# …and Justice for all

(A trial lawyer's ethical duties to his client, all victims and the civil justice system.)

## I.
## *Rules Governing Ethical Duties*

There are many sources of rules applicable to the ethical duties of attorneys. Some rules are binding and must be followed while others are general guidelines for attorney conduct. The following list briefly describes the sources of rules governing ethics.

1. **Model Rules of Professional Conduct** – Adopted by the House of Delegates of the American Bar Association in 1983.
2. **Kansas Rules of Professional Conduct** - Rules adopted by the Kansas Supreme Court which all attorneys in the state of Kansas must follow or face possible disciplinary action. These rules are based upon the Model Rules of Professional Conduct.
3. **Code of Professional Responsibility** [a/k/a/ **Canons of Professional Ethics**] - These were the original rules of ethics, which are not currently a basis for disciplinary action, but are a guide for attorney conduct.
4. **Ethical Considerations** – These considerations were adopted by the American Bar Association at the time the Model Rules of Professional Conduct was adopted. They are non-binding rules that give guidance for attorney conduct.

5. **Preamble and Comments Accompanying the Model Rules** - The Prefatory Rule to the Kansas Rules of Professional Conduct adopts in principle preamble and comments accompanying the model rules. The preamble and comments accompanying the model rules therefore gives additional guidance concerning attorney conduct.
6. **Common Law** – Before the formal adoption of any professional rules of professional conduct, the courts addressed such issue through case law.

"Sections 1-32 of the Canons of Professional Ethics were adopted by the American Bar Association August 27, 1908, and by the Kansas Bar Association on January 27, 1909. Supplemental sections 33-45 were adopted by the American Bar Association July 26, 1928 and in Kansas May 28, 1932." 135 Kan. p. iii (1932). Prior to the adoption of these Canons of Professional Ethics, attorneys were governed by a standard of ethics laid down in Kansas Supreme Court through case law. See *In re Learnard*, 121 Kan. 596, 249 P. 606, 607 (1926).

Today the ethical duties of attorneys are governed by the Kansas Rules of Professional Conduct, which were adopted by the Kansas Supreme Court on March 1, 1988. See Kansas Supreme Court Rule 226. These are the ethical rules by which every member of the bar of Kansas must abide. "Violation of such standards constitutes grounds for disciplinary action." See Rule 226: Prefatory Rule. Prior to the effective date of the Kansas Rules of Professional Conduct, the Code of Professional Responsibility, including Canons 1 through 9, provided the standard for the professional conduct of attorneys in Kansas. See Kansas Supreme Court Rule 225; superseded by Rule 226 effective March 1, 1988. The Canons of Professional Ethics were not included in the Kansas Rules of Professional Conduct, but they still offer guidance for the conduct of attorneys in Kansas. Canons 1 through 9 are reserved as general statements of required conduct. Our courts have recognized that the Kansas Rules of Professional Conduct a/k/a

The Canons of Professional Ethics still provide guidance as to required conduct. See *In re Estate of Koch*, 18 Kan.App.2d 188, 212, 849 P.2d 977, 993 (1993); wherein the Court stated:

> The Canons of Professional Responsibility numbered 1 through 9, adopted as part of Supreme Court Rule 225, continue as general statements of required professional conduct.

See also *Geisler by Geisler v. Wyeth Laboratories*, 716 F.Supp 520, 524 (D.Kan. 1989); wherein the Court stated:

> While the Kansas Rules of Professional Conduct supersede and supplement the Code of Professional Responsibility ("CPR"), Canons 1 through 9 of the CPR were preserved "as general statements of required professional conduct.

It is well established that the Canons of Ethics are still useful to state the general conduct required of attorneys even though they are not currently the required rules of conduct.

Ethical Considerations (EC) were adopted by the American Bar Association at the time of the adoption of the Model Rules of Professional Conduct. The terminology section of the Kansas Rules of Professional Conduct defines “Ethical Considerations” as “non-enforceable rules but they are statements of policy for the guidance of lawyers when deciding upon a course of action not controlled by law or Disciplinary Rules.” See Rule 226; Terminology.

