KADC

Spring 2010

Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*

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:

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WHAT YOU DIDN'T WANT (BUT HAVE) TO KNOW ABOUT YOUR DUTIES REGARDING ESI: *ZUBULAKE* REVISITED – SIX YEARS LATER

I. Introduction

Gone are the days where practitioners can ignore their responsibilities concerning electronically stored information (ESI) upon the mistaken belief that such issues only arise in large or complex cases. Virtually all clients in all types of cases will have ESI which must be preserved. Failure by the practitioner to comply with the electronic discovery requirements and expectations can lead both you and your client to a situation where the Court is not determining *if* sanctions are warranted, but rather, *how severe* of a sanction to impose.

Southern District of New York Judge Shira Scheindlin brought in the New Year with a decision revisiting her prior rulings set forth in the *Zubulake* series of opinions concerning ESI and e-discovery in *Montreal Pension v. Banc of America*[1]. The opinion is as important for its reminders of past *Zubulake* rulings as it is for its actual holdings. More importantly, the opinion cements the notion that counsel must be actively involved in the preservation, collection and production of ESI and that a party's failure to employ sufficient methods to accomplish such objectives can be met with sanctions.

II. *Montreal Pension*

A. Factual Background[2]

Plaintiffs[3], a group of investors, brought suit to recover substantial losses stemming from the liquidation of two hedge funds ("Funds") in which they held shares. The Funds were managed by Lancer Management Group, LLC ("Lancer") and its principal, Michael Lauer. The Funds retained Citco Fund Services (Curacao) N.V. ("Citco NV") to perform certain administrative duties, but it eventually resigned as administrator of the Funds. In April, 2003, Lancer filed for bankruptcy, and in July, 2003, the Funds were placed into receivership in the Southern District of Florida. In October 2007, during the discovery process, Citco NV, its parent company, the Citco Group Limited, and former Lancer Offshore directors who were Citco officers (collectively with Citco NV, the "Citco defendants") claimed there were substantial gaps in plaintiffs' document productions. As a result, depositions were taken and declarations were submitted between October 2007 and June 2008.

Lawrence E. Nordling
Sherman Taff Bangert Thomas & Coronado, P.C.

With discovery complete, the Citco defendants sought sanctions against plaintiffs, alleging each plaintiff failed to preserve and produce documents, including ESI, and submitted false and misleading declarations regarding their document collection and preservation efforts. The Citco defendants sought dismissal of the Complaint, or any

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PRESIDENT'S MESSAGE

Tracy Cole
Gilliland & Hayes

In the last newsletter I wrote about how practicing law can be a scary proposition. In this article I want to write about how practicing law, specifically trying cases, can be the best way to achieve some measure of justice. This is particularly relevant to me this week as I just completed a jury trial late last Friday.

The trial was very personal for both parties. They both wanted to see it through and have the opportunity to testify and present their side. Multiple times during the course of trial the Judge encouraged us to reconsider and explore settlement. I was reminded by the Judge that the case was likely to turn out poorly for one of the parties – I took it to mean my client. I discussed this with my client and at several points inquired whether he wanted to go forward or reopen settlement negotiations. He wanted to go forward.

Counsel, the Court and the jury expected the case to be completed in 3 days but by Thursday evening the Plaintiff still had not rested. Before letting the jury go for the evening the Judge asked the jurors whether any of them would have a problem if the case continued into the next week. Of course, hands shot up and the frustration of the jurors was palpable. After a brief discussion with the jurors, the Judge let the jurors go and then advised counsel that we were going to get the case done the next day no matter how long we had to stay. That meant Plaintiff was going to have to finish his case, I was going to have to put on my entire case, we were going to have to decide on jury instructions, present closing arguments and get it to the jury at a reasonable time so they could deliberate.

