KADC

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Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*

THE POT CALLS THE KETTLE BLACK: A REBUTTAL TO "*CUTTING THE HEDGE: REFORMING COMPARATIVE FAULT IN MEDICAL MALPRACTICE*"

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I. Introduction

In a recent article published in the *Journal of the Kansas Trial Lawyer's Association*, they say medical malpractice defendants want to have it both ways.[1] They accuse the defendants of what they call "comparative fault hedging," because the defendants in a multi-defendant medical malpractice lawsuit do not want to affirmatively assert the fault of other defendants until they have settled or been dismissed. They criticize. They vilify. Yet, they ignore the fact that they - the medical malpractice plaintiffs – change their position when one defendant settles or is dismissed. Claims once vehemently pursued are withdrawn, experts once retained are abandoned, medical care once criticized is defended, and motions *in limine* are filed to erase any trace the plaintiff had pursued claims against those dismissed. No doubt, the medical malpractice plaintiff accuses the defendants of wanting to "have it both ways," but so does the plaintiff. The pot calls the kettle black.

The KTLA article is part of a trend in medical malpractice litigation by plaintiffs to ask the court to prohibit defendants from asserting comparative fault hypothetically. These arguments have been made at all stages of the litigation, from the scheduling conference, through written discovery, to the pretrial conference and beyond. These arguments share common themes and objectives. The common themes are an alleged need to fully disclose defenses and avoid alleged "surprise" at trial. The common objectives are twofold: first, to take an option away from the defendants that the plaintiff always enjoys up to the time the case is submitted to the jury – the ability to take a different position depending upon whether plaintiff settles with a co-defendant, and second, to force the defendants to unconditionally state they either are pointing fingers at one another or are waiving their defense of comparative fault.

In this article, we take a look at comparative fault in multi-defendant medical malpractice cases and its effect on the strategies of the plaintiff and remaining defendants if one defendant settles or is dismissed. This article will show that Kansas law permits the plaintiff to change his or her position regarding the fault of a co-defendant if that defendant settles or is dismissed, and that defendants should likewise have that right. This article will show that the defendants, just like the plaintiffs, have the right under Kansas law to assert their claims or defenses in the alternative or hypothetical, regardless of consistency, and that this right continues up until the time the case is presented to the jury. Just as the plaintiff enjoys the right to adjust his or her case if a defendant settles, so do the defendants. That is not only what the law is, but what it ought to be.

II. The truth about pots and kettles in medical malpractice cases.

A. A typical scenario

Here is a typical scenario with two different endings. The plaintiff files a medical malpractice action against two health care providers, A and B, alleging both are at fault. The defendants A and B raise comparative fault as a defense. In re-

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LOOKING AHEAD...KANSAS CONSUMER PROTECTION ACT

The next issue of the *Kansas Defense Journal* will include an analysis of Kansas law regarding the Kansas Consumer Protection Act and its application to health care providers. The analysis will discuss *Williamson v. Amrani*, 152 P.3d 60 (Kan. 2007), and any new Kansas legislation.

NEWSLETTER EDITOR
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THE KADC: A CROWD OF GREAT INDIVIDUALS

Scott Nehrbass
KADC President
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Our next issue is going to focus on the saga regarding efforts to amend the KCPA. As I write this, despite the Governor's disappointing veto, there's still hope for moving medical services out of the KCPA's reach. I hope you've been reading our occasional email updates, staying informed and taking action (as you deem appropriate) on this important issue. I also hope you're encouraged by our organization's renewed vigor for legislative battles.

We are no monolith on this issue. Most of our members seem to agree we should support this year's effort to exclude medical services from the KCPA without insisting this year's legislation also exclude legal and other professional services. That is something we can tackle, in conjunction with other professional groups, next year. But more than one of you sent emails criticizing that decision and saying KADC "dropped the ball." "If we don't push for such legislation this year," you legitimately asked, "will not the opportunity have forever passed?" At the other end of the spectrum, some sent emails taking the position that no professional services – medical, legal or other – should be excluded from the KCPA.

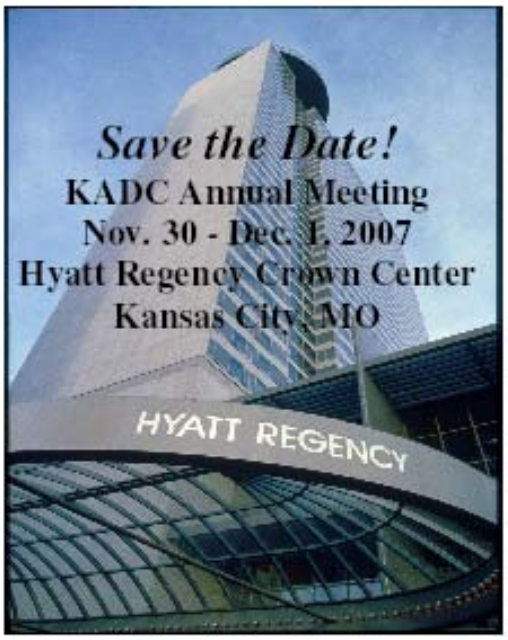
The most glorious thing I've read outside the scriptures is Kierkegaard. I remember vividly the moment – the classroom, the seat, the smell of the blue-colored textbook – when I first read these words during Philosophy class at KU: "The crowd is untruth." They resonated with me.

Call me a "free spirit," but I do find the crowd so often wrong and myself so often satisfied when I think for myself. I've passed this individualism along to my nine year old, who sometimes worries his mother (and the other mothers) with his desire to go his own way, spending time alone shooting baskets when all the other boys want to play soccer or baseball instead.

Incidentally, is there anything better than eavesdropping on your son as he pretends he's a Jayhawk the way you did when you were 9? "There's only seconds left. 10 seconds. All-American point guard Jack Nehrbass has the ball. 5 seconds. He penetrates. 1 second – he shoots! The Hawks win!! The crowd goes wild!!!" My son makes that Sleestak-like sound (surely there are some out there who grew up watching "Land of the Lost"), trying to mimic the crowd noise. The crowd loves the individual; for a moment, the individual loves the crowd.

I think good lawyers think for themselves but love a good crowd. The great lawyers I know – and I'm certainly not one of them – think for themselves without being so thin-skinned they can't receive or recognize good ideas from others, no matter the source. They also know how to tell others their ideas are bad without making them feel bad: "There is a great man who makes every man feel small. But the real great man is the man who makes every man feel great." -- G.K. Chesterton. I don't know about you, but I'm still a long ways from being that man.

KADC has been led by some great men and women. It's a humbling honor at my age to have the opportunity to "lead" such a crowd, feeling the pressure to step up and "serve" during what my dad tells me are "the most productive years of your life." We're a crowd of great individuals, led by an impressive board (casting aside yours truly), a very smart and responsive executive director, and members who care enough about what's happening to send me emails when they think we're screwing up. Please keep those emails coming. I know that sometimes "the crowd is untruth."



LAWYERS IN THE MIDDLE: THE THREE-WAY TENSION AMONG LAWYERS, CLIENTS AND FEE-PAYERS

J. Nick Badgerow
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I. Introduction

Clients count on their lawyers to be loyal. A client has a right to expect that his lawyer will act with loyalty to the client's interests, without questioning whether interests of another client (or the interests of the lawyer) are actually motivating the lawyer's actions or advice.

The lawyer owes a duty of loyalty, to represent the client with commitment, dedication and zeal.

A lawyer is sometimes thrust into situations which may cause a client to question the lawyer's loyalty:

- Lawyers commonly represent a person covered by a policy of insurance which pays for his defense. Will the lawyer exercise independent professional judgment for the client-insured, or will the lawyer mold his defense to suit the requirements and demands of the insurer who is paying the legal fees, and presumably (or at least hopefully) will be the source of additional representation in the future?
- Corporations and businesses are often sued along with an employee or officer of the corporation. In those situations, the corporation paying the bill for representation of both defendants hopes for the economy of a single law firm to represent both. The corporation also perhaps hopes to keep the individual defendant from turning "state's evidence" – agreeing to testify on behalf of the plaintiff in exchange for a lenient settlement or outright dismissal. This approach may also help to solidify a unitary defense strategy. Will the individual constituent come to question whether the law firm is truly loyal to him, or has divided loyalties based on the corporate client also being the source of the fees and the potential source for future representations – and fees?
- Minors sometimes find themselves in need of representation by counsel and, being unable to pay, count on their parents to provide funds for their defense. Will the paying-parents believe that this buys them the right to have input into their child's defense, or an avenue to discover privileged communications?
- In a corporate setting, the same may be asked of corporate parents paying for the representation of a subsidiary company. To which company will the lawyer be truly loyal?

In each of these situations, the lawyer is thrust into the middle of a potential conflict. The lawyer owes a duty of loyalty, to represent the client with commitment, dedication and zeal.[1] The lawyer also deserves to be paid for his services. The Rules of Professional Conduct provide the framework for analysis of this tension, as well as mechanisms to resolve it. The Comments to Rule 1.7 of the Kansas Rules of Professional Conduct ("KRPC")[2] state the following with regard to loyalty:

> *Loyalty is an essential element in the lawyer's relationship to the client . . .* As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. . . . Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.[3]

The Kansas Court of Appeals emphasized the essential nature of the duty of loyalty in *Alexander v. Russo*:

> The relationship between an attorney and his client is one of the highest trust and confidence and, as long as that relationship or the influence of the relationship may exist, the attorney must observe the utmost good faith and candor and must not allow his private interests to conflict with those of his client. *Cf. In re Estate of Seeger*, 208 Kan. 151, 490 P.2d 407.[4]

The purpose of this article is to explore the applicable Rules, as well as the case law interpreting them, to discuss the particular aspects of "conflicts of interest" that may arise in these cir-

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REVISED ETHICS RULES CLARIFY PROHIBITION AGAINST *EX PARTE* CONTACTS WITH FORMER EMPLOYEES

Steven D. Ruse
Shughart Thomson & Kilroy, P.C.

Significant changes were made to Rule 4.2 and the Comments to Rule 4.2 which, among other things, now make it crystal clear that there is no prohibition against ex parte contacts with former employees of a represented organization.

The Kansas Rules of Professional Conduct have been substantially revised. The revisions will become effective July 1, 2007. KADC members are encouraged to become familiar with the revised Rules, which can be viewed at the Disciplinary Administrator's website: http://www.kscourts.org/attydisc/KRPCproposed.htm.

Rule 4.2 is the ethical rule governing communications with persons represented by counsel. Significant changes were made to Rule 4.2 and the Comments to Rule 4.2 which, among other things, now make it crystal clear that there is no prohibition against *ex parte* contacts with former employees of a represented organization. The revised Rule 4.2 changes the prohibition against contacting "parties" known to be represented by counsel, to "persons" known to be represented by counsel. The Comments to Rule 4.2 expressly state: "Consent of the organization's lawyer is not required for communication with a former constituent."

In this respect, the revised Rule 4.2 is consistent with the rule in Kansas federal court following the holding in *Aiken v. Business & Industry Health Group, Inc.,* 885 F. Supp. 1474 (D. Kan. 1995). The new Rule effectively overrules 1991 KBA Ethics Advisory Committee Opinion 92-07, which limited the circumstances under which *ex parte* contacts with former employees were permitted. The revised version of Rule 4.2 in Kansas, using the word "person" rather than "party," is in line with the American Bar Association's version of Rule 4.2, which has long been interpreted by the ABA and other courts as permitting *ex parte* contacts with former employees of a represented organization.

The complete text of Rule 4.2 with its revisions is as follows:

RULE 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~ person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law ~~to do so~~ or a court order.

Other important revisions to Rule 4.2 and its Comments that are of interest are:

1. Regarding current employees of a represented organization, the revised Rule eliminates the "managing-speaking agency test" for determining which current employees may not be contacted *ex parte*. Under the new Comments, the prohibited categories are (a) an employee "who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter," or (b) an employee "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." This changes the previous version of the Rule which provided protection to "persons having managerial responsibility on behalf of the organization." Further, the new Rule eliminates the prohibition against contacting organizational employees "whose statement may constitute an admission on the part of the organization."

2. Comments have been added making it clear, consistent with decisional law, that the Rule applies even though the represented person initiates or consents to the communication. A lawyer has an affirmative duty to "immediately terminate communication with a person if,

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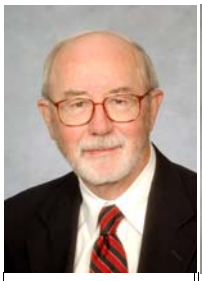
TEN QUESTIONS FOR GENE BALLOUN: AN INTERVIEW BY TOBY CROUSE



J. Eugene Balloun
Shook Hardy & Bacon LLP

Toby Crouse
Shook Hardy & Bacon LLP

At the 2006 KADC Annual Conference, our association conferred its highest award, the William Kahrs Lifetime Achievement Award, on J. Eugene Balloun of Shook Hardy & Bacon. In his five decades of legal practice, Gene has not only developed an esteemed career, but has mentored many young attorneys in litigation, trial, and appellate practice. The following is a discourse between Gene and Toby Crouse, an associate at Shook Hardy & Bacon, chronicling some of Gene's most prominent lessons.

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Toby: I have had the pleasure of working for you and for talented lawyers who know and respect you. I was hoping you would take a moment to share with me – and my fellow young lawyers – some of your experience, wisdom, and guidance as we try to build our careers in the practice of law.

Question: First, I know your early advocacy was honed with and against some of the most famous Kansans of our day, Sen. Robert Dole and Sen. Arlen Specter. What did you learn from your relationship with those gentlemen?

Response: I think you asked this question to let the readers know early on how old I am! Whenever I tell someone that I grew up in Russell, Bob Dole and Arlen Specter's names are immediately uttered. After I was discharged from the Air Force (after 2 years as a lawyer stationed in Enid, Oklahoma!), I returned to my home town to run against Bob Dole for County Attorney. He was then on his fourth term, and I made the political mistake of assuming that my honorable military service in Oklahoma would level the playing field. But I take comfort in knowing that losing to Bob Dole in an election put me with good company. Arlen and I were high school classmates and debate partners, and being in school with him was a learning experience and fun.

After only a few weeks in law school, I knew what I wanted to do for the rest of my life.

Question: Aside from Russell's favorite sons, who were important figures in building the foundation of your legal career?

Response: Most people would probably answer this question with some comment about important lawyers who influenced them. In my case the most significant persons were my father and my high school debate coach. My father, who had scrimped his way through two years of business college, was an ardent advocate for education. He had urged me to go to law school. My high school debate coach was a talented and driven teacher from whom I learned much about analysis and advocacy. I consider her to be the most important teacher I ever had. But when I started to Kansas University, I wanted to be a chemical engineer. One semester in the engineering school convinced me I wanted to be in the business school. After graduation, I decided to try law school, thinking it would be good background for the business world. After only a few weeks in law school, I knew what I wanted to do for the rest of my life.

