs may allege a defendant committed "deceptive acts and practices" or "unconscionable acts and practices."[69] KCPA claims are not limited to the violations enumerated in the statutes.[70] Claims based on alleged deceptive acts and practices are tried to a jury.[71] In contrast, claims based on alleged unconscionable acts and practices are tried to the court.[72]

Deceptive acts and practices include such conduct as making representations knowingly or with reason to know that: the services have characteristics, uses or benefits that they do not have; the services are of a certain quality if they are of a materially different quality; and services have benefits or characteristics unless the supplier relied upon and possesses a reasonable basis for the representation.[73] In addition, deceptive acts and practices claims may be based upon the willful failure to state a material fact or falsely stating, knowingly or with reason to know, that services are not needed.[74] Unconscionable acts and practices include conduct where the supplier knew or had reason to know: the supplier took advantage to the consumer's inability to protect his interests due to the consumer's physical infirmity; the consumer was unable to receive a material benefit from the transaction; and the supplier made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment.[75]

The burden of proof in a

(Continued on page 14)

Williamson v. Amrani *(Continued from page 13)*

KCPA case is somewhat different than a medical malpractice case. In order for a consumer to recover under the KCPA, the consumer must show a causal link between the violation and his or her injury.[76] There is no requirement that the supplier willfully or intentionally violated the KCPA.[77] "It is sufficient to prove the representation was made 'knowingly or with reason to know.'"[78]

The KCPA provides that a successful plaintiff may recover a civil penalty of no more than $10,000 for each violation.[79] If a violation is continuing, each day on which the act or practice occurs is a separate violation.[80] An actual damages award is not required in order to recover a civil penalty.[81] As a matter of public policy, the supplier cannot insure against KCPA civil penalties.[82]

The potential consequences of Williamson v. Amrani cannot be discussed without also considering the impact of the Legislature's subsequent amendment to the KCPA.

The "prevailing party" in a KCPA claim may be awarded attorney fees under certain circumstances. In order for the court to award attorney fees, the action must have terminated by judgment or settlement.[83] The consumer/plaintiff may be awarded attorney fees simply by succeeding in proving the supplier/defendant violated the KCPA.[84] In contrast, the supplier/defendant may be awarded attorney fees by successfully defending the case *and* showing the consumer "brought or maintained an action the consumer knew to be groundless."[85] Considering the KCPA is to be liberally construed to promote the protection of consumers, it appears unlikely that a prevailing supplier could meet this burden and be awarded attorney fees.

Where several causes of action are joined and only some of them permit the award of attorney fees, the work on the various causes of action must be segregated to determine an attorney fee award for only the causes of action that permit the award of attorney fees. In other words, an attorney must apportion his or her fees based upon the time spent on the claims that permit the award of attorney fees.[86] The courts recognize one exception to this rule, that being "when the attorney fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts."[87] In that situation, the prevailing party may recover attorney fees covering all claims.[88] The Kansas Supreme Court has also found expenses may be recovered, although no KCPA statute expressly contains that provision.[89]

VI. Potential Consequences and Unanswered Questions From *Williamson v. Amrani*

The potential consequences of *Williamson v. Amrani* cannot be discussed without also considering the impact of the Legislature's subsequent amendment to the KCPA. The Legislature amended the K.S.A. 50-635 to provide:

> (b) The Kansas Consumer Protection Act does not allow for a private cause of action or remedy against a licensed health care provider for causes of action for personal injury or death resulting, or alleged to have resulted, from medical negligence. For purposes of this subsection, 'health care provider' shall have the meaning as provided in subsection (a)(1) of K.S.A. 65-4915, and amendments thereto.[90]

The amendment is loosely based on a Texas statute.[91] The amendment does not define the term "medical negligence," nor did the Legislature include a statement that the amendment was to be applied retroactively. Generally, if the Legislature does not include language that clearly indicates its intent for a statute to operate retroactively, the statute will operate prospectively.[92] An exception to this general rule has been recognized where a statutory change is procedural or remedial in nature and does not prejudice the parties' substantive rights.[93] Substantive statutes establish the rights and duties of the parties.[94] Possible consumer-plaintiffs are likely to argue the amendment cannot apply retroactively because such application would cut off their substantive right to bring a KCPA cause of action. On the other hand, health care provider-defendants may argue that due to the swift action of the Legislature to amend the KCPA following the Court's decision in *Williamson v. Amrani*, the amend-

(Continued on page 15)

Health care provider-defendants may argue that due to the swift action of the Legislature to amend the KCPA following the Court's decision in Williamson v. Amrani, the amendment can be applied retroactively because it merely clarifies the Act rather than changes it.

Williamson v. Amrani *(Continued from page 14)*

ment can be applied retroactively because it merely clarifies the Act rather than changes it.[95]

The following is a brief discussion of some of the potential consequences of and conflicts created by the *Williamson v. Amrani* decision. This discussion is not intended to be exhaustive. In fact, it is impossible to know all the possible repercussions of the decision and the statutory amendment.

A. Statute of Limitations

Claims brought under the KCPA will be subject a three-year statute of limitation, rather than the two-year statute of limitations applicable to typical medical malpractice actions.[96] Due to the fact that typical medical malpractice actions do not accrue until the injury is reasonably discoverable, subject to a four-year statute of repose, the differences in the applicable statutes of limitations probably will not have a great impact.[97] One notable exception is wrongful death cases, where the injury is usually discoverable at the time of death.

