Approved April 1, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Chairman Joe Knopp at
Chairperson

3:30 xxxx/p.m. on February 26, 19 86 in room 313-S of the Capitol.

All members were present except:
Representatives Duncan, Luzzati and Teagarden were excused

Committee staff present:
Jerry Donaldson, Legislative Research Department
Jan Sims, Committee Secretary

Conferees appearing before the committee:
Byron M. Cerrillo, Shawnee County Sheriff's Department
Lt. Dusty Rhoads, Leavenworth County Sheriff's Department
Bill Sneed, Kansas Association of Defense Counsel
David Litwin, Kansas Chamber of Commerce & Industry
Kathleen Sebelius, Kansas Trial Lawyers Association
Arden Bradshaw, Kansas Trial Lawyers Association
Ron Smith, Kansas Bar Association

HB 2783 - An act concerning criminal procedure; relating to the admission of certain evidence at a preliminary examination.

Rep. Clint Acheson appeared in support of HB 2783 and introduced representatives of the Shawnee County Sheriff's Department who also spoke in support of this bill. He said the basic intent of this bill is the inclusion of the Shawnee County Sheriff's Department and the Topeka Police Department's forensic reports at preliminary examinations. Rep. Bideau voiced some concerns he has about the continued expansion of more departments into K.S.A. 1985 Supp. 22-2902a. He cautioned that if we expand the bill and further we should come up with some standard criteria for these labs and training sessions before this is expanded across the state. Rep. Douville moved that HB 2783 be reported favorable for passage. Seconded by Rep. Walker. Motion carried on a voice vote. (Attachment 1)

HB 2869 - An act concerning extradition of certain persons; relating to custody and expenses therefor.

Rep. Clyde Graeber appeared in support of HB 2869 citing the fiscal strain the extradition of prisoners from the Federal Penitentiary at Leavenworth is having on Leavenworth County. This bill would transfer the responsibility for these prisoners from the county jail to the Department of Corrections within 30 days and have the state assume the financial burden for them at that time. (Attachment 2). Lt. Dusty Rhoads of the Leavenworth County Sheriff's Department appeared before the committee in support of HB 2869. He said the physical facility housing the jail was built in 1938 and is not secure enough for the type of prisoner released from the federal penitentiary. He expressed his department's concern that these federal penitentiary prisoners teach their county jail population all the tricks of the trade in escaping, etc. He said the 30 day provision in the bill is necessary in order to provide the prisoners with an opportunity to bond out.

HB 2457 - An act relating to civil procedure; concerning punitive damages; providing for bifurcated trials in actions where punitive damages are claimed; relating to distribution of such damages.

Bill Sneed of the Kansas Association of Defense Counsel appeared before the committee in support of HB 2457. He said that in some limited instances punitive damages are justified and should be allowed. The rules of negligence have changed through the years but the provisions relative to punitive damages have not changed to keep pace with the negligence changes. He presented Attachment 3 which is a proposed "model" bill and sets down some guidelines for the establishment of punitive damages. This bill will provide the social evildoer with some safeguards similar to the criminal system yet set a framework for punitive damages. Punitive damages currently serve as a hammer; they are acceptable but there must be some guidelines provided to know what is necessary to prove them. There is a need for codification so reliance on case law is

not the only determining factor. Negligence and punitive damages were historically developed together and since the implementation of comparative fault punitive damages need to be addressed.

David Litwin of the Kansas Chamber of Commerce & Industry appeared before the committee in support of HB 2457 and stated that his organization thinks the Legislature should look at this area. Punitive damages are allowed in 45 states and are a justified way to deter outrageous conduct and provide additional compensation for such areas as distress.

Kathleen Sebelius of the Kansas Trial Lawyers Association spoke in opposition to the bill. She said punitive damages were established to be compensatory and to deter outrageous conduct and serve as a punishment for same. They allow plaintiffs to collect intangible damages. Since the establishment of punitive damages, the courts have allowed the recovery of noneconomic damages. Courts currently have a protection mechanism for the allocation of punitive damages in that before a jury can allow them the judge has to make a determination that the jury can consider that question. Only then does the jury make the decision if the acts justify punitive damages.

Arden Bradshaw of the Kansas Trial Lawyers Association spoke to the committee about what current guidelines there are for the establishment of punitive damages and stated that a verdict including punitive damages in Kansas is rare. He said juries shy away from providing windfalls for plaintiffs and generally consider punitive damages to be a windfall.

Ron Smith of the Kansas Bar Association appeared before the committee in opposition to BH 2457 and presented Attachment 4. He said punitive damages do need to be looked at but this is not the right bill to do so. We should not change the punitive damage system unless there is a public benefit to it.

HB 2792 - An act concerning county law libraries. Rep. Snowbarger explained the provisions of this bill and indicated that it affects only Johnson County's law library. Rep. Snowbarger moved to report HB 2792 favorable for passage the same to be placed on the consent calendar. Seconded by Rep. Cloud. Motion carried on a voice vote.

HB 2941 - An act concerning district courts; relating to jurisdiction over certain matters.

Rep. Wunsch explained the provisions of this bill to the committee. Rep. Wunsch moved to report HB 2941 favorable for passage the same to be placed on the consent calendar. Seconded by Rep. O'Neal. Motion carried on a voice vote.

The chairman adjourned the meeting at 5:40 P.M.

Shawnee County
Sheriff's Dept.
200 East 7th, Topeka, KS 66603

ED RITCHIE
SHERIFF
295-4047

DALE COLLIE
UNDERSHERIFF
295-4050

February 26, 1986

TO: House Judiciary Committee

FROM: Byron M. Cerrillo, Legal Advisor
Shawnee County Sheriff's Department

RE: House Bill 2783

On behalf of the Shawnee County Sheriff's Department, I wish to thank you for the opportunity to speak on behalf of House Bill 2783. House Bill 2783 would amend K.S.A. 22-2902a, which permits certain law enforcement agencies to enter forensic examination reports prepared by them as evidence at preliminary examinations without the examiner's presence in the courtroom. The Shawnee County Sheriff's Department wishes to be included as one of those law enforcement agencies.

The statute we wish to be amended has a two-fold purpose: (1) it allows the court to move through preliminary examinations in a quick orderly fashion, and (2) saves the maker of the report from waiting to testify concerning the reports.

We provide frequent training programs to the officers so they may become familiar with new procedures as well as remain current in all aspects of law enforcement. Presently, Sergeant Richard Warrington performs our forensic testing and makes the reports in his areas of expertise. These areas include marijuana testing, photography and crime scene investigation. Sergeant Warrington is a certified instructor for the State of Kansas in the areas of photography and crime scene investigation. Deputy Rick Atteberry has received extensive training in crime scene investigation and photography and will be certified in both areas in the near future. You have been supplied copies of certificates which they have received. These certificates evidence the training these two men have undertaken.

The Shawnee County Sheriff's Department could save considerable expense by passage of House Bill 2783. The county's forensic testing is conducted in facilities located at Forbes Field - some nine (9) miles distance from the Courthouse where

Attachment 1
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the preliminary hearings are held. The officers who presently testify must drive in from Forbes, be present during the hearing and then drive back to Forbes. Not only could manpower hours be saved by using the forensic reports in lieu of testimony, but there would also be a savings in gasoline expense and vehicle wear. It seems to us it would be a much more efficient use of time and money to allow the Shawnee County Sheriff's Department to be included as one of the law enforcement agencies allowed to submit forensic reports at preliminary hearings.

Thank you for your time and consideration of this matter.

Byron M. Cerrillo

Byron M. Cerrillo
Legal Advisor

BMC/jl

Shawnee County
Sheriff's Dept.
200 East 7th, Topeka, KS 66603

ED RITCHIE
SHERIFF
295-4047

DALE COLLIE
UNDERSHERIFF
295-4050

January 21, 1986

Sergeant Richard J. Warrington
Crime Scene Search Team
Shawnee County Sheriff's Department
Sworn in as Deputy Sheriff on July 19, 1971
Assigned to the Shawnee County Jail from July, 1971 to May, 1978
May, 1978 Transferred to Crime Scene Search Team.

TRAINING AND SCHOOLING

April & May, 1975	-	Kansas Law Enforcement Training Center, 200 hours
May, 1975	-	Registered N.R.A. Police Firearms Training Course, Hutchinson, Kansas
May, 1978	-	One (1) Week M-Squad School
July, 1978	-	Two (2) Week Training at K.B.I. (Collection and Preservation of Evidence)
August, 1978	-	One (1) Week F.B.I. Fingerprint Classification School at K.B.I.
October, 1978	-	Two (2) Day Seminar (Western Crime Conference on Problems with Women and Children)
May, 1979	-	Two and One Half (2 1/2) days - M-Squad Refresher School
May, 1979	-	Two (2) Day Seminar (Criminal Investigation at Kansas City, Missouri by Sirchie Fingerprint Laboratories)
May, 1979	-	Two (2) Day Seminar (Western Crime Conference on Investigation of Mass Deaths & Science in Criminal Investigation
May, 1980	-	Instruct M-Squad School for New Recruits on Crime Scene Investigation and Set up Practical Problem
August, 1980	-	Two (2) Day Seminar on Crime Scene Investigations at Overland Park, Kansas by the National Law Enforcement Institute
December, 1980	-	First Annual Forensic Science Seminar for Law Enforcement Officers at Kansas State University
October, 1982	-	Seminar on Electronic Easedropping by South-Western Bell
October, 1982	-	International Association of Identification Training Seminar on Latent Fingerprint Techniques and Bite Mark Evidence
November, 1982	-	Member of Kansas Division of International Association of Identification
August, 1983	-	Crime Scene Investigation Seminar by Topeka Police Training Academy.

September, 1983	-	Emergency Vehicle Operations by Shawnee County Sheriff's Department Instruction Seminar in Recognizing and Identifying Hazardous Materials.
October, 1983	-	International Association of Identification Training Seminar on Latent Fingerprints-Crime Scene to Courtroom.
May, 1984	-	International Association of Identification Training Seminar on the Forensic Expert Within the Judicial System and the Creative approach to Crime Scene Investigation
June, 1984	-	One (1) Week Training at K.B.I. (Indentification of Marihuana and Tetrahydrocannabinol)
July, 1984	-	Specialized School in Juvenile Code Presented by K.B.I.
August, 1984	-	Specialized School in Incident Base Reporting presented by K.B.I.
October, 1984	-	International Association of Identification Training Seminar on Latent Fingerprint and Document Evidence
May, 1985	-	Four (4) Training by Metropolitan Topeka Airport Authority for Combustible Chemicals used in Crimes, Basic Arson Scene Investigation Crime Scene Preservation & Search, Explosive Devices used in Crimes.
April, 1985	-	International Association for Identification Training Seminar on Identification of Bones, Gunshot Wounds & Bomb Disposal
October, 1985	-	International Association for Identification Training Seminar on Psychological Stress and Psychological Profiling.
November, 1985	-	Training Seminar on Violent Criminal Apprehension Program (V.I.C.A.P.) Presented by the F.B.I.