Question: You have practiced in a small firm in a small, central Kansas town and now practice in a large, international firm in the Kansas City area. What is the one constant that makes a lawyer successful, no matter the size firm he or she practices with?

Response: Narrowing the answer to this question to one "constant" is very difficult. I am convinced there are many factors that make lawyers successful. Without question one of the most important is the ability to consider the client's interest

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WHAT I LEARNED FROM NICK DAILY

by David Rogers, Amy Lemley, Craig West, Tony Atterbury, Gaye Tibbets, Kathy Webb, Chris Steincamp and Wyatt Wright

In December 2006, Kansas lost one of its respected trial attorneys, Nicholas Daily, to unexpected death at age 57. Nick Daily was a former president of the Kansas Association of Defense Counsel, as well as a former secretary-treasurer and board member of the association. He was a partner with Depew, Gillen, Rathbun & McInteer in Wichita, where he worked as a trial attorney with an emphasis on business, personal injury and medical malpractice litigation.

Prior to joining Depew Gillen, Daily worked for 13 years as a trial attorney at Foulston Siefkin LLP in Wichita, with an emphasis on personal injury defense work. The following article is reprinted with permission from its authors and from the Bar-o-Meter, a monthly news magazine of The Wichita Bar Association.

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At the December WBA luncheon, KBA president Dave Rebein included Nick Daily on a list of several lawyers who were examples of the "great tradition of great lawyers from Wichita." If you spent time in any state or federal courthouse in the last twenty-five years, you would have run across Nick, who died suddenly of a heart attack on December 11, 2006. Nick was from Coldwater, Kansas and was the son of a lawyer, Frank Daily. He spent twelve years trying cases at Foulston, Siefkin and sixteen years doing the same at Depew, Gillen. It would only take a few minutes for anyone watching him in trial to see why Rebein ranked him among the state's outstanding trial lawyers.

For us, what singled Nick out from other lawyers, even other great lawyers, was not as obvious or as personally profitable as his easygoing and effective trial skills. What made Nick stand out for many of us was that he was not only a great trial lawyer, but a great teacher of trial lawyers. . . . Some of the things we learned from him:

What made Nick stand out for many of us was that he was not only a great trial lawyer, but a great teacher of trial lawyers.

David Rogers

Nick was a keen observer of people and what effect they may have on a judge or a jury. "The messenger is the message" -- if I heard that once I heard it a million times. Nick would never do anything that might offend or alienate a juror or a judge. I used to think this was the trial lawyer in him. I learned, though, that it was just him. I never saw Nick do anything that would offend or alienate anyone in or out of the courthouse. He was always a gentleman with a truly kind heart.

Gaye Tibbets

Nick taught me courtroom manners that he had learned when he was a young lawyer and that I now teach young lawyers. We stand when speaking to the judge, even when the judge gives us permission to sit. Nick insisted that we learn the names of the court reporter and the administrative assistant and routinely thank them at the end of the trial for the work they do because, for the most part, "they have thankless jobs." Put a five dollar bill in the coffee kitty to be certain to pay for our share of coffee and the share of less conscientious lawyers. Do not drink from the water pitcher at counsel table in front of the jury because it is rude to take a drink in front of others without offering them anything. Stand for the jury. Each time I do these things, I remember him and his emphasis on basic courtesy.

Deposition arguments aren't worth it because "you can't 'win' a deposition." Besides, there was no need to show other lawyers or parties that you were smart or prepared before trial; to the contrary, being underestimated was good. When he moved from the Foulston firm to the Depew Gillen firm he warned a young Randy Rathbun, who was facing Mike Stout in trial for the first time, that Stout's "ah, shucks, I am just a simple country lawyer" persona was misleading cover for his razor sharp intellect and intense competitiveness. We kidded him that in revealing to Randy that Stout was

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What I Learned from Nick Daily *(Continued from page 6)*

brilliant, he was divulging privileged firm information.

Nick emphasized that "you want to win, but you only need to win by a little bit." At his funeral, I was impressed with how many opposing counsel attended and that they were as shocked and saddened by his death as his partners.

Nick gave us all confidence in our early years. He convinced nervous insurance adjustors that Jeff Jordan and Craig West and Amy Lemley and Wyatt Wright and I were competent enough to handle cases on our own. Even when we occasionally proved ourselves otherwise, he never, never raised his voice or spoke a harsh word. He once consoled me after a loss by saying: "The surgery was a success, but the patient died."

He played up our successes, but even more generously, he downplayed our failures.

He played up our successes, but even more generously, he downplayed our failures. For weeks before my first trial, he lectured on the importance of drawing a diagram during opening statement. He went so far as to say that "it would be malpractice" in an automobile accident case to expect the jury to understand what had happened without a diagram of the accident scene. Taking my chair at counsel table after finishing opening statement, I realized that while simultaneously talking and drawing, my nerves had gotten the best of me. My inaccurate chalkboard diagram placed the cars in the wrong lanes in a way that implied my client was responsible for a head-on collision – something not even the other side had accused him of. This, I decided, was the end of my career as a trial lawyer. Nick sighed and waved off my tearful lunchtime apology. He reassured me, in complete opposition to his pretrial admonitions, that accident diagrams were "not that important" and that the jury was "probably not paying attention" to anything so early in the trial and that there was still time to win the case if I would just get over my mistake and go on.

Years later, I watched from opposing counsel table as young lawyer Tony Atterbury delivered his first opening statement. Trying to reassure him, I told him that no matter how he did, his first effort could not be as bad as mine. "I know," he said. "Nick told me that before I left for the courthouse this morning."

Tony Atterbury

No matter how late it was, if I left the office before Nick he would say with a smile, "Well, it is fine with me if you leave, but it shows a certain lack of dedication on your part, don't you think?" He tried a lot of tough cases in all areas of the law but he said that the hardest job he ever did was trying to uphold Randy Rathbun's verdicts on appeal. He advised me that the quickest way to become a "big deal lawyer" was to lose a lot of money. "When you lose a million dollars on a one hundred thousand dollar case, people take notice and decide maybe you are ready to handle big matters," he said with his big loud laugh. We all are going to miss that laugh.

I asked him to be at a meeting with one of my clients who was hearing very bad news. Afterward, the client said that he had not understood everything that was said in the meeting, but that he knew it was bad when he looked over at Nick and saw a tear in his eye. Clients knew that he cared for them and they reciprocated. One client emailed after he died that "We considered him a friend, not just our lawyer."

Craig West

As the minister noted at the funeral, Nick frequently sported ketchup or mustard on his shirt or tie, and ink on his hands and cuffs. His shirt pockets were often blue at the bottom, from absent-mindedly putting an uncapped pen in his pocket.

One Friday lunch several of us went to Players. The waiter brought us our burgers, and I passed the mustard to Nick. He gave the giant sized squeeze bottle a vigorous shake. On both the back swing and the follow through, a stream of mustard and flew out, along with the loosened cap on the squeeze bottle. Mustard spattered on people in two different booths behind us, the purse and shoe of a woman at an adjacent table, and all over the front of my suit. Even where the mustard had hit the floor first, it splashed up and did more damage. There was a moment of silence at all four tables, and then someone started to laugh. Nick's apologies were very composed, and he offered immediately to pay for any damage. The laughing at the tables, and especially ours, went on throughout the mustard clean-up process. The people at the other tables were all in casual clothes or were able to clean the mustard off of shoes and purses, but my suit (and tie, and socks, and shoes) were all hit, and the suit was beyond rehabilitation. Nick insisted (over my protests) that he buy me a new suit. Every time I went to lunch with him after that, I made a point of warning the others we were with about the danger of eating with Nick when he had a mustard bottle.

Chris Steincamp

Nick devoted an enormous amount of time to

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The most important lesson has been to be considerate of fellow lawyers and be scrupulously honest at all times.

What I Learned from Nick Daily *(Continued from page 7)*

teaching new lawyers how to practice law. I may have taken more time than most. He spent nearly 15 years working on me. The number of things that I learned from him is both countless and has, I hope, become part of the way I practice. I have tried be worthy of the teacher. The most important lesson has been to be considerate of fellow lawyers and be scrupulously honest at all times. Another that has served me well is that just because your opponent says something doesn't mean that you should always disagree with what is said. Think about it carefully. Many times the other side's version of the facts works as well or better for your position. The ultimate "OK, so what?"

There were phrases used only by Nick. People with conflicting characteristics were "an interesting mix." Whenever he told a story, when he got to the high point, he would say "but, alas…" When he went to the courthouse, or anywhere, he was going to "wander" there. If I said something obvious he would say "so you say…"

Nick also taught me that it is important to understand the personalities and motivations of the people involved. Nick was a master of understanding his fellow man. I am sure that Nick would consider himself to have failed at teaching me how to be as great a trial lawyer as he was, however, I hope that he would think that he succeeded at teaching me to be a better lawyer and a better person. I know that I am better for having known him.

Kathy Webb

My favorite "teaching moment" with Nick was my very first deposition. He accompanied me as I deposed a plaintiff in a car wreck case. I asked the deponent to draw a diagram and explain where the cars were located at the time of the accident. On the way back to the office, he remarked that saying "You were here and the other car was here and the witnesses were here and the stop sign was here…." would not be of much help when the transcript was read. I learned many more lessons from Nick over the years and I will miss him greatly.

Amy Lemley

It is hard to distinguish the lessons I learned from Nick Daily from all the lessons I learned as a young lawyer. When Nick was your mentor, you were apt to be learning from other lawyers Nick watched or tried cases against, both by positive and negative example. And, like all good teachers, Nick didn't always teach by critiquing you directly; he most often taught by telling stories. Almost always funny stories, too. For example, he taught me that a good trial lawyer never relies on a "read" from a juror, and never pitches his case to one juror to the exclusion of the other eleven. Nick did that once. He tried a case that lasted 3 or 4 days, and starting in jury selection, he thought he felt a real connection with one of the jurors. The guy had distinguished graying hair, with an expensive looking haircut. He was dressed in a nice business suit, a starched shirt with a conservative tie, wore polished wing tips, and looked the part of the perfect, conservative, businessman juror. And he was giving Nick positive feed back for everything Nick did. Mr. Distinguished nodded his head, he sighed, he rolled his eyes, he grimaced; in fact, he was a non-verbal symphony in perfect harmony with Nick's theme of the case. Nick began having more and more eye contact with the juror. He began looking at Mr. Distinguished for affirmation whenever a subtle but significant cross-examination point was made. And finally, in closing argument, Nick poured his advocacy directly to Mr. Distinguished, who actually wiped a tear from his eye in response to Nick's eloquence. Nick was exultant. He knew he had this case won.

After the jury had been out for 10 minutes, the buzzer rang, and the bailiff went back to the jury room. She was gone a long time. When she returned, she advised the court and counsel that the issue with which the jury was having difficulty was too long to write down as a question. "What is the problem?" asked the judge. "Well, your honor, I saw it for myself. Mr. Distinguished was walking back and forth,

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What I Learned from Nick Daily *(Continued from page 8)*

waving his arms around, telling the jury what a great job Mr. Daily had done. . . . representing him. In this case. He is begging the jury to find him innocent. Your honor, Mr. Distinguished thinks that he is the one on trial here, and that Mr. Daily represents him. He thinks Mr. Daily is his lawyer." A phone call or two made to hastily located family members resulted in Mr. Distinguished being led out of the courtroom, by the hand. He was having a psychotic break, his family said. As soon as the juror was led away, Nick began negotiating with the other side about whether to agree to a ten/one or a nine/two agreement verdict from the remaining jurors.

Nick was a great teacher and possessed a calm, steady disposition that was always intact during his trials. I think that is one of the things that made him a great trial lawyer. He will be missed.

One thing Nick said to me, a countless number of times over the past twenty years was: "This too shall pass." In my particular case, he was most apt to say it when I was angry or sad about something. When I began saying it as a mantra, I looked it up. The phrase comes from a story about King Solomon, who was seeking a magic ring. The power of the ring was said to be that if a happy man looks at it, he becomes sad, and if a sad man looks at it, he becomes happy. When a trusted advisor found and gave the King the ring, it was a simple gold band engraved with the words: "This too shall pass."

Wyatt Wright

He taught me to let the little things go and learn to be patient with the things you have and to fight the urge to disclose what you have until you can use it to impeach the other side, even if that means waiting until closing argument. I remember Nick took the jury a couple of times to the "movies" in closing argument after the claimant testified that all of their woes started after the accident. He would show medical records, created long before the accident, on the overhead screen that demonstrated otherwise. Nick also had a knack for asking great questions on the fly. Once I remember him asking a wrongful death claimant during a trial what her late father's phone number was—she couldn't recall despite her claiming a loving and closeknit relationship with her dad, the deceased. The jury specifically commented about that question and answer. I never saw him "Rambo" a witness but he typically got what he needed from them. Nick was a great teacher and possessed a calm, steady disposition that was always intact during his trials. I think that is one of the things that made him a great trial lawyer. He will be missed.

Nick Daily

Given how modest and reserved he was, he could not have read this article without engaging in some self-deprecating comment. Here is an email he sent recently that is "classic Nick":

> "Just got a letter saying I had been selected as one of "the best lawyers in America." It is now clear to me that all of those nasty things I may have said about them in the past were in error, and that this is in fact a list of the most carefully selected, smartest, most energetic, seasoned, creative, dynamic, hard working, talented, forceful, experienced, compassionate, generous, inspirational, prominent (and might I add good looking) attorneys that has ever been compiled, or that ever could be compiled.
>
> I would have been even more impressed by the discerning eye of the compilers, had they spelled my name right." - N

Special thanks to Amy Lemley of Foulston Siefkin LLP for coordinating republication of this article for the Kansas Defense Journal.

REPORT ON THE KADC AMICUS BRIEF: *WILLIAMS V. LAWTON*

Peter Johnston
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The Kansas Court of Appeals granted leave to KADC to file an amicus curiae brief in the case of Richard Williams v. Dr. Steve Lawton (Case No. 06-97132-A), a medical malpractice case arising from Sedgwick County District Court in which Dr. Lawton was ably defended by Amy S. Lemley of Foulston Seifkin LLP. My partner Dustin Denning and I prepared the brief on KADC's behalf. KADC's brief addressed only one of the issues in the appeal, namely, the District Court's interpretation of K.S.A. 60-3412 with respect to the qualification of the plaintiff's expert witness.

In our amicus brief, we argued that the District Court should have looked to the plain language of the statute to conclude that a retired physician who had conducted no patient care whatsoever for four months prior to the relevant incident date could not qualify as an expert witness under the statute.

K.S.A. 60-3412 provides that in any medical malpractice case, no person shall qualify as an expert witness unless at least 50% of such person's professional time within the two-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed. The Kansas Supreme Court has indicated that the statute clearly was intended to prevent the use of "professional witnesses."

