KADC

Fall 2008 Issue II

Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*

INTRODUCING EVIDENCE OF SETTLEMENT IN MULTI-DEFENDANT MEDICAL MALPRACTICE CASES

Medical malpractice cases frequently start out with multiple defendants whose numbers diminish as trial approaches. Among the many reasons for this phenomenon is settlement. When a co-defendant settles (regardless of whether it is two years or two days before trial), the plaintiff will undoubtedly seek to exclude the fact of settlement from the jury. While evidence of settlement is inadmissible to prove liability of the settling co-defendant or to show collateral source benefits, it should be admissible to impeach the credibility of the plaintiff's expert who either abandons his or her opinion regarding the settling defendant's fault or who downplays the settling defendant's responsibility.

Illustrative Case

Tom Pickert
Logan Logan & Watson, L.C.[1]

Patient comes into Hospital's emergency room department with minor neurological complaints of unknown origin. ER-Physician performs a complete work-up, including a chest x-ray. The work-up is deemed unremarkable, and Patient is appropriately discharged. The following day, Radiologist over-reads Patient's chest x-ray and notes a possible pulmonary neoplasm

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POST-VERDICT JUROR INTERVIEWS: *WILLIAMS v. LAWTON*

> If we were to endorse the conduct of defense counsel in this case, we believe it would indeed 'open the door to the most severely harmful methods for tampering with jurors' and no verdict would be safe from the ravages of counsel for the losing party.[1]

What egregious conduct warranted this tongue lashing from the Kansas Court of Appeals? It is a practice that nearly every trial attorney reading this article has employed – the post-verdict interview of jurors.

Williams v. Lawton[2] is a medical malpractice case originating from Sedgwick County. Defendant Steve Lawton, M.D., a urologist, performed an adult circumcision on plaintiff, Richard Williams. There were complications

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following the circumcision, and the parties disputed whether the complications resulted from Plaintiff's or Defendant's actions. Plaintiff presented no evidence of economic loss and made no claim for economic loss. Plaintiff demonstrated no viable claim for lost wages or medical expenses, and admit-

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PRESIDENT'S MESSAGE

Anne Kindling
Stormont-Vail Healthcare, Inc.

Dear KADC Friends,

As I sit down to write this column, my thoughts are scattered to such topics as service, civility, and ethics. Recently back from the DRI annual conference in New Orleans, I could write about the camaraderie of defense attorneys around the country and the exchange of ideas on planning a successful annual meeting (we already have among the highest percentage turnout among the states I talked to), maintaining involvement of the seasoned attorneys and past-presidents of the association, and attracting and keeping new members – or about things you can see in the wee hours of the morning on Bourbon Street! Instead, my thoughts focus on the topic of mentoring and developing young trial lawyers, since the future of our association and our profession is in their hands.

Good teachers are hard to come by. I am reminded of that each August when school starts and I wait with baited breath to see if I will connect with my kids' teachers. I've been lucky so far, although really it's my kids who have been lucky. It struck me this year, finally, that it's not so important that **I** connect with my kids' teachers but that **my kids** connect. After all, my kids spend 6-7 hours each schoolday with their teachers; I only have to see them at parent-teacher conferences or when I get the chance to volunteer in the classroom.

Being a teacher is hard, no doubt about it. It's not simply a matter of knowing the material you are trying to teach. It's being able to reach your students in the mode that they each receive and process information. With "No Child Left Behind," many schools "teach to the test" and are interested in performance, not individuality. However, in classrooms with 15 or 16 students (yes, my kids have been lucky to have small classes), or even 29 or 30 or more in the upper classes, there might be as many different learning styles as there are students. Teachers, therefore, have to figure out a way to reach **all** of their students. And, ideally, they figure out how to help students conform to expectations while still fostering their individuality (something my 5-year-old is struggling with currently!).

The KADC Trial Academy, now in its second year, recognizes not only the importance of teaching our young lawyers the rules of the game but also the individuality necessary to succeed in our chosen field; this certainly isn't a cookie-cutter profession. This year our faculty will educate the young lawyers on cross-examination of economic experts. Each faculty member will demonstrate a sample cross-examination and show his or her unique courtroom style and approach. The new lawyers will be able to pick and choose which of the approaches – probably bits and pieces of each – they can incorporate into their own practice. Damages are a key element in most of the lawsuits we try (or settle), so please, please encourage young lawyers to attend this program – it's one they will get a lot of miles out of!

Mentoring and development of young lawyers is something that is often taken for granted. Larger firms in the state have in-house training programs for younger lawyers, and many firms send their young lawyers to local or national seminars to learn trial skills. But the concept of true "mentoring" is not something you get from a seminar or in-house training. It's also not something you can simply expect to happen when younger lawyers talk weekly with their more seasoned partners. It's more than telling a young lawyer the answer; it's teaching them to think for themselves and apply learning from one situation to a new fact pattern. It takes a certain skill to be a mentor, and you have to be paired with someone you "connect" with. In August 2008, the Young Lawyers piece in the Journal of the Kansas Bar Association asked "Have you Hugged a Young Lawyer Today?" I commend this to your reading and hope you can implement the suggestions not just with young lawyers in your own firm but with young lawyers in your community or around the state that you may connect with.

Circling around to other topics, I want to commend Amy Morgan for her hard work in publishing the Kansas Defense Journal. I know first-hand the amount of time and ef-

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DON'T MISS THE ANNUAL KADC CONFERENCE!

by Tracy Cole
Gilliland & Hayes, P.A.

The 30th Annual Conference of Kansas Association of Defense Counsel takes place Friday, December 5 and Saturday, December 6 at the Kansas City Marriott Country Club Plaza. Since you will have time to enjoy the beauty and vibrancy of Kansas City – including the Plaza lights, fabulous restaurants, shopping, museums, the must-see WWI Museum at the Liberty Memorial, and entertainment – this is a great conference to bring your family along. A reasonable room rate of $159 per night, single or double, is available through November 10, so I encourage you to make your plans now.

This year's program recognizes the necessity of effectively presenting our case to opposing counsel, mediators, jurors and judges. We know the law and legal distinctions. We may even develop a story to illustrate our case, but are we defeating our hard work by failing to present ourselves and our witnesses effectively?

Lisa DeCaro and Leonard Matheo of Courtroom Performance, Inc. will help us with those presentation skills. Ms. DeCaro and Mr. Matheo have worked with thousands of lawyers to plan not only what you say but how you say it. They will provide valuable instruction to help build the necessary credibility and relationships to advance your argument. We all know, however, it isn't just our presentation and credibility that affects our case. Our experts have to advance our case, too. So Courtroom Performance, Inc. will also provide instruction on preparing the expert for deposition and trial.

In addition to ourselves and our experts, we have to know how to deal with that pesky opposing counsel. Tammy Meyer, a highly-recognized trial attorney from Indiana, will instruct on objections. She will give guidance on forming a strategy and then carrying out that strategy by planning for and making objections.

Kurt Gerstner, from a Boston law firm specializing in complex, high stakes cases, will help us move beyond the Elmo. Technology has permeated our lives, including our cases. So, we better learn how to use that technology to further our case. Mr. Gerstner will provide helpful information suitable for both the novice and the techie.

Jeffery Pike from FORCON International in Atlanta comes to us highly recommended by our colleagues in Georgia. As we all know,

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Register Today!