Kansas Law Enforcement Training Center
The University of Kansas
Lawrence, Kansas

This is to certify that

RICHARD J. WARRINGTON

on this 23RD day of MAY 1975, successfully completed

The Law Enforcement Basic Training Course

as required for certification by the law of the State of Kansas conducted at

HUTCHINSON, KANSAS

authorized by

INSTITUTE FOR SOCIAL AND ENVIRONMENTAL STUDIES

and

KANSAS LAW ENFORCEMENT ADVISORY COMMISSION

Archie R. Hykes
Chancellor

Maynard L. Brazel
Director of Police Training

Capital Area Major Case Squad

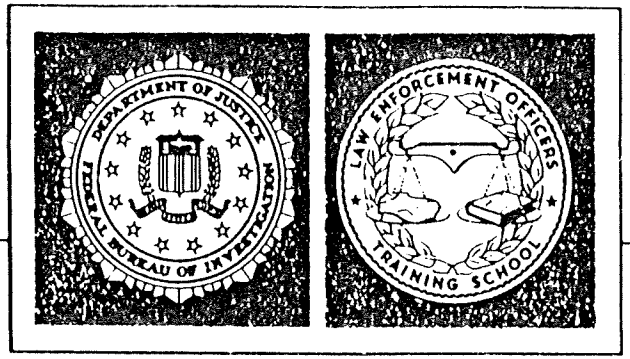
This Certifies that Richard J. Warrington

has completed the Capital Area Major Case Squad School of Investigation and with the authority vested by the Board of Directors hereby awards this

Certificate

Given this 26th day of May, A. D. 19 78

DIRECTOR



LAW ENFORCEMENT OFFICERS TRAINING SCHOOL

CERTIFICATE OF ATTENDANCE

THIS IS TO CERTIFY THAT

RICHARD J. WARRINGTON

ATTENDED A SPECIALIZED SCHOOL IN

FINGERPRINT CLASSIFICATION

HELD AT

Topeka, Kansas

FROM August 28, 1978 TO September 1, 1978

UNDER SPONSORSHIP OF

Kansas Bureau of Investigation

IN COOPERATION WITH THE FEDERAL BUREAU OF INVESTIGATION

W. L. Albott

W. L. ALBOTT
Director

FBI/DOJ

THE WESTERN CONFERENCE ON CRIMINAL AND CIVIL PROBLEMS

CERTIFICATE OF ATTENDANCE

Participant: SERGEANT RICHARD J. WARRINGTON

A Seminar

on Problems of Women and Children

Date: October 18-19, 1978

Box 8282
Wichita, Kansas

William G. Eckert, M.D.
General Chairman

THE WESTERN CONFERENCE ON CRIMINAL AND CIVIL PROBLEMS

CERTIFICATE OF ATTENDANCE

Participant: MR. DICK WARRINGTON

A Seminar on Investigation of Mass Deaths and Science in Criminal Investigation

Date: *May [illegible], 1979*

Box 8282
Wichita, Kansas

William G. Eckert, M.D.
General Chairman

Criminal Investigation

PROFESSIONALISM AWARD

This is to Certify that SGT. RICHARD J. WARRINGTON

has demonstrated a high degree of PROFESSIONALISM through the employment of the most up to date advancements in the field of CRIMINAL INVESTIGATION.

This AWARD granted on this 30th day of the month of MAY

in the year of 1979 by Sirchie Finger Print Laboratories.

Signed and sealed on this day in the City of Raleigh

County of Wake State of North Carolina

Tom Curtis

Phillip A. Blum

NATIONAL LAW ENFORCEMENT INSTITUTE

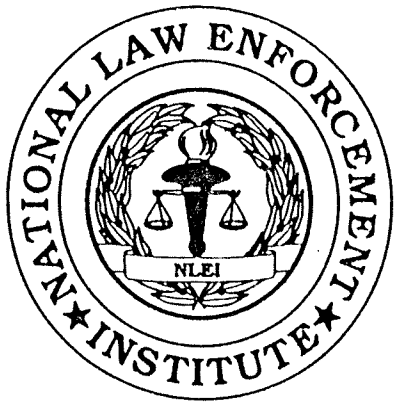
It is hereby certified that

Dick Warrington

has successfully completed NLEI'S

CRIME SCENE INVESTIGATIONS SEMINAR

conducted August 7 & 8, 1980
at Overland Park, Kansas



Robert M. Jenkins
Executive Director

Kansas State University

THIS CERTIFICATE IS AWARDED TO

RICHARD WARRINGTON

in recognition of attendance and participation in a seminar on

FIRST ANNUAL FORENSIC SCIENCE SEMINAR FOR LAW ENFORCEMENT OFFICERS

Alvan D. Johnson
RILEY COUNTY POLICE DEPARTMENT

12/11/80
DATE

Arthur J. Stone Jr
Chief of Police
KSU SECURITY & TRAFFIC

LITHO. IN U.S.A.

BECTON DICKINSON PUBLIC SAFETY

Certificate of Training

This is to certify that

RICHARD J. WARRINGTON

has successfully completed the Polytesting
Narcotics Screening & Identification training
program and is qualified to use the N.I.K.™ system
in the course of Investigative duties.

NIK™

Awarded: OCTOBER 6, 1982

Location: KANSAS BUREAU INVESTIGATIONS

Signed: Thomas M. Smith
Director of Training

KANSAS DIVISION
OF THE
INTERNATIONAL ASSOCIATION FOR IDENTIFICATION

THIS IS TO CERTIFY THAT

RICHARD WARRINGTON

PARTICIPATED IN THE ANNUAL

TRAINING SEMINAR

HELD AT

SALINA, KANSAS OCTOBER 22, 1982

ON

LATENT FINGERPRINT TECHNIQUES & BITEMARK EVIDENCE

International Association for Identification

Wm W Tucker
Secretary

President

No. 167

Kansas Division of the International Association for Identification

Sir Francis Galton's
Right Index Print

Member's Right Index

To Whom it may Concern - Greetings:

This Certifies that RICHARD J. WARRINGTON

having complied with all requirements of the Constitution and By-Laws of the KANSAS DIVISION of the INTERNATIONAL ASSOCIATION for IDENTIFICATION is hereby declared a MEMBER, and entitled to all Rights, Privileges and Benefits of the Association.

William W. Wills
Secretary-treasurer

President

DATE November 8, 19 82

Richard J. Warrington
Member's Signature

Topeka Police Training Academy

This Certifies that R. J. WARRINGTON

has satisfactorily completed the full course of instruction in

CRIME SCENE INVESTIGATION SEMINAR

sponsored by the Topeka Police Department and instructed by the Wilbur Anderson

from 01 AUGUST 1983 0800 Hours *to* 01 AUGUST 1983 1700 Hours *and in view of this achievement is awarded this Certificate of Completion this* First *day of* AUGUST *in the year of our Lord One Thousand Nine Hundred* eighty-three

Robert L Stanley
Chief of Police

Director of Training

SHAWNEE COUNTY SHERIFF'S DEPARTMENT
CERTIFICATE OF TRAINING

This is to certify that

Sgt. Richard Carrington

has

COMPLETED FOUR (4) HOURS INSTRUCTION

EMERGENCY VEHICLE OPERATIONS

Sheriff

This 17TH day of SEPTEMBER 1983

Director of Training

SHAWNEE COUNTY SHERIFF'S DEPARTMENT
CERTIFICATE OF TRAINING

This is to certify that

Sgt. Richard Warrington

has

COMPLETED FOUR (4) HOURS OF INSTRUCTION IN
RECOGNIZING AND IDENTIFYING
HAZARDOUS MATERIALS

Sheriff

This 13TH day of OCTOBER 19 83

Director of Training

Kansas Division
of the
International Association for Identification

THIS IS TO CERTIFY THAT

RICHARD WARREN SMITH

PARTICIPATED IN A

KANSAS TRAINING SEMINAR

HELD AT THE

[illegible] PARK, [illegible] OCTOBER 28, 1983

IN

[illegible] TENT [illegible] CRIME SCENE TO COURTROOM

international association for identification

William W. Webb
Secretary

President

LITHO IN U.S.A.

Kansas Division
of the
International Association for Identification

THIS IS TO CERTIFY THAT

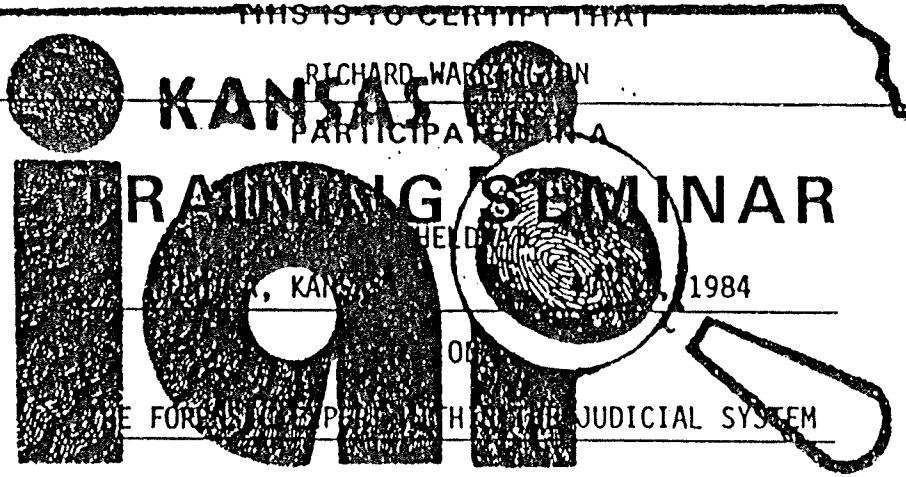
RICHARD WARRINGTON

PARTICIPATED IN A

KANSAS TRAINING SEMINAR

HELD IN , KANSAS , 1984

OF THE FORENSIC SCIENCE PROGRAM FOR THE JUDICIAL SYSTEM



international association for identification

William W. Babler
Secretary

Richard A. Maxfield
President

Kansas Division
of the
International Association for Identification

THIS IS TO CERTIFY THAT

RICHARD WARRINGTON

PARTICIPATED IN A

KANSAS

TRAINING SEMINAR

HELD IN

[illegible], KANSAS, 1984

ON

THE CREATIVE APPROACH TO CRIME SCENE INVESTIGATION

international association for identification

William W. Hobbs
Secretary

President

SEAL

LITHO IN U.S.A.

KANSAS BUREAU OF INVESTIGATION

Certificate of Attendance

This is to Certify That

Richard J. Warrington

Attended a Specialized School in

Identification of Marihuana & Tetrahydrocannabinol

Held at

Kansas Bureau of Investigation

Topeka, Kansas

Robert T. Stephan
Attorney General

Thomas E. Kelly
Director

6-4-84 TO 6-8-84
36 HOURS

∞

KANSAS BUREAU OF INVESTIGATION

Certificate of Attendance

This is to Certify That

RICHARD J. WARRINGTON

Attended a Specialized School in

JUVENILE CODE

Held at

TOPEKA, KANSAS

JULY 26, 1984

Robert T. Stephan
Attorney General

Thomas E. Kelly
Director

KANSAS BUREAU OF INVESTIGATION

Certificate of Attendance

This is to Certify That

RICHARD J. WARRINGTON

Attended a Specialized School in

INCIDENT BASE REPORTING

Held at

TOPEKA, KANSAS

AUGUST 8, 1984

Robert T. Stephan
Attorney General

Thomas E. Kelley
Director

Kansas Division
of the
International Association for Identification

THIS IS TO CERTIFY THAT

RICHARD HARRINGTON

PARTICIPATED IN A

KANSAS

TRAINING SEMINAR

HELD IN TOPEKA, KANSAS ON OCTOBER 25, 1984

IN LATENT FINGERPRINT AND PALM PRINT EVIDENCE

international association for identification

William W. Wills
Secretary

Thomas H. Mayfield
President

LITHO IN U.S.A.