The District Court in this case qualified a prospective witness who had retired completely from actual clinical practice four months prior to the date of the incident giving rise to the lawsuit. Instead of finding that this period of retirement disqualified the expert, the District Court utilized a complex formula that appeared to average the expert's professional time during the two-year period to conclude that the prospective expert's total actual clinical time exceeded the total non-clinical professional time. The District Court's analysis could open the door to allow full-time professional expert witnesses to testify in medical malpractice cases in Kansas if the expert can simply produce evidence that, on average, more than 50% of their professional time was devoted to actual patient care, regardless of whether they had ceased patient care altogether for months or even a year prior to the relevant incident date.

KADC believes that the District Court ruling is erroneous not only because it is inconsistent with the plain language of the statute, but because it is inconsistent with the clear intent of the statute as noted above. In our amicus brief, we argued that the District Court should have looked to the plain language of the statute to conclude that a retired physician who had conducted no patient care whatsoever for four months prior to the relevant incident date could not qualify as an expert witness under the statute.

We filed KADC's amicus brief with the Court on February 22, 2007. Full text of the brief is available online at www.KADC.org under "Amicus Briefs." To our knowledge, oral arguments have not yet been scheduled. We appreciated having this opportunity to be of service to KADC, and we wish to recognize Amy Lemley and her colleagues at Foulston & Seifkin LLP for their excellent appellate briefs in the case.

The authors of the KTLA article argue for one-sided "reform" by advocating that district courts should bar defendants at or before the pretrial conference from stating that their positions will be different depending upon whether plaintiff settles with one defendant, yet still allow plaintiffs thereafter to freely change positions depending upon whether such a settlement occurs.

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sponse to interrogatories, defendants state that by naming multiple defendants, plaintiff has placed comparative fault in issue. They also state that if plaintiff settles with a co-defendant or that co-defendant is otherwise dismissed, they incorporate by reference plaintiff's contentions of negligence against that defendant. Similar statements are included in the pretrial order. What all parties do next, including the plaintiff, depends on whether plaintiff settles with either A or B.

Alternate ending 1: Suppose plaintiff does not settle with A or B before trial. In that case, plaintiff will present expert testimony concerning the fault of each defendant. Defendants A and B will typically defend their respective portions of the case without pointing fingers at one another, or calling witnesses against one another. Following the instructions given by the court and closing argument, the case is submitted to the jury to determine whether either A or B were at fault, and if so, to apportion fault between A and B.

Alternate ending 2: Now, suppose before trial plaintiff settles with A for his policy limits. Plaintiff will change his or her position regarding A's fault. Plaintiff might formally move to amend the pretrial order to withdraw those claims. The jury may not see the pretrial order, may not hear evidence that plaintiff once made claims against A[2] and may not hear evidence that plaintiff settled with A.[3] Moreover, despite whatever may have been argued during discovery, plaintiff will not argue to the jury that A was at fault. Instead, plaintiff will argue only B was at fault and will seek 100% of the damages from B to maximize plaintiff's recovery. Meanwhile, the settlement triggers the hypothetically pled defense raised by B, and as a result, B incorporates plaintiff's claims against A. In effect, because of the settlement and dismissal, both the plaintiff and defendant B switch roles at trial in presenting the same evidence concerning whether defendant A was at fault. A windfall is hopefully avoided, as the jury is asked to apportion fault among A and B based on the same scope of evidence it may have considered had A not settled.

The authors of the KTLA article argue for one-sided "reform" by advocating that district courts should bar defendants at or before the pretrial conference from stating that their positions will be different depending upon whether plaintiff settles with one defendant, yet still allow plaintiffs thereafter to freely change positions depending upon whether such a settlement occurs. The pot calls the kettle black.

B. Alternative or hypothetical pleading of claims or defenses is expressly permitted by K.S.A. 60-208(e)(2).

Before we address in response to the KTLA article what the law regarding pleading comparative fault in the hypothetical *should be*, let's first address what the law *is*. Suppose the medical malpractice plaintiff has stated his claims against multiple defendants in a petition, or in response to written discovery or in the pretrial order. At those corresponding points in time, suppose a defendant states his claim of comparative fault essentially as follows: "If there is a settlement with or dismissal of any co-defendant, then this defendant, pursuant to K.S.A. 60-208(e)(2) and Kansas case law, incorporates by reference those contentions of negligence that are or have been asserted by plaintiffs, against the same, as if fully set forth herein." Does Kansas law permit this "if-then" form of pleading? The answer is "yes."

We begin with the language of K.S.A. 60-208(e)(2), which provides, in relevant part:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses…A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds or on both.[4]

The language of this statute expressly applies to claims and defenses. The language of the statute expressly permits claims and defenses to be stated hypothetically.

According to the American Heritage Dictionary, a "hypothetical" means: "**1.** Of, pertaining to, or based on a hypothesis. **2. a.** Suppositional; conjectural. **b.** Conditional; contingent."[5] The conditional statement "If x, then y" is a clear example of a hypothetical. The defense as worded follows the permitted "if-then" form of pleading.

The claim/defense of the pleader if the condition is satisfied (i.e., if the co-defendant settles) versus if the condition is not satisfied (i.e., if the co-defendant does not settle), does not need to be consistent. K.S.A. 60-208(e)(2) expressly permits inconsistent claims and defenses. Therefore, it is entirely permissible for the defendant to say that he or she will affirmatively assert fault under some circumstances but will not affirmatively assert fault under others. Everyone is on notice regarding what will happen in the event of settlement. The plaintiff knows what defendants will do by reading the defense and plaintiff's own conten-

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tions. The defendants know what plaintiff will do by using some common sense.

A district court's decision prohibiting a party from pleading in the alternative or hypothetical is reversible error. In *Griffith v. Stout Remodeling, Inc.*,[6] the Kansas Supreme Court reversed and remanded a case back to the district court where the district court had required a pretrial election of remedies, which was contrary to K.S.A. 60-208(e)(2).[7] After discussing that statute and its change upon the common law, the court stated: "Under these rules consistency of claims is not important at the pleading stage, the practical effect of which is to diminish the doctrine of election of remedies as it was applied under our former procedural code."[8] The Court added: "The spirit of the new rules would appear to permit the pleader to shift the theory of his case as the facts develop so long as he has fairly informed his opponent of the transaction or 'aggregate of operative facts' involved in the litigation."[9] The court observed that K.S.A. 60-208(e)(2) permits a plaintiff to combine more than one cause of action and pleading in the alternative, regardless of consistency. The court concluded that it was error for the district court to require a pretrial election of remedies, and error again for not allowing an amendment to the pretrial order to remedy this error.[10] The case was remanded for a new trial.

The right to plead hypothetical, alternative and inconsistent claims or defenses not only exists at the time of the pretrial conference, but continues through the time the case is presented to the jury. Directly on point, in *Griffith*, our Supreme Court quoted K.S.A. 60-208(e)(2) and then immediately followed the quote with its ruling that "[t]he result of the foregoing [i.e., 60-208(e)(2)] must be that the trial court in the initial action (case No. 20011) erred in requiring a pretrial election of remedies and in not permitting an amendment to the pretrial order."[11]

The right to plead hypothetical, alternative and inconsistent claims or defenses not only exists at the time of the pretrial conference, but continues through the time the case is presented to the jury.

Further, Kansas courts have long held that alternative and inconsistent claims and defenses are allowed up until the time the case is presented to the jury.[12] The "reform" the authors of the KTLA article request – a deadline for defendants to state unconditionally whether they are affirmatively asserting the fault of the co-defendants or not – is contrary to K.S.A. 60-208(e)(2) and long-standing Kansas case law.

C. The purpose of comparative fault is served by giving all parties an equal opportunity to switch roles in the presentation of evidence depending upon whether a settlement and/or dismissal occurs.

The Kansas comparative fault statute limits recovery by the plaintiff to that percentage of injuries attributed to a party's fault.[13] As the Kansas Supreme Court has observed, the jury is entitled to compare in one action the fault of all parties who are potentially at fault.[14] The comparative negligence statute applies in any action where the comparative negligence of any two or more parties must be determined.[15]

The immunity of a potential tortfeasor does preclude him from being placed on the verdict form. This is true whether that immunity comes from a negotiated settlement agreement and release, a voluntary dismissal, a dismissal based on the statute of limitations, statute of repose, governmental immunity or other similar defenses. As the Kansas Supreme Court has explained, the intent and purpose of the legislature in adopting K.S.A. 60-258a was "to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault."[16]

It is unfair to a defendant to pay for more than his or her respective portion of fault. The amount of the judgment against him should not be dependent upon whether plaintiff and a co-defendant negotiate a settlement. As the Kansas Supreme Court has explained: "There is no compelling social policy which requires the co-defendant to pay more than his fair share of the loss."[17] "The legislature intended to equate recovery and duty to pay to degree of fault...There is nothing inherently fair about a defendant who is 10% at fault

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paying 100% of the loss…"[18] Therefore, if the purpose of K.S.A. 60-258a is fulfilled, a defendant will only pay damages equal to his respective percentage of fault whether a co-defendant settles or does not.

In a typical medical malpractice claim with more than one defendant, the fault of all defendants is in issue, and the plaintiff bears the burden of proving all of the elements of negligence of each.[19] If plaintiff meets this burden in her case in chief, that alone is sufficient for the jury to consider whether any of the defendants are at fault, and if so, to assign percentages of fault to each. If the plaintiff presents evidence of comparative fault against parties potentially at fault, it is academic whether we say the defendants in their case also have the burden to prove the fault of the others defendants – the evidence has already been presented. Of course, if the plaintiff settles with a defendant, plaintiff no longer has an incentive to fault the party with whom she settled. At that point, the remaining defendants carry the burden of proof alone, and must present evidence supporting the defense/claim.

The comparative negligence statute applies in any action wherein the comparative negligence of any two or more parties must be determined.[22] It is the law applicable to the case, it is not just an affirmative defense.

Because no one knows for certain which of the alleged tortfeasors might settle and therefore become "immune" from a judgment, flexibility is necessary to allow the plaintiff to withdraw her contentions of fault, and for the defendants to the prove up those contentions of comparative fault. Because the plaintiff can settle or voluntarily dismiss a defendant even during trial, this flexibility to argue the issues within the scope of the pretrial order should be continued for all parties up until the time the case is presented to the jury. As long as the defendants give adequate notice to the plaintiff concerning the factual circumstances that will trigger the hypothetical claim, and the contentions do not go beyond the scope of what the defendants said they would adopt in the pretrial order,[20] there is no prejudice or unfair surprise to the plaintiff. The purpose of comparative fault is fulfilled, plaintiff does not receive a windfall because her recovery of damages is limited to the remaining defendants' proportionate share of fault, and each defendant pays no more than his or her fair share of the loss.

III. Addressing the alleged harms of hypothetical pleading of comparative fault.

A. Alleged undue benefits to defendants and prejudice to plaintiffs.

In this section, we examine the arguments advanced by the authors of the KTLA article concerning the alleged harms of what they call "hedging." Those arguments are representative of those we see in court. First, they complain it "allows defendants to switch their stories as soon as any defendant settles or is dismissed."[21] This characterization is unfair. The comparative negligence statute applies in any action wherein the comparative negligence of any two or more parties must be determined.[22] It is the law applicable to the case, it is not just an affirmative defense. The issue is who is making the specific contentions of negligence or departures from the standard of care, who is going to present the supporting evidence to the jury, and who will request those contentions be submitted to the jury? Of course, the defendants know from common sense that plaintiff will not repeat those previous contentions to the jury or present the necessary supporting evidence if a settlement or dismissal occurs. As a result, the defendants give plaintiff notice before trial that if there is a settlement or dismissal of a defendant, they will make those contentions of negligence and present the supporting evidence. If the authors' characterization that defendants "switch stories" is fair, then it is also fair to say that plaintiffs "switch stories" as soon as any defendant settles or is dismissed.

Next, the authors complain the defendants rely on expert witnesses retained and paid by the plaintiff to prove the fault of a former defendant after the settlement.[23] However, plaintiffs are free to do the same thing. Just as the defendants are free to read a deposition of one of plaintiff's former experts to prove fault, the plaintiff is free to read the deposition of the former defendant's expert to disprove it. The authors question why a defendant should be permitted to "rest on his laurels and knowingly fail to obtain an expert witness" to fault another de-

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fendant. One could ask, tongue in cheek, why should the plaintiff be able to "rest on his laurels and knowingly fail to obtain an expert witness" to *defend* the care of a defendant, but instead use his opponent's expert witness?[24] The authors write there is nothing inherently unfair to use another party's witness for one's own benefit. We agree, but that goes both ways.[25]

The authors complain that plaintiffs suffer undue prejudice because hypothetical pleading "denies plaintiffs critical information about the defendants' positions and prevents them from preparing for trial."[26] They claim the defendants are engaging in "trial by surprise."[27] This argument is not persuasive. The plaintiff knows precisely what circumstances will trigger the defense by reading the defendants' contentions. In fact, the plaintiff is often in the best position to know whether a settlement will occur with one defendant, and certainly in a better position than the other defendants. Further, the plaintiff knows exactly what claims the defendants incorporate if a settlement or dismissal occurs – they are the contentions which were written by the plaintiff's own lawyer! Plaintiff also fully knows what expert witnesses may be called and what they will say – they are plaintiff's experts! Indeed, when one party settles it will require the plaintiff to prepare herself to focus her case on the remaining defendants, and defend the care by the settling defendant. Yet this task is no more unduly burdensome or unfair than the defendants preparing to defend the case and also proving the former defendant's fault. There is no undue prejudice to the plaintiff.

Further, the plaintiff knows exactly what claims the defendants incorporate if a settlement or dismissal occurs – they are the contentions which were written by the plaintiff's own lawyer!

Finally, the authors allege they have no equal and opposite strategy to hypothetical pleading of affirmative comparative fault.[28] Not so. Interestingly, the authors concede that "[p]laintiffs may move to amend the pretrial order once a defendant is dismissed; however, such motions are at the mercy of the trial judge and at times are not granted."[29] This has not been my experience, as I have found that when those motions are made they are routinely granted. Regardless of what claims plaintiff has made in the pretrial order, plaintiff is free to not present evidence against the settling defendant or argue his or her fault to the jury. Further, in Kansas state court motions *in limine* are filed, and could be sustained, keeping out reference to the settlement or the fact that plaintiff previously made claims against those dismissed.