KADC Annual Meeting
Dec. 5 - 6, 2008
Marriott Country Club Plaza
Kansas City, MO

www.kadc.org

KADC MEMBERSHIP COMMITTEE UPDATE

by Shon Qualseth
Thompson Ramsdell & Qualseth, P.A.

The KADC Membership Committee has made some progress toward increasing the membership ranks of the KADC. This update is to explain what the Committee has done so far (the spoonful of sugar to make the medicine go down), and to ask for your assistance (the medicine) in making the KADC a stronger organization.

First off, the Membership Committee exists. It is comprised of Lora Jennings, Amy Morgan, Wen Wurst, and me. I thank Lora, Amy, and Wen for stepping forward. Second, we have sent letters to Kansas DRI members who are not yet members of the KADC. We hope this is fertile ground for recruitment – defense attorneys who are already familiar with DRI and state lawyer defense organizations.

We also had a "brown bag" lunch at the KU School of Law to inform students about the KADC. The lunch was to put the KADC on students' radar screens, and to gauge interest in creating a student-membership category in the KADC. Turnout was a little low at seven students; apparently, a free lunch is not as powerful a draw as when I was a law student. On the bright side, the students who did attend had never been approached by the Kansas Association for Justice. Some did not know the KAJ exists. So there may be some room for encouragement for future lunches by having a presence at the law school that the KAJ lacks. We may have another lunch at KU in the spring for soon-to-be graduating 3Ls, and we may want to try it at Washburn as well. We have also discussed the possibility of having a booth at the swearing-in ceremony in Topeka. While we don't expect to have any immediate members from these efforts, there may be some long-term benefit in making law students and new lawyers aware of the KADC and its advantages.

Now for the medicine. At my firm, all five of our full-time attorneys are KADC members. We need all of you to make sure there is maximum KADC membership in your office. Please designate a "point person" at your firm to ensure that all new lawyers become members of the KADC. New-member dues are cheap – just $85 for an entire year. While it may not be realistic for some firms to have 100% of their attorneys be KADC members, there is still room for improvement in getting increased membership within our own firm ranks. If every firm added just one more member, the KADC would be a much stronger organization for lobbying, obtaining high-quality speakers at the annual conference, filing *amicus* briefs, and other efforts to make our legal system better.▲

WELCOME NEW KADC MEMBERS

Jay Heidrick - Shughart Thomson & Kilroy PC, Overland Park
Matthew Stromberg - Foulston Siefkin LLP, Overland Park

DRI Seminars

November 13-14, 2008

Complex Medicine

San Diego, CA

November 20-21, 2008

Fire and Casualty

Chicago, IL

December 4-5, 2008

Insurance Coverage and Practice

New York, NY

January 28-30, 2009

Civil Rights and Governmental Tort Liability

New Orleans, LA

March 5-6, 2009

Sharing Success: A Seminar for Women

Santa Monica, CA

March 11-13, 2009

Medical Liability and Health Care Law

Lake Buena Vista, FL

DRI Update

The Voice of the Defense Bar

by Dan Diepenbrock
Law Office Of Daniel H. Diepenbrock, P.A.

It's not whether you get knocked down that's significant, Vince Lombardi preached, but whether you get up.

The great city of New Orleans was certainly knocked down – and nearly out – by hurricane Katrina, but I'm here to report that the city is back up and better than ever. There is really something inspiring about a city, grounded in history, music and the arts, that rises up from the devastation of a natural disaster like Katrina and not only survives but returns to its status as a center of American culture.

The flagship event of any organization is its annual meeting, and I'm able to report on the good news about New Orleans because DRI held its 2008 Annual Meeting in that great city in October. If you were unable to attend, you missed an event that combined an impressive slate of Blockbuster speakers with high quality CLE and networking opportunities at numerous receptions.

The Blockbuster speakers covered the spectrum with Newt Gingrich on the right, Eleanor Clift on the left, and NPR political analyst Juan Williams in the middle. On the CLE front, veteran trial consultant Sonya Hamlin shared her insights in a presentation that would interest every trial lawyer: *Now* What Makes Juries Listen?

The final presentation of the meeting was, in my view, vintage DRI. On Saturday morning, a panel of five premier defense lawyers, including one in-house counsel, spent three hours telling the audience of defense lawyers how to get and keep good clients. They shared their secrets on building clientele, getting more work from existing clients and keeping the clients you have. The in-house lawyer gave her do's and don'ts of marketing from the client perspective.

Think about it. Four of your competitors, and one client, giving you tips on how to get and keep good clients.

In a few weeks KADC's flagship event will get off the ground when we gather in Kansas City for our annual meeting. Kansas City – especially the Country Club Plaza – is a great place to be in December. And although we cannot match the magnitude of the DRI meeting, Tracy Cole has put together a program of CLE speakers designed to help you win your trials and provide you the opportunity to earn 12.5 hours of CLE, including 1.0 of ethics.

In addition to presentations on improving your persuasive presentation skills and making electronic presentations at trial, come hear Athletic Director Lew Perkins's report on the continuing success story that is KU athletics.

DRI and KADC continue to work together to provide you with the tools you need to enhance your civil defense practice. If you have not attended a DRI or KADC annual meeting, it's not too late to start. See you in Kansas City December 5-6.▲

2008 TRIAL SKILLS WORKSHOP

The 2008 Trial Skills Workshop will be held in conjunction to the Annual Conference on Thursday, December 4th in Kansas City. This session will be devoted to trial skills for "young lawyers" (under age 36 or who have been admitted to the bar within the past five years) and focus on the Deposition and Cross-Examination of Plaintiff's Expert Economist. Participants in the Workshop will learn from veteran KADC members, and then break into small groups where they'll get their own crack at examining real expert economists or CPAs.

For a details and registration information, go to www.kadc.org.

Evidence of Settlement *(Continued from pg 1)*

(lung cancer). Under the over-read policy a Hospital employee is to transmit an information sheet from Radiologist to ER-physician to inform ER-Physician of any discrepancy between Radiologist's final interpretation and ER-Physician's "wet read." ER-Physician, however, never receives an information sheet and Patient is never informed of Radiologist's finding. Patient dies several years later of lung cancer. Patient's family (hereinafter Plaintiff) subsequently learns of Radiologist's over-read finding and files a medical malpractice action against Hospital, ER-Physician, and Radiologist for wrongful death and lost chance of survival.

Settlement Scenario: **Plaintiff settles with Hospital before identifying any expert opinion against Hospital and settles with ER-Physician after identifying an expert who is critical of both ER-Physician and Radiologist.**

Prior to trial against Radiologist, Plaintiff files a motion *in limine* to preclude Radiologist from introducing the fact of Plaintiff's settlement with Hospital and ER-Physician. Plaintiff asserts three arguments. The first argument is premised on K.S.A. 60-452 and K.S.A. 60-453, which provide that the existence of a settlement between a plaintiff and one or more tortfeasors is inadmissible to prove or disprove the liability of a settling party. The second argument is premised on the collateral source rule, which generally precludes the admission of evidence of benefits paid by a source other than the tortfeasor. The third argument is premised on *Smith v. Massey-Ferguson, Inc.*,[2] which holds that a defendant cannot introduce evidence of settlement to impeach a settling co-defendant who has no financial interest in the outcome of trial. While these arguments accurately reflect Kansas law, they are not comprehensive and do not apply to situations where an expert either abandons his or her opinion regarding the settling defendant's fault or downplays the settling defendant's responsibility. When (and if) this occurs, the fact of settlement becomes highly relevant and therefore admissible to impeach the expert's credibility.