B. Insurance Coverage

Insurance coverage is the area where the greatest uncertainty exists. Whether health care providers have insurance coverage for a KCPA claim will require a case by case determination and will depend upon the individual insurance policy and the claims asserted under the KCPA in a specific lawsuit. Will future insurance policies expressly provide coverage for KCPA claims and, if so, at what cost?

An added concern related to insurance coverage is the possibility of a health care provider being ordered to pay civil penalties. In *State Farm Fire & Cas. Co. v. Martinez,* the Court of Appeals found KCPA civil penalties are exemplary, like punitive damages, and thus it would be against public policy to permit the wrongdoer to insure against them.[98]

C. Attorney Fees

Another significant difference between the KCPA and the typical medical malpractice action is the possibility of an award for attorney fees. This factor alone, which would result in a large financial difference in a plaintiff's recovery, make encourage plaintiffs to seek to amend actions that are already on file and to include a KCPA claim in new lawsuits that are not subject to the Legislature's amendment. In addition, there is no express requirement that an attorney fees award be proportionate to the damages award.[99]

D. Comparative Fault, Vicarious Liability and Other Negligence Concepts

Due to the fact that KCPA claims were created by statute, it is not clear whether any common law negligence concepts apply. Do common law defenses such as comparative fault apply?[100] Certainly KCPA cases do not require proof of the same elements as required in typical medical malpractice actions. It is debatable whether the prohibition against holding a health care provider who is covered by the Kansas Health Care Stabilization Fund vicariously liable or responsible for any injury or death arising out of the acts of another health care provider applies in an action brought under the KCPA.[101]

Of special note is the distinction between a medical malpractice action and a KCPA claim of unconscionable acts and practices where the plaintiff alleges he "was unable to receive a material benefit" for the

(Continued on page 16)

Williamson v. Amrani *(Continued from page 15)*

transaction.[102] In the context of the practice of medicine, the KCPA places a huge burden on health care providers to deliver a "material benefit." This is in contrast to tort law where the health care provider is presumed to have carefully treated or operated on a patient and no presumption of negligence exists from the fact of an adverse result.[103]

VII. The Supreme Court's Shift in Statutory Construction

The Kansas Supreme Court's division over *Williamson v. Amrani* appears to signal differing views on statutory construction. If this is true, the decision's significance goes beyond the application of the KCPA to health care providers and marks a new literalist view of statutory construction by the Court. The term "strict construction" comes to mind, a term that has been tossed about more often in recent years, typically in regard to the United States Supreme Court. The meaning of "strict construction," however, can easily vary depending upon individual view points and the legal issue presented.

The majority followed the rule of construction that "when a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be."

One of the functions of the court is to interpret statutes. Courts are to perform this function by giving a statute the effect intended by the Legislature.[104] It is undisputed that "[i]t is a fundamental rule of statutory construction to which all other rules are subordinate that the intent of the legislature governs when the intent can be ascertained."[105] Both the majority and dissenting opinions paid homage to this rule.[106] The majority implemented this rule by looking at the language contained within the KCPA, finding it to be clear and unambiguous, and determining the Court need look no further to ascertain the Legislature's intent.[107]

The dissent stated that the majority viewed the KCPA "with blinders as to other statutes" that deal with the physician-patient relationship.[108] The majority's approach is indeed a departure from a decision issued by the Court less than a year earlier where it quoted with approval the rules of construction relied upon by the dissent that call for the Court to construe together several provisions of an act or acts.[109] There, the Court stated:

> [I]t is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. The court must give effect to the legislature's intent even though words, phrases, or clauses at some place in the statute must be omitted or inserted.[110]

Always with an eye on ascertaining and implementing legislative intent, the Kansas Supreme Court has invoked rules of construction that did not require the literal application of a statute's words. When the interpretation of one statute according to the exact and literal import of its words would contravene the purpose of the Legislature, the Court may disregard so far as necessary the strict letter of the law.[111]

The *Williamson* majority chose not to invoke any of these well-established rules of construction. Instead, the majority followed the rule of construction that "when a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be."[112] Although from the viewpoint of Dr. Amrani, other

(Continued on page 17)

Williamson v. Amrani *(Continued from page 16)*

health care providers and defense counsel the majority's application of this rule could lead to unexpected and perhaps unreasonable results, it can be argued that the consistent, strict application of this rule leads to more predictable results for litigants. Often, however, it is not readily apparent what is "plain and unambiguous" until the court with the final say in the matter declares it to be so.

The majority's decision in Williamson v. Amrani represents significant changes – first, in the application of the KCPA to health care providers and, second, in the Court's approach to statutory construction.

If *Williamson v. Amrani* is the beginning of a trend in statutory construction where the Supreme Court will not look beyond a single statute or act if it is deemed unambiguous, litigants need to form their arguments accordingly. In addition, litigants and their counsel should also consider being more proactive in approaching the Legislature for new legislation and amendments clarifying existing statutes.

VIII. Conclusion

The majority's decision in *Williamson v. Amrani* represents significant changes – first, in the application of the KCPA to health care providers and, second, in the Court's approach to statutory construction. Due to the Legislature's swift action in amending the Act to exclude health care providers, the Court's decision will have limited impact. KCPA claims can only be a threat during the three year window prior to the amendment. So the *Williamson v. Amrani* decision is not likely to be the Pandora's Box it could have been.