B. Alleged increased court workload.

The authors suggest that if the court prohibited hypothetical pleading of affirmative comparative fault, it would increase the likelihood of finger-pointing between the defendants and therefore increase the possibility of settlements, reducing the court's workload.[30] The premise that this would increase the number of cases settled is debatable.[31] Regardless, arguments of this nature are without merit. The court cannot and should not take away any party's right to plead in the alternative or hypothetical under K.S.A. 60-208(e)(2) (or any right for that matter) simply because the other side says doing so will increase the possibility of settlement and decrease the court's workload. This argument is no more persuasive than a defendant arguing that every motion for leave to amend to state a claim for punitive damages should be denied because doing so would increase settlements, and decrease the court's workload. The truth is that many factors enter into whether a case settles or does not, and no party should ask the court to give that party an advantage over the other just because doing so might increase that party's settlement position.

IV. Plaintiff's proposed solution "unveiled."

The authors of the KTLA article propose a seemingly innocuous solution: "Require the defendants to comply with the rules of civil procedure and supplement discovery requests as facts are made known."[32] Who wouldn't want that to apply to all parties, and isn't that essentially the law under K.S.A. 60-226(e)(2) anyway? The problem is that the authors suggest courts should apply that statute to prohibit the defendant from asserting in discovery responses (or in the pretrial order) alternative, hypothetical or inconsistent defenses pled pursuant to K.S.A. 60-208(e)(2).[33]

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K.S.A. 60-226(e)(2) provides: "A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." K.S.A. 60-208(e)(2) provides, in relevant part: "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds or on both. . . ." These statutes must be read so as not to make one inconsistent with the other.

In fact, a party is not required to make an election between inconsistent claims or defenses until the case is submitted to the jury.

As previously discussed, the Kansas Supreme Court has held that K.S.A. 60-208(e)(2) applies to the pretrial order, and therefore hypothetical, alternative and inconsistent pleading of claims or defenses are permitted at that time. In fact, a party is not required to make an election between inconsistent claims or defenses until the case is submitted to the jury. It therefore follows that during the discovery phase of a case, a party's response to a contention interrogatory may likewise include claims or defenses which are stated in the alternative or hypothetical, regardless of their consistency.

The authors' reliance upon *Cuiksa v. Hallmark Hall of Fame Productions, Inc.*[34] is misplaced. In that case, the defendants had answered discovery stating the plaintiff was the "only party" with whom they would compare fault. At the pretrial conference, the defendants proposed language comparing the fault of two non-parties which they had not previously identified during discovery, D & D Rental and the plaintiff's supervisor. The magistrate judge sustained plaintiff's objection to this proposed language, which was affirmed by the district court.

The *Cuiksa* case is not on point. First, in that case the issue concerned comparing the fault of a non-party. Here, the issue concerns comparing the fault of the named defendants using plaintiff's contentions. Second, and most importantly, in that case the defendant had affirmatively stated in prior discovery that the plaintiff was the "only party" with whom it would compare fault, then added new non-parties at the pretrial conference. Also, in that case the defendant did not state his defense of comparative fault in the hypothetical or in the alternative. Because it has no reason to, the *Cuiksa* case does not address Fed. R. Civ. P. Rule 8(e)(2), the federal counterpart to K.S.A. 60-208(e)(2). In that case, the defendant gave no warning before the pretrial conference that the fault of D & D Rental or the supervisor might be compared. Finally, there is no suggestion in the opinion that these allegations fell within the exception to supplementation inasmuch as they were "otherwise made known during discovery." Here, certainly the facts supporting claims of comparative fault against the defendants would be well known by the plaintiff often before suit is filed, yet no later than the time his expert reports are prepared, produced and their depositions are taken.

Unlike the plaintiff, the defendant is not required to obtain an expert witness before suit is filed nor explore whether other health care providers may be at fault. Early in the case the defendant does not have sufficient information to determine whether he or she will compare the fault of another defendant, even hypothetically if the plaintiff settles with or dismisses that defendant. Indeed, after some discovery, we may learn that some co-defendants have no business being named in the lawsuit – maybe they never saw the patient, or maybe they did but their care was exceptional, or maybe they did not cause any injury, or maybe they are only small players and it will not financially benefit the plaintiff or the defendants to keep them in the case.[35] Until there is some discovery and development of evidence to support faulting a co-defendant, such as through an expert witness report or deposition, a compelling argument can be made that it is premature to take any position on comparative fault concerning another defendant, even one contingent on dismissal or settlement.

Yet, after the expert witness disclosures and depositions, plaintiff will argue those interrogatory answers should be supplemented. This argument could be persuasive. Defendants can avoid potential problems by not waiting until the pretrial conference to inform plaintiff whether they are going to potentially assert the fault of a co-defendant in the event that defendant settles or is dismissed. In other words, the advice for defendants is that once you feel you have enough information to say you would assert the fault of a co-defendant by adopting plaintiff's contentions if that co-defendant settles, then tell the plaintiff by supplementing your discovery.

Of course, discovery responses from a defendant stating that he will compare fault of a co-defendant by adopting plaintiff's contentions in

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the event of a settlement or dismissal is not what the plaintiff really wants. Carefully examined, the argument that the discovery rules should apply to prohibit this form of pleading is a reincarnation of those arguments we have seen made at pretrial conferences. Plaintiff's real objective is the same – to require the defendants to either (a) state in writing that they are pointing fingers at one another, which the plaintiff would show to the jury and argue that "everyone agrees there was fault," or (b) waive their defense of affirmative fault, giving the plaintiff the opportunity to settle part of the case and seek a windfall recovery from the remaining defendant(s). It is a win-win situation for the plaintiff, and a lose-lose situation for the defendants. It is a "do as I say, not as I do" position, as plaintiff wants to retain the freedom to drop claims if there is a settlement or dismissal of one defendant, and wants to keep the jury from learning those claims had been previously asserted.[36] Plaintiffs do not just want to "hedge their bets," they want to change them.

Unless the court wants to go to a system that places a pre-trial deadline on the plaintiff to settle or voluntarily dismiss a defendant (and unless the court could also guarantee that a defendant would never be dismissed by the court on directed verdict based upon immunity, the statute of limitations, or the statute of repose) then our system of justice must afford all parties an opportunity to take different positions concerning the fault of those dismissed as long as everyone is on notice. The means by which plaintiff gives the defendants notice a change will occur is common knowledge – we know they simply abandon their claims against those dismissed, and turn around and defend them. The means by which defendants give plaintiff notice is by stating that plaintiff's contentions of fault will be adopted by them in the event of a settlement or dismissal. This system is all authorized under Kansas law, avoids a windfall to the plaintiff, assures the jury may deliberate and decide the fault of all potential tortfeasors in one action and involves no surprise to anyone.

No party should be required to choose between alternative claims or defenses (as long as there is evidence to support them) before the case is presented to the jury.

V. Conclusion

The authors of the KTLA article say medical malpractice defendants want to have it both ways. They accuse defendants of something that sounds catchy and derogatory: "comparative fault hedging." They criticize defendants for wanting to take a different position as to the fault of a co-defendant than they would if that defendant settled. But, they ignore the fact that they too will take a different position when one defendant settles or is dismissed. The pot calls the kettle black.

The KTLA article sets out arguments we have seen by plaintiffs at all stages of the litigation in an effort to tie the hands of the defendants, while plaintiffs are free to change their position. Under Kansas law, neither the hands of the plaintiff nor the defendants should be tied in this fashion. Any party may assert as many claims or defenses as are supported by the evidence, may state them in the alternative, in the hypothetical, and regardless of their consistency. No party should be required to choose between alternative claims or defenses (as long as there is evidence to support them) before the case is presented to the jury. That is not only what the law is, but what it ought to be.

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1. John W. Johnson and Edward L. Robinson, *Cutting the Hedge: Reforming Comparative Fault in Medical Malpractice*, KTLA JOURNAL, January 2007 at 12-15.

2. *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, 725, 869 P.2d 598 (1994).

3. A settlement is not admissible unless the settling party retains a financial stake in the outcome of the case, such as through a *Mary Carter* agreement. *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, 722-23, 869 P.2d 598 (1994) (analyzing effect of prior authorities interpreting K.S.A. 60-452 and K.S.A. 60-453).

4. K.S.A. 60-208(e)(2).

5. American Heritage Dictionary, 2d College Ed, p. 634.

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6. 219 Kan. 408, 548 P.2d 1238 (1976).
7. Plaintiff will argue that K.S.A. 60-208(e)(2) applies to "pleadings" and that a pretrial order is not a pleading. *Griffith* shows this argument is without merit.
8. *Id.*
9. *Id.* at 413 (citing 1 Vernon's K.S.A. Code of Civ. Proc. 60-208.2, p. 492).
10. *Id.*
11. *Id.*
12. *See Noel v. Pizza Hut, Inc*., 15 Kan. App. 2d 225, 232, 805 P.2d 1244 (1991), *Oller v. Kincheloe's Inc*., 235 Kan. 440, 447, 681 P.2d 630 (1984), *Griffith v. Stout Remodeling, Inc*., 219 Kan. 408, 413, 548 P.2d 1238 (1976) and *Ware v. Christenberry*, 7 Kan. App. 2d 1, 6, 637 P.2d 452 (1981).
13. K.S.A. 60-258a; *Luther v. Dannder*, 268 Kan. 343, 346, 995 P.2d 865 (2000).
14. *Wilson v. Probst*, 224 Kan. 459, 463, 581 P.2d 380 (1978).
15. *Miles v. West*, 224 Kan. 284, Syl. ¶1, 580 P.2d 876 (1978).
16. *Id*.
17. *Brown v. Keill*, 224 Kan. 195, 203, 580 P.2d 867 (1978)
18. *Id.*; *Miles v. West*, 224 Kan. 284, 286, 580 P.2d 876 (1978)(declining to adopt Colorado Supreme Court's construction that would allow plaintiff to recover 100% of her damages from a defendant who was only 1% at fault; notwithstanding fact that immune tortfeasor was found 99% at fault).
19. *See e.g. Irvin v. Smith*, 272 Kan. 112, 31 P.3d 934 (2001) ("The plaintiff in a medical malpractice case bears the burden of proof in establishing the elements of the negligence claim").
20. Just as a plaintiff can drop contentions of negligence during trial against a defendant and choose to present evidence concerning only some of those contentions, the defendants may do the same with plaintiff's list of contentions.
21. John W. Johnson and Edward L. Robinson, *Cutting the Hedge: Reforming Comparative Fault in Medical Malpractice*, KTLA JOURNAL, January 2007 at 13.
22. *Miles, supra*, 224 Kan. a Syl. ¶1.
23. John W. Johnson and Edward L. Robinson, *Cutting the Hedge: Reforming Comparative Fault in Medical Malpractice*, KTLA JOURNAL, January 2007 at 13-14.
24. *Id*. at 14.
25. Of course, for clarification, the party who retained the expert does not pay for the expert's time in deposition, opposing counsel does. K.S.A. 60-226(b)(5)(C) (requiring party taking deposition to pay "reasonable fee" for expert's time). This further underscores why we agree there is nothing inherently unfair about using another party's expert.
26. John W. Johnson and Edward L. Robinson, *Cutting the Hedge: Reforming Comparative Fault in Medical Malpractice*, KTLA JOURNAL, January 2007 at 13.
27. *Id*. at 14.
28. *Id.*
29. *Id.*
30. *Id.*
31. One could argue it would increase settlements because cases involving finger pointing are almost impossible to defend on the question of fault. Conversely, one could argue this fact would increase plaintiff's settlement expectation, making the case almost impossible to settle.
32. *Id.*
33. *Id.* (adding "Furthermore, specific allegations of fault must be made as opposed to setting a condition subsequent [sic], which is the current practice").
34. *Cuiksa v. Hallmark Hall of Fame Productions, Inc*., 2004 WL 303553, 2004 U.S. Dist. LEXIS 2177 (D. Kan. 2004). *See also, Wooderson v. Ortho Pharmaceutical Corporation,* 235 Kan. 387, 681 P.2d 1038 (1984).
35. Before these defendants are dismissed plaintiff will typically ask the remaining defendant to agree not to compare fault.
36. Perhaps if the plaintiffs' bar would agree not to change their position, presentation of evidence or argument in the event of a dismissal or settlement, the defense bar would not believe it is necessary to plead affirmative allegations of fault hypothetically or otherwise.

Lawyers in the Middle *(Continued from page 3)*

cumstances, and then to consider the various solutions available to the careful practitioner.

A. Amended Kansas Rules of Professional Conduct – Effective July 1, 2007

The Model Rules of Professional Conduct underwent significant review by a special commission established by the American Bar Association at the end of the Twentieth Century. The Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") was comprised of 13 members, assisted by 250 advisory councilors. The Commission held meetings over 39 days in a 40-month period, and issued a comprehensive report in November 2000.[5] That Report was then amended, updated and finally approved by the ABA House of Delegates at the February 2002 Mid-Year Meeting.[6]

The Kansas Bar Association then appointed a Commission in March 2002. That Commission, comprised of lawyers from around the State, studied the ABA's Ethics 2000 Report, and recommended the adoption of many of the changes proposed. The KBA Ethics 2000 ("KBA/E2K") Report was then submitted to the KBA Board of Governors in April 2004. The KBA Board eventually approved the Report and submitted it to the Kansas Supreme Court with a recommendation that it be adopted. The Supreme Court then published the KBA/E2K Report for public review and comment,[7] and the Court has now approved the Report in its entirety. The new Rules are to become effective on July 1, 2007. Since the new Rules have now been adopted, they are addressed in this article.

The new Rules are to become effective on July 1, 2007.

A couple of key provisions in the new Rules are worth noting when discussing conflicts of interest. The Rules reflect an emphasis on two concepts, "informed consent," and "confirmed in writing." Under the Rules to be effective on July 1, 2007:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
>
> . . .
>
> "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

These terms resonate throughout the new Rules and are of particular relevance in the area of conflicts of interest.

B. Third Restatement of the Law Governing Lawyers

After "thirteen years of devoted effort,"[8] a distinguished and significant panel of legal scholars and practitioners completed the Restatement of the Law, Third, The Law Governing Lawyers ("Restatement") in the year 2000. This comprehensive work encompasses a wide variety of legal issues confronting lawyers, and attempts to encapsulate the "general law" as it relates to the subjects covered.

While one may believe (or hope) that a Restatement offers general law supported by a majority of the American jurisdictions, in fact it makes no such pretense. As noted by Professor Charles Wolfram, Reporter for the Restatement, the Committee considered

> that a substantive position in a Restatement is warranted as "restating" the law if it can be rested on the support of at least one decision in an American jurisdiction. The Institute has occasionally departed from even that minimalist support position, as it did in adopting its disclosure-to-save-life provision at the 1996 Annual Meeting.[9]

Moreover, the Restatement denies any attempt to state rules of ethics, which establish minimum standards for practice as a guide for attorney discipline.[10] However, it is the "lawyer codes of ethics" – no matter how infirm – with which the lawyer must comply in order to maintain a license to practice his chosen and sworn profession.

Thus, the "Restatement" should be read within this context.