The Haley rule does not preclude a party from introducing evidence of settlement if it is being offered for some purpose other than to prove or disprove liability.

Law and Analysis

Under the settlement scenario described above, evidence of Plaintiff's settlement with Hospital and ER-Physician would be highly relevant and proper impeachment evidence if Plaintiff's expert downplayed or ignored Hospital's and/or ER-Physician's role in Patient's care or their respective fault. For instance, if Plaintiff's expert who had once been critical of ER-Physician has a change of heart and testifies something along the lines of, "upon further reflection and review of medical records, I believe ER-Physician had little if any fault in this case," or with respect to Hospital, Plaintiff's expert suggests that "physicians cannot rely on Hospital personnel, so Radiologist bears the brunt of the responsibility for the information sheet not making it back to ER-physician," Radiologist should be allowed to impeach Plaintiff's expert with the fact of settlement so that he can argue to the jury that Plaintiff's expert is biased and is downplaying ER-Physician's and/or Hospital's role in Patient's care because Plaintiff's expert knows that Plaintiff will not recover from Hospital or ER-Physician at trial no matter how large the verdict is against either of these settling defendants.

K.S.A. 60-452 and K.S.A. 60-453

In *Haley ex rel. Haley v. Brown*,[3] the Kansas Court of Appeals held that the existence of a settlement between the plaintiff and one or more tortfeasor is inadmissible under K.S.A. 60-452 and K.S.A. 60-453 to prove or disprove the liability of a settling party.[4] This rule, however, does not preclude a party from introducing evidence of settlement if it is being offered for some purpose other than to prove or disprove liability. That is, Radiologist is not seeking to introduce the fact that Plaintiff settled with ER-Physician and Hospital to prove or disprove liability but to impeach the weight and credibility of Plaintiff's expert.

In *State v. Montanez*,[5] the Kansas Supreme Court held that "[b]ias, interest or improper motives of a witness may always be shown in order to place his [the witness'] testimony in proper perspective."[6] Under K.S.A. 60-420,

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Evidence of Settlement *(Continued from pg 6)*

a party may introduce extrinsic evidence concerning *any* relevant credibility matter:

> Subject to K.S.A. 60-421 and 60-422, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence concerning any conduct by him or her and *any other matter relevant upon the issues of credibility*.[7]

In *State v. Bowen*,[8] the Kansas Supreme Court emphasized that "[t]he exposure of a witness' motivation in testifying is a proper and important function of cross-examination."[9] As the Supreme Court of Kentucky adeptly put it in *Miller ex rel. Monticello Baking Co. v. Marymount Medical Center*,[10] "[a]ny proof that tends to expose a motivation to slant testimony one way or another satisfies the requirement of relevancy. The range of possibilities is unlimited."[11] Thus, it follows that if Plaintiff's expert offered criticisms of ER-Physician prior to trial but backs away from them after settlement, Radiologist should be entitled to impeach Plaintiff's expert with the fact of settlement. Likewise, if Plaintiff's expert attempts to unfairly minimize or wholly ignore Hospital's role in the over-read system, Radiologist should be allowed to impeach Plaintiff's expert with the fact that Plaintiff settled with Hospital, demonstrating the expert's bias and likely motivation for his or her narrow opinions, *i.e.*, the fact that Plaintiff cannot recover from Hospital beyond the settlement amount no matter how large the verdict is against it.

Any proof that tends to expose a motivation to slant testimony one way or another satisfies the requirement of relevancy.

While the Kansas appellate courts have not addressed this issue, several other jurisdictions (with evidentiary rules regarding the use of settlement to prove or disprove liability similar to K.S.A. 60-452 or K.S.A. 60-453) have held that it is proper to impeach witnesses with evidence of settlement.[12] For instance, in *Miller ex rel. Monticello Baking Co. v. Marymount Medical Center*,[13] the Kentucky Supreme Court held the plaintiff's settlement with two co-defendants was admissible to impeach the credibility of the plaintiff's experts at trial.

Miller involved an alleged birth injury. Two weeks prior to trial, the plaintiff settled with the two physician co-defendants and proceeded to trial against the hospital. At trial, the plaintiff's expert criticized the hospital's nursing staff for the first time for failing to perform repeat blood gas tests pursuant to one of the settling defendant's order, which stated "Blood gases," not "Blood gas." Although the plaintiff's expert did not give this opinion at his deposition, he testified that it was due to an "oversight" he had not noticed when he reviewed the plaintiff's records prior to his deposition.

On cross-examination, the trial court allowed the hospital to impeach the credibility of the plaintiff's expert by showing that he changed his opinions with respect to the hospital's negligence only after being informed that the plaintiff had settled with the co-defendants. In affirming the trial court's decision, the Kentucky Supreme Court explained that "[p]articularly in medical malpractice cases, the credibility of experts is a paramount issue. Whether an expert is a 'hired gun' or one whose opinions have greater foundations of objectivity is an issue to be litigated by counsel and considered by the jury."[14] *Miller* further held that "[t]he interest of a witness . . . is not collateral and may always be proved to enable the jury to estimate credibility. It may be proved by the witness' own testimony upon cross-examination or by independent evidence."[15]

In *State v. Asher,*[16] the Kansas Court of Appeals recognized that "the trial, although inevitably an adversarial proceeding, is above all else a search for truth."[17] The importance of cross-examination in reaching this end was addressed in *Matter of Grant*,[18] where the Kansas Supreme Court explained: "As lawyers and judges, we acknowledge cross-examination as an aid in the search for truth."[19] Thus, because "[t]he role of the jurors as factfinders necessarily depends upon their ability to resolve issues of credibil-

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Evidence of Settlement *(Continued from pg 7)*

ity between competing witnesses,"[20] the fact of settlement must be admissible to impeach the credibility of an expert witness who either abandons his or her opinion regarding a settling defendant's fault or otherwise downplays a settling defendant's responsibility. K.S.A. 60-452 and K.S.A. 60-453, therefore, do not preclude a defendant from introducing evidence of settlement to impeach the credibility of the plaintiff's expert who either abandons his or her opinion regarding the settling defendant's fault or who downplays the settling defendant's responsibility.

Collateral Source Rule

Generally speaking, "the collateral source rule prevent[s] the jury from hearing evidence of payments made to an injured person by a source independent of the tortfeasor as a result of the occurrence upon which the personal injury action is based."[21] Preliminarily, as noted by the Tenth Circuit in *F.D.I.C. v. United Pacific Ins. Co.*,[22] the collateral source rule ordinarily does not apply to settlement proceeds since a settlement of litigation does not fall within the rationale of the rule.[23]

In *Wentling v. Medical Anesthesia Services, P.A.*,[24] the Kansas Supreme Court recognized that a collateral benefit is admissible where it "clearly carries probative value on an issue not inherently related to measurement of damages."[25] In the example discussed above, the fact of settlement necessarily carries probative value on the issue of the bias of plaintiff's expert – which is inherently unrelated to the measure of damages.[26] Thus, even if one assumes that evidence of settlement is a "collateral source," it is nevertheless admissible to impeach the credibility of the plaintiff's expert witness. Accordingly, the collateral source rule does not preclude a defendant from introducing evidence of settlement to impeach the credibility of the plaintiff's expert who either abandons his or her opinion regarding the settling defendant's fault or who downplays the settling defendant's responsibility.