Friday morning Plaintiff put on the defendant as a short witness and rested. The Judge did not excuse the jury but kept them in the box as we briefly argued my motions at the bench. I then gave my opening argument, which I had reserved, and started calling my witnesses. I had to focus in on the most relevant issues and keep the case moving. In the end I rested by 3:30 and we had it to the jury by 4:40. They deliberated over a pizza supper and returned a verdict for the defense at 6:45 p.m. Nine of the jurors stayed for almost an hour discussing the case and questioning the attorneys.

One of the first things the jurors said was – it probably worked to your benefit to have to put your case on so quickly. They commented that on Friday they were getting one piece of evidence after another, which they liked, and in their own jobs they cannot waste time over things that don't matter. The juror I was most concerned about was the foreperson of the jury. During voir dire he expressed general feelings that were not favorable to my client but he did as he said

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President's Message
(Continued from pg 2)

would – he listened to the evidence and came to a conclusion based on the facts and law.

To me being in the courtroom presenting the case on behalf of my clients is the best part of being a lawyer. I know many of you agree. Last week my client felt he had his day in court. Unfortunately the opportunities to do so are becoming more and more infrequent.

There are many barriers along the way to a civil trial. Including the cost of litigation, the economics of settlement, the requirements in some districts for mediation/settlement conferences, the time commitment required for clients and witnesses, and the Court's reticence to name a few. Even so, as reinforced so recently for me, there is no better way for the parties to be heard and the law of the community applied.

As defense counsel we need to assure the continued vitality of the civil justice system. There are several ways for you to become involved in preserving and promoting the civil justice system. The DRI Judicial Task Force published "Without Fear or Favor" in 2007. The task force gave several recommendations to the state organizations which we should consider. In 2009 the DRI Jury Service Task Force issued "It's Jury Service, Not Duty." Again several recommendations were provided for state organizations that we may want to pursue. Recently, while attending a CLE with solely defense counsel in attendance, I heard one of our members state, as defense attorneys we need to become more involved in the PIK committee deciding the wording and application of jury instructions. We also need to become involved in Bench-Bar committees to assure the perspectives and interests of defendants are understood.

I would love to hear your thoughts and suggestions in regard to saving the civil jury trial. Please contact me at TCole@gh-wichita.com and let me know how you want to be involved.▲

MARK YOUR CALENDARS TODAY

June 11, 2010	KADC Membership Breakfast	Hyatt Regency Wichita
September 10, 2010	KADC Membership Meeting	Salina
December 3-4, 2010	2010 KADC Annual Conference	Marriott Country Club Plaza Kansas City

EXECUTIVE DIRECTOR'S REPORT

Scott Heidner
Executive Director

Greetings from KADC HQ! By the time you read this, the Kansas legislature will (probably) have concluded its work after dealing with the worst budget crisis in memory. While the past year has been incredibly trying for entities that depend upon public financing, the overwhelming focus on the budget can almost be a benefit to other organizations in terms of legislative activity. Because the legislature focused almost exclusively on the budget, there has been less overall mischief under the dome than in years past.

However, it is not likely that will be the case again in the 2011 legislative session. The budget situation in 2011, while still bad, is not likely to be quite as dire as the current year. This leaves more time and energy for other issues, almost certainly including things of importance to our association. Adding to the uncertainty is the pending November election where all seats in the Kansas House of Representatives will be in play. New legislators always mean new ideas....for better or worse.

With that in mind, it is critical that KADC members invest in the upcoming elections and the political process in general. The good news? Investing in that process is easier and less demanding than most people suspect. The vast majority of people do not make any effort to contact their elected officials or be active in the political process. While this is unfortunate, it creates an environment where it is easy for you to develop a relationship with your elected officials.

While money is the most common and obvious form of support, there are many other ways to gain the trust and appreciation of your elected officials. Taking your legislator out to lunch, hosting a meet and greet in your neighborhood, agreeing to walk a neighborhood and hang door signs, or even just putting a sign in your yard will bring you to your legislator's attention. Once you have that access, tell them about your career, your practice, and the types of legislative issues that would be of interest or concern to you. If you can show your legislator that you will bring a professional, dispassionate approach to a discussion of legislative issues, you will become a resource that your legislator can trust. Your calls during the legislative session will rise to the top of the stack. And you will have created an opportunity to help your industry that is worth at least as much as the time you have invested.