II. Rule 1.7 – Conflicts with Current Clients

A. Current Version of KRPC

The principles governing conflicts of interest with a current client are found in Rule 1.7(a), which currently provides as follows:

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> A lawyer shall not represent a client if the representation of that client will be *directly adverse* to another client, *unless*
>
> (1) the lawyer reasonably believes the representation will *not adversely affect the relationship* with the other client; *and*
>
> (2) each client *consents* after consultation.[11]

Summarized, Rule 1.7(a) prohibits directly adverse representation *unless* there is actual and reasonable belief that the conflict will not cause an adverse effect on the relationship with either client, and both clients give knowing consent after consultation.

One must view the situation through the eyes of a disinterested outsider.

The justification for the Rule is that the lawyer needs to give advice, to negotiate, and to advocate, for the benefit of one client. The lawyer's thoughts and efforts, and the transaction itself, need to be free from being clouded by the interests of another client. They need to proceed without the lawyer confronting a mental conflict of deciding whose interests to advocate, and without the specter of doubt on the part of either client as those whose interests are actually being served.

Usually, there is little doubt about whether the representation is directly adverse to the interest of another client. In *Petition of Hoang*,[12] relying on Rules 1.7, 1.9, and 1.10, the Kansas Supreme Court upheld the disqualification of a public defender because the office of the public defender had previously represented a prosecution witness. Any confidential information conveyed by this former client could be imputed to the challenged attorney. The public defender therefore had a conflict of interest between his duty to represent his present client and his obligation to maintain the attorney-client privilege with regard to the former client. While the court held that the former client could have been protected by restricting the scope of the public defender's cross examination so as to avoid violating the attorney client privilege, such a restriction may have given the defendant a valid claim of ineffective assistance of counsel.[13]

In *Chapman Engineers v. Natural Gas Sales Co.*,[14] one party moved under Rule 1.7(a) to disqualify opposing counsel on the ground that he was concurrently representing another party in a "substantially related" piece of litigation. Following a hearing, the court rejected the motion, finding insufficient evidence to prove that the two parties represented by the challenged attorney had "directly adverse" interests.[15] The court held that the possibility that adversity might arise was not enough to disqualify the attorney. Rather, the party moving for disqualification must show a reasonable probability that such adversity would occur.[16]

The Rule requires the lawyer to have the *actual* and *reasonable* belief that the relationship with the other client will not be adversely affected. This means that a reasonable third party, looking at the transaction or action taken by the lawyer, would conclude that the relationship with the other client would not be affected by the adverse representation.[17] Such occurrences are rare.[18]

This is an objective standard. As noted in the comment, one must view the situation through the eyes of a disinterested outsider.

> [W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.[19]

This consultation should include a complete disclosure of the adverse nature of the representation, and an understanding that, despite the lawyer's loyalty to the client in other matters, he is loyal only to the other client in the matter at hand.[20]

The definitions ("Terminology") in the Model Rules detail the type of consultation which shall be provided, in order for the clients to give knowing consent:

> "Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

While the information imparted will necessarily vary, depending on the situation, it is clear that the adverse representation must be disclosed, as well as the risks and advantages resulting from continued representation despite the conflict. For example, in the case of *In re Wilkinson*,[21] the lawyer was held to have improperly represented a client in the sale of another client's property without full disclosure, because he did not inform the client of his intention to satisfy his fee claim against the other client from the proceeds of the sale.

At a minimum, the clients must be informed of the adverse representation, and every effort must be

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made to foresee – and disclose – the various alternative results which may arise, and the impact of those results. The more detailed information that is provided, the more likely it is that the consultation will be deemed adequate. The "negative" factors could include the risk of presenting a "joint" position which is inconsistent with the "best" position for one or the other of the clients; the risk of "guilt by association" from one client to the other; and the possible absence of real independent judgment and advice from counsel. The "positive" factors from joint representation could include the savings from sharing attorneys' fees and expenses; the benefit of presenting a unified position, without cross-fire from a co-party; and the benefit of retaining the initial attorney of one's choosing.

The key concepts which appear anew in the 2007 version of the Rules are (a) informed consent, which must be (b) confirmed in writing.

This disclosure may require the imparting of confidential information from the other client, in order to explain the possible adversity or the ramifications of various potential results in the matter. In this situation, lawyers must be mindful of Rule 1.6, regarding confidentiality. If the other client does not consent to the release of confidential information to the new client, then an adequate consultation cannot be concluded, and knowing consent cannot be obtained. As noted in the official Comments:

> [T]here may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. [22]

If knowing consent is given (and the lawyer actually and reasonably believes the adversity will not adversely affect the relationship with the client), the conflict may be waived.[23] The consent must be knowingly given,[24] after full disclosure of all relevant facts.[25]

B. New Version of Rule 1.7

Effective July 1, 2007, Rule 1.7 will provide as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.[26]

As noted earlier, the key concepts which appear anew in the 2007 version of the Rules are (a) informed consent, which must be (b) confirmed in writing.

The Ethics 2000 authors explain these concepts in the context of concurrent conficts in the Comments to Rule 1.7:

> Informed Consent:
>
> Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

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. . .

Confirmed in Writing:

Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.[27]

The new version of the Rules, then, focus more directly on the client giving a knowing waiver, armed with the relevant facts – and then having that disclosure and consent documented for the record. This serves the dual purpose of providing evidence of the waiver after the fact (in the case of faded memories), but more importantly emphasizing to clients, before the fact, that the waiver is a serious matter, not to be given lightly, because it must be read and approved.

Even when the interests of two concurrent clients are allied, the risk of other conflicts arise, including conflicts with the lawyer's own interests.

Lawyers will need to be aware of these new concepts. They will need to formulate more specific ways to explain conflicts, waivers and their effects, and to develop new forms of written disclosure and waiver.

C. Restatement

The Restatement is somewhat broader on the subject of conflicts with current clients. Section 201 of the Restatement prohibits a lawyer from representing a client if the representation would involve a conflict of interest, and then provides:

A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.[28]

The Restatement then proceeds in subsequent sections to discuss conflicts in civil and criminal litigation, non-litigation matters, corporate representations, and government representations.[29]

Like the provisions of the new version of the Rules, *supra*, the Restatement also allows waiver of conflicts only upon "informed consent," although the Restatement does not require such consent to be "confirmed in writing." Section 122 (a) of the Restatement provides:

(a) A lawyer may represent a client notwithstanding a conflict of interest prohibited by §121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.[30]

According to the Restatement, the rules of professional responsibility are "intended to assure clients that a lawyer's work will be characterized by loyalty, vigor, and confidentiality," but the rules also allow a "waiver through informed consent by a client who elects less than the full measure of protection that the law otherwise provides."[31]

III. RULE 1.7(b) – Conflicts with Lawyer's Own Interests

Even when the interests of two concurrent clients are allied, the risk of other conflicts arise, including conflicts with the lawyer's own interests.

A. Current Version of KRPC

Rule 1.7(b) provides a similar proscription against representation of a client, even where the representation itself is not "directly adverse" to another concurrent or former client. That Rule currently provides as follows:

(b) A lawyer shall not represent a client if the representation of that client may be *materially limited* by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, *unless*:

(1) the lawyer *reasonably believes* the representation will not be adversely affected; and

(2) the client *consents* after consultation. When representation of multiple clients in a

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> single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[32]

When a lawyer finds that the representation of a client brings him into conflict with his own interests, then the lawyer must examine the relationship and proceed with caution. This could arise, for example, where the client wishes to pursue an entity in which the lawyer owns an interest; where the lawyer becomes aware of information from which he could profit personally; or where the client's interest would be to prolong a case (e.g. to obtain more information), while the lawyer's interest would be to conclude the matter quickly because he is representing the client on a fixed-fee basis.

B. New Version of KRPC

The comparable provision to Rule 1.7(b) in the new version of the Rules appears at Rule 1.7(a), where it includes in the definition of "concurrent conflict" as follows:

> (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The KBA/E2K Comments explain:

> The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.[33]

When embarking on any representation, the lawyer must consider whether that representation will bring him into conflict with other clients, or with his own financial, personal, philosophical or religious beliefs.

Thus, when embarking on any representation, the lawyer must consider whether that representation will bring him into conflict with other clients, or with his own financial, personal, philosophical or religious beliefs. Again, the client is entitled to representation by a lawyer generally free from such constraints. At the least, the client is entitled to know of the conflict and should be given the opportunity to waive it – after consultation.

C. Restatement

The comparable principle in the Restatement is found at §125, which states:

> Unless the affected client consents to the representation under the limitations and conditions provided in §122,[34] a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.[35]

Not only are financial interests implicated, but also personal, philosophical, or religious interests and beliefs must be considered.[36]

IV. Rule 1.9 – Conflicts with Former Clients

A. Current Version of KRPC

Conflicts with former clients are governed by Rule 1.9, which currently provides as follows:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in *the same or a substantially related matter* in which that person's interests are materially adverse to the *interests* of the former client unless the former client *consents after consultation*; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.[37]

The Rule is based on the principle that the lawyer's duties of loyalty and confidentiality survive the termination of the relationship. A former client should be confident that, even after the lawyer-client relationship has been terminated, the lawyer will not take action against the former client in the same matter or a substantially related matter, and will not disclose client confidences which were imparted during the existence of the relationship.

In determining the existence of a conflict with a former client, the first inquiry is whether the new matter is the same as, or substantially related to, the matter handled for the former client.[38] The

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determination will be based on a factual inquiry. Thus, representation against a former client in the same lawsuit or the same transaction would clearly be prohibited.[39] Representation against a former client in a matter which could be deemed "substantially related" to the same lawsuit or transaction would also be prohibited (again, unless knowing consent is obtained from the former client).[40]

A lawyer should not be able to convert a "current client" into a "former client" by dropping the current client like a "hot potato" at the time the potential conflict arises.

A lawyer should not be able to convert a "current client" into a "former client" by dropping the current client like a "hot potato" at the time the potential conflict arises.[41] If there is a current client conflict, it must be dealt with under Rule 1.7, or avoided by not taking on the new client.

In *City of Hutchinson v. Gilmore,*[42] a lawyer appointed to represent a DUI defendant removed himself from the case (after meeting with the client) because his firm had been on the other side of litigation involving that defendant. The defendant was then found guilty. On appeal, that same lawyer was the new prosecutor, and the defendant moved to disqualify the lawyer under Rule 1.9(a), arguing that since the lawyer had first acted as defendant's appointed counsel, he could not represent the city as prosecutor. The lawyer and the client disagreed as to the substance of the matters discussed in their initial meeting. The case thus involved the question of whether the prosecutor should be disqualified, and whether he received confidential information in connection with the prior representation.

> Under K.S.A. 60-246(c)(1), a person becomes a client for purposes of privilege and confidentiality when that person contacts an attorney *seeking* legal advice. If confidential or privileged information is exchanged, a conflict would arise if that attorney then switched sides, even if no actual employment resulted from the initial conference. MRPC 1.9, 1.10.[43]

The Court then remanded the case for a hearing to determine whether, in the initial conference, confidential information was imparted by the client.[44]

On the other hand, a formal termination of the relationship should not be necessary. The court should consider the nature of the representation and the facts of the particular case in deciding whether the attorney-client relationship had actually been concluded. Where there is evidence to indicate that the client no longer considered the law firm to represent him, or that the subject matter of the representation was concluded, then the client should be considered a "former" client, and not a "current" client.[45]

B. New Version of KRPC

The new version of Rule 1.9(b), effective July 1, 2007, states the same basic rule as the current Rule 1.9(b), but with additional detail:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> > (1) whose interests are materially adverse to that person; and
> >
> > (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9 (c) that is material to the matter;
>
> Unless the former client gives informed consent, confirmed in writing.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.[46]

Note again the repeated requirement for "informed consent" to be "confirmed in writing."

Of relevance to the present article is a comment regarding the representation of multiple parties who subsequently become adverse.

> Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a

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> substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.[47]

Thus, when a lawyer has represented two or more parties in a matter, such as the employer and a supervisor defendant in a sexual harassment case, it will be difficult for the lawyer subsequently to terminate his representation of the supervisor and then take on the defense of the supervisor's wrongful termination case, where the termination arose from disclosures made by the supervisor during the prior representation.

Another consideration under Rule 1.9 arises when lawyers move from firm to firm.

> First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. . . . If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.[48]

Rules 1.9 and 1.10 will not prevent a firm from representing a client in matter which is the same or substantially related to one where a lateral lawyer's former firm represented the adverse party, if the lawyer did not actually work on the matter himself and did not acquire material, confidential information about the matter.

Thus, Rules 1.9 and 1.10 will not prevent a firm from representing a client in matter which is the same or substantially related to one where a lateral lawyer's former firm represented the adverse party, if the lawyer did not actually work on the matter himself and did not acquire material, confidential information about the matter. Similarly, when a lawyer has left the firm, taking a client with him, the former firm may represent a party adverse to that former client, even if the matter is the same or substantially related to the matter on which the firm represented the former client if any lawyer remaining in the firm did not acquire material, confidential information relating to the representation.[49]

C. Restatement

The concept of conflicts with former clients is addressed in the Restatement at §132, which provides:

> Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in §122, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or substantially related matter in which the interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:
>
> (1) the current matter involves the work the lawyer performed for the former client; or
>
> (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.[50]

According to the Restatement, this rule "accommodates four policies:"

1. The rule should deter the temptation to ignore continuing duties to former clients, including loyalty and confidentiality;
2. The rule also should cause the lawyer to consider whether he can adequately and zealously represent the new client, bound as he is to honor obligations to the former client;
3. Prospectively, the rule should deter lawyers representing current clients from laying a foundation for a subsequent adverse representation, when the "current" client becomes a "former" client. This encourages strong and zealous representation of current clients.
4. The rule does encourage representation of new clients, by prohibiting representation adverse to former clients only in limited circumstances, i.e. where the new representation relates substantially to the matter on which the lawyer represented the former client.[51]

V. Compensation from Someone Else

A. Current Version of KRPC

The current version of Rule 1.8(f) provides as follows:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (2) there is no interference with the lawyer's

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> independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to the representation of a client is protected as required by Rule 1.6.[52]

Someone paying for the representation of another person may be motivated first by the desire the minimize the cost of the representation, while minimizing costs may not be in the best interest of the actual client. Thus, the Kansas Supreme Court has held that one who represents defendants in a mortgage foreclosure action must diligently represent those clients and get the appropriate waivers after disclosure, while being paid by someone who had purchased the clients' redemption rights.[53]

A related principle is found in the Comments to Rule 1.7(b), where it is recognized:

> A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.[54]

Where someone else is "paying the bills," the lawyer must ensure that the payer also is not "calling the shots" in the representation of the client.

Thus, Rules 1.8(f) and 1.7(b) must be considered when taking on the representation of a party whose legal fees are being paid by another.