Even if one assumes that evidence of settlement is a "collateral source," it is nevertheless admissible to impeach the credibility of the plaintiff's expert witness.

Smith v. Massey-Ferguson, Inc.

In *Smith*,[27] the Kansas Supreme Court determined that evidence of a settlement between the plaintiffs and a settling co-defendant was not relevant to impeach the testimony of the settling co-defendant since he was not a cross-claimant, he was not a party to a sliding-scale agreement, he was not a party to the action, and he had no financial interest in the litigation.[28] The Court's determination focused exclusively on the disclosure rule for "Mary Carter" type settlements that it announced in *Ratterree v. Bartlett*:

> When a settlement agreement is entered into between the plaintiff and one or more, but not all, alleged defendant tortfeasors, the parties entering into such agreement shall promptly inform the court in which the action is pending and the other parties to the action of the existence of the agreement and its terms. If the action is tried to a jury and a defendant who is a party to the agreement is a witness, the court shall, upon motion of a party, disclose the existence and content of the agreement to the jury unless the court finds in its discretion such disclosure to the jury will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.[29]

This rule is not comprehensive as it only concerns the use of settlement for impeachment of a settling co-defendant. In the example discussed above, Radiologist is not seeking to introduce the fact of settlement to impeach ER-Physician or Hospital (or any of its representatives) pursuant to *Ratterre*e but to show the slanted and biased nature of Plaintiff's expert's opinions. Thus, *Smith* and/or *Ratterree* do not control the issue of whether settlement between Plaintiff and ER-Physician or Plaintiff and Hospital can be introduced for the purpose of impeaching Plaintiff's expert. Rather, the issue is governed by K.S.A. 60-420.

Conclusion

(Continued on page 9)

The fact of settlement is highly relevant and therefore admissible to impeach the credibility of a plaintiff's expert witness.

Evidence of Settlement *(Continued from pg 8)*

While it is generally inadmissible to prove liability of the settling co-defendant or to show that the plaintiff received a collateral benefit, the fact of settlement is highly relevant and therefore admissible to impeach the credibility of a plaintiff's expert witness who either abandons his or her opinion regarding a settling defendant's fault or who downplays the settling defendant's responsibility. The plaintiff will not be prejudiced by the admission of this highly relevant evidence, and there is simply no valid concern of "jury confusion" since any such possibility may be effectively eliminated with an appropriate instruction.

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1. Tom is an associate at Logan Logan & Watson, L.C. in Prairie Village, Kansas.
2. 256 Kan. 90, 124-29, 883 P.2d 1120 (1994).
3. 36 Kan.App.2d 432, 140 P.3d 1051 (2006).
4. Id. at 441.
5. 215 Kan. 67, 72, 523 P.2d 410 (1974)
6. Id. at 72.
7. K.S.A. 60-420 (emphasis added).
8. 254 Kan. 618, 867 P.2d 1024 (1994)
9. Id. at Syl. ¶ 6.
10. 125 S.W.3d 274 (Ky. 2004).
11. Id. at 281-82.
12. See, e.g., Tripp v. Jeld-Wen Inc., 327 Mont. 146, 152, 112 P.3d 1018 (2005) (holding that evidence of settlement was properly admitted because "the witness was not asked about the settlement in order to prove any issues of liability, but to illustrate the bias of the witness"); Miller ex rel. Monticello Baking Co. v. Marymount Medical Center, 125 S.W.3d 274, 281 (Ky. 2004) (holding that an expert may be properly impeached with evidence of settlement as "[t]he interest of a witness, either friendly or unfriendly, in the prosecution . . . is not collateral and may always be proved to enable the jury to estimate credibility"); Northington v. Sivo, 102 Wash. App. 545, 8 P.3d 1067, 1070 n. 7 (2000) ("[W]hether a witness' testimony remains consistent after settling is an important factor in determining whether settlement evidence should be admitted to show bias."); Quirion v. Forcier,161 Vt. 15, 20, 632 A.2d 365, 368 (Vt.,1993) (holding that the evidence of settlement tended to prove bias and prejudice on the part of the expert and provided a motive for his change of opinion). See also Hareng v. Blanke, 90 Wis.2d 158, 279 N.W.2d 437, 441-42 (1979) (evidence of settlement with other co-defendants in a medical malpractice action is admissible to show prejudice of plaintiff as a witness because she had a motive to play down the negligence of settling defendants and emphasize that of non-settling defendants).
13. 125 S.W.3d 274, 281 (Ky. 2004).
14. Id. at 284 (internal citations omitted.)
15. Id. at 284 (internal citations omitted.)
16. 18 Kan.App.2d 881, 861 P.2d 847 (Kan. App. 1993).
17. Id. at 886.
18. 262 Kan. 269, 936 P.2d 1360 (Kan. 1997).
19. Id. at 274.
20. State v. Barber, 2007 WL 1309602, *3 (Kan.App. May 4, 2007) (unpublished).
21. Hayes Sight & Sound, Inc. v. ONEOK, Inc., 281 Kan. 1287, 1303, 136 P.3d 428 (2006) (internal citations omitted).
22. 20 F.3d 1070, 1083 (10th Cir. 1994)
23. Id. (citing Kassman v. American University, 546 F.2d 1029, 1034 (D.C.Cir.1976)).
24. 237 Kan. 503, 701 P.2d 939 (1985).
25. Id. at 515 (citing 3 Minzer, Nates, Kimball, Axelrod and Goldstein, Damages in Tort Actions § 17.00, p. 17-5 (1984)).
26. See Dumas v. Harry, 638 So.2d 283, 286 (La.App. 5 Cir.1994) (holding that while a tortfeasor may not introduce evidence regarding benefits or payments received by the plaintiff, if the tortfeasor seeks to introduce such evidence to impeach the credibility of the plaintiff, then the collateral source rule is inapplicable); Hack v. State Farm Mutual Automobile Insurance Co., 37 Wis.2d 1, 154 N.W.2d 320 (1967) (holding that evidence of collateral source payments was admissible to impeach the credibility of the plaintiff.)
27. 256 Kan. 90, 883 P.2d 1120 (1994).
28. Id. at 129.
29. 238 Kan. at 29, 707 P.2d 1063 (quoting Ratterree v. Bartlett, 238 Kan. 11, 707 P.2d 1063 (1985). ▲

Post-Verdict Juror Interviews *(Continued from pg 1)*

ted that he had no ongoing issue with sexual performance. Plaintiff sought $1 million in future noneconomic damages.

During trial, juror C.S. was repeatedly tardy for court, and other jurors reported that she smelled of alcohol. Juror B.B. was engaged in the business of selling adult novelties and decided to capitalize on the business opportunity presented by civic service and brought her adult novelty catalogs to the jury room. The court removed the catalogs and advised B.B. to cease soliciting business in the jury room. This proved to be only the tip of the iceberg regarding questionable conduct by members of the jury.

Following trial, district court Judge William Woolley entered a jury verdict finding defendant, Dr. Steve Lawton, 54% at fault for injuries to the plaintiff, Richard Williams. The jury returned a verdict far in excess of the prayer, awarding $1,750,000 in future noneconomic damages in addition to $200,000 in past damages.

After entering the verdict, Judge Woolley lifted the admonitions from the jury and gave the instruction mandated by Kansas Supreme Court Rule 169.