State of Kansas

Law Enforcement Training Commission

This is to certify that

RICHARD J. WARRINGTON

K2C0H1

having successfully completed all of the prescribed requirements therefor is hereby awarded this certificate as a

Law Enforcement Officer

January 28, 1985
Date

Thomas W. Regan
Chairman

METROPOLITAN TOPEKA AIRPORT AUTHORITY

Certificate of Training

This is to certify that

SGT. DICK WARRINGTON
SHAWNEE COUNTY SHERIFF's
CRIME SCENE SEARCH TEAM

has successfully completed

1. Combustible Chemicals Used in Crimes (8)
2. Basic Arson Scene Investigation (8)
3. Crime Scene Preservation & Search (8)
4. Explosive Devices Used in Crimes (8)

Given at FORBES FIELD AIRPORT, SAFETY DEPARTMENT

May 24, 1985
DATE

SAFETY DIRECTOR

Kansas Division
of the
International Association for Identification

THIS IS TO CERTIFY THAT

RICHARD WAR[illegible]N

PARTICIPA[illegible] A

TRAINING SEMINAR

HELD [illegible]

[illegible], KAN[illegible] [illegible], 1985

[illegible]N

[illegible]FICA[illegible] [illegible]NS[illegible] [illegible]UNDS & BOMB DISPOSA[illegible]

KANSAS

international association for identification

Secretary

President

Kansas Division
of the
International Association for Identification

THIS IS TO CERTIFY THAT

RICHARD WA[illegible]N

PARTICIPATED IN A

KANSAS

TRA[illegible]NG SEMINAR

HELD [illegible]

IN [illegible]ANSAS [illegible]R 18, 1985

[illegible]ON

[illegible]YCHO[illegible]T [illegible]P[illegible]GICAL PROFILING

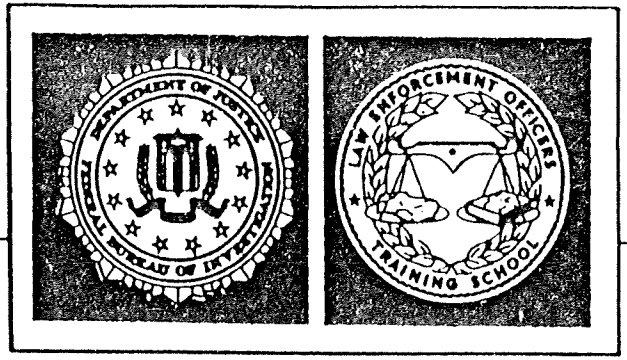
international association for identification

William W. Wells
Secretary

President

IAI

LITHO IN U.S.A.



LAW ENFORCEMENT OFFICERS TRAINING SCHOOL

CERTIFICATE OF ATTENDANCE

THIS IS TO CERTIFY THAT

Richard J. Warrington

ATTENDED A SPECIALIZED SCHOOL IN

VIOLENT CRIMINAL APPREHENSION PROGRAM (VICAP)

HELD AT

Topeka, Kansas

FROM November 26, 1985 TO November 26, 1985

UNDER SPONSORSHIP OF

KANSAS BUREAU OF INVESTIGATION

IN COOPERATION WITH THE FEDERAL BUREAU OF INVESTIGATION

Robert B. Davenport

NATIONAL LAW ENFORCEMENT INSTITUTE

It is hereby certified that

Rick Atteberry

has successfully completed NLEI's

HOMICIDE INVESTIGATIONS SEMINAR

Conducted October 24 & 25, 1985
at Kansas City

NATIONAL LAW ENFORCEMENT INSTITUTE ★ NLEI ★

Robert M. Jenkins
Executive Director

Washburn University Criminal Justice Training Center

This certifies that

RICK ATTEBERRY

has satisfactorily completed the

STREET SURVIVAL® SEMINAR

a 16-hour training course in firearms tactics, patrol procedures, and officer survival awareness

Conducted in conjunction with
Calibre Press, Inc.

Awarded at Topeka, KS, this 25th day of July, 1984

David S. Tracy
Instructor

David S. Smith
Instructor

KANSAS BUREAU OF INVESTIGATION

Certificate of Attendance

This is to Certify That

RICK ATTEBERRY

Attended a Specialized School in

JUVENILE CODE

Held at

TOPEKA, KANSAS

JULY 26, 1984

Robert T. Stephan
Attorney General

Thomas E. Kelly
Director

CO

KANSAS BUREAU OF INVESTIGATION

Certificate of Attendance

This is to Certify That

RICK ATTEBERRY

Attended a Specialized School in

INCIDENT BASE REPORTING

Held at

TOPEKA, KANSAS

AUGUST 8, 1984

Robert T. Stephan
Attorney General

Thomas E. Kelley
Director

CD

THE WESTERN CONFERENCE ON CRIMINAL AND CIVIL PROBLEMS

CERTIFICATE OF ATTENDANCE

Participant: RICK ATTEBERRY

DOMESTIC TERRORISM

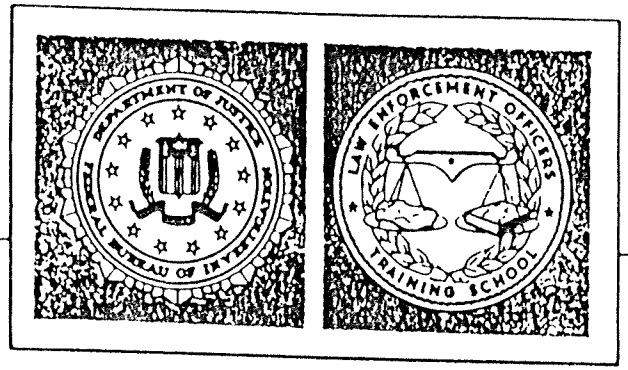
AND

ADVANCED HOMICIDE INVESTIGATION

Date: SEPTEMBER 5th and 6th, 1985

Box 8282
Wichita, Kansas

William G. Eckert, M.D.
General Chairman



LAW ENFORCEMENT OFFICERS TRAINING SCHOOL

CERTIFICATE OF ATTENDANCE

THIS IS TO CERTIFY THAT

Rick Atteberry

ATTENDED A SPECIALIZED SCHOOL IN
VIOLENT CRIMINAL APPREHENSION PROGRAM (VICAP)

HELD AT

Topeka, Kansas

FROM November 26, 1985 TO November 26, 1985

UNDER SPONSORSHIP OF

KANSAS BUREAU OF INVESTIGATION

IN COOPERATION WITH THE FEDERAL BUREAU OF INVESTIGATION

Robert B. Davenport

TESTIMONY
Clyde D. Graeber
House Bill 2869
House Judiciary Committee

Mr. Chairman, Committee Members,

House Bill 2869 is a bill to relieve the County of Leavenworth from the responsibility for keeping and maintaining prisoners released from the Federal Penitentiary at Leavenworth and held for extradition to other states.

The proposed legislation is the result of a long standing problem peculiar to Leavenworth County. The State of Kansas and 49 other states have entered into an extradition compact which provides for the uniform exchange of prisoners between the various states when prisoners wanted by other states are released from Federal custody at the completion of their federal sentences. These prisoners are, by law released from the Federal Penitentiary to the custody of the Sheriff of the County in which the Federal Institution is located. In the case of Leavenworth County, the release and detention of Federal prisoners awaiting extradition to other states results in an annual cost to Leavenworth County taxpayers of approximately $50,000 per year.

House Bill 2869 addresses this situation and seeks that these prisoners released from the penitentiary at Leavenworth be turned over to the Department of Corrections within 30 days and that the State of Kansas assume the financial burden and the responsibility for keeping and maintaining these prisoners until the extradition can be completed.

This type of legislation is not unique, in fact, the drafting of House Bill 2869 is patterned after a similar law in the State of Pennsylvania that has been in effect since 1980.

I feel that this proposed piece of legislation is certainly reasonable and that it is not fair to expect the County of Leavenworth to pay the cost of maintaining these prisoners released from the Federal Penitentiary when they are held solely by reason of the existence of the extradition compact between the State of Kansas and the other 49 states.

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Mr Chairman, Committee members, ladies, and gentlemen, I am Lt Dusty Rhoads of the Leavenworth County Sheriff Department. I am representing Sheriff Terry L. Campbell, who is unable to appear before you because of a prior out of state commitment.

My comments are in relation to proposed House Bill No 2869 submitted by Representative Clyde Graber of Leavenworth.

The proposed bill stems from a long standing problem peculiar to our Department and County. The State of Kansas and the other forty nine states have, in the past, entered into an Extradition Compact which provides for the uniform exchange of felons between the various states to expedite the needs of our system of justice. This compact is silent on the source of necessary funding required in the performance of these duties by the various confining agencies. When prisoners, wanted by other states, are released from federal custody at the completion of their federal sentences, they are by law released to the custody of the Sheriff of the county in which the federal institution is located. In this case we are discussing the Federal Penitentiary at Leavenworth, Kansas, releasing prisoners to the custody of the Leavenworth County Sheriff. When the Sheriff

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receives custody of the prisoner, he is required by statute to take the prisoner before a Kansas District Judge. At this point the prisoner makes the choice of either waiving extradition proceedings and being immediately returned to the requesting state, or he may, and often does, file a writ with the Court which requires the requesting state to go through the lengthy procedure of extradition. From this point, until the demanding state eventually gets him, he is a ward, both legally and financially, of the County of Leavenworth. It is to be noted at this time that the prisoner has not committed a crime in Leavenworth County and is being supported by the citizens of Leavenworth County solely because of the existence of the Extradition Compact made by the State of Kansas with the other States. In the past, the most notorious of these cases has taken forty eight months to process and the most recent sixteen months. The most prevalent reason prisoners give for fighting extradition is that they have a much better chance of escaping from a county jail than they have in the requesting state's prison system. Our county jail has a daily average of just under six prisoners per day, year in and year out, of this particular category. At a daily cost of approximately $22.00 in 1980 and approximately

$26.00 per day in 1985, this is a burden on the county tax payers of approximately $54.000.00 per year. What is worse yet about the situation, is the general nature of the received prisoners. As a whole they are some of the worst offenders society has to offer because of the prison they are housed in, which is a federal maximum security institution. Most of the escapes in past years in our jail have involved this category of prisoner. We have in the past petitioned the Federal Government through the Bureau of Prisons, Department of Justice, US House of Representatives, and other states seeking relief, and in all cases have found none.

The Bill addresses the two major factors, financial and security. The financial aspect should be absorbed by the State because it is a problem created by the State. The security aspect cannot be measured in dollars. A third, as yet not mentioned aspect, is that if the prisoner knows he will remain in a prison, with little chance of escape, the likely hood of his electing to fight extradition will diminish greatly, and the chances of his signing a waiver of extradition are greatly enhanced.

I would like to point out that this is not a pie in the sky request. A bill of this type has been law in Pennsylvania since 1980 and has been very

successful.
If I can field any questions at this time, I will gladly do do.

EXTRADITION STATISTICS

January 1, 1981 thru December 31, 1985

YEAR	AMOUNT OF YEARLY PRISONERS	AMOUNT OF PRISONER DAYS	AMOUNT OF AVERAGE STAY	AMOUNT OF DAILY AVG	AVERAGE YEARLY COST
1985	51	1838	36.04	5.04	$47,788.
1984	70	2772	39.60	7.59	$72,072.
1983	41	2400	58.54	6.58	$57,600.
1982	48	1671	34.81	4.58	$40,104.
1981	45	1750	38.89	4.79	$38,500.

AVERAGE YEARLY COST TO LEAVENWORTH COUNTY: $54,236.

COMMENTARY:

1. Purpose:

The purpose of punitive damages is to deter the social "evildoer."[1] With the expansion of compensable intangible injuries, the single and undisputed justification for punitive damages is today punishment for the sake of deterrence.[2] Punitive damages otherwise no longer serves any public policy or legitimate interests of unentitled recipients.[3] Nevertheless, there has been a literal explosion in claims for punitive damages.[4] Jury verdicts, like the $125,000,000 awarded in the infamous Grimshaw-Pinto case, have "heightened the proliferation of punitive damages awards in the nation's courts, raising the specter of huge expense increases for defendants, while vastly increasing the attractiveness of filing suit for plaintiffs."[5]

Substantially every tort action now seeks punitive awards against defendants of all economic worth.[6] No longer are punitive damages confined to the evil malefactor who intentionally harms for personal gratification or pecuniary gain.[7] Punitive damages may be awarded in almost any tort action, including certain claims founded on negligence.[8] The plaintiff's weapon, the sanction of punitive damages, allows them to engage in a form of private prosecution which is a mere facsimile of criminal punishment; pure retribution to effectuate compliance with given social norms.[9] Thus, the plaintiffs in punitive damages actions have become "private attorney generals," with a mission to vindicate social justice.