On the other hand, the fallout from the decision will be more than a minor irritant. It will take years to sort out issues related to insurance coverage. In addition, the majority opinion could lead to a conclusion that the KCPA applies to other learned professions, such as the practice of law. Because the Legislature's amendment did not include any learned profession other than health care providers, other kinds of professionals may find themselves facing creatively pled KCPA claims.

Nancy Ogle was part of the team of attorneys who represented Dr. Jacob Amrani in Williamson v. Amrani. The team was lead by Steven C. Day of Woodard, Hernandez, Roth & Day LLC.

---

1. *Farney v. Kansas Heart Hospital, et. al.*, Case No. 02 CV 2251 (Sedgwick County Dist. Ct.) (dismissing KCPA claim when plaintiff failed to disclose evidence of reliance upon the allegedly deceptive advertising).
2. *See, e.g.*, Arthur S. Chalmers and Jerry D. Hawkins, *Does the KCPA Apply to the Practice of Law or Medicine?*, KADC Legal Letter 1 (Winter 2004).
3. *See, e.g., Spires v. Hospital Corp. Of America*, Case No. 06-2137-JTM, 2006 WL 2264024 (D. Kan. July 26, 2006) (granting defendant's motion to dismiss because plaintiffs' lawsuits alleging hospital understaffing killed their decedents and violated the KCPA were actually claims of medical malpractice; plaintiffs were attempting to circumvent the requirements of proving medical malpractice).
4. Chalmers and Hawkins, *supra* n. 2, KADC Legal Letter at 7 ("No jurisdiction currently allows consumer protection claims where the alleged misconduct involves the pure practice of . . . medicine.").
5. 283 Kan. 227, 152 P.3d 60 (2007).
6. 283 Kan. at 227.
7. *Id.*
8. 283 Kan. at 231-32.
9. 2007 Kan. Sess. Laws 1713 (Chapter 194, effective

(Continued on page 18)

Williamson v. Amrani *(Continued from page 17)*

May 24, 2007).

10. *Williamson,* 283 Kan. at 227-28.
11. Factual statements are taken primarily from Brief of Appellee Dr. Amrani at 2-4 (Mar. 20, 2006).
12. Amended Petition at ¶¶ 9, 12, Case No. 02 C 1899 (Sedgwick County Dist. Ct. Feb. 21, 2003).
13. Brief of Appellant Tracy Williamson at 3 (Nov. 16, 2005).
14. Brief of Appellee at 4-9 (procedural summary of the case); *see also*, 283 Kan. at 228-30.
15. *See generally*, Amended Petition.
16. *Williamson,* 283 Kan. at 228.
17. Brief of Appellee at 6-7 (quoting Judge Lahey's letter to counsel dated Dec. 29, 2003).
18. *See* Appellate Case No. 91777 (application filed Feb. 11, 2004, application denied Mar. 2, 2004).
19. Brief of Appellee at 8.
20. *Williamson,* 283 Kan. at 229-30 (Supreme Court quoting Judge Wilbert's conclusions of law).
21. 283 Kan. at 230 (quoting Judge Wilbert).
22. 283 Kan. at 246.
23. Appellee's Motion for Rehearing or Modification (Mar. 1, 2007).
24. *Williamson*, 283 Kan. at 246.
25. Order Denying Motion for Rehearing or Modification (Mar. 29, 2007); Mandate issued (Mar. 30, 2007).
26. 282 Kan. at III (Jan. 2007 Advance Sheets) (Justice Donald L. Allegrucci retired on January 8, 2007, after the oral arguments for *Williamson v. Amrani* and before the decision was handed down; Justice Lee A. Johnson was appointed to the seat on the Supreme Court vacated by Justice Allegrucci).
27. *Williamson,* 283 Kan. at 246-47.
28. 283 Kan. at 247, 267.
29. 283 Kan. at 231-32 (citing K.S.A. 50-624).
30. K.S.A. 50-624(c).
31. K.S.A. 50-624(j).
32. *Williamson,* 283 Kan. at 232.
33. 83 Kan. at 233-34 (citing *State ex rel. Stovall v. DVM Enterprises, Inc.*, 275 Kan. 243, 62 P.3d 653 (2003); *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 61 P.3d 687 (2003); *State ex rel. Stovall v. ConfiMed.com,* 272 Kan. 1313, 38 P.3d 707 (2002)).
34. 283 Kan. at 234.
35. 273 Kan. 2, 41 P.3d 755 (2002).
36. 273 Kan. at 8-9.
37. 273 Kan. at 3.
38. 273 Kan. at 10-11.
39. 273 Kan. at 12.
40. *Williamson*, 283 Kan. at 235-240.
41. 283 Kan. at 236.
42. 83 Kan. at 238-39.
43. 283 Kan. at 240.
44. 283 Kan. at 242.
45. 283 Kan. at 243 (distinguishing its decision in *Chelsea Plaza Homes, Inc. v. Moore*, 226 Kan. 430, 434, 601 P.2d 1100 (1979), where it held the Kansas Residential Landlord and Tenant Act is specific legislation that takes precedence over the broad KCPA).
46. 283 Kan. at 245.
47. 283 Kan. at 235.
48. 283 Kan. at 246.
49. 283 Kan. at 246 (emphasis added) (citing *Charley v. Cameron*, 215 Kan. 750, 756, 528 P.2d 1205 (1974)). The Court's statement that expert testimony is "*ordinarily necessary*" leaves room for the common knowledge exception.
50. 283 Kan. at 246 (emphasis added).
51. *See supra* at n. 17 (quote from Judge Lahey's decision regarding expert testimony).
52. 283 Kan. at 247.
53. 283 Kan. at 248 (emphasis by the court) (quoting *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 768, 69 P.3d 1087 (2003)).
54. 283 Kan. at 249 (distinguishing the majority's application of *Chelsea Plaza Homes, Inc. v. Moore,* 226 Kan. 430, 601 P.2d 1100 (1979)).
55. 283 Kan. at 249.
56. 283 Kan. at 252 (emphasis by the court) (quoting K.S.A. 65-4914).
57. K.S.A. 65-2801 *et seq*.
58. K.S.A. 65-2801 ("it is deemed necessary as a matter of policy in the interests of public health, safety and welfare, to provide laws and provisions covering the