B. New Version of KRPC

The new version of Rule 1.8(f), effective July 1, 2007, is not significantly different from the current rule, just substituting "informed consent" for "consents after consultation."

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.[56]

Note that this consent is not required to be "confirmed in writing." The KBA/E2K Comments recognize the conflict inherent in this situation, which frequently arises, but allows it to be accommodated by disclosure and consent.

> Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).[]

Thus, where someone else is "paying the bills," the lawyer must ensure that the payer also is not "calling the shots" in the representation of the client.

C. Restatement

Section 134 of the Restatement takes a negative approach, but adds a whole new subsection:

> (1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in §122 and knows of the circumstances and conditions of the payment.
>
> (2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if:
>
> (a) the direction does not interfere with the lawyer's independence of professional judgment;
>
> (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
>
> (c) the client consents to the direction under

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> the limitations and conditions provided in §122.[57]

This rule recognizes the risks inherent in a situation where some other than the client pays the lawyer to represent the client, but allows it only upon informed consent.

VI. Insurer Paying for Insured

Much has been written on the subject of the "tripartite" relationship among insurer, insured and defense counsel. "There is a large amount of commentary" about this issue.[58]

> A majority of jurisdictions limit or prohibit lawyers representing insureds from complying with insurers' directives about case management, practice, and billing. *See In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000)(insurers' contractual requirement of prior approval regarding billing and practice rules for defense counsel appointed to represent insureds violates several rules violates several rules of professional conduct, including Rule 1.8, because of fundamental interference with defense lawyer's duty to exercise independent judgment and to give undivided loyalty to insureds).[59]

The ABA Standing Committee on Ethics and Professional Responsibility has addressed this issue in detail in its Formal Opinion 01-421. Summarized, this opinion holds:

> [W]e conclude that lawyers representing insured clients must not permit the client's insurance company to require compliance with litigation management guidelines the lawyer reasonably believes will compromise materially the lawyer's professional judgment or result in his inability to provide competent representation to the insured.[60]

The Opinion goes on to specify that the lawyer must not release confidential client information to an adjuster or auditor without consent of the client, including in the billing statements submitted to the insurer for payment.[61]

Rather than devote substantial space to this issue, when others have done so in a deeper and more meaningful manner, it is sufficient to recognize the conflict inherent in this situation. With the advent of "informed consent" which must be "confirmed in writing," lawyers would be well-advised to develop forms of engagement letter which document and confirm the lawyers' independence, and the client's consent to the relationship.

With the advent of "informed consent" which must be "confirmed in writing," lawyers would be well-advised to develop forms of engagement letter which document and confirm the lawyers' independence, and the client's consent to the relationship.

A suggested form of such a letter is included as Appendix A to this article.

VII. Employer Paying for Employee

Another frequent circumstance encountered by defense lawyers arises where an employer and its employee, such as a supervisor or manager, are jointly sued in the same case. Under those circumstances, the employer may feel compelled to pay for the defense of the supervisor or manager, perhaps even to avoid the individual defendant allowing a default to be taken against him.

Employers in employment lawsuits are often responsible and liable, as a matter of law, for the discriminatory or other wrongful acts of their employees, if those acts relate to or arise from the terms and conditions of employment.[62] Therefore, employers often find it expedient and beneficial to provide their employee co-defendants with a defense. If the employer and the employee believe, after consultation, that their interests will not be adversely affected, and if they provide knowing consent, then the joint representation is appropriate.[63]

In *Shadid v. Jackson,*[64] plaintiffs sued the city and several of its police officers, claiming brutal treatment. The court found that joint representation of the city and the police officers by the same lawyer created a conflict of interest, because of the potential for conflicting loyalties. The court, while acknowledging that a common defense created no conflict, went on to hold that the common defense might change during the course of the case – such as a situation where the city came to believe that the police officers did, in fact, act in an inappropriate manner towards the plaintiffs.[65] This disqualified counsel from representing the individual defendants.

In *Dunton v. Suffolk*,[66] the county attorney jointly represented the county a police officer. The County asserted the defense that the police officer was not acting within the scope of his employment when he (allegedly) assaulted the plaintiff. Of course, this detracted somewhat from the police officer's defense of good faith immunity.[67] This irreconcilable (and non-waivable) conflict created an untenable situation for the police officer, and represented a conflict of interest, disqualifying the lawyer.[68]

In a New York case, it was the individual em-

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Lawyers in the Middle *(Continued from page 26)*

ployee defendants who brought a motion to disqualify their own counsel, and to compel their employer to engage independent counsel to represent them. In *England v. Town of Clarkstown,*[69] the employees (police officers) were being represented by the attorney who was also representing the Town – the officers' employer. The conflict of interest was no technicality: the hired counsel failed to provide zealous representation to the individual defendants, and even failed to communicate with them adequately.

> First, the action/inaction of the attorney currently representing the police officers and the Town is troubling. Counsel never advised these officers of the potential conflicts that could exist between the Town and its employees in a civil rights action. Nor did he inform the defendants that they could be held individually liable and that they were being sued individually for punitive damages. Furthermore, counsel has not been cooperative in providing the defendant police officers with copies of pleadings and motion papers which are germane to the Court's inquiry herein.[70]

Because of a statute requiring the Town to provide independent counsel to its employees when sued, the Court ordered disqualification of the attorney in representing the individual defendants, and ordered the engagement of independent counsel.[71]

Where the lawyers represented both the employer and the employees, an irreconcilable conflict of interest was found to exist in the West Virginia case of *State ex rel. Morgan Stanley & Co. v. Macqueen,*[72] where defendants brought a writ of prohibition against the trial judge, to compel him to disqualify of plaintiffs' counsel in the underlying case.

The plaintiff in the underlying case (the State of West Virginia) sued several brokers for conspiring with State employees to violate state securities laws. Meanwhile, the lawyers for the State were providing counsel and representation to those very State employees accused of being co-conspirators. The broker defendants claimed a conflict of interest. The trial judge refused to disqualify the State's counsel, and the brokers appealed.

On appeal, the Court – citing Rules 1.7 and 1.13, MRPC – held that the plaintiffs' counsel had an irreconcilable conflict of interest, and ordered disqualification.

> Although the State does not name the seven Staff members as actual defendants in the underlying litigation, the pleadings, as framed at the time this case was argued, do potentially implicate these individuals with the alleged wrongdoing in connection with the investment losses at issue. That implication, in and of itself, is sufficient to raise the necessary element of adverse interests. The allegations against the Staff, although asserted collectively rather than individually, nonetheless create potential adverse interests between the State and those individual Staff members, which in turn further create a potential, if not actual, conflict of interest.[73]

When the employer is a public entity, this problem is compounded because of restraints against the public entity giving "informed consent" on behalf of the public that the entity represents. In *Macqueen*, the Court held that the State is incapable of giving its consent to a conflict of interest.

> [T]he State is incapable of granting its consent. . . . The rationale underlying this rule is quite simple: "It is essential that the public have absolute confidence in the integrity and impartiality of our system of justice." . . . Given the obvious public interest inherent in the State's pursuit of its claim for investment losses, the State cannot consent to a dual representation which involves such adversity of interests as to raise even the appearance of such impropriety. *See also* Guthrie Aircraft, Inc. v. Genesee County, N.Y., 597 F.Supp. 1097, 1098 (W.D. N.Y. 1984) ("[A] municipality may not consent to adverse representation, since the public interest is involved"); In re A. and B., 44 N.J. 331, 209 A.2d 101, 102-103 (1965) ("Dual representation is particularly troublesome where one of the clients is a governmental body. So, an attorney may not represent both a governmental body and a private client merely because disclosure was made and they are agreeable that he represent both interests.").[74]

In the context of a criminal case, where the employer pays for the representation of the employee, the influence exerted by the employer-payer may raise a question of whether the due process rights of the individual employee-defendant were violated by the arrangement. In *Wood v. State of Georgia*,[75] the United States Supreme Court remanded for further inquiry and

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In the context of a criminal case, where the employer pays for the representation of the employee, the influence exerted by the employer-payer may raise a question of whether the due process rights of the individual employee-defendant were violated by the arrangement.

Lawyers in the Middle *(Continued from page 27)*

decision, a case where the employee defendant was not paying for his defense in the criminal case, but rather, his defense was being paid by his employer, a co-defendant.[76]

> Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest. Another kind of risk is present where, as here, the party paying the fees may have had a long-range interest in establishing a legal precedent and could do so only if the interests of the defendants themselves were sacrificed.[77]

Again, the lawyer will be well-advised to obtain "informed consent" from the client, and to have this informed consent "confirmed in writing." A suggested form of letter on this issue appears as Appendix B to this article.

The attorney should be mindful of the ethical rules applicable to the situation, and where it is appropriate to continue with the representation, provide the necessary full disclosure, and obtain knowing, written consent.

VIII. Parent Paying for Minor

A third, and perhaps less frequent situation, arises when a minor finds himself in trouble and without funds, thereby counting on a parent or guardian to provide the funds for a defense. Oftimes, the paying parent feels entitled to have input into the defense or even to be granted access to confidential and privileged communications.[78] In *People v. White*,[79] the Michigan Court of Appeals held that a lawyer was ineffective in representing a minor client, since he was more concerned with the wishes of the client's father, who hired him, than with the best interests of the son/client, concerning the desirability of psychiatric examination.

Because the lawyer will be paid by someone other than the client, informed consent should be obtained and confirmed in writing. A suggested form of letter on this issue appears as Appendix C to this article.

IX. Screening

The Kansas Supreme Court has consistently rejected the concept of a screen, Chinese Wall, or wall of insulation to avoid the harsh impact of disqualification in the event of a conflict.[80] However, the concept of screening remains a viable option for lawyers leaving governmental practice or judgeships. Rule 1.12 has permitted screening since at least 1999.

And the Kansas Supreme Court has now approved screening in certain circumstances as it relates to prospective clients, by adopting new Rule 1.18 as part of the Ethics 2000 package.

Because of the depth of this subject, more will have to be written elsewhere on the subject of screening under Rules 1.10 and 1.18, and what constitutes a viable and enforceable screen.

X. Conclusion

Representing multiple clients in a single matter often makes a lot of sense. There are common interests which can best be represented by a single counsel or firm. There are common theories, strategies, and tactics which can be pursued by a single spokesperson. There are economies of scale which will allow the clients to be represented fully, which financial constraints might not otherwise permit.

However, there are also risks involved in the representation of multiple clients in a single matter, not the least of which are inherent conflicts of interest attendant to one person paying for the representation of another.

Therefore, the attorney should be mindful of the ethical rules applicable to the situation, and where it is appropriate to continue with the representation, provide the necessary full disclosure, and obtain knowing, written consent.

J. Nick Badgerow is the partner-in-charge of the Overland Park, Kansas office of Spencer Fane Britt & Browne LLP, where he practices as a trial lawyer, in the areas of employment, construction, professional responsibility, and general business litigation. Nick is an honors graduate of The Principia College in Elsah, Illinois, and he is a graduate of the University of Missouri – Kansas City School of Law. Nick is a member of the Kansas Judicial Council, and Chairman of the Council's Civil Code Committee; Member of the Kansas State Board of Discipline for Attorneys; chairman of the KBA Ethics Advisory Opinion Committee; chairman of the KBA Ethics 2000 Commission; and chairman of the Johnson County Bar Association Ethics and Grievance Committee. Nick has presented more than 170 seminars and published 30 articles, mainly on the issues of professional responsibility and legal ethics.

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1. "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Rule 1.3, KRPC, Official Comments.
2. Kansas Rules of Professional Conduct ("KRPC"), found at Rule 226, Rules of the Kansas Supreme Court. Formerly known as the "Model Rules of Professional Conduct" or "MRPC," in Kansas the name of the rules was changed by amendments adopted on March 11, 1999 to the "Kansas Rules of Professional Conduct."
3. *Official Comment*, Rule 1.7, KRPC, emphasis added.
4. *Alexander v. Russo*, 1 Kan. App. 2d 546, 554, 571 P.2d 350 (1977).
5. *Report of the Commission on Evaluation of the Rules of Professional Conduct*, ABA Center for Professional Responsibility, November 2000 (hereinafter "*Ethics 2000 Report*"). The report is available on-line at http://www.abanet.org/cpr.
6. ABA Center for Professional Responsibility, http://www.abanet.org/cpr/e2k/home.html
7. Kansas Bar Association website, http://www.ksbar.org/ethics2000.html
8. Restatement of the Law Governing Lawyers, Third, ALI/ABA (2000), Foreword, p. xxii.
9. Wolfram, Bismarck's Sausages and the Ali's Restatements, found at http://www.hofstra.edu/Academics/Law/law_lawrev_wolfram.cfm#Ref7, *citing* Wolfram, Legal Ethics and the Restatement Process – The Sometimes Uncomfortable Fit, 46 Okla. L. Rev. 13, 17 (1993).
10. Restatement, § 1, Reporter's Note, note to "comment b."
11. Rule 1.7(a), KRPC (emphasis added).
12. *Petition of Hoang*, 245 Kan. 560, 781 P.2d 731 (1989).
13. 245 Kan. at 569.
14. *Chapman Engineers, Inc. v. Natural Gas Sales Co., Inc.*, 766 F. Supp. 949 (D. Kan. 1991).
15. *For example, see, State v. Swoyer*, 228 Kan. 799, 619 P.2d 1166 (1980) (lawyer cannot represent corporation regarding termination of its business affairs while also representing an employee claiming wages from that same corporation).
16. The court also rejected the request for disqualification on the grounds that the two parties represented by the challenged attorney would be "adequately represented" despite his presence, and that the clients gave informed consent, displaying a "reasonable understanding of the legal ramifications" of proceeding. *Chapman Engineers*, 766 F. Supp. at 956 and 957.
17. *In re Glenn*, 238 Kan. 625, 712 P.2d 1278 (1979) (where two parties made assignment agreement, lawyer could not represent both parties because the relationship would be adversely affected).
18. Belief that the relationship would not be adversely affected is reasonable, for example, where the lawyer takes action against a corporation or other client which employs numerous lawyers in various disciplines, and does not retain a single lawyer or a small group of lawyers for all of its work.
19. Rule 1.7, KRPC, Official Comment.
20. Of course, if the relationship later is affected, the client is free to change counsel and to seek another attorney.
21. *In re Wilkinson*, 242 Kan. 133, 744 P.2d 1214 (1987).
22. Rule 1.7, Official Comment.
23. *In Re Seeger's Estate*, 208 Kan. 151, 490 P.2d 407 (1971); *Matter of Baby H.*, 12 Kan. App. 2d 223, 739 P.2d 1 (1987).
24. *Shongutsie v. State*, 827 P.2d 361 (Wyo. 1992).
25. *Turner v. Gilbreath*, 3 Kan. App. 2d 613, 599 P.2d 323 (1979).
26. Ethics 2000 Report, published by Kansas Supreme Court at http://www.kscourts.org/attydisc/KRPCproposed.rtf .
27. Rule 1.7, KRPC, Ethics 2000 Report, found at http://www.kscourts.org/attydisc/KRPC proposed.rtf
28. *Restatement of the Law Governing Lawyers, Third*, ABA (2000)("Restatement"), Section 201. The Restatement can be found in Morgan and Rotunda, *2000 Selected Standards on Professional Responsibility*, Foundation Press (2000).
29. Restatement, §§ 209, 210, 211, 212, and 214, respectively.
30. Restatement, § 122.
31. Restatement, § 122, Comment b., *Rationale*.
32. Rule 1.7(b), KRPC (emphasis added).
33. Rule 1.7, Comment, Ethics 2000 Report, published by Kansas Supreme Court at http://www.kscourts.org/attydisc/ KRPCproposed.rtf
34. § 122 of the Restatement defines the terms and conditions of "informed consent to the lawyer's representation."
35. Restatement, § 125.
36. *Id.* at Illustration No. 7.
37. Rule 1.9, KRPC (emphasis added).
38. KBA Ethics Opinion 92-16 (if the new matter is not the same as or substantially related to the former matter *and* if confidential information will not be used, then continued representation in the new matter is permissible). *See also* KBA Ethics Opin-

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ion 89-4 (representation of new client in negotiation to reduce unpaid hospital bill is permitted by lawyer who formerly represented hospital in malpractice action).