Unlike a criminal proceeding, however, the punitive damages defendant is afforded no special procedural safeguards.[10] Additionally, he is more vunerable than he would be in an ordinary civil action since prejudicial evidence regarding his wealth is generally admissible.[11] To this end, the civil defendant may be punished far more severely than he would have been under criminal penalties for the same wrong. And, though the State is indirectly involved in punitive damages actions by sanctioning civil punishment, the defendant is denied the benefit of protective evidentiary standards[12] and he may be forced to testify against himself, self incrimination that can be more devastating than a criminal confession.[13]

The punitive damages defendant is also completely at the mercy of a jury because a judgment of punitive damages has been held not to carry the stigma of criminal conviction.[14] But unlike any other legal proceeding, the jury does not have to account for their deliberations or discretion in punishment.[15] This makes the punitive damages defendant especially vulnerable where the civil trial is emotionally charged and the jury is affected by latent biases or by retributional or redistributive inclinations.[16] In turn, trial lawyers are able to capatilize on such vulnerability by placing a "premium" on oratory skills in swaying juries into a dislike of defendants and sympathy for plaintiffs.[17]

It is notable that the primary targets are the "deep pocket" corporations, and any dislike or distrust by a jury is apt to bias a decision.[18] In reality, there is probably no large corporation that walks into the face of punitive damages claims that has not initially lost. One study has shown that latent bias in juries against business runs deep, but the finding is not surprising with the media sending a message to the public that big business represents all that is wrong with America today.[19] Implicitly recognizing this, the judiciary is in accord, acknowledging that juries commonly achieve unfounded results when awarding punitive damages.[20] The United States Supreme Court, for example, has dryly commented that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."[21]

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Excessive or unnecessary punishment is not desired. Judges and juries, however, are notorious for erring on the side of the plaintiff, especially against financially wealthy defendants. Accordingly, this Model Statute is not intended to abrogate punitive damages, but it embodies the need to balance the negative features of punitive damages against the doctrines positive good. This Model Statute has been specifically drafted to establish procedures that will reduce false positive outcomes — especially punishment of the marginally culpable — to a tolerable level.[22] This Statute represents only one effort among numerous legislative proposals to reform the punitive damages doctrine.[23] The view represented by this Statute is aptly stated in **Travelers Indemnity Co. v. Armstrong**, 442 N.E. 2d 349 (Ind. 1982) where the court stated: "[f]or, just as we agree that it is better to acquit a person guilty of crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error."

2. **The Bifurcated Trial:**

Section [1] (a) of this Model Statute provides:

> In any civil action where claims for punitive damages are included, the trial shall be bifurcated. In the trial's first phase, the trier of fact shall determine, concurrent with all other issues presented, whether punitive damages may be assessed. If the trier of fact is a jury, the verdict must be unanimous on the issue of liability for punitive damages.

The provision in this statute assigning assessment of damages by the trial judge in a bifurcated trial is merely a codification of the structure that recent commentators and jurors are supporting in increasing numbers.[24] A similar system has been adopted in at least one state.[25] The Federal Uniform Product Liability Act is also in accord.[26]

There are currently no helpful touchstones or guidelines available to juries to aid them in assessing the appropriate punishment.[27] While the "ratio rule"[28] or evidence of the defendants wealth[29] are sometimes utilized,[30] they offer no real substance to the law.[31] Such rules are probably no more than a hook on which to hang judicial justification in support or reversal of a punitive damages verdict[32] since it is impractical to attempt to instruct or instill in a jury the needed discretion in determining punishment. Trial judges are better equipped through experience and training to evaluate the necessary retribution that should be meted out in any given situation.[33]

3. **Liability:**

Section [1] (b) of this Model Statute provides:

> If liability for punitive damages is found in the trial's first phase, the judge shall then assess the sum of punitive damages in the trial's second phase. The judge may consider evidence not formally admitted at trial, including economic and social policy. The judge may hear any evidence outside the record that would be an aid in determining the amount of punitive damages to be assessed. The defendants shall have the right in the trial's second phase to introduce expert testimony concerning the assessment of punitive damages.

Punitive damages are a penalty, and encompass no remedial justification.[34] The punishment deprives defendants of their property rights — retribution that has never been sanctioned by the Supreme Court unless the requisite criminal safeguards attend the deprivation.[35] Since the Court may never address the issue in relation

to punitive damages, however, this statute requires a unanimous jury verdict on the issue of liability. If the defendant in a civil action needs to be disciplined, the proper manifestation of such a determination is a jury undivided over guilt or innocence. The bifurcated trial is thus one of the several balancing factors enunciated in the Model Punitive Damage Statute to counteract the present absence of safeguards available in similar criminal actions.

4. **Wealth:**

Section [1] (c) of this Model Statute provides:

> No evidence of the defendant's wealth or financial condition shall be admissable during the trial's first phase. No discovery of the defendant's financial condition shall occur unless liability for punitive damages is found by the trier of fact.

The defendant's financial condition is not a function of liability determination.[36] Additionally, such information is not available in any other tort proceeding,[37] and a growing number of states now control discovery of the defendant's financial condition.[38]

Because the jury's only duty is to determine whether the defendant's conduct arises to a socially reprehensible act deserving of punishment, evidence of wealth can only be prejudicial to their deliberation.[39] Rich or poor, a defendant is either culpable or he is not. He either has or has not engaged in the alleged socially undesirable behavior.[40] Thus, the Model Statute adopts the trend in New York courts[41] to withhold evidence of the defendant's wealth until liability is determined. Only the trial judge shall hear such evidence in the penalty assessment phase. This limitation on the admissibility of wealth will also prevent plaintiffs from using financial information of the defendant as a tool of extortion in exacting unjust settlements.[42] This extortion power has been realized as a paramount problem in punitive damages proceedings, and commentators have urged a resolution to its unfairness.[43]

In deferring discovery of the defendant's financial condition, the drafters realize this is not the most expeditious manner of litigating a punitive damages claim where liability may be established. However, it will avoid undue expense and unneccessary disclosure of personal information in all cases where liability is found. The position of the drafters is reflected in **Rupert v. Sellers**, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975) in which the court stated:

> We recognize that in some respects this procedure may delay the final disposition of a case. But such delay will be compensated (1) by the protection of defendants from harrassment by discovery of their net worth in cases where plaintiffs have only alleged, but have not established, a cause of action for punitive damages and (2) by the time saved in barring such discovery in cases where plaintiff cannot prove that he is entitled to punitive damages. Moreover, the limited discovery to which a plaintiff is entitled as to defendant's wealth in a punitive damage case should be conducted expeditiously, and in most cases it should be completed and the necessary evidence be available for presentation to the same [judge who presided over the trial].

5. **Actual and Nominal Damages:**

Section [1] (d) of this Model Statute provides:

> In no case shall punitive damages be assessed where compensatory damages are not awarded, or where only nominal damages are awarded, or where no actual damage is found by the trier of fact.

Intangible injury is now recognized as compensable in American jurisprudence.[44] Thus, where no actual damages are awarded, any culpability of a defendant is so marginal or so speculative that punishment cannot be sanctioned. Similarly, where only nominal damages are received in judgment, the plaintiff has

suf d little more than an irrit n, and a serious deprivation of the de dant's property rights is not just . This provision of the Model Punitive Damages Statute is well supported by case law.[45]

6. **Multiple Punishment:**

Section [1] (e) of this Model Statute provides:

> Punitive damages shall not be levied against a tortfeasor more than once for any single wrong regardless of the duration of the tort or number of claimants. Punitive damages shall not be assessed against a defendant for a wrong upon which he has been criminally or civilly punished by the government by fine or imprisonment, nor shall punitive damages be awarded for a wrong upon which the defendant is subject to potential criminal punishment or criminal or civil fine by the government before the outcome of any possible state proceedings is determined.

Double or multiple punishment clearly violates the right against double jeopardy, at least in the spirit of the law.[46] Some courts have implicitly acknowledged this in refusing punitive damages awards where criminal sanctions have been imposed for the same wrong.[47] The drafters of the Model Punitive Damages Statute have adopted this same restraint. Additionally, since punitive damages serve no non-penal goal, the defendant shall be civilly or criminally punished only once on any base wrong, regardless of that wrong's duration or the number of persons affected. The drafters express no view as to whether an initial punitive damages judgment may apportion the allowable plaintiff's percentage of the award under this statute to two or more victims.

Since there is no right to punitive damages,[48] the drafters emphatically reject reasoning by those courts holding that each victim of a mass tort has a "right" to individually punish the defendant.[49] It is the trial judge's duty to insure that the initial punishment, where he determines a fine must be levied on the wrong found by the jury, is adequate to satisfy the goals of the punitive damages doctrine. An initial penalty assessment shall be determined as sufficient for retribution and deterrence. Additional punishment thus cannot further deterrence, and is forbidden under this statute.

7. **Standard of Proof:**

Section [2] of this Model Statute provides:

> (a) In any civil action where claims for punitive damages are included, the plaintiff shall have the burden of proving the defendant's culpabiliy, as defined in section [3] of this statute, beyond a reasonable doubt in the initial phase of the trial. Presumptions shall not be used to shift the burden of proof to the defendant.
>
> (b) The reasonable doubt standard as used in this section creates the same evidentiary burden that a prosecutor has with respect to a defendant charged with a crime. Each element in a punitive damages liability verdict must be based on facts proved beyond a reasonable doubt.

The State clearly has an interest in the outcome of a punitive damages proceeding since such damages are provided to deter socially undesirable conduct[50] which legislatures wish to prevent. Requiring a protective standard of proof is thus not inconsistent with this purpose. The Courts have repeatedly held that where the State is not neutral as to the end result of litigation, evidentiary standards higher than a "mere preponderance" are mandated.[51] The Model Statute recognizes this important rule in following the lead of Colorado, Indiana, Wisconsin, Oregon, and Minnesota who have all rejected the "preponderance" standard in determining punitive damages liability[52]. The weight of the State must be balanced between the litigants to insure fairness in the punitive damages proceeding. Since civil punishment is sanctioned by the State, the "beyond a reasonable doubt" standard is required to prevent unjust retribution. The reasonable doubt requirement is to be applied to every element the plaintiff must prove in his action for punitive damages. The jury should be instructed on

a reasonable doubt standard similar to that used in criminal proceedings. A model instruction is provided in the footnotes.[53]

8. **Culpability:**

Section [3] of this Model Statute provides:

In determining culpability of a defendant in the first phase of the trial, it must be proven that the defendant acted towards the plaintiff with oppression, fraud, or malice. These terms, as used in this statute, are defined as follows:

(i) Malice means conduct which is specifically intended by defendant to cause tangible or intangible injury to the plaintiff, or an act that is carried out with a flagrant indifference to the rights of others and with a subjective awareness that such an act will result in human death or great bodily harm.
(ii) Oppression means a specific intent to subject a person to cruel and unjust hardship.
(iii) Fraud means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Malice:

Express malice under this statute must be proved by an intentional and deliberate act on behalf of the defendant, and directed at the victim who is ultimately harmed. It must be deliberate in the sense that the actor has weighed the benefits and costs of the particular course of action before deciding to carry out his evil deed. It must be intentional in the sense that he has undertaken the act solely of his own volition and with specific design to achieve a specific and tortious result. The analysis adopted brings the definition of express malice closer into line with the criminal law to assure that unjust punishment is not inflicted. For the same reasons, the drafters restate the law of implied malice (which has borrowed the punitive damages definition of malice to support homicide[54]) as applied to punitive damages liability. To impute malice, the defendant must be proven to have intentionally proceeded on a course of conduct, committing an act or acts which in all probability will cause or result in serious bodily injury or death, and that he thereafter proceeded with a flagrant indifference to the consequences. A flagrant indifference means that the defendant must be aware of a social duty not to engage in the conduct, and that he acted despite that awareness. The defendant must subjectively appreciate the risk of his act,[55] and, to this extent, the drafters refute **Taylor v. Superior Court**[56] and similar cases.[57] Malice may not be proved by any other test, method, or analysis. The drafters specifically direct that the term "probability" be used as opposed to "possibility." The latter term is a negligence concept not supported in the law of malice as applied to punitive damages.[58] Since the defendant must be subjectively aware of the risks of his act, the drafters also reject the use in its place of "knowing of substantial certainty."[59]

Oppression:

Under this statute, oppression must be actual, and, to this extent, contain an element of express malice. The end result need not be specifically intended. Rather, the defendant must act of his own volition, and with a specific intent to subject a person to cruel and unjust hardship by extreme departures from acceptable social norms as existed at the time of his act.[60] The extreme departure may also be proved by the commission of an act subjecting a person to cruel and unjust domination, cruel and unjust exercise of authority or power, or by cruel and unjust imposition of burdens.[61] Proving oppression by any other inquiry, such as the "conscious disregard of another's rights" analysis is expressly rejected.[62] To this end, the drafters also reject utilizing terms such as "vex" or "annoy" in jury instructions, as being too vague and misleading.