(Continued on page 19)

Williamson v. Amrani *(Continued from page 18)*

granting of [the privilege to practice the healing arts] and its subsequent use, control and regulation to the end that the public shall be properly protected . . .").

59. K.S.A. 40-3402(a).
60. *Williamson*, 283 Kan. at 259.
61. *Id.*
62. 283 Kan. at 259-65.
63. 283 Kan. at 262.
64. 283 Kan. at 265.
65. 283 Kan. at 265-67.
66. K.S.A. 60-512(2) (an action upon a liability created by statute is subject to a three-year statute of limitations).
67. *Williamson*, 283 Kan. at 242.
68. The KCPA also provides the Attorney General shall enforce the Act for the benefit of the public. *See* K.S.A. 50-628.
69. K.S.A. 50-626 and 50-627, respectively.
70. *Willie v. Southwestern Bell Tel. Co.,* 219 Kan. 755, 758, 549 P.2d 903 (1976).
71. *Ray v. Ponca/Universal Holdings, Inc.*, 22 Kan. App. 2d 47, 51, 913 P.2d 209 (1995).
72. K.S.A. 50-627(b).
73. K.S.A. 50-626(b)(1).
74. K.S.A. 50-626(b)(3), (9).
75. K.S.A. 50-627(b).
76. *Finstad v. Washburn University*, 252 Kan. 465, 473-74, 845 P.2d 685 (1993) (citing K.S.A. 50-634(b)).
77. *York v. Intrust Bank, N.A.*, 265 Kan. 271, 291, 962 P.2d 405 (1998).
78. *Moore*, 273 Kan. at 2, Syl. ¶ 2.
79. K.S.A. 50-636(a).
80. K.S.A. 50-636(d).
81. *Swanston v. McConnell Air Force Base Federal Credit Union*, 8 Kan. App. 2d 538, 543, 661 P.2d 826 (1983).
82. *State Farm Fire & Cas. Co. v. Martinez*, 26 Kan. App. 2d 869, 878, 995 P.2d 890, *review denied* 269 Kan. 934 (2000) (noting that "it would be contrary to public policy to allow a wrongdoer to insure against civil penalties associated with his or her actions").
83. K.S.A. 50-634(e)(2).
84. K.S.A. 50-634(e)(1); *see also York v. In-Trust Bank, N.A.*, 265 Kan. at 307-08 (awarding attorney fees under K.S.A. 50-634(e)).
85. K.S.A. 50-634(e)(1).
86. *DeSpiegelaere v. Killion*, 24 Kan. App. 2d 542, 549, 947 P.2d 1039 (1997) (wherein one of the successful claims was brought under the KCPA).
87. *DeSpiegelaere,* 24 Kan. App. 2d at 542, Syl. ¶ 2.
88. *Id.*
89. *See York v. Intrust Bank, N.A.*, 265 Kan. at 308.
90. 2007 Kan. Sess. Laws 1713.
91. Interview with Rep. Michael R. O'Neal (July 10, 2007).
92. *In re Marriage of Ruth*, 32 Kan. App. 2d 410, 419, 83 P.3d 805 (2004).
93. *Id.* at 410-11.
94. *Id.* at 411.
95. *In re Care & Treatment of Hunt*, 32 Kan. App. 2d 344, Syl. ¶ 4, 360-61, 82 P.3d 861 (2004) (noting that when a dispute exists over the interpretation of a statute, the amendment constituted a clarification of existing law rather than a substantive change in that law).
96. *Compare* K.S.A. 60-512(2) *with* K.S.A. 60-513(a)(7).
97. *See* K.S.A. 60-513(c).
98. *State Farm*, 26 Kan. App. 2d at 878.
99. *See* K.S.A. 50-634(e).
100. See K.S.A. 60-258a.
101. *See* K.S.A. 2006 Supp. 40-3403(h).
102. K.S.A. 50-627(b)(3).
103. *Roesch v. Clark*, 861 F. Supp. 986, 991 (D. Kan. 1994); *Webb v. Lunstrum*, 223 Kan. 487, 489, 575 P.2d 22 (1978).
104. *NCAA v. Kansas Dept. of Revenue*, 245 Kan. 553, 557, 781 P.2d 726 (1989).
105. *Id.*
106. *Williamson*, 283 Kan. at 231, 247-48.
107. 283 Kan. at 240.
108. 283 Kan. at 248.
109. *State ex rel. Topeka Police Dept. v. $895.00 U.S. Currency*, 281 Kan. 819, 827, 133 P.3d 91 (2006).
110. *Id.* (quoting *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, Syl. ¶ 2),
111. *Jackson v. City of Kansas City*, 235 Kan. 278, 318-19, 680 P.2d 877 (1984).
112. *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 957, 135 P.3d 1127 (2006).