KADC is fortunate to have a small cadre of dedicated volunteer leaders who represent the association before the legislature each session. By taking time to invest in the political process this summer and fall, you will have made their task a little easier and your profession a little stronger.▲

WELCOME NEW KADC MEMBERS

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Tiffany Hogan - Sherman Taff Bangert Thomas & Coronado, P.C., Kansas City

Lynn Judkins - Foland & Wickens PC, Kansas City

Matthew Merrill - Brown & Ruprecht, P.C., Kansas City

KADC Breakfast

In conjunction with the 2010 Joint Judicial Conference and Kansas Bar Association Annual Meeting

Friday, June 11, 2010
7:30 a.m.
Hyatt Regency
Wichita, Kansas

Guest Speaker: Mike O'Neal

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***Zubulake* Revisited** *(Continued from pg 1)*

lesser sanction deemed appropriate by the court. Though the Citco defendants did not obtain the specific sanction they requested, plaintiffs' conduct was sufficiently egregious that the court entered both monetary sanctions and a spoliation instruction.

B. Negligent vs. Grossly Negligent vs. Willful Conduct

Concepts of negligence, gross negligence and willfulness exist upon the continuum of unacceptable conduct. Negligence involves unreasonable conduct in that it creates a risk of harm to others, whereas willfulness involves intentional or reckless conduct that is so unreasonable that harm is likely to occur. Gross negligence is conduct more severe than negligence, but only in degree, and not in kind.[4] Drawing upon standard definitions of the terms negligent and willful, the court brought meaning to such terms in the discovery context. A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent and, depending on the circumstances, may be grossly negligent or willful.[5] Clearly, the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful.[6] Possibly after October 2003, when *Zubulake IV*[7] was issued, and definitely after July 2004, when *Zubulake V*[8] opinion was issued, the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of evidence.[9]

C. Examples from Opinion

The *Montreal Pension* opinion gave several examples of negligent conduct, as well as conduct which would be considered grossly negligent.[10] Though the court cautioned the examples were certainly not an exhaustive list, a review of such examples is beneficial to defining the duties and expectations of counsel. Categorizing each type of conduct varies case by case, but the following are examples of conduct described in the *Montreal Pension* opinion accompanied by a description of the minimum culpability categorization[11] within which such conduct would fall:

- Failing to timely issue a written litigation hold which directs employees to preserve all relevant records, both paper and electronic; and which creates a mechanism for collecting the preserved records so they can be searched by someone other than the employee. (Gross Negligence).
- Simply notifying all employees of a litigation hold and expecting that the party will then retain and produce all relevant information. (Negligence).
- Placing operations-level employees in the position of deciding what information is relevant. (Negligence).
- Simply directing employees to search their own computers and files, but not searching the company servers or the employees' hard drives. (Negligence).
- Having no management oversight in the search process, or delegating search efforts without continuing supervision from management (Negligence).
- Having incompetent management oversight of the search process, (*i.e.* person overseeing search process not having the technical knowledge of what email system is used; not knowing locations and how ESI is stored within company; etc.). (Negligence).
- Failing to suspend document destruction practices or continuing to delete electronic docu-

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***Zubulake* Revisited** *(Continued from pg 6)*

ments after the duty to preserve arises; includes failing to suspend policy of periodically overwriting backup tapes. (Gross Negligence).

- Failing to identify key players and preserve and collect their documents after the duty to preserve has attached. (Gross Negligence).
- Failing to collect information from the files of former employees which remain in a party's possession, custody and control after the duty to preserve has attached. (Gross Negligence)
- Failing to collect records from employees who might have had a passing encounter with the issues in the litigation. (Negligence).
- The loss or destruction of data or information during collection and review. (Negligence).
- Failing to assess the accuracy and validity of selected search terms. (Negligence).