## II.
## *A Lawyer Should Assist In Improving the Legal System*

> “Law is the business to which my life is devoted and I should show less than devotion if I did not do what was in me to improve it.”
>
> Oliver Wendell Holmes

Canon 8 very simply reads: "**a lawyer should assist in improving the legal system**." To most this would be a "no brainer," but all to often we get caught up in all the other issue of our practice and forget the basics of why we are here. Canon 8 provides a "general statement of required professional conduct" for every attorney in the state of Kansas: we should all work to ***improve the legal system***. It goes without saying that the duty to improve our system includes a more fundamental duty to protect the legal system from attack that would damage the system. Canon 1 states: "A Lawyer Should Assist In Maintaining the Integrity and Competence of the Legal Profession." A cursory reading of Canons 1 and 8 makes it clear that we have a duty ***to maintain and improve the integrity of our legal system***. As trial lawyers we have chosen to represent the injured, the defenseless and the oppressed. Our choice carries with it additional duties. Not only do we owe our clients the duties every lawyer owes to every client, we have the heightened duty to protect the rights of our clients. In fact, all lawyers licensed to practice in this state have been provided a certificate that recognizes such a duty. The certificate provided to each Kansas attorney, signed by all the Kansas Supreme Court Justices, specifically provides that we "will neither delay nor deny the rights of any person through malice, for lucre, or from any unworthy desire." [*Lucre* is defined as, "a gain in money or goods; profit; usually in an ill sense, or with the sense of something base or unworthy." Black's Law Dictionary 1098 (4th ed. 1968); Cf. *"Loogie"* defined as "a phlegm wad" The Online Slang Dictionary, http://www.ocf.berkeley.edu/~wrader/slang/l.html]. Although the certificate to practice law in Kansas does not create an affirmative duty to protect the rights of the injured, the defenseless or the oppressed, it does recognize our special duty toward "the rights of any person." In Missouri the certificate to practice law

states: “I will practice law to the best of my knowledge and ability and with consideration for the defenseless and oppressed.”

The Preamble recognizes the duty of lawyers to help citizens who are impoverished. Kansas Rule of Professional Conduct Rule 6.1 encourages pro bono public service. The comment to Rule 6.1 explains “the ABA House of Delegates has formally acknowledged the basic responsibility of each lawyer engaged in the practice of law to provide public service legal services in one or more of the areas of poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice.” The legal profession must work to represent those who cannot represent themselves. The majority of Americans cannot afford to send lobbyists to Congress like large businesses can, thus the Bar should represent the people who cannot afford to lobby but may someday need the ability to recover. The poor have never had an equal footing with those more fortunate, and we have a duty to continue fighting for their rights. Our special responsibility as a public citizen should never let us stray from our duty to improve the law in order to protect those less fortunate and the public interest.

## III.
## *Tort Reform and Our Legal System*

The preamble to the Kansas Rules of Professional Conduct states that “a lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.” These responsibilities help explain the ethical duty of attorneys in the face of “tort reform.” The initial reaction of most trial lawyers is to oppose anything labeled

"tort reform." We fight tort reform because it represents change. Most of the changes labeled as "tort reform" truly create a threat to the rights of our clients and the legal system, but we must not forget that change is also healthy. EC 8-9 states that "the advancement of our legal system is of vital importance in maintaining the rule of law...and lawyers should encourage, and should aid in making, needed changes and improvements."

A lawyer is a representative of his or her client. The lawyer's duties under the preamble to the Kansas Rules of Professional Conduct include: advising clients, advocating the client's position zealously, negotiating advantageous results for his or her clients, and acting as a spokesperson for the client. The responsibility to act "as a spokesperson for the client" requires attorneys representing clients who may be affected by tort reform legislation to speak out against the legislation in order to act as an advocate for their clients.

A lawyer is an officer of the legal system. The Preamble to the Kansas Rules of Professional Conduct states "that a lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." When a lawyer is faced with tort reform that will "deny the rights of any person" it is their duty "to challenge the rectitude of official action." Challenging these proposals would include speaking out against proposed legislation or challenging the laws in a court of law or the court of public opinion.

Kansas Rules of Professional Conduct Rule 6.4 specifically provides that a lawyer "may serve as director, officer or member of an organization involved in reform of the law or its administration." If the lawyer knows the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer must disclose this benefit. The Kansas Rules of Professional Conduct encourage attorneys to participate in the reformation of the law, which is a basic duty of every attorney under Canon 8 if you define "improving" the law as "reforming" the law.

In Thomas Koenig and Michael Rustad's book entitled In Defense of Tort Law (New York University Press, 2003) they argue that historically the public policy aspects of tort law have long been neglected in addition to neglecting the important role tort law plays in social justice (Koenig, 2).

Koenig and Rustad further argue that tort law has been a highly contested branch of the law and it is often overlooked that "[t]he latent function-the hidden face- of tort law is its public role of addressing corporate misconduct without requiring a rigid government bureaucracy. Private tort litigants serve the public interest by uncovering dangerous products and practices.[5] This public law purpose of torts is rarely recognized in law school classes, court decisions, or by the litigants. Professional responsibility courses emphasize the duty of the lawyer to zealously advance the interests of the client. However, the trial attorney also serves a less visible public policy function by uncovering and punishing corporate malfeasance. Thus, tort law not only performs the manifest function of alleviating "the plight of the injured," but it also fulfills the latent function of furthering "the cause of social justice."[6]" (Koenig, 2).