Fraud:

This provision on fraud is self-executing. It is to be interpreted according to its plain meaning and applied as previously enunciated by judicial construction.[63]

In defining culpability under this Model Statue, the general mind state now required under Section [3] is that the defendant intends to bring about a specific result from an act he directs at the plaintiff, ..iat he specifically intend to subject the plaintiff to cruel and unjust treatment, or that he act with a flagrant disregard for other's safety. The defendant must subjectively determine to do such an act or acts. It is not enough that he is merely the force that is responsible for the end result of this act. Punitive damages are not intended to punish those who had no subjective perception of the probability of harm to an unintentional victim. No purpose is served by punishing defendants where their act or end result is totally fortuitious. In such a situation, compensatory damages serve the purpose of both compensating the victim and providing an incentive to ameliorate the problem. Society does not demand punitive treatment for negligence. It is, rather, the evildoer that must be deterred. The purpose of defining the necessary mind states is to bring about certainty in the law of punitive damages. Former Justice Richardson, of the California Supreme Court, has noted this need. For example, in writing on contract obligations, the justice said that certainty in the law of punitive damages is needed to remove contract obligors grounded on the "Scylla of making immediate payments as to reasonably founded questions as to liability, or the Charybdis of suffering punitive damages for failure to make quick payment. . . ."[64]

9. **Good Faith:**

Section [4] of this Model Statute provides:

> In no case shall punitive damages be awarded for any harm where the defendant has acted in good faith, or on the advice of an attorney, or on the advice of any government official. No punitive damages shall be awarded where the defendant has relied upon a statute or judicial decision.

This section is first intended to clarify punitive damages instructions to the jury where a breach of the covenant of good faith and fair dealing is the basis of a punitive damages claim. Compensatory damages may be awarded for a breach of the implied covenant of good faith and fair dealing attendant every contract,[65] but this is not sufficient for punitive damages. Rather, "bad faith" must be proved before a defendant can be punished. Bad faith connotes the type of act and mind state required under Section [3] of this statute. The bad faith act must proximately cause the breach of the implied covenant. These concepts are often confused in punitive damages assessment. This statute, therefore, mandates proper utilization of the term "bad faith" as opposed to a simple "breach of the implied covenant of good faith and fair dealing" to establish punitive damages liability.[66]

Good faith is also a defense to a tort on which a punitive damage claim is premised when the defendant commits a wrongful act under a mistake of fact.[67] The mistake need only be reasonable, unless the defendant has acted with malice or oppression as defined under this statute. In such an instance, the defendant must also subjectively believe circumstances leading to the commission of the tort be other than actually existed at the time of the alleged wrong. Also, a party is not liable in punitive damages when acting in good faith on the advice of an attorney. This is intended to include reliance on independently contracted attorneys, as well as "in-house counsel," regardless of whether such "in-house counsel" is an officer of the corporation.[68] A defendant must disclose all facts to his attorney before he can be acting in good faith upon his attorney's advice.[69] Since under this statute "in-house counsel" may be relied upon to the same extent as outside attorneys, those cases holding contra are disapproved.[70] Disciplinary proceedings or individual lawsuits are the proper procedures where corporate counsel have engaged in unethical conduct in advisement or management of their companies.[71]

Reliance on a government official is justified whenever the official has the authority to give advice and is acting in his official capacity, or the defendant has no cause to believe a person so acting is not empowered to so act, or to so act in an official capacity. The defendant must have made known to the official, or one whom he believes to be an official, all those facts that a reasonable person would disclose in seeking advice. The defendant must also subjectively believe he is relying on a government official.

Justifiable reliance on a statute or judicial decision exists whenever "two legal minds familiar with the subject can differ over its meaning" and the defendant so believes the law could be decided in his favor.

10. **Recovery of Punitive Damages:**

Section [5] of this Model Statute provides:

> All punitive damages recovered shall be paid into the state general revenue fund, except for 5% of such recovery, which shall be awarded to the plaintiff. This established distribution scheme shall not be introduced as evidence and shall not be a proper subject matter on voir dire. The provisions of this act shall not be construed to grant the state or any political subdivision thereof the right to recover punitive damages, nor may the state or any political subdivision thereof be a party to any action in which punitive damages are sought; except, however, the state shall have a right to an action to collect such damages after they are determined payable by the judgment of a court of record. The state may seek punitive damages in its own right where authorized by statute.

Courts are nearly unanimous in asserting that claims for punitive damages are not favored in the law.[72] Punitive damages do not constitute a cause of action [73] and can be awarded only at the sole discretion of the trier of fact[74]. It is universally declared that punitive damages are nothing more than a "windfall" to the lucky plaintiff[75] since they have no remedial purpose.[76]

Since punitive damages serve governmental interests of punishment, this Statute allocates all but 5% of such awards to the General State Fund. The 5% represents an award only to further the goal of private litigation where justified. The purpose is to encourage private citizens to pursue meritorious suits that are in society's interest,[77] without spawning new classes of "eager victims."

There is some argument, however, that punitive damages are an indirect award of attorneys' fees[78] and thus the plaintiff's percentage of the judgment should be larger. Such reasoning directly contradicts the long upheld American Rule.[79] More importantly, the Supreme Court has held that attorneys' fees and costs are not to be considered a function of punitive damages since the defendant would be denied the benefit of an equal rule where he prevails on his defense.[80] Finally, the argument of alternative purpose is unconvincing since punitive damages have traditionally been awarded on the jury's discretion[81] with utilization of "ratio rules,"[82] evidence of the defendants wealth,[83] or both,[84] neither of which has ever been even remotely connected with a function of litigation cost.

Under the current trend in punitive damages, the plaintiff has no incentive to take precautions to avoid harm, and indeed, it is desirable to subject oneself to abuse.[85] The 5% rule is thus designed to reflect basic economic principles which scholars now recognize and encourage in legal reasoning.[86] Since the limited punitive reward for suffering under this statute has a large diminishing return for the amount of harm that a plaintiff will want to expose himself to, the plaintiff will have an incentive to maximize his opportunities and resources to take initial measures to prevent harm.[87] This section stops the "eager victim",[88] while still providing an incentive to litigate cases that are in society's interest.

Another purpose of this section is to create an additional balancing factor. It is a general proposition that a person may not insure himself against punitive damages since this supposedly gives him a license to engage in misconduct.[89] The drafters refute this view in the law as preposterous, since the same argument

can be made that insurance gives one the freedom to engage in negligent conduct. The 5% rule, then, will encourage counsel to more carefully scrutinize cases in making sure the complaints are not born of the "deep pocket" syndrome. This provision will, in addition, give plaintiff's attorneys the incentive to quickly seek and accept in good faith reasonable settlements when punitive damages are at issue.

11. **Defense Motion:**

Section [6] of this Model Statute provides:

> Upon motion of the defendant and after a hearing, should the court (1) determine that a claim for punitive damages was brought without knowledge of sufficient facts and evidence to reasonably entitle the plaintiff to a judgment for such damages, or (2) if a claim for punitive damages is maintained after it is reasonably evident that there are insufficient facts and evidence to reasonably entitle the plaintiff to such damages; the court may award to the defendant such costs, expenses, and reasonable attorneys' fees as the court deems fair and equitable and may grant judgment therefore against either the plaintiff or the plaintiff's attorney, or both.

Since the plaintiff is rewarded for a successful punitive damages claim, the defendant, in all fairness, should at least be protected by a corresponding rule where he is required to defend a meritless claim. Since plaintiff's award of punitive damages is limited to 5% of the judgment, this section limits the defendant's recovery to those situations of bad faith litigation by the plaintiff. This provision is not novel, and merely follows the federal exception to the "American Rule" which allows costs "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ."[90] This provision also reflects a trend in state statutes.[91] The provision is to be vigorously applied by the courts.

12. **Vicarious Liability:**

Section [7] of this Model Statute provides:

> In no case shall punitive damages be assessed against a principal or employer for the acts of an agent or employee, unless such principal or employer authorized or ratified the questioned conduct. The ratification or authorization must have been made by a person expressly empowered to do so.

While an employer or principal may be held liable for an employee's or agent's torts under the doctrine of respondent superior,[92] there is no punitive damages liability where he neither directs nor ratifies the act. This statement of the law is well settled.[93] Under this Statute, however, the use of "managerial employee" to determine who may ratify or authorize tortious conduct, or who may act on behalf of a corporation is rejected[94] as an illusive and unworkable concept. Illustration No. 1 to Section 908 of the Restatement of Torts (Second) is an example of vicarious liability that is not supported under this Statue.[95] Instead, under this Model Punitive Damages Statute, vicarious liability can only be imputed to a principal or employer if he is expressly empowered to directly authorize or ratify the act or acts alleged to be tortious. The drafters thus reject any inconsistent case law.[96] Also rejected is that part of comment b to §909 of the Restatement (Second) of Torts declaring that the policy of the law is "to make liable an employer who has recklessly employed or retained a servant or employee who was known to be vicious, if the harm resulted from that characteristic."[97] Since the particular act must be authorized or ratified, mere commission of a tortious act during the course of an agent's or employee's duties is insufficient to establish vicarious liability where the tort is incidental to, and not included in the authorized act. To this end, the drafters reject illustration No. 3 to §909 of the Restatement of Torts (Second)[98] as a correct interpretation of vicarious liability under this statute. Illustration 2 of the Restatement (Second) of Torts §909 is ratified.[99]

13. **Public Policy:**

Section [8] of this Model Statute provides:

> No punitive damages shall be awarded for a tortious breach of contract unless the contract directly involves a subject matter of great public interest.

The drafters recognize the implied covenant of good faith and fair dealing in every contract.[100] But, punitive damages may be awarded only when a tortious breach of the covenant occurs and the contract involves a vital public service that may be labeled quasi public in nature.[101] Mere lack of balance in the contractual relationship is not enough to establish a contract that has a quasi public interest. There must be an adhesive nature to the bargain, and the contractual relationship must involve great disparity in bargaining power that existed both at the time of contracting and at the time of the breach. Again, however, the contract must reflect an underlying public interest in the subject matter, regardless of the bargaining positions of the parties. To this extent, the drafters disapprove expansion of the tort of tortious breach of contract as reflected in **Photovest Corporation v. Fotomat Corporation.**[102] The court is to use great scrutiny in finding liability for any claim alleging tortious breach of contract affected with a public interest under this Statute.

14. **Severability:**

Section [11] of this Model Statute provides:

> The invalidation of any part of this statute shall not affect the validity of the remaining provisions.