D. Spoliation Standards and Shifting Burden of Proof

Commensurate with the examples of negligent and grossly negligent conduct set forth in the *Montreal Pension* opinion, Judge Scheindlin determined sanctions against plaintiffs were appropriate. To warrant imposition of sanctions for spoliation of evidence, the innocent party must prove that the spoliating party: (A) had control over evidence and obligation to preserve it at time of destruction or loss; (B) acted with culpable state of mind upon destroying or losing evidence; and (C) missing evidence is relevant to the innocent party's claim or defense.[12]

In determining what sanction to impose for spoliation of evidence, the court must consider, in addition to spoliating party's conduct, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as result of loss of evidence.[13] In order to establish that spoliated evidence was relevant, the innocent party must show that destroyed evidence would have been responsive to a document request, and that evidence would have been helpful in proving its claims or defenses.[14] When a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.[15]

Before the imposition of sanctions for spoliation of evidence, the spoliating party should be afforded the opportunity to demonstrate that the innocent party has not been prejudiced by absence of missing information. When a spoliating party's conduct is sufficiently egregious to justify court's imposition of presumption of relevance and prejudice, or when a spoliating party's conduct warrants permitting the jury to make such a presumption, the burden shifts to the spoliating party to rebut that presumption by demonstrating, for example, that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses.[16] If the spoliating party demonstrates there could not have been any prejudice to the innocent party, no jury instruction is warranted, although a lesser sanction might still be required.[17]

The goal of discovery is to obtain information, not enter sanctions. Thus it stands to reason that appropriate sanctions for spoliation of evidence should (A) deter parties from engaging in spoliation; (B) place risk of erroneous judgment on the party who

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***Zubulake* Revisited** *(Continued from pg 7)*

wrongfully created the risk; and (C) restore the prejudiced party to same position it would have been in absent the wrongful destruction of evidence by the opposing party.[18] A terminating sanction, such as a dismissal, for spoliation of evidence is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.[19] In determining appropriate sanctions for spoliation of evidence, after the preservation duty has attached, failure to adhere to contemporary standards can be considered gross negligence.

E. Lessons Learned

The main lesson to be learned from *Montreal Pension* case is that spoliation sanctions may be imposed even without extremely egregious behavior, such as intentional destruction of ESI, and now more than ever, counsel must be actively involved in the preservation, collection and production of ESI. Commensurate with the reminder of the requirement for counsel to be actively involved, the court criticized collection methods which place total reliance on the custodian or operations level employees without adequate supervision and/or which failed to determine the "key players" and fully appreciate the way in which the client stores ESI. Finally, *Montreal Pension* brought forth a new balancing test for a shifting burden of proof in situations where the spoliating party's conduct is sufficiently egregious to justify the court's imposition of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants permitting the jury to make such presumption.

III. Practical Considerations for Counsel

A. Litigation Hold Must Be Timely and Effective

By now, it is presumed practitioners understand once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold. Failure to do so is gross negligence. A deficient or ineffective litigation hold is at least negligent, and depending on the circumstances, could be grossly negligent. It is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.[20]

The actions taken by the plaintiffs' counsel in *Montreal Pension* involved the counsel: (1) contacting plaintiffs to begin document collection and preservation; (2) calling and emailing plaintiffs and distributing memoranda instructing plaintiffs to be over, rather than under, inclusive; (3) noting that emails and electronic documents should be included in the production; and (4) indicated that the documents were necessary to draft the complaint, although they did not expressly direct that the search should be limited to those documents. These actions failed to meet the standard for a litigation hold because they failed to: (1) direct employees to preserve all relevant records – both paper and electronic; and (2) create a mechanism for collecting the preserved records so that they could be searched by someone other than the employee.