Koenig and Rustad believe the historical development of tort law is an important element to understanding the reforms that have occurred throughout history. In their book, which is an excellent reference material on tort law, he outlines the advancement of international tort law in a timeline that easily demonstrates its gradual progression (Koenig, 12-13).

[A] Intentional Tort Law Timeline

1066—The Norman institution of the jury is incorporated into the English legal system by William the Conqueror.[32]

1348 or *1349—Ide S et ux. v. W de* S[33] recognizes assault as a form of trespass to the person.[34]

1616—*Weaver v. Ward*[35] is first case to hold "that a defendant might not be liable, even in a trespass action, for a purely accidental injury occurring entirely without his fault."[36]

1647—Court rules that a man carried onto the plaintiff's land against his will by third parties is not liable for trespass.[37]

1669—Court holds that conditional threats unaccompanied by immanent hostile action do not constitute an assault.[38]

1697—*The Statute of 5-6 William and Mary c. 12* abolishes the criminal side of the writ of trespass, leaving it as a purely civil action.[39]

1704—Court rules that the least touching of another in anger constitutes a battery.[40]

1763—First court to use the phrase *exemplary damages* to describe a monetary penalty paid to the plaintiff above and beyond compensatory damages.[41]

1768—Sir William Blackstone publishes *Commentaries on the Law of England.*

1784—First American court to award punitive damages, in a case involving a physician spiking his rival's wine with Spanish fly, a pain-causing cantharide. [42]

1799-The defense of assumption of risk is applied for the first time.[43]

1799—The English case of *Merryweather v. Nixon*[44] is the first to recognize the doctrine of joint and several liability in ruling that wrongdoers cannot have redress or contribution against each other.

1808—English court rules that there is no recovery for wrongful death absent a specific

statute.[45]

1846—The English Fatal Accidents Act of 1846, referred to as Lord Campbell's Act, provides a statutory remedy for wrongful death.[46]

1809—*Butterfield v. Forrester*[47] devises rule of contributory negligence barring actions where "a party... [who] contributes to his own injury ... may not recover anything from the defendant."[48]

1814—Court upholds exemplary damages award where the actual damages are slight in *Merest v. Harvey.*[49]

1834—Court rules that a master is not liable for a servant's torts on the grounds that the servant was on an unauthorized "frolic"[50]; this becomes an exception to an employer's vicarious liability.

1837—First court to hold a seller liable for injuries caused by a defective product on the theory of deceit.[51]

1837—English court holds farmer liable for negligence even though he was ignorant of the danger to neighboring cottages posed by spontaneous combustion of uncured hay.[52] Court's ruling is key for developing an objective standard of reasonable care in negligence actions.[53]

1837-Court constructs the common employment or fellow servant rule barring recovery when a co-worker is at fault.[54]

1842—Privity of contract bars a lawsuit filed by a horse-drawn mail coach that overturned due to a defective wheel. Privity was the chief roadblock to the development of products liability.

1842—The pro-defendant doctrine of the "last clear chance" is first recognized in *Davies v. Mann.*[55]

1851—U.S. Supreme Court upholds punitive damages award in a trespass action, stating that the measure of damages is based upon the "enormity of the offense" rather than the compensation owed to the plaintiff.[56]

1852—Punitive damages are assessed against a pharmacy for the deadly consequences of careless mislabeling of poison by a druggist. This was a precursor to awarding punitive damages in products liability.[57]

1856—Justice Alderson defines negligence as conduct falling below the standard established by law that creates an unreasonable risk of harm.[58]

1859—First American treatise on tort law is published by Francis Hilliard.[59]

1860—First English treatise on tort law is published.[60]

1863—English court devises the doctrine of *res ipsa loquitur* or the "thing speaks for itself." That doctrine was later extended to medical malpractice cases where the unexpected outcome would not have occurred without negligence.[61]

1865—English court treats *res ipsa loquitur* as a species of circumstantial evidence.[62] Court rules that the circumstances of the accident created an inference that someone was careless and that it "arose from want of care."[63]

1873-The railroad turntable doctrine permits child trespasser to recover for injuries despite having no permission to be on the premises.[TM]

1876—Court develops spousal immunity. Husbands and wives cannot sue each other on the grounds that lawsuits disrupt family harmony.[65]