This provision is provides for the contingency of partial invalidation of this statute by the courts. This statute has been specifically drafted so that invalidation of any section will not void or vitiate the remaining provisions. Where possible no single section of the Model Punitive Damages statute should be construed as dependent on any other section.

1. **Rosener v. Sears, Roebuck & Co.,** 110 Cal. App. 3d 740, 759, 168 Cal. Rptr. 237 (1980) (Elkington, J., concurring) (punitive damages are a punishment for evil intent); Restatement (Second) of Torts § 908, comment (a) (1979).
2. Mallor & Roberts, **Punitive Damages: Toward a Principled Approach,** 31 Hastings L.J. 639 (1980).
3. **Rosener v. Sears, Roebuck & Co.,** 110 Cal. App. 3d 740, 758, 168 Cal. Rptr. 237 (1980) (Elkington, J., concurring).
4. Hiltzik, **Punitive Claims Challenge Limits of Law,** Los Angeles Times, Feb. 17, 1984, § 1, at 1, col. 4; **Rosener v. Sears, Roebuck & Co.,** 110 Cal. App. 3d 740, 762, 168 Cal. Rptr. 237 (1980) (Elkington J., concurring).
5. Hiltzik, **Punitive Claims Challenge Limits of Law,** Los Angeles Times, Feb. 17, 1984, § 1 at 1, col. 4.
6. **Rosener v. Sears, Roebuck & Co.,** 110 Cal. App. 3d 740, 762, 168 Cal. Rptr. 237 (1980) (Elkington J., concurring).
7. **Id.**
8. Punitive damages may be awarded for a nonintentional tort when it can be said that the wrong is of a "shocking nature". **Nolin v. National Convenience Stores,** 95 Cal. App. 3d 279, 286, 157 Cal. Rptr. 32 (1979).
9. **Egan v. Mutual of Omaha Insurance Co.,** 24 Cal. 3d 809, 820, 598 P.2d 452, 157 Cal. Rptr. 482 (1979); **In re Paris Air Crash,** 622 F.2d 1315, 1322 (9th Cir. 1980)
10. Friendly, **Criminal Safeguards and the Punitive Damages Defendant,** 34 U. Chi. L. Rev. 408, 410 (1967).
11. **See Rupert v. Sellers,** 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975).
12. The common justification for disallowing higher degrees of safeguards is that punitive damages are awarded in "purely" civil proceedings. **See Toole v. Richardson-Merrell, Inc.,** 251 Cal. App. 2d 689, 716-717, 60 Cal. Rptr. 398 (1967).
13. For example, Cal. Penal Code §672 (West Supp. 1984) provides that a penal fine may not exceed $10,000 when no other punishment is prescribed. Yet, in punitive damages actions where no fine is predetermined by statute, the million dollar award is becoming increasingly frequent. Owen, **Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,** 5 J. Prod. Liab. 341, 352 n.59 (1982).
14. **Campus Sweater & Sportswear v. M.B. Kahn Construction,** 515 F. Supp. 64, 108 n.129 (C.D. N.C. 1979). **But See Wagen v. Ford Motor Co.,** 97 Wis. 2d 260, 294 N.W. 2d 437 (1980) (criminal type stigma attaches to a finding of conduct justifying punitive damages) and Wheeler, **The Constitutional Case For Reforming Punitive Damages Procedures,** 69 Va. L. Rev. 269, 282 (1983) (punitive damages equal a "badge of disgrace").
15. If the evidence supports a finding of punitive damages liability, an appellate court will not distrub the penalty assessed unless the circumstances raise a presumption that the award was the result of passion and prejudice. **Cunningham v. Simpson,** 1 Cal. 3d 301, 308, 461 P.2d 39, 81 Cal. Rptr. 855 (1969).
16. Ellis, Jr., **Fairness and Efficiency in the Law of Punitive Damages,** 56 S. Cal. L. Rev. 1, 42 (1982).
17. Owen, **supra** note 13, at 352.
18. Ellis, Jr., **supra** note 16, at 42-43.
19. Owen, **supra** note 13, at 351 and n.56.
20. **Gertz v. Welch, Inc.,** 418 U.S. 323, 350 (1974). A perfect example of the runaway jury is the recent case **Parnell v. Continental Casualty Insurance Co.,** 146 Cal. App. 3d 483, 194 Cal. Rptr. 275 (1983). The court considered there a jury verdict that awarded $900,000 punitive damages, but no compensatories. The plaintiff, previously acquitted of the murder of her husband, sought to collect on her husband's life insurance policies which named her the beneficiary, even though she admitted she had forged his signature. Other than her testimony, there was no evidence indicating the deceased had been aware that the policies were in existence. Interestingly, the aggregate policy premiums were $600 a month, although her husband's income had totaled only $400 to $500 monthly. A plethora of evidence suggested she murdered her husband. Yet, the jury awarded $900,000 in punitive damages though no actual damage was found. The trial judge ordered a new trial, and the court of appeals affirmed.

21. **...ertz v. Welch, Inc.,** 418 U.S. 323, 350 (1974).

22. Ellis, Jr., **supra** note 16, at 7.

23. See: S. 44, 98th Cong., 1st Sess., (1983); S. 1513, 1984 Sess., (1984 Calif.); S. 17, 1984 Sess., (1984 Ind.); H. 1204, 1984 Sess., (1984 Ind.); H. 440, 1984 Sess., (1984 Md.); S. 44, 1984 Sess., (1984 Wis.). For a collection of those jurisdictions already instituting criminal procedural type protections in punitive damages proceedings, **see infra** notes 25, 41, and 52.

24. Owen, **supra** note 13, at 391; Mallor & Roberts, **supra** note 2, at 663-666 (listing a collection of commentors in accord at note 153).

25. Conn. Gen. Stat. Ann. §52-240b (West Supp. 1984) (if the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded the plaintiff).

26. Uniform Product Liability Act § 12 (C)(S. 44, 98th Cong., 1st Sess., (1983)).

27. **Rosenbloom v. Metromedia,** 403 U.S. 28, 84 (1971) (Marshall, J., dissenting).

28. The "ratio" rule requires a proportioning of the award to actual damages. D. Dobbs, **Principles of Punitive Damages** 210-211 (1973).

29. Many jurisdictions allow evidence of the defendant's wealth for purposes of mitigation or enhancement of punitive damages. D. Dobbs, **supra** note 28, at 210.

30. **Rosenbloom v. Metromedia,** 403 U.S. 29, 84 (1971) (Marshall, J., dissenting).

31. D. Dobbs, **supra** note 28, at 211.

32. **Id.**

33. Mallor & Robert, **supra** note 2, at 663-666.

34. The purpose was noted by commentators over 50 years ago. **See** Morris, 44 Harv. L. Rev. 1172 (1931). **See also Huff v. White,** No. 78-2540 and 78-2541, slip. op. (7th Cir. Oct. 9, 1979) (punitive damages are not compensation, they are instead private fines intended to punish). However, some states utilize punitive damages not to punish, but to compensate for certain types of injury [K. Redden, **Punitive Damages** 604 (1980)] and thus to that extent are not punitive at all.

35. On the other hand, "[t]he Supreme Court has never determined whether or not the procedures used in punitive damages actions satisfy due process." Wheeler, **supra** note 14, at 273 - 276.

36. **Rupert v. Sellers,** 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975).

37. **See** Note, **Pretrial Discovery of Net Worth in Punitive Damages Cases,** 54 S. Cal. L. Rev. 1141, 1144 - 1145 (1981) (the reason evidence of wealth is admissible in punitive damages proceedings is that in order to deter the defendant and others similarly situated the penalty must inflict a pocket book punishment).

38. For a listing of the jurisdictions and cases so holding, see Note, **supra** note 37, at 1145 n.32.

39. "Defendant's wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty of malice . . . ." **Rupert v. Sellers,** 48 A.D.2d 265, 272, 368 N.Y.S.2d 904 (1975).

40. The defendant's wealth is a function only of deterrence, **not** culpability. **See generally Rupert v. Sellers,** 48 A.D.2d 265, 272, 368 N.Y.S.2d 904 (1975).

41. **Rupert v. Sellers,** 48 A.D.2d 265, 272, 368 N.Y.S.2d 904 (1975) (bifurcated trial on the issue of liability and damages assessment disallowing evidence of wealth until liability is determined). A number of states require at least a prima facie showing of liability before plaintiff may seek to discover information about the defendant's financial situation. For a listing of jurisdictions and cases in accord, see Note, **supra** note 37, at 1149 n. 61, n.62. **See also** Cal. Civ. Code §3295 (West Supp. 1984) (protective order requiring prima facie evidence of punitive damages liability before discovery is allowed into the defendant's financial condition).

42. **Doak v. Superior Court,** 257 Cal. App. 2d 825, 832, 65 Cal. Rptr. 193 (1968). **See also** Note, **supra** note 37, at 1151 - 1153 (on the effect of pretrial discovery of defendant's wealth on coercive settlements).

43. **Id.**

44. ...allor & Roberts, **supra** note 2, at 642-643.

45. For a collection of those jurisdictions requiring actual damages as a predicate for awarding punitive damages, **see** Annot., 17 A.L.R.2d 527, 527 - 539 (1951).

46. Friendly, **supra** note 10, at 413-414.

47. Friendly, **supra** note 10, at 414 (citing **Louisville, N.A. & C. Ry. v. Wolfe,** 128 Ind. 347, 27 N.E. 606 (1891) and **Fay v. Parker,** 53 N.H. 342 (1873)). **But see** Annot., 98 A.L.R.3d 870-885 (1980) (criminal punishment not a bar to punitive damages).

48. A plaintiff is **never** entitled to punitive damages. **Brewer v. Second Baptist Church,** 32 Cal. 2d 791, 801, 197 P.2d 713 (1948).

49. **See e.g., State ex rel Young v. Crookham,** 290 Or. 61, 618 P.2d 1268, 1273 (1980); **Neal v. Carey Canadian Mines, LTD.,** 548 F. Supp. 357, 376-377 (E.D. Pa, 1982).

50. **See supra** note 9.

51. **See e.g., United States v. Fatico,** 458 F. Supp. 388, 403 (E.D. N.Y. 1978); **City of Ukiah v. Fones,** 64 Cal. 2d 104, 108, 410 P.2d 369, 48 Cal. Rptr. 865 (1966).

52. **Wangen v. Ford Motor Co.,** 97 Wis. 2d 260, 294 N.W. 2d 437 (1980); Minn. Rev. Stat. Ann. §52-49.20 (West Supp. 1983); Or. Rev. Stat. §30.925 (1981); **Travelers Indemnity Co. v. Armstrong,** 442 N.E. 2d 349 (Ind. 1982); Colo. Rev. Stat. §13 - 25 - 127(2) (1973) (Colorado requires proof beyond a reasonable doubt).

53. The drafters suggest a jury instruction on reasonable doubt similar to that found in **California Jury Instructions:** Criminal § 2.90 (West 1979). The instruction should provide as follows:

> A defendant in an action for punitive damages is presumed not to be liable until the contrary is proved. In a case of reasonable doubt about liability, the defendant shall be found not liable. This presumption places upon the plaintiff the burden of proving the defendant liable in punitive damages beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainity, of the truth of the plaintiff's allegations.

For a collection of those states requiring higher standards of proof, see **supra** note 52.

54. **See People v. Watson,** 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981) (employing verbatim a definition of "conscious disregard for human life" taken from a malice definition enunciated in **Taylor v. Superior Court,** 24 Cal. 3d 890, 589 P.2d 854, 157 Cal. Rptr. 693 (1979). **See also** Grass, **Drunk-Driving Murder and People v. Watson: Can Malice be Implied?,** 14 SW. L. Rev. 401, 434 (1984)(analysis of the civil crossover of malice into criminal law).