After entering the verdict, Judge Woolley lifted the admonitions from the jury and gave the instruction mandated by Kansas Supreme Court Rule 169. Rule 169 directs the trial court to give the substance of the following instruction upon completion of trial and before discharge of the jury;

> You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may discuss this case with the lawyers who presented it to you. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. *It is proper for the attorneys to discuss the case with you and you may talk with them, but you need not.* If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If an attorney persists in discussing the case over your objections, or becomes critical of your service either before or after any discussion has begun, please report it to me …

Dr. Lawton's attorney opted to interview the jurors after the trial. Defense counsel directed her legal assistant, who attended trial, to contact all of the jurors for the purpose of evaluation and education for future reference, due to the excessive, unsupported verdict, and due to the prior incidences of juror misconduct. Defense counsel's legal assistant called the jurors; some of them returned the call and some did not.

Juror A.S. advised that the presiding juror had persuaded the other jurors that ten members of the jury did not have to agree on the verdict, but instead that all twelve jurors' opinions could be averaged to reach a verdict. A.S. explained that due to the presiding juror's direction and influence, the other jurors agreed in advance to average their opinions to reach a verdict on the percentage of fault, and the jury then did so. Of the remaining jurors who discussed the case with counsel following the verdict, no one disclosed any information which would cast any serious doubt on the credibility of juror A.S.

Counsel for Dr. Lawton filed a motion for a new trial citing the improper quotient verdict as one error warranting a new trial. The affidavit of juror A.S. stated that the instructions were not read, the jury was dominated by the foreman, the verdict was a quotient verdict, improper areas of damages were considered, and plaintiff's attorneys fees were budgeted into the award. This affidavit was attached to the motion for new trial. Plaintiff responded to the motion for new trial and attached affidavits from juror C.D., who was the presiding juror, and juror B.B., the "entrepreneur" of the jury room.

Judge Woolley then conducted a hearing on the motion for new trial, whereupon he reviewed the affidavits. At the hearing, Plaintiff argued that the conduct of defense counsel and her assistant in contacting the jurors was improper and was sanctionable. Judge

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Post-Verdict Juror Interviews *(Continued from pg 10)*

Woolley made the record clear by stating that there was no order in place that said the attorneys could not or should not contact the jurors. He further explained that under Kansas law, so long as the parties were not harassing the jurors and were following the Judge's instructions with regard to the nature of the conduct and contact, attempting to contact any of the twelve jurors was not improper. After indicating his desire to recall the jury to discuss the allegations of misconduct, Judge Woolley entertained an oral motion by defense counsel to request the jurors appear in court for a recall hearing.

Despite the express language set forth in Rule 169, the panel majority decided that the "better practice" is to seek permission of the court to interview jurors after a verdict.

Eight of the jurors voluntarily returned to Judge Woolley's courtroom. The parties were allowed to submit proposed questions to the jurors; however, the questioning was conducted solely by the Court. The jurors were all questioned in a similar manner, which included asking whether they discussed the plaintiff's ability to obtain medical insurance, whether attorneys fees were considered, whether fault was determined by an average of the jurors' opinions, whether the jury agreed that the number resulting from the average would be the end verdict of the jury, as well as how damages were determined. Following the recall hearing, Judge Woolley ordered the attorneys and parties to have no further contact with any of the jurors. There was no evidence in the record that any juror felt pressured by Dr. Lawton's attorney or legal assistant, or that either Dr. Lawton's attorney or her legal assistant tampered with any member of the jury during the interview process.

Judge Woolley ultimately found that the jury reached its verdict with regard to fault by averaging the jurors' opinions. The Court found that because some of the jurors believed they had agreed that the average result would be the verdict of the jury, there was not a full opportunity for discussion and deliberation as to the final verdict. Thus, the verdict was improper and considered to be a quotient verdict. The trial court ultimately found that Defendant suffered substantial prejudice as a result of the quotient verdict.

Judge Woolley granted a new trial and certified three (3) questions for interlocutory review, among them the propriety of the post-verdict recall of the jurors. The Court of Appeals panel reviewing the case issued a split decision. The panel majority held that the trial court erred in its decision to recall the jury.[3] One of the factors analyzed in the panel majority's ruling was the post-verdict interviews of jurors conducted by defense counsel.

In particular, the panel majority was "most offended by the systematic contact of jurors after the verdict in an attempt to impugn the integrity of the verdict."[4] Despite the express language set forth in Rule 169, the panel majority decided that the "better practice" is to seek permission of the court to interview jurors after a verdict.[5] They further held that the "systematic contact of the entire jury, juror by juror, with the clear intention of exploring grounds to impeach the verdict [should] be undertaken only with the knowledge and consent of the court."[6] The panel majority stated defense counsel's approach "resulted in tampering with the jurors in an attempt to destroy the verdict."[7] The panel majority also expressed the view that if they were to endorse the post-verdict juror interviews conducted by defense counsel, "it would indeed 'open the door to the most severely harmful methods for tampering with jurors' and no verdict would be safe from the ravages of counsel for the losing party."[8] At the district court level, no one had even suggested that jury tampering had occurred. There was no evidence of any attempt by defense counsel or defense counsel's legal assistant to pressure, harass, persuade or otherwise manipulate the jurors. There was simply no evidence of wrongful conduct.

The panel majority also stated there was no consent of the court to the juror contact.[9] But, as previously noted, by reading the instruction mandated by Kansas Supreme Court Rule 169, the trial court explicitly gave the jurors permission to speak with the attorneys and so stated on the record again at the motion for a new trial.

(Continued on page 12)

Post-Verdict Juror Interviews *(Continued from pg 11)*

A dissenting view was filed by Justice Larson. In his dissent, Justice Larson stated that he saw nothing improper with the communications between counsel or representative of the defendant and members of the jury. He noted that the jurors had the right to talk to counsel and that there was no requirement, as the majority attempted to establish, that requires the explicit consent of the court prior to contact with each juror. Justice Larson correctly noted that such a requirement would be "an abandonment of long-time practice, severely limit counsel in their search for the truth and integrity of a jury's verdict, and make misconduct of the jury unduly difficult to be discovered and rectified."[10] The dissent also expressed the view that the panel majority's opinion had misinterpreted two cases it had relied on, *State v. Ruebke*,[11] and *State v. McDonald*[12].

The Kansas Supreme Court granted Dr. Lawton's Petition for Review following the split panel's decision, and the KADC submitted an amicus curie brief supporting defense counsel's conduct and the right to conduct post-verdict juror interviews. In its amicus brief, the KADC argued against the departure from traditional practice and the Supreme Court Rule, as advocated by the panel majority, and encouraged the Supreme Court to adopt the dissenting opinion of Justice Larson.

The majority opinion of the Court of Appeals in Lawton effectively subverts Rule 169 and establishes a requirement that counsel obtain the court's permission in order to conduct post-verdict juror interviews.

I.