1884—Justice Oliver Wendell Holmes, Jr., ruled in *Dietrich v. Northampton* that there was no remedy for prenatal injuries.[66]

l889—New York Court of Appeals recognizes consortium as an element of damages. Loss of consortium includes loss of love, companionship, affection, and sexual relations as well as solace.[67]

1897—In *Wilkinson v. Down ton*[68] the court permits the plaintiff to recover for extreme emotional distress when a practical joker told a woman that her husband was seriously injured in an accident. This case led to the tort of outrage, first recognized in the modern period. (Koenig, 13-15)

As the United States saw enormous industrial growth and development in the late nineteenth century so did the paradigm for negligence. As the system of transportation and industrialization was rapidly accelerating in America so were the injuries suffered by the industrial workforce. Therefore, the law of torts in the negligence era allowed compensation for industrial workers who had suffered such injuries. (Koenig, 28-29)

Koenig and Rustad state that, "Negligence law, in no small part, was railway, streetcar, and steamboat accident law. It evolved to compensate the victims of accidents caused by common carriers and industrial corporations that failed to use reasonable care to protect the public.238."(Koening, 30)

Keoning and Rustad's negligence timeline demonstrates the developing trend during the late nineteenth and early twentieth century to limit the compensation the law of torts provided. (Keonig, 30)

[A] Negligence Era Timeline

l842—Massachusetts Supreme Judicial Court adopts England's fellow servant rule in *Farwell v. Boston and WR.R. Corp.*[244]

1850—Chief Justice Shaw advances the negligence theory in accidental injury cases by setting liability standard as whether the defendant exercised reasonable care under the

circumstances.[245]

1880—The Massachusetts Supreme Judicial Court develops the locality rule in medical malpractice cases, defining negligence as a departure from local community practice as opposed to standards for the profession as a whole.[246]

1883—Court defines negligence as the failure to use ordinary care and skill in the circumstances.[247]

1887—Pharmacist is liable for negligently handing out the wrong drug prescription, injuring the plaintiff.[248]

1891—In *Vosburg v. Putney*[249] a twelve-year-old Wisconsin student kicks a fourteen-year-old classmate during class. What would have been a minimal injury turns out to be quite serious because the plaintiff had a preexisting condition. The court holds that the defendant is liable for all of the consequences of his intentional act.

1890-The right of privacy originates in a law review article by Samuel D. Warren and Louis D. Brandeis.[250]

1893—Proof of negligence is required in blasting cases unless the explosion is accompanied by an actual physical invasion of property.[251]

1896—In *Mitchell v. Rochester R.R. Co.,*[252] the court denies a plaintiff's recovery for a miscarriage caused by fright from the defendant's onrushing team of horses because of the absence of physical impact.

1906—Court holds that negligent blasting with dynamite resulting in twenty pound rock being thrown through plaintiff's window stated a valid claim even though there was no physical impact with the plaintiff.[253]

1911—The New York Court of Appeals strikes down the nation's first workmen's compensation act because it is based on strict liability[254]

1913—A retail druggist is held liable for selling the plaintiff an injurious compound.[255]

1915—A seller is held absolutely liable for negligent manufacture if the article proves to be dangerously defective.[256]

1916—Judge Benjamin Cardozo authors opinion in *MacPherson* v. *Buick Motor Co.,*[257] which holds that if a defectively made article is reasonably certain to be a thing of danger and to place life and limb in peril, the seller is liable unless he acts with skill. Buick is held liable for injuries caused to the plaintiff when the wooden wheel of his Buick collapsed.

1917—New York's workers' compensation statute is held to be constitutional.[258]

1917—Court imposes a heightened standard of care upon common carriers to protect the traveling public.[259]

1920—Congress passes the Jones Act permitting recovery for negligence injuries or death of seamen injured on the high seas.

1928—Justice Cardozo authors opinion in *Palsgraf v. Long Island Railroad Co.*,[260] which becomes the basis for the risk theory of negligence. "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk to another or to others within the range of apprehension."[261]

1929—The American Law Institute makes sellers liable for fraudulent misrepresentation provided they induce reliance from buyers.[262]

1932—Columbia University proposes a comprehensive compensation for automobile accidents.[263]

1935—Court holds that a nineteen-year-old unemancipated minor cannot sue his parent for negligent operation of a motor vehicle, invoking the doctrine of parental immunity.[264]

1938—Congress passes the Food, Drug and Cosmetic Drug Act to monitor the safety of food and drugs.

1939—American Law Institute membership approves Restatement (First) of the Law of Torts.