55. Subjective awareness means that the actor knows that the **probable** results of his activity is death or great bodily harm.

56. **Taylor v. Superior Court,** 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (punitive damages for injury resulting from driving while intoxicated).

57. See Annot., 65 A.L.R.3d 661-664 (1975 & Supp. 1983). **See** Grass, **supra** note 54, at 434 (examination of the adaption and expansion of civil punitive damages malice into the criminal law.)

58. **Taylor v. Superior Court,** 24 Cal. 3d 890, 908, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (Clark, J., dissenting).

59. **Rosener v. Sears, Roebuck & Co.,** 110 Cal. App. 3d 740, 748, 168 Cal. Rptr. 237 (1980) and those cases similarly holding are rejected to the extent that a defendant was liable in punitive damages for conduct that the defendant knew was "substantially certain to injure plaintiffs." Actual appreciation of the risk must be entertained under this Statute.

60. This definition is essentially the one Professor Owen uses to describe "flagrant" as a more workable te ı for defining intentional misconduct. The definition is transplanted from his products liability analysis into this statute to supplement the delineation of oppression. See Owen, **supra** note 13, at 364.

61. **...th v. Shell Oil Co.,** 185 Cal. App. 2d 676, 682, 8 Cal. Rptr. 514 (1960).

62. See the old definition in Cal. Civ. Code §3294 (c)(3) (West Supp. 1974).

63. This statute adopts the basic approach to punitive damages based on fraudulent conduct as enunciated by the California courts. Basically, the fraud must be accompanied by malicious conduct under this statute. The defendant must intend to harm the plaintiff by committing a fraud against him, and thereafter carry out the fraud. The requirement of malice in fraud is recognized in **Ebaugh v. Rabkin,** 22 Cal. App. 3d 891, 894, 99 Cal. Rptr. 706 (1972) and **Rosener v. Sears, Roebuck & Co.,** 110 Cal. App. 3d 740, 748, 168 Cal. Rptr. 237 (1980).

64. **Neal v. Farmers Insurance Exchange,** 21 Cal. 3d 910, 941, 582 P.2d 980, 148 Cal. Rptr. 389 (1978) (Richardson, J., dissenting).

65. **Comunale v. Traders & General Insurance Co.,** 50 Cal. 2d 654, 658 - 660, 328 P.2d 198, 68 A.L.R.2d 883 (1958).

66. A breach of the covenant of good faith and fair dealing implied in every contract is not sufficient in and of itself to establish liability for punitive damages. Malice or oppression must be independently established. **Silberg v. California Life Insurance Co.,** 11 Cal. 3d 452, 462, 463, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

67. **See Ebaugh v. Rabkin,** 22 Cal. App. 2d. 891, 896, 99 Cal. Rptr. 706 (1972).

68. The drafters adopt the view on reliance from the opinion **Beck v. State Farm Mutual Automobile Insurance Co.,** 54 Cal. App. 3d 347, 353 and 356, 126 Cal. Rptr. 602 (1976).

69. **See Templeton Grain Feed and Grain v. Ralston Purina Co.,** 69 Cal. 2d 461, 472 n.7, 446 P.2d 152, 72 Cal. Rptr. 344 (1968).

70. Thus opinions to the contrary are disaffirmed. **See e.g., Krusi v. Bear Stearns & Co.,** 144 Cal. App. 3d 644, 192 Cal. Rptr. 793 (1983) (holding defendant liable in punitive damages despite reliance on in-house legal representation). From the same case the drafters ratify the view of Elkington, acting P.J., (concurring and dissenting) stating that where a defendant reasonably relies on such advice, malice cannot be shown. (**Id.** at 682). Also disapproved is **Rosener v. Sears, Roebuck & Co.,** 110 Cal. App. 3d 740, 754, 168 Cal. Rptr. 237 (1980) (stating that good faith is only one factor in assessing defendant's conduct. **Id.**). Good faith under this statute is a complete defense. **See also supra** note 67 and accompanying text.

71. **See Id.**

72. **Beck v. State Farm Mutual Auto. Insurance Co.,** 54 Cal. App. 3d 347, 355, 126 Cal. Rptr. 602 (1976).

73. Punitive damages are sums awarded in addition to, and apart from, actual damages. See D. Dobbs, **supra** note 28, at 204. **See also** Annot., 22 Am. Jur. 2d **Damages** §241 (1965 & Supp. 1983).

74. **Brewer v. Second Baptist Church,** 32 Cal. 2d 791, 801, 197 P.2d 713 (1948) (**But see** Conn. Gen. Stat. Ann. §52-240(b) (West Supp. 1984) (giving the judge the duty to assess the amount of punishment **after** the jury finds liability).

75. **Ferraro v. Pacific Finance Corp.,** 8 Cal. App. 3d 339, 355, 87 Cal. Rptr. 226 (1970); **Rosenbloom v. Metromedia,** 403 U.S. 29, 84 (1971) (Marshall, J., dissenting).

76. Instead of any remedial effect, punitive damages serve "the same function as criminal penalties." **Rosenbloom v. Metromedia,** 403 U.S. 29, 82 (1971) (Marshall, J., dissenting).

77. **See** Owen, **Punitive Damages in Products Liability Litigation,** 74 Mich. L. Rev. 1257, 1258-1299 (1976).

78. **Id.** at 1297.

79. The "American Rule" requires each litigating party to bear their own costs and attorney fees. **Alyeska Pipeline Services v. Wilderness Society,** 421 U.S. 240, 247 (1979).

80. **Day v. Woodward,** 54 U.S. (13 How.) 363, 373 (1851).

81. **Gertz v. Welch, Inc.,** 418 U.S. 323, 350 (1974).

82. **See supra** note 28.

83. **See supra** note 29.

84. Applying both rules together, however, is inconsistent since they operate on functions that cannot be logically interrelated. **See** D. Dobbs, **supra** note 28, at 210-211.

85. In analogy, Posner notes that where the victim can avoid the tort at less cost than any effort by the tort-feasor, there is no need to "adopt a rule of liability that places the burden of accident prevention on the injurer." Posner, **A Theory of Negligence,** 1 Journal of Legal Studies 33 (1972). Also **see generally** Ellis, Jr., **Fairness and Efficiency in the Law of Punitive Damages,** 56 S. Cal. L. Rev. 1 (1982); Comment, **Economic Analysis of Punitive Damages,** 56 S. Cal. L. Rev. 79 (1982).

86. **Id.**

87. **Id.**

88. **See generally Id.**

89. The logic is rejected by the commentators. **See** Priest, **Punitive Damages and Enterprise Liability**, 56 S. Cal. L. Rev. 123, 136-137 (1982). The American jurisdictions are divided on the issue of insurability against punitive damages. **See** the review of cases in **Harrell v. Traders Indemnity Co.,** 279 Or. 199, 567 P.2d 1013, 1026-1027 (1977) (Holman, J., dissenting).

90. **Alyeska Pipeline Services v. Wilderness Society,** 421 U.S. 240, 258-259 (1979).

91. **See e.g.,** Cal. Civ. Proc. Code §§ 128.5 (West 1982) and 1030 (West Supp. 1984).

92. See the collection of authorities in **Ebaugh v. Rabkin,** 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706 (1972).

93. **Id.** The drafters refute those trends in the law extending employer liability in punitive damages for employee acts that were neither ratified nor directed by the employer. **See e.g.** Cal. Civ. Code §3294(b) (West Supp. 1984) (allowing an employer to be held liable in punitive damages for employee torts on a standard less than actual knowledge of the employees unfitness at the time of employment — a standard the drafters reject).

94. As an example of the legal trend rejected, **see e.g., Egan v. Mutual of Omaha Insurance Co.,** 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979) (use of managerial capacity to define limits of liability). Thus, Section (c) of The Restatement (Second) of Torts §909 (1979) is disaffirmed to the extent "managerial capacity" is utilized to establish punitive damage liability for any party.

95. Restatement (Second) of Torts §909, Illustration 1 (1979).

96. See **supra** note 94.

97. Restatement (Second) of Torts §909, comment (b) (1979).

98. Restatement (Second) of Torts §909, Illustration 3 (1979).

99. Restatement (Second) of Torts §909, Illustration 2 (1979).

100. **See Comunale v. Traders & General Insurance Co.,** 50 Cal. 2d 654, 658, 328 P.2d 198 (1958).

101. To this extent, the reasoning vacated in the opinion of **Seaman's Direct Buying Service, Inc. v. Standard Oil Co.,** 708 Cal. Rptr. 399 (1982) (vacated 129 Cal. App. 3d 436) is nevertheless approved by the drafters. The extent of liability for breach of the convenant of good faith and fair dealing under this statute is correctly adduced in **Consol. Data Term. v. Applied Digital Data Systems,** 708 F.2d 385, 399 - 400 (9th Cir. 1983). While the case inteprets only California law, it may be read as the correct interpretation of the limited scope of liability under the Model Punitive Damages Statute in relation to tortious breach of contract actions, with the exception that the tort may not be further expanded by the courts.

102. 606 F.2d 704, 729 - 730 (7th Cir. 1979).

FINAL REPORT
and
MINUTES
of the
KBA LITIGATION SECTION SUBCOMMITTEE
on
PUNITIVE DAMAGES
December 29, 1984

Members present:

Gerald L. Rushfelt, Chairman
Arthur C. Hodgson
Jerry R. Palmer
Robert C. Martindell
Steve Hornbaker

Other Members unable to attend the December 29, 1984 meeting were Tom Murray and Ron Williams. KBA Staff present: Ron Smith. The previous minutes of November 26, 1984 were approved as submitted.

Committee Charge:

Because of considerable interest by members of the Kansas Bar Association in the subject, and that several interest groups were indicating a desire to introduce legislation into the 1985 Kansas Legislature to substantially alter the procedure by which punitive damages could be pled, proven and awarded, KBA President Darrell Kellogg requested the KBA Litigation Section undertake a study of the subject and make recommendations back to the KBA Legislation Committee and Executive Council for a recommended KBA position on the subject.

The result was the formation and charge to this subcommittee by Litigation Section President Clarence L. King. The makeup of the committee was intended to be as balanced as possible between lawyers who generally represented civil plaintiffs and defendants in personal injury actions.

Scope of Discussions.

Several meetings of the Subcommittee were held at the KBA office in Topeka. General discussion on the subject of punitive damages, their historical context and development, and the public's perception of punitive awards. Previous legislation on the subject and current statutes, such as Chapter 160 of the 1984 Session Laws of Kansas concerning insurance for vicarious punitive liability and the Kansas Code of Civil Procedure, were

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House Judiciary
2-26-86

also discussed. In addition, numerous prospective laws and court decisions concerning punitive damages were also considered and discussed. The unofficial report of the American Bar Association's Special Committee on the Tort Liability System was also part of the Subcommittee's deliberations.

Subcommittee members indicated during deliberations that a group composed of members of the Kansas Medical Society has written letters to Kansas physicians indicating that in the wake of the recent award against Humana Hospital in Overland Park, punitive damages represented a considerable "threat" to physicians, that physicians were basically uninsured against such awards, and that such awards would "take everything you've got," and that such letters indicate the legislative atmosphere within which this subject will be considered in 1985.

Other Subcommittee members had contacted the American Bar Association's special committee on Punitive Damages, which is just underway in its own deliberations with a request for an outline as to which areas of the issue this ABA committee will address. The ABA committee's recommendation will not be ready for over a year, but the Rand Corporation has been hired to assist the ABA committee gather statistics for a meaningful analysis of Punitive Damages, their practice, and awards.

Several Kansas interest groups are interested in punitive damage "reform" legislation. The Subcommittee has adopted no formal position as to any general proposition that reform either is or is not needed in Kansas.