Finally, it should be noted that the date upon which a duty to preserve and collect information can likely, if not often, arise for a plaintiff before such a duty arises for a defendant. A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.[21]

B. Counsel must familiarize themselves with client and client's processes

Although not a new or novel concept, *Montreal Pension* hammers home the importance of counsel familiarizing

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***Zubulake* Revisited** *(Continued from pg 8)*

themselves with their client's retention policies and the overall architecture of their client's data retention structure. *Zubulake IV* gave specific examples[22] of the duties of counsel, and while *Montreal Pension* directs sanctions to the plaintiffs without singling out specific counsel, plaintiffs would have been well served had they and their counsel followed the directives given in *Zubulake IV*.

Becoming familiar with the client's processes involves personal communication with the client's staff, including potential outsourced staff or independent contractors, to assist counsel in understanding how the client stores ESI. By communicating with members of the client's information technology staff or outsourced providers, the practitioner can gain valuable information not only about the "how" and "where" ESI is stored, but also "what" is collected and stored, and the "when" for how long it is kept. It is important to know the policies that were in place prior to the issuance of the litigation hold so as to ensure sufficient efforts are in place to preserve and collect ESI, and if needed, to combat potential allegations of impropriety.

C. Counsel must take active role in process

Montreal Pension did not directly call out specific counsel, but rather focused on the efforts (or lack thereof) of the parties. However, the shortcomings of the respective plaintiffs' efforts in *Montreal Pension* serve as a further reminder of the need for counsel's active *and continued* involvement in the process of preserving, collecting and production of ESI. Though at least some of the teaching points from *Montreal Pension* should have been previously learned from the *Zubulake* series of opinions.

Attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important, with the adequacy of each search being evaluated on a case by case basis. For effective oversight, counsel must become familiar with the client's retention policies and client's data retention architecture by: (1) speaking with proper personnel who can explain the system-wide backup procedures and the actual implementation of the firm's recycling program; (2) speaking with the "key players" in the litigation in order to understand how they store information; (3) being creative, such as running a system-wide search and preserving a copy of each hit, when it us not feasible to speak to all "key players" due to size of a company or scope of a lawsuit, or negotiating search terms with opposing counsel; and (4) having a reasonable and defensible collection method by communicating with key players and IT personnel as outlined above. Many of the negligent and grossly negligent actions by the plaintiffs in *Montreal Pension* centered on the fact that those "in charge" of the preservation, search and collection of data had no real knowledge of where information was kept or what was searched.

In short, counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. Proper communication between client and counsel will ensure: (A) all sources of relevant information are discovered; (B) relevant information is retained on a continuing basis; and (C) relevant non-privileged material is produced to the opposing party.

D. Communication with opposing counsel

Counsel should endeavor to start communications early concerning ESI, and in Federal cases, the Federal Rules require counsel to do so.[23] At the outset it is important to agree, where possible, on the scope, timing and search methods, including search terms or concepts, to be used as early as possible. Reaching an agreement on the scope of discovery of ESI assists both parties, as the producing party can narrow its focus and the requesting party is not inundated with extreme amounts of irrelevant documents. An agreement as to the timing of the production, such as a rolling production, likewise benefits both parties as the producing party can be afforded a more reasonable and realistic production schedule and the requesting party has the benefit of reviewing the information as it comes in, as opposed to the information being heaped upon it all at once.

Communication and agreements reached between counsel not only assist in the analysis of ESI, but also reduce the potential for discovery disputes later in the litigation. After all, the ultimate goal should be the preservation, collection and production of the information, not a game of techno-"gotcha" or finding deficiencies with opposing counsel's efforts in the hopes of getting a spoliation sanction. Judge Scheindlin expressed her dissatisfaction[24] with the time-consuming process of ruling on motions for sanctions, where the court's valuable time could be spent in a more meaningful way, and it is likely most judges would share the same concern.

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***Zubulake* Revisited** *(Continued from pg 9)*

IV. Conclusion

Current practitioners can no longer claim ignorance, and the argument that the law in this area is still so freshly developed that the court should not require compliance with these principles is all but extinct. After six years of declining patience since the *Zubulake* series of opinions was written, the refuge of not understanding ESI, or not understanding counsel's duties in a client's preservation, collection and production of ESI, is no longer available for the unwary practitioner. Consider yourself warned (*again*), that counsel must take an active and continuing role in the client's preservation, collection and production of ESI. Failure to heed this warning can result in sanctions for the client and counsel.