The plain language of Rule 169 permits attorneys to discuss cases with jurors after trial. There is no requirement for attorneys to seek the court's permission prior to speaking with jurors. The majority opinion of the Court of Appeals in *Lawton* effectively subverts Rule 169 and establishes a requirement that counsel obtain the court's permission in order to conduct post-verdict juror interviews.[13]

> The panel majority's gloss on Rule 169 is not supported by the case law it cites:
>
> [Rule 169] and its mandatory instruction seems to contemplate an open exchange of information between *willing* jurors and counsel, but the statutory restrictions on formal use of such information demonstrates that any such exchange is primarily intended for the educational benefit of counsel and not for the purpose of "fishing" for grounds to impeach the verdict. See *State v. Blocker,* 211 Kan. 185, 196, 505 P.2d 1099 (1973) (K.S.A. 60-444 "not intended to authorize broad hunting expeditions or fishing excursions.").[14]

The *Williams* majority's citation to *Blocker* to support the principle that the Rule's authorization of post-verdict discussions with jurors is not intended for the purpose of discovering grounds upon which a verdict might need to be challenged is perplexing. In *Blocker*, counsel for the defendant moved for a new trial and summoned four of the former jury members to find out what happened in the jury room during deliberations. Prosecutors objected to this process calling it a "fishing expedition for error" and the court ultimately agreed. The defendant's attorney, when asked to make a proffer, responded that the jurors would "perhaps" generally describe matters they considered in arriving at their verdict. The court called this proffer "iffy at best," and the court seemed to condemn the defendant's attorney for failing to interview or visit with members of the jury after the verdict which failure, in turn, caused counsel to have no idea whether cause existed for questioning the verdict.[15]

Thus, the attorney conduct criticized by the *Blocker* court consisted of bringing a motion for new trial and summoning four jurors to the hearing on the motion without having contacted and interviewed the jurors to see what they would say in advance of the hearing. The "hunting expedition" and "fishing excursion" referred to in *Blocker* was the calling of jurors to be witnesses at a hearing when the attorney moving for new trial did not know what they would say because he had *neglected* to contact and interview the

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Post-Verdict Juror Interviews *(Continued from pg 12)*

jurors. Moreover, contrary to the *Lawton* panel majority's take on Rule 169, the *Blocker* court found that one of the important benefits of post-verdict discussions with jurors was the ability to ascertain whether the verdict might be subject to legal challenge.[16]

To complicate things further, defense counsel's conduct in *Lawton* was consistent with the applicable rules of professional conduct.[17] The *Blocker* court noted that a former rule similar to KRPC 3.5(b) implied "that after a verdict has been returned it is not improper for an interested attorney to interview members of the jury so long as the limitations of the rule are observed."[18]

The *Lawton* panel majority also relied upon *State v. Ruebke*[19] for the proposition that leave of court is required prior to conducting post-verdict juror interviews. However, *Ruebke* is distinguishable, as it dealt with post-trial recall of juries pursuant to Supreme Court Rule 181. Rule 181 specifically provides that jurors should not be recalled for hearings on post-trial motions without orders of the court upon motion and hearing. This is significantly different from Rule 169, which specifically allows contact with jurors without a court order. In *Ruebke*, the Supreme Court held that the trial court did not err in refusing to allow a party to contact and recall the entire jury panel in order to discover information that could lead to the need for a new trial. The *Ruebke* Court noted in discussing the parties' request pursuant to Rule 181 that the judge had "conscientiously allowed jurors to be interviewed during and after the trial." The judge did not allow a mass interview of the jury panel in hopes of turning up some form of juror misconduct, thus there was no abuse of discretion found. *Ruebke* in no way stands for the proposition that Rule 169 should be abrogated in favor of a requirement that a court order must be obtained prior to interviewing jurors post verdict.

Finally, the *Lawton* majority also relied on *State v. McDonald*[20] for the proposition that the "proper course" or "better practice" is to seek permission of the court to interview jurors after a verdict. In *McDonald*, a criminal defendant's attorney sought a motion for new trial. Upon oral argument of this motion, counsel informed the court that he had not interviewed any of the jurors and felt that he should first secure the consent of the trial judge before doing so. He requested leave to contact the trial jurors in order to determine the existence or possible nonexistence of prejudicial pretrial publicity. The court denied the motion and barred the attorney from contacting the jurors. The Supreme Court ultimately held that the trial court should have granted leave to interview the jurors. In its discussion, the Supreme Court specifically stated, "[w]hile there is nothing in our law to prohibit counsel from interviewing jurors after the conclusion of trial, leave of court is required before jurors may be called for hearings on post-trial motions.[21]

The *McDonald* court went on to state that counsel pursued a proper course in seeking permission of the court to interview the jurors. The *Lawton* majority apparently construed this as a mandate that at all times counsel should seek permission from the court to interview jurors after a verdict.

II.

Perhaps the most detrimental aspect of the *Lawton* majority's ruling with respect to post-verdict juror interviews by attorneys is its potential to create confusion among the trial lawyers of this state. As things currently stand, a Supreme Court Rule and the Rules of Professional Conduct permit such interviews, without leave of court. The language of the panel majority's opinion, however, casts doubt on the permissibility of post-verdict interviews. The ruling itself seems less than clear:

> [W]e hold that the better practice dictates that the systematic contact of the entire jury, juror by juror, with the clear intention of exploring grounds to impeach the verdict be undertaken only with the knowledge and consent of the court.[22]

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As things currently stand, a Supreme Court Rule and the Rules of Professional Conduct permit such interviews, without leave of court. The language of the panel majority's opinion, however, casts doubt on the permissibility of post-verdict interviews.

Post-Verdict Juror Interviews *(Continued from pg 13)*

The ruling is couched in terms of a "holding," which "dictates" that interviewing every juror "be undertaken only with the knowledge and consent of the court." The majority also states defense counsel's conduct "resulted in tampering." On the other hand, other language in the majority opinion seems to limit the scope of the ruling: maybe this is only "the better practice," limited to circumstances where the attorney desires to contact every juror with the "clear intention" of impeaching the verdict.

Applying this language to trial practice, however, would not be so clear-cut. A lawyer may begin contacting a few jurors with the intent of benefiting from their views of his or her presentation and advocacy skills, only to discover that there may have been jury misconduct. This leads the lawyer to interview a few more jurors with the dual intent of receiving feedback on performance and following up on the possible misconduct. Clear evidence of misconduct is then discovered and the lawyer is compelled to file a motion requesting a new trial. Has the lawyer violated the "holding" of the Court of Appeals? A lawyer may not begin post-verdict interviews with the intent to contact every juror or the "clear intent" of impeaching the verdict – but it may well happen in practice. That the "holding" seems to be in conflict with a Supreme Court Rule and the Rules of Professional Conduct only adds to the confusion. At the very least, the controlling law regulating post-verdict attorney contact with jurors should not come from a 2-1 majority opinion from the Court of Appeals. It is an issue that should be governed, as it is presently, by a rule promulgated by the Supreme Court, which would achieve a more consistent application and greater awareness than a decision by the majority of a panel of the Court of Appeals.

The panel majority's criticism of defense counsel's conduct only compounds the confusion because such conduct appears to be authorized, if not condoned, by numerous professional associations.

The panel majority's criticism of defense counsel's conduct only compounds the confusion because such conduct appears to be authorized, if not condoned, by numerous professional associations. For example, the American Bar Association's Model Code of Professional Responsibility provided, "After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases."[23] The ABA's current Model Rules of Professional Conduct also contains no prohibition against responsible post-verdict interviews by attorneys.[24] The American College of Trial Lawyers goes further, and provides

> Subject to any limitations imposed by law, it is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge.[25]

The *Lawton* majority's opinion, which appears to restrict the ability of lawyers to interview jurors after a verdict, conflicts with these ethics authorities. This is likely to lead to confusion among lawyers who try cases as to when it is ethical to contact jurors after a trial – an area in which no trial attorney desires confusion.[26] One commentator has explained his criticism of local rules restricting post-verdict contact with jurors as follows:

> The confusion spawned by such policies is apparent. The ethical attorney prepares himself for practice by schooling himself in principles espoused in professional responsibility standards. In some locations, when the lawyer acts in complete accord with the ethical precepts heretofore detailed and talks with a juror, dire results are threatened because a local rule may bar this very practice. Such disharmony between ethical standards and local trial rules is intolerable. There should be no tension between court rules and ethical standards.[27]

Such confusion would, again, only be exacerbated by the fact that the restriction on post-verdict interviews with jurors is now set forth in a single appellate opinion which conflicts

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Post-Verdict Juror Interviews *(Continued from pg 14)*

with a Supreme Court Rule and another published opinion.