Generally, the Subcommittee reached unanimous consensus that punitive damage awards represent a viable concept in the law, and that the award of punitive damages does have social value in appropriate situations. Because specific legislation was being considered by other interest groups, the Subcommittee felt it should confine any comments or recommendations on whether the award of civil punitive damages should be the subject of "reform" legislation to the actual provisions of proposed legislation. By the December, 1984, Subcommittee meeting, the Kansas Association of Defense Counsel had announced its intent to introduce a "Model Punitive Damages Act," patterned after proposed legislation promulgated by Jeffrey W. Grass, Administrative Counsel for the Farmers Insurance Group. Recommendations in this Report, therefore, are limited to the provisions in the draft KADC bill, to which the Subcommittee had access. While the Subcommittee is aware that the Kansas Medical Society may introduce a bill that eliminates the ability to award punitive damages altogether, in keeping with the policy in this paragraph, the Subcommittee makes no comment on such legislation at this time.

Caveat

While this Subcommittee Report represents the input, discussion, conclusions, and recommendations of its members concerning the proposed KADC Punitive Damages bill and its provisions, it should be noted from the

outset that several members of the Subcommittee are philosophically opposed to any changes in the current law for determining and awarding punitive damages in this state.

Subcommittee Discussion and Recommendations Regarding the KADC Proposed Bill.

The proposed KADC bill is attached to this Subcommittee Report. Enumeration of sections and subsections underlined below refer to the proposed bill, and the reader is directed to the proposed bill for specifics of each section discussed. Subcommittee recommendations are the indented paragraphs.

Sections 1(a) and 1(b) of the KADC Punitive Damages Act creates a bifurcated trial and require unanimous verdicts with regard to the award of punitive damages by the trier of fact. The consensus of the Subcommittee was against the concept of mandated bifurcation. The reasons given were jury confusion, impracticality, increase in the court's workloads and clogging of the docket system, and possible constitutional problems with requiring a unanimous verdict on punitive damages when underlying liability claims need only be proven by 10-2 verdicts.

> Current law allows any party to request a bifurcated trial as to damages, and the Subcommittee does not recommend support for legislation to mandate such bifurcation. [Vote on this Recommendation: 5-0]

Section 1(c) requires the Court to assess the amount of punitive damages and that the court may consider evidence "outside the record" and that only the defendant could introduce post-jury-trial evidence which attempts to mitigate the award. The Subcommittee's consensus was that constitutional problems could exist with such provisions. Notably, the final sentence might be perceived as improper in the event the plaintiff was not entitled to present evidence, too. The Subcommittee believes both parties should have a right to present evidence in a post-trial hearing..

> The Subcommittee recommends that juries should retain the authority to assess punitive damages, and points out that district courts have the power to control the ultimate award of compensatory and punitive damages through current post-trial procedures. [Vote: 5-0]

Section 1(d) limits the situations under which discovery of evidence of the defendant's "wealth or financial condition" becomes admissible at trial. There was clear consensus among the Subcommittee members that some modification of the circumstances under which such evidence can be dis-

covered and introduced should be implemented because procedure in different courts on when and how such evidence is admissible is not uniform and such non-uniformity is inappropriate. If a punitive damage count survives pretrial objections and goes to trial, plaintiffs need a procedural system which assures such evidence is available at the appropriate moment at trial. Several methods regulating discovery are available, including protective orders and in camera inspections.

> The consensus of the committee was that a plaintiff has a need to know the defendant's wealth or financial condition, but that the defendant has the right to protect such information from disclosure prior to the establishment of a prima facie case of liability and damages at trial.
>
> The Subcommittee recommends no support for the concept that automatically prohibits evidence of wealth. The Subcommittee suggests the creation of a rule, preferably by the Kansas Supreme Court rather than the legislature, which would insure that the procedure used to discover such evidence is fair to all parties, and also insures the availability of evidence if it is deemed admissible at trial. [Vote: 5-0.]

Section 1(e) would prohibit awards of punitive damages when compensatory, nominal, or actual damages are not awarded. The Subcommittee discussed the 1984 Kansas case where punitive damages were held to be proper where only equitable relief was awarded. The Subcommittee discussed the New Jersey Rule which allows punitive damages to be awarded in fraud cases without a showing of actual damages. The Subcommittee feels that current Kansas law, requiring some kind of actual damages or equitable relief be awarded as a prerequisite to an award of punitive damages was proper.

> The Subcommittee was satisfied with the current state of law in Kansas in this topic area, and believes that some "affirmative relief" is an appropriate prerequisite to punitive damage awards, such as compensatory, actual or equitable relief. [Vote: 5-0]

Section 1(f) regulates instances when multiple awards of punitive damages against a tortfeasor may be made when they eminate from a single wrong, or when the tortfeasor is subject to punishment under the criminal law. This section spawned considerable discussion with the Subcommittee. Evidence of previous awards or judgments of punitive damages for similar cases in other jurisdictions—or other Kansas cases—is irrelevant to jury considerations when awarding punitive damages.

The Subcommittee's consensus was that deterrence of tortious conduct is the main purpose of punitive damages. There was Subcommittee support for the general concept that Hyatt-like multiple lawsuits should have only one punitive damage award. This viewpoint was countered by situations that might develop where defendants facing multiple awards would have an incentive under this type of statute to plead to a misdemeanor or a small, single award of punitive damages, then engage in a continuing tort with impunity for further awards of punitive damages. The phrase in the last clause of the section prohibiting punitive awards if the defendant "is subject to potential criminal punishment or civil liability" would force civil plaintiffs to wait on the criminal statute of limitations before filing suit or amending pleadings to include a punitive count, with possible impact on the plaintiff's civil statute of limitations.

The Subcommittee recognizes that, no matter how desirable the procedure might be, Kansas district courts currently have no express authority to hear evidence of unrelated punitive damage judgments rendered in other jurisdictions as being relevant to the question of remittitur or additur in a pending case concerning a multiple punitive award arising from a single wrong.

> The Subcommittee recommends non-support for Section 1(f), but recognizes that a rule, preferably enacted by the Kansas Supreme Court, be considered to allow a post-trial hearing for modification of any punitive damage judgment, and that evidence of other punitive damage judgments against the same defendant be admissible in the post-trial hearing. All parties should be allowed to present evidence at such post-trial hearing. The Supreme Court could use its authority to make ex parte amendments of the Kansas Code of Civil Procedure, especially to K.S.A. 60-259(f) and/or 259(g) to allow this procedure. [Vote 4-1.]

Section 2 changes the burden of proof in actions for punitive damages to "beyond reasonable doubt" and each element of the burden must meet this test. Subcommittee feelings were mixed. Some felt that criminal burdens of proof should remain with the criminal law, and that the subsections were not well drafted. Subcommittee members believe the concepts in this section will come under constitutional attack in future court decisions in many jurisdictions where the argument will be that punitive damages are similar to a criminal fines and penalties and that constitutional requirements of criminal burdens of proof must be adopted before due process is guaranteed. Other Subcommittee members disagree, arguing a State can determine its own standards for the punitive damage burden of proof.

> No consensus was possible with the concepts in this section, but of the five committee parti-

cipants, the opinions on what burden of proof should remain as the burden of proof in punitive damage matters was:

Reasonable Doubt - 1
Clear & Convincing - 1
Preponderance of Evidence - 3

(It should be noted that, in addition to the above vote, one committee member who was unable to attend the second meeting was strongly in favor of a Clear and Convincing standard of proof at an earlier meeting.)

Section 3 speaks to the definitions of when a punitive damage defendant is culpable, and attempts to incorporate current Kansas law. It was pointed out that the KADC section attempts to delete the "wanton conduct" cause of action, which currently exists under Kansas law.

The Subcommittee consensus was that the current state of Kansas law is satisfactory and it therefore recommends no change. [Vote 5-0.]

Section 4 creates extensions of the "good faith" defense against punitive damage liability. Discussion was varied. A recent Iola Bank case saw the Kansas Supreme Court affirm a trial court's award of punitive damages against the bank even though its officers had relied on the advice of counsel in using a setoff procedure. Current law allows "good faith" as a defense, and several Subcommittee members felt this was enough. Examples were cited where the possibility of collusion exists where a corporation might claim it relied on "in house" counsel's advice to escape liability. Other members suggested the phrase "reasonably relies" on counsel be incorporated, but the Subcommittee was unable to reach consensus on amendments to the proposed section to make it better.

After considerable debate, the Subcommittee recommends non-support for the proposed provision, and feels that current law on these provisions is adequate. [Vote: 5-0.]

Section 5 proposes that plaintiffs be allowed to retain only 5% of a punitive damage award, and that the balance go to the state general fund. The section caused considerable debate.

The Subcommittee agreed that any established distribution scheme should not be the subject of voir dire, or part of any evidence produced at trial. They also agreed that 5% is too small as an adequate incentive to the plaintiff to prosecute the punitive damage claim as a "private attorneys general." Further, it was agreed that the parties in this type of allocation should have the ability to offer suggestions to the Court as to

disbursement options of any portion of a punitive damage award that does not go to or for the benefit of the plaintiff.

Members of the Subcommittee were concerned that splitting a punitive damage award creates ethical conflicts of interest for the plaintiff's counsel, in that it is the primary duty of a plaintiff's counsel to obtain as much money as possible for his client. There was concern that creation of this "fund" emasculates the bringing of punitive damage claims. The counter argument was that a plaintiff had no inherent right to punitive damages, since they are meant as "deterrence" against the defendant and that the plaintiff's actual damages fully compensate him.

Alternative concepts were discussed. The trial court could apportion punitive damages awarded to the plaintiff and/or plaintiff's counsel or to the appropriate fund, within the court's discretion. Or the court could insure from the punitive award that plaintiff is reimbursed attorneys fees and the costs of litigation, with the remainder going to the disbursement fund.

> The Subcommittee was divided on the issues in this section, but makes a recommendation to give limited support that a "substantial portion" of the punitive damage award be distributed to entities other than the plaintiff. [Vote: 3-2.]

Section 6 allows certain motions be made by the defendant regarding spurious claims for punitive damages. The discussion centered around K.S.A. 60-211, 60-2007 and Nelson v. Miller, 227 Kan. 271 (1980). Members indicated that Chapter 7 of the statutes, particularly 7-106, contains reference to holding attorneys liable for having improperly brought causes of actions, and the codification of the ethical rules of conduct in K.S.A. 7-125 prohibit such conduct. Nelson imposes a duty of "independent investigation" on Kansas attorneys filing suits.

> The Subcommittee consensus was a recommendation that the proposed subsection is unnecessary in light of current remedial statutes and caselaw. [Vote: 5-0.]

Section 7 allows immunity for vicarious liability of principals or employers for the tortious acts of agents or employees. Chapter 160 of the 1984 Kansas Session Laws, granting insurance coverage for punitive damages awarded in such situations, and the recent Kline case were discussed.

> The Subcommittee consensus was that the proposed subsection is unnecessary in light of the current state of the law in Kansas. [Vote: 5-0.]

Section 8 prohibits punitive damage awards for tortious breach of contract unless the contract involves matters of "great public interest." Current Kansas law requires proof of an independent tort before a plaintiff is entitled to punitive damages in breach of contract cases. While there was concern by some Subcommittee members that plaintiff lawyers attempt to inject punitive damages into every case possible, there was agreement that "great public interest" was ambiguous.

> The Subcommittee consensus was non-support of the provision because of the stated ambiguity. [Vote: 5-0.]

Sections 9, 11 and 12 were considered as legislative boilerplate, and the Subcommittee therefore has no comment. [Vote: 5-0]

Section 10 makes the statute applicable to any pending litigation. The Subcommittee disagrees with this section.

> The Subcommittee recommends that because substantive rights are involved that any changes of a statutory nature should have only prospective application. [Vote: 5-0.]

These constitute the recommendations of the KBA Special Litigation Subcommittee on Punitive Damages.

Respectfully Submitted,

Gerald Rushfelt, Chairman