1944—Judge Roger Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*[265] articulates the public policy rationale for the adoption of strict products liability.[266] (Koenig, 31-32)

# IV.
# *Tort Reform is Our Duty*

A lawyer, as public citizen, has a special responsibility for the quality of justice.

The Preamble to the Kansas Rules of Professional Conduct states:

> As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice

> and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

According to the Preamble of the Kansas Rules of Professional Conduct:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Neglect of these responsibilities compromises the independence of the profession and the public interest, which it serves.

"Tort reform" is said to have its beginnings in the progressive era after World War I. During this era, the law experienced progressive tort reform aimed at removing the rules protecting the interests of defendants in civil actions. In the first half of the twentieth century, tort laws favored civil defendants so progressive tort reformers fought to even the field for plaintiffs. Through this era up until the late 1960's, plaintiffs obtained more rights which resulted in improvements for plaintiffs such as strict liability. See "Common Sense" Legislation: The Birth of Neoclassical Tort Reform, 109 Harv.L.Rev.1765, 1765-1768 (1996); wherein it was recognized that this "progressive" tort reform began to decline in the late 1960's due to increased premiums placed on health care providers. There was another "tort reform" in the late 1970's driven by a concerted effort on behalf of manufacturers to cut costs. Then in the 1980's the insurance

crisis fueled another round of "tort reform." This historical account of the "birth of tort reform" ignores the fact that tort reform existed during formation of our government. Following the Battle of Lexington the British presented the Continental Congress an Offer of Reconciliation. On July 31, 1775 the Continental Congress rejected this offer upon the advice of a committee consisting of Benjamin Franklin, Thomas Jefferson, Richard Henry Lee, and John Adams. This message of rejection included the following statement:

> We are of [the] opinion [that] the proposition is altogether unsatisfactory because...it does not propose to repeal the several acts of Parliament...taking from us the right of trial by jury…in cases affecting both life and property... J. Kendall Few, In Defense of Trial by Jury 170 (American Jury Trial Foundation 1993).

The right to a jury trial is one of the factors that lead the American Patriots to the Revolutionary War.

Contrary to the negligence era in which we saw restrictions on tort law, during the progressive era there was instead an expansion. The tort liberalization timeline below helps track this expansion during this period. (Koenig, 46)

[A] Tort Liberalization Timeline

1945—England abolishes doctrine of contributory negligence.[391]

1946—First case to permit recovery for prenatal injuries.[392]

1947—The American Law Institute amends the Restatement of Torts to recognize the tort of intentional infliction of emotional distress.[393]

1947—Judge Learned Hand, in United States v. Carroll Towing, Inc.,[394] develops a negligence formula, which compares the burden of precaution to the probability and severity of the injury.

1950—The U.S. Supreme Court, in Feres v. United States,[395] holds that the federal government is immune from any suit filed by soldiers for injuries sustained while serving in the military.

1951—Sixteen states introduce legislation abolishing contributory negligence.[396]

1952—State Rubbish Collectors Assoc. v. Siliznoff is the first judicial recognition of the tort of the intentional infliction of emotional distress.[397]

1954—Court requires proof of physical injury to recover for the tort of the intentional infliction of mental distress.[398]

1959—In Martin v. Reynolds Metal Co.,[399] the Oregon Supreme Court extends the law of trespass to cover polluting of another's Land. In this case, the corporation permitted gases and particulate to settle on the plaintiff's land, making it unfit for raising livestock.

1960—In Henningsen v. Bloomfield Motors, Inc.,[400] the New Jersey Supreme Court finds an automobile manufacturer liable to a customer's wife despite the seller's disclaimers and the lack of privity. This case launches the field of products liability.

1960—Ronald Coase publishes famous essay arguing that when parties compete for the same resource, it makes no different to the allocation of resources which way the court imposes liability.[401] Coase's article launches the law and economics theory of tort law.

1961—Constitutional torts remedies recognized in case in which the City of Chicago is held liable for its police officers' torts committed against a black couple.[402]

1961—Kentucky overrules doctrine of charitable immunity.[403]

1962—New York overrules long-standing rule that there can be no recovery for the negligent infliction of mental distress in the absence of physical impact.[404]

1963—Green man v. Yuba Power Prods., Inc.[405] is the first appellate case to recognize the doctrine of strict products liability, in an opinion authored by Justice Roger Traynor.

1964—The U.S. Supreme Court, in New York Times v. Sullivan,[406] holds that the constitutional protection given to speech and the press limits defamation lawsuits brought by public officials.

1965—The American Law Institute approves the Restatement (Second) of Torts, §402A, which recognizes strict products liability.