III.

The panel majority seems to have attempted to limit the requirement that counsel seek a court order authorizing post-verdict interviews to situations where every juror is contacted and it is counsel's "clear intent" to impeach the verdict. Nevertheless, the fact that these requirements would not be so clear-cut in practice, coupled with an attorney's reluctance to risk violating this mandate, suggests that the holding of the panel majority would have a chilling and discouraging effect on *all* post-verdict juror interviews by counsel.[28]

The holding of the panel majority would have a chilling and discouraging effect on all post-verdict juror interviews by counsel.

As Justice Larson suggests, the panel majority under-valued the benefits of post-verdict interviews and over-emphasized the negative consequences. There are at least two widely acknowledged reasons for permitting counsel to conduct ethically responsible post-verdict juror interviews. First, "[p]ost-trial questioning of jurors serves as an educational tool for attorneys and can aid them in providing better representation to future clients. Jury interviews about juror impressions of a case can help attorneys improve their trial skills and performance in future cases."[29] This "self-education" justification has, at once, an obvious professional self-improvement dimension, as well as a beneficial effect on the justice system. Skilled trial lawyers who can present evidence, arguments, and witness examinations clearly and effectively to jurors enhance not only their professional careers, but the justice system as a whole.[30] The majority opinion is also inconsistent with common practice in Kansas trial courts. It has long been customary in the State of Kansas for litigators to conduct post-verdict interviews with jurors. This process serves a useful function by helping lawyers discover what is effective with a jury.

The second benefit of post-verdict juror interviews is "discovery of evidence of improper jury conduct or deliberations for purposes of impeaching a verdict ... Specifically, an attorney has a strong interest in discovering that some extraneous information tainted the jury deliberations or that some improper juror conduct took place."[31] An attorney's dedication to his or her client dictates that he or she "must have the tools for ascertaining whether or not grounds exist for a new trial."[32] Without the ability to interview jurors after a trial, the legal system is stripped of one of its most important safeguards against juror misconduct.[33] Although in theory the danger of a verdict based on juror misconduct would be alleviated by the trial court's consenting to post-verdict interviews, in practice there is a substantial danger that the court will refuse consent in such cases.[34]

In *Lawton*, the panel majority unduly focused on the potential evils of post-verdict juror interviews. The majority's focus was too weighted with an eye toward preserving the finality of verdicts without considering the safeguards necessary to be sure that verdicts are worth preserving. As one commentator has observed,

> The interest in finality is the most substantial concern prompting the historic rule that limits juror testimony about the deliberations and verdict. The unspoken assumption is that a close inquiry into how the jury reached its verdict will frequently reveal impropriety. The stated assumption upon which our jury trial system is based, however, is that the jurors will act properly.[35]

The Kansas Rules of Evidence also recognize the need to permit juror testimony in order to detect juror misconduct.[36] It would be odd indeed if the law were to also allow a court to prohibit interviews designed to discover whether those grounds are present.[37]

There is also reason to believe that the panel majority overstated the danger of "jury tampering" that could arise unless consent of the court is obtained.

> The process of interviewing jurors after a verdict does not appear to

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Post-Verdict Juror Interviews *(Continued from pg 15)*

> present more of an opportunity for unseemly conduct on behalf of the interviewer than the process of interviewing witnesses prior to the trial. In both cases the interviewer might act improperly and plant suggestions to the unwary witness. No one has suggested that lawyers should not interview witnesses. This concern for interviewing jurors reflects an underlying view that jury verdicts are so fragile that they can be overturned easily by a carefully worded phrase sworn to by one juror ... An improper verdict should not be artificially protected by procedural or competency [of testimony] rules that limit the court's access to evidence relevant to the issue of whether the verdict should be overturned.[38]

Other authorities examining the issue have also warned that the dangers to finality of verdicts should not be overstated at the expense of competing policy concerns.[39]

IV.

The language contained in the *Williams* majority opinion criticizing defense counsel's conduct with respect to post-verdict juror interviews, which appears to create a new rule governing attorney conduct, should be disavowed. The panel majority's opinion in this regard is contrary to Supreme Court Rule 169 and all relevant ethical rules, which permit attorney contact with willing jurors after trials, so long as interviews are conducted in an appropriate and professional manner. Furthermore, the public policy considerations weigh in favor of the clarity of the present Supreme Court Rule and professional ethical standards. Allowing responsible post-verdict contact with jurors presents lawyers with an educational opportunity with both personal and public benefits, as well as the ability to detect jury misconduct and deter future misconduct.

Oral argument before the Kansas Supreme Court took place on September 2, 2008 and the court's ruling is currently pending.

The panel majority's opinion in this regard is contrary to Supreme Court Rule 169 and all relevant ethical rules, which permit attorney contact with willing jurors after trials, so long as interviews are conducted in an appropriate and professional manner.

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1. *Williams v. Lawton*, 38 Kan.App.2d 565, 584, 170 P.3d 414 (2007).
2. 38 Kan.App.2d 565, 170 P.3d 414 (2007). The recitation of the facts of the case is taken from Dr. Lawton's Supplemental Brief to the Supreme Court.
3. 38 Kan.App.2d at 585.
4. Id. at 584.
5. Id. at 577.
6. Id. at 581.
7. Id. at 584.
8. Id. at 584 (citing *City of Ottawa v. Heathman*, 236 Kan. 417, 420 (1984)).
9. Id. at 581.
10. Id. at 589 (Larson, S.J., dissenting).
11. 240 Kan. 493, 731 P.2d 842 (1987).
12. 222 Kan. 494, 565 P.2d 267 (1977).
13. *See* Rule 169 (stating that the district court "shall" inform the jury that "[i]t is proper for the attorneys to discuss the case with you and you may talk with them, but you need not").
14. 38 Kan.App.2d at 578 (emphasis in original).
15. *Blocker*, 211 Kan. at 196-97 ("Indeed it was conceded that counsel had not even attempted to interview or visit with members of the jury. Defense counsel had no idea whether cause existed for questioning the verdict").
16. 211 Kan. at 197-98 ("Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected ...") (quotations and citation omitted).
17. *See* Sup.Ct.Rule 226, KRPC 3.5(b) ("A lawyer shall not ... communicate or cause another to communicate with a member of a jury ... *until after the discharge of the jury from further consideration of the case*") (emphasis added).
18. 211 Kan. at 197.