H.B. 2451 *(Continued from page 1)*

Proud, 189 Kan. 6, 367 P.2d 61 (1961), specifically:

> As malpractice covers every way in which a patient is injured through the dereliction of a doctor in his professional capacity, the approach, depending upon the facts, can be through any of several familiar forms of action. But no matter what the approach, it remains an action for malpractice, not one for deceit, contract, or anything else. *A well-recognized ground for recovery is where a physician represents that he has the skill to perform a certain operation when in fact he does not. This form of action requires the same elements of proof that an action in fraud requires, yet it could not be successfully disputed that as between the two it is an action for malpractice.*

Bonin, 261 Kan. at 210-211 (citing *Noel*, 189 Kan. at 10) (emphasis original to *Bonin* decision).

A majority of the current makeup of the Kansas Supreme Court brushed *Bonin* aside, reasoning that *Bonin* provided little guidance because it dealt with a common law cause of action and did not deal with a claim under the KCPA. The Court found that the plain language of the KCPA was broad enough to encompass medical treatment provided by health care providers to patients. While the Court obviously found merit in most of the policy arguments as to why the KCPA should not apply to medical negligence actions, as many other jurisdictions have held, the Court made it clear that they did not consider it their role to determine public policy. That is the role of the Legislature. *Amrani*, 283 Kan. at 240.

The Kansas Legislature acted quickly to address, legislatively, the Amrani decision.

With that statement and tacit invitation, the Kansas Legislature acted quickly to address, legislatively, the *Amrani* decision. The irony of the Court's statement that they were not in the business of determining public policy was not lost on many of us who had survived the school finance battles of the previous years, wherein the Court took it upon itself to determine school finance policy. Nevertheless, the 2007 Legislature accepted the Court's recognition that it was up to the Legislature to determine the public policy as to whether the KCPA should apply to traditional medical malpractice actions.

On February 15, 2007 – six days after the Kansas Supreme Court handed down its opinion in *Amrani* – we had introduced in the House H.B. 2530. The next day the bill was assigned to the house Judiciary Committee that I chair and we had hearings and passed the bill out as amended on March 8, 2007. H.B. 2530 would have returned the law to the way it had been since the passage of our Health Care Provider Act. For years we have had statutes in place establishing a mechanism for handling medical malpractice claims, including the requirement of mandatory professional liability insurance.

In the House Judiciary Committee, the attorney who represented plaintiff/appellant Tracy Williamson testified in opposition to the bill. Plaintiff's counsel admitted at the hearing that the "KCPA does not apply to ordinary medical malpractice actions." He also agreed that in the 34 years the KCPA has been in existence, the act has been applied to the medical profession in only a handful of cases and "even the handful of cases involved the business aspect of practicing medicine which we understand to be not a part of the proposed bill." A number of other opponents appeared, primarily citizens appearing at the behest of trial attorneys in a virtual "infomercial" for the plaintiffs' firms. They offered several "scenarios" in an effort to sidetrack the bill. In every fact situation, however, it was clear that their cases were already covered under current medical malpractice law or would be covered as a business practice claim under the KCPA without regard to *Amrani*.

Significantly, the office of Attorney General Paul Morrison appeared in opposition to the bill. His chief counsel provided written testimony to the committee that contained factual errors. Chief counsel claimed that, if enacted, "this bill would eliminate the Attorney General's authority to investigate and prosecute deceptive and unconscionable acts committed by members of the health care industry in the state of Kansas." The bill did no such thing. Chief counsel went on to claim in his written testimony that "the Board of Healing Arts regulates a subset of

(Continued on page 21)

H.B. 2451 *(Continued from page 20)*

health care providers. The Board is only responsible for licensing functions. The Board has no authority to investigate or prosecute deceptive or unconscionable acts." A five-minute scan of the Board of Healing Arts statutes quickly confirms that this representation was inaccurate. The Board of Healing Arts has extensive investigative and disciplinary power. Indeed, the Healing Arts Act contains the medical equivalent of a consumer protection act for patients. Similar regulatory duties are imposed by law on the licensing agencies of other health care providers and health care facilities.

Committee amendments to the bill made it clear that the KCPA should not and would not apply to professional services, *i.e.,* claims arising out of the rendering or the failure to render professional services. The KCPA would continue to apply to the purely business aspects of medicine, *i.e.,* billing, media advertising and other business services.

H.B. 2530 was debated in the House on March 14, 2007 and passed on final action the next day with a vote of 109 yeas to 14 nays. The bill then moved to the Senate, where it was referred to the Senate Judiciary Committee on March 16, 2007. A committee hearing in the Senate Judiciary Committee was held on March 21, 2007.

The Senate Judiciary Committee ultimately did not take formal action on the bill, due to time constraints, and House Bill 2530 was therefore not debated in the full Senate. Having passed one house of the Legislature however, the bill was, by joint legislative rules, "conferencable," *i.e.,* available to be considered for recommendation by a joint House and Senate conference committee.

In conference, we agreed that the legislation should definitely move forward. In conference committee, "vehicles" for bills that have passed one house but not the other, can be and are created from time to time by moving the contents of a bill in conference committee to another bill, and accordingly the conference committee identified Senate Bill 55 as such a "vehicle." The conference committee agreed to new language as a result of conversations with and negotiations by the Kansas Medical Society and representatives of the Office of the Kansas Attorney General. H.B. 2530 in its original form would have amended K.S.A. 50-635, commonly known as the exemption section within the KCPA. Responding to concerns by the Kansas Attorney General that H.B. 2530 in some way called into question the Attorney General's power to investigate the KCPA claims coming into his office, the conference committee agreed to move the amendatory language into K.S.A. 50-634 of the KCPA, commonly know as the private remedy section.