1965—Professors Keeton and O'Connell propose a no-fault automobile accident compensation plan.[407]

1965—The American Law Institute approves §519, which recognizes strict liability for "abnormally dangerous activities."

1965—The Ohio Supreme Court rules that a defendant doctor in a medical malpractice action could be cross-examined as to accepted medical practice.[408] This ruling permitted malpractice victims to counter the "conspiracy of silence" in which doctors refused to testify against other doctors.

1965—Kentucky Supreme Court abolishes that state's doctrine of municipal immunity in a case in which negligence led to a seven-year-old child drowning in a city swimming pool.[409]

1967—African-American plaintiff is held to have a valid cause of action for assault and battery when he was approached in a buffet line by a restaurant employee who "snatched the plate from his hand and shouted that no Negro could be served in the club."[410]

1967—Court denies recovery for new tort of wrongful life.[411] Court rejects argument that mother would have undergone abortion if she had known of the risks of contracting German measles during pregnancy.

1967—First appellate case approving the awarding of punitive damages in a strict products liability action. Merrell-Richardson, the defendant, was charged with falsifying test results and marketing the unsafe anti-cholesterol drug, MER-29.[412]

1968—An automobile manufacturer was held to have a duty of care in designing a crash-worthy vehicle.[413]

1968—California Supreme Court abolishes landowner categories of trespasser, licensee, and invitee in favor of a standard of reasonable care in Rowland v. Christian.[414]

1969—New York Court of Appeals overrules long-established precedent that actual proof of negligence is required in blasting cases absent physical invasion. Chief Judge Fuld rules that the question is which party should bear the cost of resulting damage from dangerous activities, not whether the activity was lawful.[415]

1969—New York Court of Appeals abolishes the parent—child immunity rule.[416]

1969—Minnesota and Florida abolish interspousal immunity.[417]

1970—Arizona repudiates parent—child immunity.[418]

1970—Ralph Nader brings an invasion of privacy lawsuit against General Motors for a campaign of dirty tricks and harassment to suppress his crusade against unsafe automobiles.[419] With the proceeds of the judgment, Nader establishes public interest law group devoted to exposing corporate wrongdoing.[420]

1970-An owner of an apartment building is found liable for negligent security in a case involving a criminal attack on a tenant in a common hallway. Kline v. 1500 Massachusetts Avenue Apartments Co.[421] became a precedent for the development of premises liability.[422]

1970-California court recognizes tort of outrage against insurance company for bad faith refusal to settle a claim.[423] This case launches the field of bad faith insurance claims.

1971—The Supreme Court upholds a Federal Tort Claims Action against police officers in an unreasonable arrest and search action.[424]

1973—Florida replaces contributory negligence with comparative negligence.[425]

1975—In Li v. Yellow Cab Co.,[426] the California Supreme Court adopts a pure comparative negligence statute based upon the extent of fault of the parties.[427]

1976—In Tarasoff v. Regents of University of California,[428] the Supreme Court of California holds that a psychiatrist has an affirmative duty to warn of his patient's dangerous propensities.

1976—New Jersey partially abolishes parental immunity doctrine.[429]

1979—Court finds a professional football player liable for the intentional infliction of injury.[430]

1980-California Supreme Court adopts market share liability permitting DES daughters to recover for reproductive injuries occurring many decades after their mothers ingested anti-miscarriage drugs.[431]

1980—Congress enacts the federal Superfund law governing hazardous waste sites.432 (Koenig, 47-50)

## V.
## *Right to Trial by Jury*

> Law is a magic mirror in which we see reflected not only our own lives, but also the lives of those who went before us.
>
> -Oliver Wendell Holmes

People against tort reform argue that tort reform is a step in the direction of taking juries out of the civil litigation process. Juries have been an integral part of our legal system since before the founding of our country. There is much historical support for our duty to maintain civil trials by jury.

The first argument for trial by jury is that it is the basis of our freedom and democracy. Without this right, the common man would be judged, not by a panel of his peers, but by someone in a position of higher authority. Our founding fathers believed the right to trial by jury was an important piece to our freedom.