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Post-Verdict Juror Interviews *(Continued from pg 16)*

19. 240 Kan. 493, 731 P.2d 842 (1987).
20. 222 Kan. 494, 565 P.2d 267 (1977).
21. *McDonald*, 222 Kan. at 497 (citing Supreme Court Rule No. 181 (220 Kan. LXVIII)).
22. 38 Kan.App.2d at 581.
23. Ethical Consideration, 7-29. *See also*, Model Code DR 7-108(D) ("After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.").
24. *See* MRPC Rule 3.5(c).
25. American College of Trial Lawyers, Annotated Code of Trial Conduct, Standard 19(f), at 41 (2005). Available at http://www.actl.com/Content/NavigationMenu/Publications/AllPublications/default.htm
26. Carlson, *Competency and Professionalism in Modern Litigation: The Role of the Law Schools*, 23 Ga. L. Rev. 689, 719 (1989) ("Certainly in a field as delicate as the subject of contact with a trial juror, the rules must be clear.").
27. Carlson, *supra*, 23 Ga. L. Rev. at 722-23 (1989).
28. *See* 38 Kan.App.2d at 589 (Larson, S.J., *dissenting*) (stating that the majority's "requirement or rule would be an abandonment of long-time practice, severely limit counsel in their search for the truth and integrity of a jury's verdict, and make misconduct of a jury unduly difficult to be discovered and rectified").
29. Dunn, *When Can an Attorney Ask: "What Were You Thinking?" – Regulation of Attorney Post-Trial Communication with Jurors After Commission for Lawyer Discipline v. Benton*, 40 S.Tex. L. Rev. 1069, 1079 (1999).
30. *See Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 433 (Tex.1998) ("We have long concluded that communication between parties, counsel, and discharged jurors can be a valuable experience for all concerned. In particular, a lawyer ... who has lost a trial may respectfully ask the jurors to tell him why they were not persuaded by his case, and thus learn something that will help him serve his clients better in the future").
31. Dunn, *supra*, at 1080. *See also*, Conn. Bar Assoc., Formal Opinion No. 36 (on file with the authors) (referencing ABA Opinion 319 and reasoning that "lawyer-juror communications are essential for determining whether grounds for new trial exist. Significantly, the ABA Committee also concluded that it is ethical for lawyers to have informal post-trial discussions with jurors for the purpose of self-education. We agree that communications with jurors are ethical for both purposes"); Supreme Court of Connecticut, "Report of the Task Force on Post-Verdict Interviews of Jurors," (June 1996) (on file with the authors) ("Post-verdict interviews of jurors were deemed by some as valuable for educational purposes and were viewed as necessary where there exists a real concern regarding juror misconduct").
32. Carlson, *supra*, at 720-21 n. 113 (citing ABA Opinion 319 (1968)).
33. *See Blocker*, 211 Kan. at 197-98; *Williams*, 38 Kan.App.2d at 589 (Larson, S.J., *dissenting*) (stating that the majority's "requirement or rule would be an abandonment of long-time practice, severely limit counsel in their search for the truth and integrity of a jury's verdict, and make misconduct of a jury unduly difficult to be discovered and rectified"); Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 St. John's L. Rev. 389, 434 (1991) ("if a party is precluded from interviewing jurors, the probability of that party's impeaching a verdict is substantially diminished. There is a danger that such limitations may prevent litigants from learning of egregious situations where the impeachment of the verdict is appropriate"); Lawsky, *Limitations on Attorney Post-verdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*, 94 Colum. L. Rev. 1950 (1994).
34. *See McDonald*, 222 Kan. 494 (holding the trial court erred in withholding its consent to post-verdict interviews); Supreme Court of Connecticut, "Report of the Task Force on Post-Verdict Interviews of Jurors" (June 1996) (on file with the authors) (former New Jersey judge noting that, under New Jersey rule requiring court's consent prior to post-verdict interviews, "leave of the court to con-

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Post-Verdict Juror Interviews *(Continued from pg 17)*

duct such interviews was very rarely granted").

35. Thompson, *Challenge to the Decisionmaking Process – Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 SW. L.J. 1187, 1225 (1985).
36. *See* K.S.A. 60-444(a); 60-441; 38 Kan.App.2d at 577 (panel majority acknowledging a "limited" need to permit juror testimony).
37. *See* Carlson, *supra*, 23 Ga. L. Rev. at 721.
38. Thompson, *supra*, 38 SW. L.J. at 1224.
39. *See People v. Hutchinson*, 71 Cal.2d 342, 350 (1969) (noting that experience demonstrates that allowing admission of juror affidavits in connection with motions for a new trial will not result in widespread upsetting of verdicts or jury tampering); Supreme Court of Connecticut "Report of the Task Force on Post-Verdict Interviews of Jurors," at p. 16 (June 1996) (on file with the authors) (stating the Task Force's conclusion "that post-verdict interviews of jurors are not a major systemic problem and did not cast a shadow on the jury deliberation process in Connecticut"). ▲

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- Comments

Email to: Amy E. Morgan, Editor, Kansas Defense Journal
amorgan@stklaw.com

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

fort it takes to generate the high quality articles our publication is known for, not to mention keeping authors on task in making timely submissions. Great job, Amy!

I also want to give a pat on the back to the present and past KADC Boards for positioning the KADC as a resource for appellate courts, attorneys, and others throughout the state. We have become involved in a number of efforts as *amicus curiae* in the past 20 years, recently on such topics as the joint defense privilege, qualification of expert witnesses, and post-trial communications with jurors, and we have a brief on constitutionality of the cap on non-economic damages in the works; check out the KADC website for copies of *amicus* briefs filed since 1990. The attorneys who contribute to the KADC and our profession by preparing these amicus briefs deserve our thanks! Our legislative efforts have also been fruitful in recent years, and I anticipate our Legislative Committee will be active again this year in efforts to maintain the favorable tort climate in Kansas.

Finally, I want to plug the Annual Conference again. The line-up is stellar and focuses on programs you can take back and use in your daily practice. Many thanks to Tracy Cole and Dan Diepenbrock for their hard work in tracking down national caliber speakers. Also, please remember that the business meeting will take place at 4:00 on Friday with the important agenda items of amending the Bylaws and electing new officers and Board members. The lunch speaker will be Lew Perkins, the Director of Athletics at KU.

See you in December!
Anne Kindling▲

KADC Annual Conference *(Continued from pg 3)*

there are numerous mechanisms of injury, including the low impact collision, but did it really cause the injuries claimed? Mr. Pike will help us sort through the engineering and legal issues involved in such cases.

Then, in recognition that we don't fight with everyone, Michael Jones, our colleague from Wichita, will discuss setting the terms for working with co-defendants in Joint Defense Agreements. And, Wyatt Hoch, also from Wichita, will provide some tips and warnings for arbitration.

For the practical overview of cases, issues and those little known but helpful tools, we have again tapped our Kansas colleagues. Stephen Kerwick will present his always informative and entertaining Kansas Case Law Update. Dave O'Neal from KaMMCO and David Wooding will discuss current issues in medical malpractice. And, new this year, a short, fast-paced segment "Tell me something I don't know." Three of our colleagues will tap their experiences to tell us some things they have learned that we have not yet encountered or it was so long ago we have forgotten.

We're discussing something different this year in the area of ethics. With the floods in Iowa, hurricanes in Houston and tornadoes in Kansas we've seen lawyers and law offices coping with destruction or inaccessibility. Are you ready? Chris Stiegemeyer from The Bar Plan will guide us on our obligation to plan for disasters large and small.

Finally, Lew Perkins from the University of Kansas will provide some motivation. From his example and insights we will learn how planning, resolve and motivating others can lead to success.

So, plan to join us in Kansas City December 5 and 6 for an informative and entertaining conference. Register at www.KADC.org. SEE YOU THERE!!!▲

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