39. KBA Ethics Opinion 90-2 (where the prior representation was in the same or a substantially related matter, disqualification would be required); KBA Ethics Opinion 92-16 (where the prior matter was not substantially related to the new matter, disqualification would not be required).
40. Note here that consent is only required from the *former*, and not from the new, client. On the other hand, in the situation of a conflict with a *current* client, consent must be obtained from *both* clients. *See* Rule 1.7.
41. *Truck Insurance Exchange v. Fireman's Fund Ins. Co.*, 6 Cal. Rptr. 2d 228 (Cal. App. 1992); *Stratagem Development Corp. v. Heron Int'l*, 756 F. Supp. 789 (S.D.N.Y. 1991).
42. *City of Hutchinson v. Gilmore*, 16 Kan. App. 2d 646, 827 P.2d 784 (1992).
43. 16 Kan. App. 2d at 649 (emphasis in original).
44. 16 Kan. App. 2d at 650. For a new development on the issue of conversations with "prospective" clients, see Ethics 2000, Rule 1.18 (Kansas Ethics 2000, Rule 1.17). http://www.kscourts.org/attydisc/KRPC proposed.rtf
45. *Barragree v. Tri-County Elec. Co-op., Inc.*, 263 Kan. 446, 457, 950 P.2d 1351 (1997) (reversing disqualification).
46. Rule 1.9, Ethics 2000 Report, published by Kansas Supreme Court at http://www.kscourts.org/ attydisc/KRPCproposed.rtf
47. *Id.* at Comment 1.
48. Rule 1.9, Ethics 2000 Report, published by Kansas Supreme Court at http://www.kscourts.org/ attydisc/KRPCproposed.rtf. *See also* Rule 1.10, KRPC and the Kansas Ethics 2000 Report.
49. *Pacific Employers Insurance Company v. P.B. Hoidale Co., Inc.*, 789 F. Supp. 1112 (D. Kan. 1992); *Exterior Systems, Inc. v. Noble Composites, Inc.*, 210 F. Supp. 2d 1062 (N.D. Ind. 2002).
50. Restatement § 132.
51. Restatement § 132, Comment b.
52. Rule 1.8(f), KRPC.
53. *In re Geeding*, 270 Kan. 139, 12 P.3d 396 (2000).
54. Rule 1.7, KRPC, Official Comment.
55. Rule 1.8(f), Kansas Ethics 2000 Report, published by Kansas Supreme Court at http://www.kscourts.org/attydisc/KRPCproposed.rtf.
56. Rule 1.8(f), Comment 11, Ethics 2000 Report, published by Kansas Supreme Court at http://www.kscourts.org/attydisc/KRPCproposed.rtf.
57. Restatement § 134.
58. ABA, *Annotated Model Rules of Professional Conduct*, Fifth Edition (2002), p. 159, citing numerous journal articles.
59. *Id.* at 158, and citing ethics opinions from 28 different states to the same effect.
60. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 01-421 (February 16, 2001) available online at http://www.abanet.org/cpr/pubs/fo01-421.html
61. *Id.*
62. *Miller v. Maxwell's Int'l, Inc.,* 991 F.2d 583, 587-88 (9th Cir. 1993), *cert denied*, 510 U.S. 1109 (1994); *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 751 (9th Cir. 1993).
63. *Lee v. Hutson*, 600 F.Supp. 957, 959 (N.D. Ga. 1984).
64. *Shadid v. Jackson,* 521 F. Supp. 87 (E.D. Tex. 1981).
65. *Id.* at 89.
66. *Dunton v. Suffolk County, State of N.Y.*, 729 F.2d 903 (2d Cir. N.Y. 1984), *modified* 748 F.2d 69 (2d Cir. N.Y. 1984).
67. *Id.* at 907.
68. *Id*. at 909.
69. *England v. Town of Clarkstown*, 166 Misc. 2d 834, 634 N.Y.S.2d 958 (N.Y.Supp. 1995).
70. 634 N.Y.S.2d at 960.
71. *Id.* at 960.
72. *State ex rel. Morgan Stanley & Co. v. Macqueen*, 187 W.Va. 97, 416 S.E.2d 55, 60 USLW 2762 (1992).
73. 416 S.E.2d at 60.
74. *Id.*
75. *Wood v. State of Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).
76. 450 U.S. at 267.
77. *Id.* at 270-71 (footnotes omitted).
78. Note the reminders of the Rule 1.6 duty of confidentiality in Rules 1.8(f) and 1.9, KRPC. This is maintained in the KBA/E2K version of the Rules.
79. *People v. White*, 338 N.W.2d 556 (Mich. App. 1983).
80. *Parker v. Volkswagenwerk Aktengesellschaft*, 245 Kan. 580, 781 P.2d 1099 (1989); *Lansing-Delaware Water Dist. v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991); *Zimmerman v. Mahaska Pepsi-Cola Bottling Co.,* 270 Kan. 810, 19 P.3d 784 (2001).

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Lawyers in the Middle *(Continued from page 30)*

APPENDIX A
INSURED CLIENT – INSURER PAYING
WAIVER OF CONFLICTS OF INTEREST

JOSEPH INSURED
ADDRESS
KANSAS INSURANCE COMPANY
ADDRESS

Re: SUSAN PLAINTIFF v. JOSEPH INSURED

Ladies and Gentlemen:

This law firm has been retained to represent JOSEPH INSURED, who is a defendant in the above-referenced case which is pending in the District Court Any County, Kansas. We understand that our fees are to be paid by KANSAS INSURANCE COMPANY.

At this time, there does not appear to be a conflict of interest between JOSEPH INSURED and KANSAS INSURANCE COMPANY. However, because KANSAS INSURANCE COMPANY has agreed to pay the costs of this defense, including our attorneys' fees, it must be understood among us that our client is JOSEPH INSURED, and that our actions and decisions have to be taken on the basis of our independent advice and consultation with JOSEPH INSURED. In the event of any dispute between KANSAS INSURANCE COMPANY and JOSEPH INSURED, including a dispute regarding the existence, nature or extent of coverage, LAW FIRM will not advise nor represent either party.

It is agreed that, although KANSAS INSURANCE COMPANY has agreed to pay for the defense of JOSEPH INSURED by LAW FIRM in the lawsuit, KANSAS INSURANCE COMPANY will not direct or control the representation of JOSEPH INSURED, and will not interfere with the independence of judgment which must be exercised by LAW FIRM in the representation of JOSEPH INSURED. Moreover, while we have received and acknowledged the instructions to outside counsel submitted by KANSAS INSURANCE COMPANY, LAW FIRM will not be able to comply with any requests for reports or information, nor take any actions or limit its defense of JOSEPH INSURED, which are contrary to LAW FIRM's obligation of independent advice and representation of JOSEPH INSURED. Further, no confidential information between JOSEPH INSURED and LAW FIRM may be shared with KANSAS INSURANCE COMPANY, in deference to the attorney-client relationship and the obligation of confidentiality imposed upon all lawyers, without waiver and consent by JOSEPH INSURED. To the extent the terms of this engagement conflict in any manner with engagements, policies, instructions, rules, or directives of KANSAS INSURANCE COMPANY, this engagement letter must prevail, because of ethical rules and requirements imposed on LAW FIRM by the applicable rules of professional responsibility.

If each of you agrees with this manner of proceeding, please indicate your approval below and return one copy of this letter, with your signature, to the undersigned. Please call me if you have any questions or comments.

Sincerely,

JAMES LAWYER

After consultation, including the opportunity to consult with independent counsel, I believe that the relationship between me and LAW FIRM will not be adversely affected by the potential conflict described above, and I consent to the representation under the terms listed above, and I hereby waive any conflict of interest on the part of LAW FIRM.

_____

JOSEPH INSURED

After consultation, including the opportunity to consult with independent counsel, KANSAS INSURANCE COMPANY believes that the relationship between it and LAW FIRM will not be adversely affected by the potential conflict described above, and I consent to the representation under the terms listed above, and KANSAS INSURANCE COMPANY hereby waives any conflict of interest on the part of LAW FIRM.

KANSAS INSURANCE COMPANY

BY_____

Title_____

(Continued on page 32)

Lawyers in the Middle *(Continued from page 31)*

APPENDIX B
CORPORATE EMPLOYER AND INDIVIDUAL EMPLOYEE
WAIVER OF CONFLICTS OF INTEREST

ABC CORPORATION
ADDRESS
MR. ROBERT SUPERVISOR
ADDRESS
Re: SUSAN PLAINTIFF v. ABC CORPORATION AND ROBERT SUPERVISOR

Ladies and Gentlemen:

This law firm has been retained to represent each of you, who are defendants in the above-referenced case which is pending in the District Court Any County, Kansas. We understand that you both agree to the joint representation.

At this time, there does not appear to be a conflict of interest between ABC CORPORATION and ROBERT SUPERVISOR as defendants in the case. Your interests appear to be allied, and a common defense you both appears to be the most efficient and cost-effective way to proceed. At some point, however, it may appear that the interests of the corporation and the individual defendant become divergent. This disparity in interests may arise by the presentation of evidence or testimony in the case – about which we are presently unaware – which demonstrate that the interests of the corporation and the individual defendant are no longer allied. For example, the evidence could indicate that MR. SUPERVISOR acted in a manner which conflicted with the policies and procedures established by ABC CORPORATION, or that there is some credence to the claims asserted by the plaintiff (which up until now has been denied by you both). If that should occur, the need for separate counsel may arise. By that time, ABC CORPORATION may have invested significantly in the defense of this case by LAW FIRM, and a change of counsel would be detrimental to both of the parties.

The benefits of a joint defense include the value of combined resources; a common defense to the plaintiffs' claims; a single law firm representing both defendants; and avoiding the possibility of assisting the plaintiff by a divided approach to the defense. On the other hand, the drawbacks to a common defense could include the possibility that one's individual interest may be better served by an individual defense, or the facts could develop to indicate that one defendant's better defense may be to place responsibility on the other.

It is agreed that, although ABC CORPORATION has agreed to pay for the defense of ROBERT SUPERVISOR by LAW FIRM in the lawsuit, ABC CORPORATION will not direct or control the representation of ROBERT SUPERVISOR, and will not interfere with the independence of judgment which must be exercised by LAW FIRM in the representation of ROBERT SUPERVISOR.

Therefore, we have all agreed after consultation that – in the event it becomes necessary for separate counsel to be retained by the defendants to protect their own interests – LAW FIRM will continue as counsel for ABC CORPORATION, notwithstanding that confidential information may have been disclosed by the individual defendants to LAW FIRM. ABC CORPORATION and ROBERT SUPERVISOR, defendants named, above waive any conflict of interest which may appear by reason of this firm's continued representation of ABC CORPORATION, including after withdrawing as counsel for ROBERT SUPERVISOR. Of course, in the event that this should occur, all confidential information which had been disclosed to the lawyers by the individual defendant in confidence will be kept confidential and will not be used against him in any way in the litigation. In addition, ROBERT SUPERVISOR agrees not to take any action to disqualify LAW FIRM from representing ABC CORPORATION, and will not intentionally waive the attorney-client privilege and work product doctrine applicable to any communications between LAW FIRM and ROBERT SUPERVISOR.

We recommend that you engage independent counsel before agreeing to this waiver.

If each of you agrees with this manner of proceeding, please indicate your approval below and return one copy of this letter, with your signature, to the undersigned. Please call me if you have any questions or comments.

Sincerely,

JAMES LAWYER

After consultation, including the opportunity to consult with independent counsel, I believe that the relationship between me and LAW FIRM will not be adversely affected by the potential conflict described above, and I consent to the representation under the terms listed above, and I hereby waive any conflict of interest on the part of LAW FIRM.

_____

ROBERT SUPERVISOR

After consultation, including the opportunity to consult with independent counsel, ABC CORPORATION believes that the relationship between it and LAW FIRM will not be adversely affected by the potential conflict described above, and it consents to the representation under the terms listed above, and it hereby waives any conflict of interest on the part of LAW FIRM.

ABC CORPORATION

By_____

Title_____

(Continued on page 33)

Lawyers in the Middle *(Continued from page 32)*

APPENDIX C
MINOR CLIENT – PARENT PAYING
WAIVER OF CONFLICTS OF INTEREST

JOHN MINOR
ADDRESS
MR. ROBERT PARENT
ADDRESS
Re: SUSAN PLAINTIFF v. JOHN MINOR

Ladies and Gentlemen:

This law firm has been retained to represent JOHN MINOR, who is a defendant in the above-referenced case which is pending in the District Court Any County, Kansas. We understand that our fees are to be paid by ROBERT PARENT.

At this time, there does not appear to be a conflict of interest between JOHN MINOR and ROBERT PARENT. However, because ROBERT PARENT has agreed to pay the costs of this defense, including our attorneys' fees, it must be understood among us that our client is JOHN MINOR, and that our actions and decisions have to be taken on the basis of our independent advice and consultation with JOHN MINOR.

It is agreed that, although ROBERT PARENT has agreed to pay for the defense of JOHN MINOR by LAW FIRM in the lawsuit, ROBERT PARENT will not direct or control the representation of JOHN MINOR, and will not interfere with the independence of judgment which must be exercised by LAW FIRM in the representation of JOHN MINOR. Further, no confidential information between JOHN MINOR and LAW FIRM may be shared with ROBERT PARENT, in deference to the attorney-client relationship and the obligation of confidentiality imposed upon all lawyers, without waiver and consent by JOHN MINOR.