> In suits at common law, trial by jury is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.
> -James Madison (1789)

> Trial by jury and the dependence of taxation upon representation, those cornerstones of liberty, must be preserved. Trial by jury is our birthright; who in opposition to the genius of United America, shall dare to attempt its subversion?
> -John Dickinson (1788)

> This was the first signal of North American Union. The struggle was for chartered rights – for English liberties - ... for trial by jury - the habeas corpus and Magna Carta. But the English lawyers had decided that Parliament was omnipotent - and Parliament in their omnipotence, instead of trial by jury... enacted admiralty courts in England to try Americans for offenses charged against them as committed in America - instead of the privileges of Magna Carta…
> English liberties had failed them. From the omnipotence of Parliament the colonist appealed to the rights of man and the omnipotence of the god of battles…
> Independence was declared. The colonies were transformed into states. Their inhabitants were proclaimed to be one people...[with] all claims to chartered rights as Englishmen. Thenceforth their charter was the Declaration of Independence. Their rights, the natural rights of mankind…
> -John Quincy Adams (1839)

Another argument for trial by jury is that it is the fairest way to conduct a trial. A group of 12 disinterested people are chosen at random, given facts, and make a decision based on these facts. Many of our founding fathers believed in the fairness of the jury system after observing historical accounts of dishonest judges.

> The jury system has come to stand for all we mean by English justice. The scrutiny of 12 honest jurors provides defendant and plaintiff alike a safeguard from arbitrary perversion of the law and preserves the old principle that law flows from the people.
> -Sir Winston Churchill (1956)

> I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of it constitution.
> -Thomas Jefferson (1788)

> The civil jury trial is preferable to any other and ought to be held sacred.
> -Virginia Declaration of Rights (1776)

> The jury is adapted to the investigation of truth beyond any other system the world can produce. A tribunal without juries would be a Star Chamber in civil cases.
> -Elbridge Gerry (1787-1788)

# VI.
# *Current Tort Reform Debate*

The current round of tort reform deals with the rising cost of malpractice insurance for physicians, litigation costs for gun manufacturers, pharmaceutical companies complaining about class action lawsuits and various other special interest groups with their own unique complaints. You can see the debate over tort reform is a hot topic by typing "tort reform" into an Internet search engine and observe the number of hits. The number is overwhelming. The people supporting today's tort reform place blame on "greedy" personal injury attorneys for the increased cost of insurance. Attorneys are blamed for an increase in the amount of litigation, an increase in frivolous lawsuits, and a huge increase in jury the amount of awards. These tort reform groups are in support of legislation to cap damages and limit claims.

On the other side of the debate are people opposing modern tort reform. This group argues the number of lawsuits has actually declined and the ridiculous jury awards seen on the evening news are misleading because details are often left out. They place the cause of rising malpractice insurance rates on the insurance companies. This side of the argument opposes statutory caps on damage amounts because they are afraid some victims may be under compensated for their injuries. The progressive tort reformers also argue the amount in damages are awarded by juries and that juries should be allowed to continue making decisions on damages rather than politicians.

Koenig and Rustad argue that in the past two decades there has been a retraction of tort law as evidenced by the capping of both punitive and non-economic damages in a number of states. Furthermore, Koenig and Rustad argue, "These "reform" statutes undermine the greatest social benefit of tort law: its ability to evolve in order to constrain new forms of oppression." The tort retrenchment timeline below helps to illustrates this trend. (Koenig, 59-60)

[A] Tort Retrenchment Timeline

1981—California appellate court remits punitive damages award in famous Ford Pinto products liability case from $125 million to $3.5 million.[545]

1981—In *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan,*[546] the court concludes that the Klan is guilty of statutory violations for intimidating Vietnamese fishermen and also liable in tort for the wrongful interference with contractual relations.

1983—California Supreme Court recognizes a negligent cause of action for the mispositioning of a telephone booth close to a major roadway.[547] This case became a favorite tort horror story of President Ronald Reagan.

1986—New Hampshire abolishes the remedy of punitive damages.[548]

1986—The American Tort Reform Association (ATRA) is organized to form legislative coalitions and mobilize corporate citizens for tort reform. Tort limitations enacted in the states are spearheaded by ATRA.[549]

1987—New Jersey, Ohio, and Oregon adopt a Food and Drug Administration (FDA) defense to punitive damages. Drug and medical device manufacturers are immunized from punitive damages if they can prove that they complied with pre-approval processes and did not withhold from or misrepresent to the agency any information that was "required, material, and relevant."

1987—The court in *Ayers v. Jackson Township*[550] finds that the plaintiff's ingestion of water contaminated with toxic chemicals was an immediate and direct physical impact and injury" permitting recovery for emotional distress.

1987—Georgia enacts a tort reform statute requiring tort claimants to remit 75 percent of all punitive damages to the state treasury. Georgia, Iowa, Kansas, Montana, New Jersey, North Dakota, Ohio, and Oregon enact tort reform statutes increasing the burden of proof for recovering punitive damages to "clear and convincing evidence."