The resulting agreement and conference committee report on Senate Bill 55 was debated and passed by the House on April 3, 2007 on a vote of 97 yeas and 26 nays. The same day, the conference committee report was debated and passed by the Senate with 24 yeas and 13 nays. The bill was enrolled and presented to the Governor on April 10, 2007 while the Legislature was on break between the close of the regular session and the commencement of the wrap-up session, and on April 20, 2007, while the Legislature was still in recess, the Governor vetoed Senate Bill 55. The Governor's veto message states in part:

On April 20, 2007, while the Legislature was still in recess, the Governor vetoed Senate Bill 55.

There have been instances in the past 34 years where health care providers have caused harm to consumers through the use of deceptive practices and statements, and Kansans were able to use the Kan-

(Continued on page 22)

H.B. 2451 *(Continued from page 21)*

> sas Consumer Protection Act to seek redress. This bill, however, would make the entire health care industry immune from liability for such practices. I agree with Attorney General Paul Morrison's statement that "No single industry can justify a special exemption from 'deceptive' and 'unconscionable' acts." One can only expect that other professions would be encouraged to seek their own exemptions should this bill become law.

Needless to say, the bill did not do what the Governor understood or claimed that it would do with regard to immunizing health care providers from liability for their actions. The bill provided a line of demarcation between cases where the patient would have a remedy under traditional tort law for alleged malpractice and those cases where they would have a statutory remedy under the KCPA for acts strictly related to the proprietary or business side of medicine.

Upon the Legislature's return to Topeka for the traditional veto or wrap-up session, proponents of the legislation weighed our options, which included efforts to find sufficient votes to override the Governor's veto or negotiate a compromise in the form of a new bill.

Upon the Legislature's return to Topeka for the traditional veto or wrap-up session, proponents of the legislation weighed our options, which included efforts to find sufficient votes to override the Governor's veto or negotiate a compromise in the form of a new bill. Leading the effort to find common ground with the Governor's office was the Kansas Medical Society, whose representatives worked tirelessly with the Governor's staff to come up with compromise language that would satisfy the Governor's perceived concerns. A number of proposals and drafts went back and forth to no avail. Meanwhile, the clock was ticking on the Legislature's ability to consider a veto override. It appeared to some that the Governor may have been trying to "run out the clock."

A two-thirds vote in both the House and Senate is required to override a gubernatorial veto. The House had consistently put up "veto-proof" numbers. The 97 yes votes on the conference committee report on Senate Bill 55 would be sufficient for an override in the House if the same members who voted in favor of the bill agreed to vote for the override. Politically, there would be pressure on House Democrats who had voted in favor of the bill to change their votes and vote in favor of sustaining the Democrat Governor's veto. In discussions with Democrat members of the House, however, we were confident that we would maintain a veto-proof majority in the House. This was an issue they were willing to break ranks with the Governor over. Much credit is due health care providers communicating with legislators back in their districts.

In the Senate, however, only 24 Senators had voted in favor of the conference committee report on Senate Bill 55. A minimum of 27 would be needed for an override. The Kansas Trial Lawyers Association lobbyists had been successful in convincing a handful of pro-life Republican Senators that somehow the legislation would benefit abortion doctor George Tiller. This political hot button was sufficient to make this handful of Senators nervous and they initially voted "No."

In the closing days of the session, we were able to demonstrate that Senators had been misled by the opposition, and it became apparent that we would indeed have sufficient votes in the Senate for an override. Suddenly, word of this reached the Governor's office, the stalemate in reaching common ground on a compromise was broken and representatives of the Kansas Medical Society were informed that an earlier proposal that they had made would now be acceptable to the Governor. Language that became House Bill 2451 was brought to me on the House floor by a member of the Governor's staff and a handshake sealed the deal.

H.B. 2451, which originally dealt with medical support provisions in child support enforcement cases was identified as the "vehicle." On April 27, 2007, the Senate Judiciary Committee amended the bill by gutting the provisions of original House Bill 2451 and inserting the compromise language amending the KCPA. Procedural votes in the Senate advanced the bill to the first order of business in the Senate on that afternoon and the bill was debated and passed on a vote of 34 yeas to 4 nays. The next day, on April 28, 2007, on a motion to concur with the Senate amendments to House Bill

(Continued on page 23)

H.B. 2451 *(Continued from page 22)*

2451, the House passed the compromise on a vote of 113 yeas to 11 nays. The bill was presented to the Governor on May 4, 2007 and approved by the Governor on May 11, 2007, notwithstanding the concerns that she had expressed previously in her veto message of Senate Bill 55.

H.B. 2451, which took effect after its publication in the Kansas Register, amends K.S.A. 50-635 to provide:

> "The Kansas Consumer Protection Act does not allow for a private cause of action or remedy against a licensed health care provider for causes of action for personal injury or death resulting, or alleged to have resulted, from medical negligence. For purposes of this subsection, 'health care provider' shall have the meaning as provided in subsection (a)(1) of K.S.A. 65-4915, and amendments thereto."