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1. --- F.Supp.2d ---- , 2010 WL 184312 (S.D.N.Y.) than in years past (Jan. 15, 2010)
2. The factual summary has been significantly reduced from the already concise factual summary provided in the *Montreal Pension* opinion as the focus of this article, and of the opinion as well in the author's view, pertains to the teaching points to be gleaned from the opinion, rather than the assessment of any fact specific ruling.
3. Although there were 96 plaintiffs in the action, only thirteen were relevant for the motion pending before Judge Sheindlin. *Montreal Pension* at FN 3.
4. *Montreal Pension* (citing *Prosser & Keeton on Torts*) at FN 12.
5. *Montreal Pension* at *3.
6. *Id.*
7. *Zubulake v. UBS Warburg LLC* ("*Zubulake IV*"), 220 F.R.D. 212 (S.D.N.Y. 2003).
8. *Zubulake v. UBS Warburg LLC* ("*Zubulake V*"), 229 F.R.D. 422 (S.D.N.Y. 2004).
9. *Montreal Pension* at *3.
10. It goes without saying that the intentional destruction of relevant information via burning, shredding or "wiping" of ESI is considered willful conduct.
11. The parenthetical after each example provides the least level of culpability applicable to each type of conduct, with the recognition that each type of conduct could be construed as a higher level of culpability depending on the specific facts involved.
12. *Montreal Pension* at *5.
13. *Id*. at *4.
14. *Id*. at *5.
15. *Id*. at *5 (citing *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 108-09 (2nd Cir. 2002)) (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998)).
16. *Id*. at *6.
17. *Id*. at *6.
18. *Id*. at *6.
19. *Id*. at *6.
20. *Zubulake V*, 229 F.R.D. at 432
21. *Montreal Pension* at *4 (additional citations omitted).
22. *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003)("*Zubulake IV*")
23. *See*, *e.g.*, Fed. R. Civ. P. 26(f)(3)(C).
24. Judge Scheindlin lamented: "I, together with two of my law clerks, have spent an inordinate amount of time on this motion. We estimate that collectively we have spent close to three hundred hours resolving this motion. I note, in passing, that our blended hourly rate is approximately thirty dollars per hour (!) well below that of the most inexperienced paralegal, let alone lawyer, appearing in this case. My point is only that sanctions motions, and the behavior that caused them to be made, divert court time from other important duties – namely deciding cases on the merits." *Montreal Pension* at FN 56.

KADC SUMMARIZED COURT OPINIONS NOW AVAILABLE ONLINE

The KADC court summaries are now available for your online viewing. In addition to your regular KADC email notifications of released Court of Appeals and Supreme Court opinions, each month we will now send an email notification when the opinions have been summarized. A big thank you is owed to KADC member Jacqueline Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C., for summarizing the opinions!

Kansas Association of Defense Counsel

Application for Attorney Membership

Category for individual attorney membership in KADC:

- ☐ Defense Attorney – $190 / yr
- ☐ Government Attorney – $100 / yr
- ☐ Young Lawyer – $100 / yr *(admitted to the Bar for five or fewer years)*

☐ Mr. ☐ Ms.

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Organization _____

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Date admitted to the Bar in the State of Kansas _____

Primary area(s) of practice _____

Bar associations, professional organizations or law societies to which you belong _____

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Legal or public offices held_____

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Are you a member of the Defense Research Institute (DRI)? ☐ Yes ☐ No

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I have read the above and hereby make application for individual membership. I devote a substantial amount of my professional time to the defense of litigated cases.

Signature of Applicant_____ Date_____

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Kansas Association of Defense Counsel

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Associations, professional organizations or student law societies to which you belong___

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_____

I have read the above and hereby make application for individual membership. I am currently registered as a student pursuing a J.D. at the school identified above.

Signature of Applicant_____ Date_____

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