If each of you agrees with this manner of proceeding, please indicate your approval below and return one copy of this letter, with your signature, to the undersigned. Please call me if you have any questions or comments.

Sincerely,

JAMES LAWYER

After consultation, including the opportunity to consult with independent counsel, I believe that the relationship between me and LAW FIRM will not be adversely affected by the potential conflict described above, and I consent to the representation under the terms listed above, and I hereby waive any conflict of interest on the part of LAW FIRM.

_____

ROBERT PARENT

After consultation, including the opportunity to consult with independent counsel, I believe that the relationship between me and LAW FIRM will not be adversely affected by the potential conflict described above, and I consent to the representation under the terms listed above, and I hereby waive any conflict of interest on the part of LAW FIRM.

_____

JOHN MINOR

Ex Parte Contacts *(Continued from page 4)*

after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule."

3. Comments have been added clarifying that Rule 4.2 allows "second opinion" communications. That is, the Rule allows communications with a represented person when that person seeks "second opinion" advice from another lawyer.

4. New text was added to the Rule permitting counsel to obtain a court order authorizing *ex parte* communications with represented persons. The Comments explain that a court order may be sought when a lawyer is uncertain whether a communication is prohibited by the Rule, or in "exceptional circumstances" such as "where communication with a person represented by counsel is necessary to avoid reasonably certain injury."

5. A new statement in the Comments was added stating: "A lawyer may not make a communication prohibited by this Rule through the acts of another." But the Comment goes on to say that: "Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." (The extent to which this language permits a lawyer to counsel his client to communicate with an adverse party is beyond the scope of this article.)

6. A new Comment states that the Rule applies only where the lawyer "knows" that the person is in fact represented in the matter; however, "actual knowledge may be inferred from the circumstances."

The revised Rule 4.2 and revised Comments will eliminate much of the controversy and litigation over the propriety of ex parte contacts with former employees of a represented organization.

The revised Rule 4.2 and revised Comments will eliminate much of the controversy and litigation over the propriety of *ex parte* contacts with former employees of a represented organization. The revisions also should clarify other issues regarding a lawyer's ethical duties in communicating with a represented person or organization, whether in the context of litigation or otherwise.

Michael Jones, President-Elect Anne Kindling, and Amy Morgan at the April KADC Board of Directors meeting

David Cooper, Tracy Cole, Vaughn Burkholder and James Robinson at the April KADC Board of Directors meeting

President Scott Nehrbass, Dustin Denning, and DRI Representative Tim Finnerty at the April KADC Board of Directors meeting

Ten Questions for Gene Balloun *(Continued from page 5)*

For me, the outstanding lawyers I have known are those who are able to and do keep their focus on their client's needs, and not on their own.

paramount, and represent that client with every ounce of the lawyer's ability and energy. For me, the outstanding lawyers I have known are those who are able to and do keep their focus on their client's needs, and not on their own.

Question: Along those same lines, how have your unique experiences in these differing firms shaped who you are and the nature of your practice?

Response: It is true that I practiced in Western Kansas (Russell and Great Bend) for a period of time, but have now been in Eastern Kansas for 35 years! I started here with a medium-sized law firm, then opened our own office with two other lawyers, and finally became a part of Shook, Hardy & Bacon almost 25 years ago. And while some of my friends describe me as a "drifter who can't hold a job," each of these experiences has been important to me. I believe the general practice in a small firm broadens your perspective, and helps you realize why and how you want to specialize. Being with a large law firm has allowed me the luxury of focusing on the type of practice I relish, which is primarily commercial litigation, coupled with some pro bono work.

Question: If you were to train a lawyer how to try cases – whether a small matter in Seward County District Court or a multi-party commercial dispute in the federal courthouse in Kansas City – what are the three most important points you would share?

Response: Volumes have been written about how to try cases. Attempting to identify a few important guidelines is a tough assignment. But in my view, credibility is the most important. Truly a lawyer's word must be his or her bond. Credibility can be built with some courts over a long period of time, or perhaps in just one trial. The lawyer must be totally honest and forthright with both the court and opposing counsel. The lawyer must always be aware that trust can be destroyed by a single action. But the court, jury, and opposing counsel will all be impressed and influenced when they know they can totally rely on what the lawyer says. It goes without saying that preparation is also key to success. The lawyer simply has to know everything possible about the facts and the law when the case goes to trial. Even then, surprises always arise. But thorough preparation is vital. Finally, let me mention a point that is often overlooked. It is critical that a lawyer develop a theme for the case, regardless of what kind of action has been filed. That theme should recur in the voir dire selection of the jury, the opening statement, the testimony of the witnesses and the final argument. But the lawyer must analyze the case and decide, "What is this case about? Why is justice on the side of my client? Why should the jury want to decide for my client?" For example, it may sound dull if the trial involves a contract dispute, but a theme for the plaintiff emphasizing "broken promises" and "people keeping their word" can strike a chord with the jury.

Question: You must have read the petition I just drafted in *Millions of Forlorn Wildcats v. Huggins*! Back to the topic, however. Word around the office is that you have argued over 100 appellate cases. As with the previous question, what are the three most critical preparation points you would emphasize when preparing a young lawyer to argue his or her first appellate case?

Response: There is no greater thrill than arguing a case before the appellate courts. We now have excellent appellate courts in Kansas, and the judges and justices are always well prepared. It makes arguing a case very exciting and challenging. As with a trial, preparation is key. Lawyers must know and understand the briefs, the legal issues, and the important cases and precedents. So preparation is vital. As with a trial, the lawyer needs to determine the theme for the case. The court has studied the briefs and understands the law by the time of oral argument. The lawyer's job is to help the court understand why his or her client should win. The legal reasoning and analysis will then give the court a way to do justice, which means your client wins. Lastly, the lawyer must be responsive to the court. I have seen lawyers either not respond directly to the court's questions, or perhaps attempt to postpone answering the question until later in the argument. But as advocates, we need to respond to the court's question immediately and directly. You should welcome the question. It gives you an opportunity to know what is bothering the court, and to clarify and advocate your position.

Question: Within the office, you are known by lawyers – young and not-so-young – to have very keen instincts on how to best frame a particular issue for the court, handle a seemingly impossible situation, or sooth the relationship with opposing counsel. What is your secret?

Response: Wow, Toby, you must have an evaluation coming up for you to ask a question like that! I have no special secrets. I do step back on any case and try to analyze and determine what are the critical issues, recognizing both the strengths

(Continued on page 36)

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Ten Questions for Gene Balloun *(Continued from page 35)*

and weaknesses in the client's position. When handling difficult situations, a lawyer must believe in his or her client's cause. If you believe, and if you stay focused on trying to accomplish what is right for your client, the tough situations become easier. I am convinced that establishing good working relationships with opposing counsel is a matter of being fair, honest, and sincere. I try very hard to diffuse confrontive situations. They rarely accomplish much, and are seldom in your client's best interest.

Question: Great answer, Gene. And yes, every day is one day closer to that next evaluation (and I need that raise!). Few lawyers love the practice of law more than you, but your pro bono activities are legendary. Why do you place so much emphasis on pro bono matters, and is this something you would recommend to young lawyers?

Response: We are all fortunate to be lawyers. We have been given much by society – prestige, important work, respect, and compensation. And we are all aware we should give back to society. But doing that is sometimes difficult. I believe that every lawyer should do some pro bono work, but it should be work that they have an interest in and enjoy. I always suggest to lawyers that they look for an area of pro bono practice that stirs their passion for doing worthwhile service for other people. In my own case, my focus has been on trying to help children. That strong interest grew out of being a foster and adoptive parent, and working with other such parents. There is no greater satisfaction than completing an adoption for foster parents who are adopting a foster child, knowing they have taken that child into their home to give the love and care that every child is entitled to have. Adoptions are a joyous day in court! There is great personal reward from helping the least powerful members of our society – our abused, dependent and neglected children.

Question: Getting back to trials, what is the importance of a trial representative in a jury trial?

Response: Having a good trial representative is critical. I have seen a number of cases in which the lack of or poor selection of a trial representative had considerable influence on the jury. For example, in one case between two large companies, we had no one who had ever been connected with the transaction available to serve as our trial representative. And no one else wanted to assume that role. We persuaded the company to recall a retired vice president to serve as the trial representative. He was a distinguished and grandfatherly type of man, made an excellent appearance, and was quite attentive during the trial. By contrast, the other party had the same problem getting a trial representative. But they solved the problem by hiring a low-level, ex-employee to sit in as their trial representative. He appeared on the first day of the trial in a leather jacket! The contrast was not missed by the jury.

Question: Have you ever actually had a "Perry Mason" moment?

Response: Toby, there is a Western Kansas saying, "even a blind hog finds an acorn now and then." So if you stay around long enough, and try enough cases, a few good things are going to happen. I am sure there are plenty of lawyers who have better war stories on this subject. But one of my most memorable happened during a jury trial in Western Kansas. The major issue in the case involved property damage caused by a fire, including a large claim for business loss. The plaintiff had a local accountant testify as an expert on the business loss issue. In reviewing his report, I had noted that he made a substantial error by inadvertently double counting some income items. During cross-examination, I led him through the report to the point where it would become obvious to him that he had made a serious mistake. When we reached that point and the question was posed, he sat staring at his report for what seemed like an eternity. The jury's eyes were fixed on him. His face became redder and redder, until finally he turned to the judge and said, "Your honor, I am sorry, I have made a bad mistake." Gee, that was fun!

Toby: Thank you, Gene. That was both entertaining and enlightening. Congratulations on your well-deserved recognition and for sharing a little of your time with us today. And, when it comes time for evaluations and compensation decisions, remember all of my fawning questions! Now I've got to get back to working up our big case for trial!

DRI Seminars 2007 Schedule

May 2-4, 2007
Employment Law
Westin Kierland - Phoenix, AZ

May 10-11, 2007
Drug and Medical Device
San Francisco Marriott - San Francisco, CA

May 17-18, 2007
Joint International Conference
JW Marriott Grosvenor Square - London, England

June 6-8, 2007
Young Lawyers
San Diego Marriott - San Diego, CA

June 14-15, 2007
Diversity
Chicago, IL

June 21-22, 2007
Bad Faith
Renaissance, Washington DC Hotel - Washington, DC

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

September 6-7, 2007
Automotive Design and Manufacturing
Hotel Del Coronado - San Diego, CA

September 26-28, 2007
Preeminent Lawyer
Westin Michigan Avenue - Chicago, IL

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

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

November 1-2, 2007
Fire and Casualty
Westin River North - Chicago, IL

DRI Update

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

One of the pleasures of this position is the interaction with other state defense organizations and the great people in their leadership. Not only are some great friendships built this way, but there is also the opportunity to compare the challenges other states are facing and the solutions they have found to them.

One of the best vehicles for this is the annual midyear meeting of the Mid Region (Utah, Colorado, Kansas, Nebraska, Missouri, and Iowa). About the time you read this, DRI state representatives from these states and their state organizations will be hosted by KADC in Kansas City. The meeting, May 4-5, will provide a forum to discuss building membership among young lawyers, discussion of specific strategies for enhancing the benefits of membership, development of diversity in our organizations, and an update on current national projects and programs of the DRI. The Mid Region also will elect a new Mid Region director to DRI's board of directors for a term commencing 2008.

At the April meeting of KADC's board of directors, the board appointed Dan Diepenbrock as my successor as DRI state representative for Kansas. Dan comes to the position with deep roots as a long-time member of KADC and one of its past presidents. Dan's term commences January 1, 2008. However, he will be getting acquainted with his new role by attending the Mid Region midyear meeting in Kansas City and the DRI annual meeting's state and local defense organization track in Washington, DC this fall. I look forward to working with Dan for a smooth transition to his leadership in this position.

DRI's annual meeting, October 10 – 14, in Washington, DC is only six months away. Mark that date now and follow this link, www.dri.org to the annual meeting's brochure. Talk to anyone who has attended past meetings and you will hear enthusiastic comments about the quality of the program (current-issue CLE and current-affairs forums), the highly enjoyable meeting environment, and at least one special evening event that, alone, will be worth attending the meeting. If you already know you are going, follow this link, http://www.dri.org/DRI/open/AM.aspx, to register and receive $100 off the price of admission before September 12. A limited number of rooms at the Marriott Wardman Park are also available before that same date at a discounted rate. See the annual meeting brochure for details.

Executive Director's Message

Scott Heidner
Executive Director

I am pleased to report that your KADC Board of Directors has had its busiest season in recent memory representing the defense counsel practice under the dome.

Greetings from KADC headquarters! I am pleased to report that your KADC Board of Directors has had its busiest season in recent memory representing the defense counsel practice under the dome. The end of the legislative session is always the busiest (and most dangerous) time for the passage of legislation. So, while we have a long way to go, KADC has already accomplished much. Here is a list of proposed legislation for which KADC has given testimony:

Judicial Budget: Jim Robinson
Supreme Court Selection: Jim Robinson
Attorney Fees, Fire/Tornado/Lightning (Lee Builders case): Tim Finnerty
Anti-Trust Full Consideration: Scott Nehrbass
Screening Panels: Anne Kindling
Physicians under KCPA: Anne Kindling

The KADC website has links to all testimony given on behalf of KADC each year. Go to www.kadc.org and click on "Legislation" and then "KADC Legislative Testimony" to view the testimony.

With the busy schedule that KADC members keep, and the need to plan ahead, I thought it might be a good idea to offer a brief summary of upcoming education and networking opportunities in 2007.

KADC is proud to host the upcoming DRI Mid Region Meeting. This meeting is held annually, and hosted each year by one of the six states that comprise the DRI Mid Region. This year's meeting, which allows both DRI and SLDO leaders to share information and ideas, will be held May 4 in Kansas City. Your KADC volunteer leadership has worked hard to put together a strong program.

It's not too early to start thinking about attending the DRI Annual Conference. While the DRI Mid Region Meeting is primarily for office holders at the state and national level, the DRI Annual Conference is for all members. This year's conference will be October 10-14 in Washington, DC. Registration is already available online at www.dri.org/DRI/open/AM.aspx.

Finally, and maybe most importantly, the KADC Annual Conference will be November 30 - December 1 in Kansas City. This is the premiere education and networking opportunity for KADC members each year. Planning is under way to put together another great program. If you have ideas or desires for the agenda, you should contact a Board member or the KADC office. There is no better way to ensure the conference is beneficial than to share with the planners what topics are most relevant to your career and your practice.

We hope to see you at one or more of these upcoming events!

Kansas Association of Defense Counsel
Application for Membership

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

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

Dated this_____ day of_____, 20_____

_____
(Signature of Applicant)

Proposed by:

_____
(Name)

_____
(City and State)

Membership Benefits

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

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

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