The practical differences between H.B. 2451 and the original proposal contained in House Bill 2530 deal with the scope of health care professionals covered. Original House Bill 2530 was broad enough in scope to include veterinarians and nursing homes, for example. The definition of health care provider in H.B. 2451 is the definition contained in the peer review statute and is somewhat narrower in scope. Veterinarians, nursing homes, and other professionals and entities not covered by the definition of health care provider in the peer review statute would not enjoy the protection.

From the standpoint of public policy, the Legislature strongly agreed with the passionate dissent authored in *Amrani* by Justice Davis who pointed out that "the majority decision undervalues the importance of the Kansas regulatory and statutory scheme relating to health care professionals..." *Amrani*, 283 Kan. at 247. We also strongly agreed with Justice Davis' observation that:

> In my opinion, adding another separate cause of action against health care providers under the KCPA exacerbates the crisis of availability and affordability of health care for Kansas citizens. There is no evidence in the record to establish that insurance for health care providers is available to cover additional actions under the KCPA. Moreover, litigation expenses covered by the mandatory professional liability insurance for health care providers would not cover actions under the KCPA. The majority decision that Dr. Amrani's providing of medical care and treatment is covered by the KCPA essentially establishes that all health care providers are covered by the KCPA with the result of increased litigation, increased costs of defending KCPA actions by health care providers, increased insurance expenses, and, ultimately, an increase in the costs of medical care. Ultimately, the majority decision regarding the KCPA conflicts with Kansas' extensive statutory scheme governing public health and the health care professions as well as the expressed public policy to maintain the quality of health care in Kansas.

Amrani, 283 Kan. at 247 (Davis, J., dissenting).

It took a veto-proof majority of elected Representatives and Senators to ensure the legislatively expressed public policy became law.

Ultimately, the Governor signed the legislation and, to that extent, can ultimately take credit, if she chooses, in voiding a decision that would run counter to her expressed desire to reduce the cost of health care to Kansans in the state. However, it took a veto-proof majority of elected Representatives and Senators to ensure the legislatively expressed public policy became law.

How to Stand Out in a Crowd (Continued from page 4)

client. This team concept can serve to foster a close relationship with other members of the outside counsel team and with the client.

C. Creative Fee Agreements

Companies want to pay a fee that fairly reflects the value received for the services rendered. Not surprisingly, the hourly rate, in many situations, is not the best mechanism to accomplish that goal. In many cases, the hourly fee reduces the incentive to adopt ways to perform legal services for clients more quickly and efficiently. Moreover, law firms' compensation models reward attorney practices that may directly conflict with the client goal of reducing legal fees and efficiency. Billable hours are familiar and comfortable to many large firms. However, true partnerships often require creative arrangements that will move away from the billable hours and will provide savings and predictability for the client.

For those firms that may be reluctant to consider creative fee arrangements, consider the alternative: Clients will partner with law firms who are willing to be creative and work together to achieve mutually beneficial results. Understand that partnering does not involve a win-lose relationship where the client benefits at the expense of outside counsel. Instead, developing creative billing arrangements can create a win-win situation where the client and law firm both benefit from the relationship.

There are many different "creative" fee concepts. Some examples include: flat fee, fixed portion fee, blended rates, and success-based fees.

Responsiveness can mean immediately providing an answer, but it can also mean acknowledging the question and communicating to the company when you will have the answer.

Flat fee. These are typically fixed arrangements. A law firm agrees to perform certain work for a fixed fee and the fee is not tied to the amount of time the firm may spend on the matters.

Fixed portion fee. These typically provide for fixed fees for certain tasks or portions of a case. For example, through discovery, a company will be billed "x" dollars.

Blended rate. These arrangements provide for all hours on a case to be billed at a blended rate. The blended rate is often an average of the associate's rate and the partner's rate.

Success-based fee. These are similar to contingent fees that are typically employed in plaintiff's cases where the fee is a percentage of the amount recovered. Typically a success-based fee is employed when the client desires to provide counsel with an incentive to achieve a desired result in litigation. Typically, the company and counsel determine a likely litigation outcome, often expressed as a desired settlement amount. If counsel is able to resolve the matter for less than a pre-determined amount, counsel will be paid a previously-established premium payment.

Many arrangements can include a combination of the above. For example, a combination flat fee and success-based fee. In this case, the lawyer accepts a smaller flat fee and then receives a percentage based on the amount recovered or based on the extent to which the companies' objectives are met. Depending on the case and a client's needs, any one or more of these arrangements may be the best fit and should be explored. Firms should understand that the days of the simple billable hour are changing.

III. HOW TO STAND OUT IN A CROWD

Companies are availing themselves of the services of fewer law firms in order to leverage work and create efficiency. How do you make sure your law firm is one of the few firms that is retained? Law firms and lawyers are hired for many reasons. However, long-lasting client relationships form only when counsel is able to meet the expectations of their client. While each client will have its own expectations, experience has shown that the best law firms share many of the same characteristics.

Learn my business and my case.

When hired, outside counsel must learn the company's business. Learning the business means that outside counsel will learn what makes the business tick. To defend a company, outside counsel must quickly come to know what is important to the company and why. Outside counsel should take care to understand their clients' current issues and challenges, the personality of management, and administrative requirements.

Be responsive – return all forms of communication within 24 hours.

In today's environment, if outside counsel is

(Continued on page 25)

How to Stand Out in a Crowd (Continued from page 24)

not perceived as providing timely service, that business likely will move. Companies are looking for decisive, practical answers in a timely manner. Responsiveness can mean immediately providing an answer, but it can also mean acknowledging the question and communicating to the company when you will have the answer.