1989—Minnesota federal district court upholds a $7 million punitive damages award in a

products liability case involving the Copper-7 intrauterine device,[551] leading to the settlement of thousands of similar cases.[552]

1989—Hawaii court raises standard of proof in punitive damages from preponderance of evidence to clear and convincing evidence.

1993—Fifth Circuit U.S. Court of Appeals holds that FDA approval preempts state tort liability in medical device case.[553] First Circuit holds that pre-market FDA approval of collagen preempts all tort liability.[554]

1993—California Supreme Court reverses action for intentional infliction of emotional distress where there was no showing that the defendant knew that depositing toxic materials in a landfill close to the plaintiffs' home would cause extreme distress.[555]

1993—U.S. Supreme Court affirms $10 million punitive damages award in business torts cases. Court rejects claim that punitive damages award is excessive and violates defendant's due process rights.[556]

1993—In *Daubert v. Merrell Dow Pharm., Inc.*,[557] the Court places new limits on expert testimony, making the trial judge responsible for determining whether a theory has a valid scientific basis.

1994-In *Honda Motor Co. v. Oberg*,[558] the U.S. Supreme Court holds that an Oregon statute that prohibits judicial review of the size of punitive damages is unconstitutional.

1994—The General Aviation Revitalization Act of 1994 becomes the first federal tort reform statute enacted. The measure imposes an eighteen-year statute of repose[559] for small aircraft.[560]

1995—Restatement (Third) of the Law of Torts: Product Liability is approved by the American Law Institute.

1995—Caps on punitive damages are instituted as a tort reform in Illinois, Indiana, New Jersey, North Carolina, and Oklahoma. Indiana enacts an FDA defense to punitive damages. Texas enacts a far-reaching statute raising the standard for obtaining punitive damages, capping damages, and limiting choice of venue.

1996—U.S. Supreme Court finds a punitive damages award grossly excessive, violating the due process clause of the Fourteenth Amendment.[561] This is the first time in American history that the U.S. Supreme Court has found a punitive damages award to violate a defendant's due process rights.

1997—Texas becomes the first state to permit lawsuits against HMOs for denying medical treatment.[562]

1997—President Clinton signs the Amtrak Reform and Accountability Act of 1997, which imposes a $200 million cap on damages for Amtrak accidents.[563]

1997—U.S. Supreme Court rules that a class action by diverse asbestos claimants violates Rule 23 of the Federal Rules of Civil Procedure.[564]

1998—The Biomaterials Access and Assurance Act of 1998 immunizes the suppliers of raw materials incorporated into medical products from products liability lawsuits.

1999—A California jury awards the victim of a products liability case

$107 million in compensatory damages and $4.8 billion in punitive damages. The trial judge remits the punitive damages award to $1 billion in a case where the plaintiff is severely burned by an exploding gas tank in a General Motors vehicle.[565]

1999—Federal government sues the cigarette industry to recoup medical expenses of smokers.[566]

1999—Florida governor Jeb Bush signs a comprehensive bill limiting joint and several liability, capping damages, instituting a twelve-year statute of repose, and limiting the liability of rental companies.

2000—A six-person Miami, Florida, jury awards $145 billion in punitive damages against five tobacco companies. In the first phase of the trial, the jury finds cigarettes to be dangerously defective and the companies' conduct in marketing cigarettes as warranting punitive damages.

2000—In *Pegram v. Herdrich,*[567] the U.S. Supreme Court holds that treatment decisions by HMOs through their physician employees are preempted by the Employee Retirement Income Security Act of 1974(ERISA).[568] (Koenig, 60-62)

This self-government imposes a duty on the legal profession to uphold higher standards on lawyers so that we may retain this self-government. Lawyers have a duty to the general public under Canon 8 to improve the legal system. Canon 8 requires attorneys to take an active role in the preservation of our law if the profession wants to maintain its independence. The Preamble argues "Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system." If the Bar sits on its hands and watches Congress legislate away fundamental rights such as juries in civil trials, they are violating Canon 8 by not

protecting the public interest. If the Bar does not fight to protect the rights our founding fathers believed in and were willing to die for, who will?

Just remember the debate itself is healthy. We want to hear the debate. We need the controversy. Sure we can do a better job of self-governing our profession. Greed has driven cases that may end up hurting our profession as a whole. Some cases should not get filed. We need to recognize these issues and address them. If we do not address the issues, somebody else will. Too many lawyers are pushing the rules of common sense and professionalism within advertising. We have not reacted to correct the problems caused by sleazy advertisers. There is much to do and the battle will never end. It is your watch now. Just remember:

When politicians, special interest groups,
large corporations, insurance companies and
other power brokers quit complaining about
juries
and trial lawyers,
***then*** it will be time to worry
about our system of justice.