There is no substitute for jumping in and learning the case and the law early on in the case.

Lack of responsiveness is a sign of ambivalence and may cause a company to look elsewhere for the answer. The converse is also true; responsiveness can turn an attorney into the company's "go to" person for matters large and small.

Be the expert.

There is no substitute for jumping in and learning the case and the law early on in the case. If hired, companies expect outside counsel to learn the facts and be in a position to give advice. Outside counsel should know the facts that are most helpful and the facts about which the company should be most concerned. When you learn the business and the case, you demonstrate that you care about the outcome of the litigation and its impact on the business and its shareholders. Companies rely on your expertise, so it is imperative to be the expert.

Ensure your invoices are accurate, specific, and conform to the terms of the engagement.

One of the best ways to communicate about a case is through the invoice for legal services. A firm's invoice is an important way to demonstrate to your client what you have been doing in the case. It is critical that your invoices are both specific and detailed. For example, instead of stating that you "interviewed witnesses," it is better to describe that you "interviewed Joe Smith and Jane Smith." Instead of stating that you "drafted a motion," it is better to state that you "drafted a motion to dismiss based on failure to comply with the statute of limitations." Instead of stating that you performed "legal research" describe what subject you researched and why.

Remember, details are important. Check your bills to ensure they conform to the terms of the engagement. Check to see that the rates are correct, that the invoices are in a form consistent with the engagement, and that the expenses are appropriately billed. Pro-actively providing appropriate write-offs, rather than "blind" bill sending, can be a great tool for achieving client satisfaction and building credibility.

Know electronic discovery rules and obligations.

One of the benefits of engaging fewer law firms is that a fewer number of firms should result in greater familiarity with the business and its records. With the new requirements of Federal Rule of Civil Procedure 26, it is even more imperative that law firms know and fully understand a client's documents and systems.

The increased prevalence of electronically stored information ("ESI") has vastly increased the complexity of discovery in any given case. Law firms need to be equipped to manage ESI as well as traditional paper documents effectively and efficiently. An electronic document management system is important to competent management of ESI and other data.

Avoid "tunnel vision" – evaluate case strategies and recommendations for impact on the client's overall business and other litigation.

It is easy to get wrapped up in one case with a specific set of facts. However, sometimes more important than defending a single case is to see the overall picture and how the outcome of that particular case will impact the company as a whole in the future. It is outside counsel's job to partner with the internal client to consider the overall picture and how specific litigation may affect the company's future arguments and how it may im-

(Continued on page 26)

How to Stand Out in a Crowd *(Continued from page 25)*

pact the business going forward.

If a client asks outside counsel for an opinion, be as informed and decisive as possible.

Many attorneys seem to think it is best to "hedge" when responding to legal problems. However, in most instances, clients need sound, efficient legal advice presented in a manner calculated to identify, evaluate and value risk. An answer such as "it depends" or there is a "50/50 chance" is frequently not what a client needs or wants to hear.

When outside counsel is hired, it is expected that they will be able to identify and analyze issues and assess risks. However, that alone is not enough. Outside counsel should prioritize the issues and offer suggestions designed to resolve or manage these issues. Outside counsel is retained for their judgment and skills. If outside counsel believes the client can win, tell the client. If the converse is true, be candid. Although it may not be what the client wants to hear, the client needs to hear a true assessment of the case or issue. The client also needs to hear the assessment in a manner it can understand. For example, rather than a twenty page legal memorandum, consider presenting your opinions using PowerPoints, spreadsheets, numbers or percentages. Your audience is most likely an MBA or an accountant, not a lawyer.

Companies pay for good advice. Good advice sometimes means telling a company that you or your firm is not the best fit for a particular job.

Avoid "over promising." If you or your firm is not the best for a particular job, tell the client. It will pay off in the end.

Companies pay for good advice. Good advice sometimes means telling a company that you or your firm is not the best fit for a particular job. Sometimes the best person for a case is a firm with extensive experience with the opposing side. Sometimes it is a large firm with resources, or a small firm with specialized knowledge, or a national firm, or a local firm. If outside counsel demonstrates that they are able to provide good advice, a company will trust that counsel and reward that counsel with additional opportunities to provide good advice.

Plan your work keeping in mind that inside counsel needs to review important pleadings and discovery responses before they go out – meet or beat deadlines.

When faced with deadlines, outside counsel should establish a timeline up front, knowing that inside counsel must review the pleadings before they are filed. Outside counsel should be realistic with the timeline, and after the timeline is established, counsel should meet or beat the timeline scheduled.

If it appears that you will not be able to meet or beat a deadline, then do not wait until the last minute to inform your client or it will be too late. Missing deadlines will seriously damage the credibility and trust you have established with your client and simply gives the impression that the case and the client's priorities are not important to you.

Do not sue a company if you want their business some day.

Most of all – companies are looking for business partners. Specifically, companies are looking for partners who will become intimately knowledgeable about their business and will help them reach their goals and help them succeed. It is no surprise that if a company is sued by your firm, it is unlikely that the company will look to establish a future partnership with you.

CONCLUSION

Whether or not a law firm is retained will depend on whether a law firm is able to meet a company's expectations. With ever-tightening legal budgets, companies expect not only to receive excellent legal services, but also expect a firm who cares about the business and who is willing to partner with the business to further the relationship. Those attorneys and firms who do this most effectively will be those that stand out in the crowd.

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