

2018 No. 1

Inside this issue of
Kansas Defense Journal:

President's Message:	1	We, the members of the KADC, are litigators. We seek to resolve our client's disputes and, if necessary, pursue their remedies in the courts created by our state and federal governments. The courts then apply the rule of law in a manner that supports due process for the litigants. Our judicial system is unique and beautiful.
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Young Lawyers Report	4	<ul style="list-style-type: none"> • Are accessible and ready to serve all 2.9 million Kansans. • Process 400,000 new cases yearly including 20,000 felony cases. • Supervise nearly 17,000 convicted criminals on probation.
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PRESIDENT'S MESSAGE:

challenges are facing schools, roads, and every other aspect of the government; but, the evidence is clear that to ensure judicial system integrity, the funding must be found.



**William Townsley
Fleeson, Gooing,
Coulson & Kitch**

The facts concerning the judicial system's economic challenges are irrefutable.

- Kansas judges rank 50th in the nation for pay.
- Kansas judicial personnel are significantly underpaid. Every non-judicial staff position has an average wage that falls below market rate and nearly 1/3 of the staff work second jobs to make ends meet.
- The Kansas judicial branch has implemented system-changing efficiencies that are being eroded due to high employee turnover.

The Kansas judicial branch sought an increase of \$17.7M this year (for a total budget of \$135M or less than 1% of the state budget). Of that amount, \$10.3M would adjust the wages of non-judicial staff to a regional adjusted average wage. The remainder would bring the salaries of district judges, appellate court judges, and district magistrates to a regionally adjusted average wage.

Again, the legislature's challenge this year is substantial. There is no easy solution for creating a budget that addresses the concerns of every deserving faction seeking funding. But, at a time in which \$2 billion price tags for other fixes are bandied about

(Continued on page 2)

In Kansas, our court system works; however, the courts are burdened, and the horizon ahead is cloudy. At the root of our challenge is funding for the Kansas judicial branch. Make no mistake, finding proper funding in these times of complicated financial tensions is difficult. The Kansas legislature's budgetary tasks are daunting given the revenue challenges before it. Simply put, there is no easy answer for funding the judicial branch given that similar fiscal

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President's Message (Continued from page 1)

the capitol, the judicial funding fix is quantifiable and achievable.

By the time you read this, the session may be concluding. As I write this, there has been no judicial funding bill approved yet in this session but compromise measures have been discussed. I am confident that the goal of adequate judicial funding will continue to present a challenge to legislators in the future. The payoff for the judicial budget increase is immense. As KADC litigators, we know that a vital court system is important for the people of Kansas.

Because 94% of the judicial budget is apportioned to salaries, virtually any increase in the judicial budget provides for better salaries. Better salaries means more qualified individuals may be recruited and retained for judicial branch jobs. The increased wages will stem the tide of employee turnover and allow for increased efficiency measures. All Kansans will benefit from a properly funded court system filled with highly qualified, motivated, and capable

employees.

Earlier in March, I joined with Kansas Bar Association members to personally meet with legislators in Topeka to explain how important the judicial budget increase is to Kansas. Other KADC members participated as well. As KADC litigators, we are uniquely qualified to explain why a healthy court system is important for every citizen. Although our efforts were well received by the legislators and despite that many recognized the critical impact of judicial funding, we learned that passage of the entire judicial branch request is unlikely this year. If you know your legislator, call him or her today. Ask your friends, family members, and colleagues to advocate for adequate funding for the judicial branch.

As KADC litigators, we have a special ability to educate both the citizens of Kansas and their elected representatives about the necessity of adequate and appropriate judicial funding. Don't let this opportunity to help the courts pass you by. Let's help make Kansas better and fund the courts.

EXECUTIVE DIRECTOR'S REPORT

Greetings from KADC headquarters!

At the time of this writing we are heading toward the First Adjournment legislative deadline, and it has been a busy and productive year for KADC. Under the leadership of Government Affairs Committee Co-Chairs Sarah Warner and Nathan Leadstrom, KADC has engaged in several policy issues, including the submission of several pieces of testimony. These issues include class-action asbestos reform, admissibility of seat belt evidence, and appeal bond reform. And, as always, we are keeping a close eye for legislation that might threaten the independence of the judiciary and judicial budgets.



Scott Heidner
KADC
Executive Director

Shannon Wead and the Annual Conference Planning Committee has made great progress already in planning the 2018 event. If you haven't already done so, I hope you'll mark your calendar for November 30 – December 1 to join us in Kansas City for another fantastic event.

Other KADC committees continue their good work as well. And if you haven't considered doing so, I'd encourage you to take a look at volunteering. In addition to the committees listed above, we also have great opportunities with our Membership, Trial Skills Workshop, Amicus, Social Media, Young Lawyers, and KADC Journal Committees. And we are excited to announce the creation in 2018 of the Community Service and Outreach Committee under the leadership of John Walbeck.

Thanks to all our hard-working volunteers contributing time to advance the KADC mission!

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Visit www.DRI.org for additional information**NEW COMMITTEE: COMMUNITY SERVICE/OUTREACH**

KADC has had and continues to have a significant impact on the legal community in Kansas. Through its members, committees and recourses, KADC has made significant strides in promoting and protecting the interests of the defense bar . We are trying to broaden that impact to the communities we all practice and live in. The idea is to start a committee that will focus on setting up service or outreach projects for the membership throughout the year, in different locations in Kansas, to try and help improve those communities.

We are looking for members who want to be a part of this committee, from the ground up, to hopefully shape it into something that will benefit many, including those involved.

If you are interested, shoot me an email at JohnW@waldeckpatterson.com or call (913) 749-0310

Thank you!

John Waldeck

WELCOME NEW KADC MEMBERS

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KADC AMICUS COMMITTEE REPORT

BY ERIC TURNER

The KADC has submitted two amicus briefs to the Kansas Supreme Court in two pending cases involving damages and liability in the personal injury context.

The Kansas Supreme Court will rehear oral arguments in *Hilburn v. Enerpipe, Ltd.*, on May 3. *Hilburn* is the first case to test the constitutional challenge to Kansas' non-economic damage caps since the framework was established in *Miller v. Johnson*, 295 Kan. 636 (2012). In *Miller*, the Court held that the non-economic damages caps in K.S.A. 60-10a02 do not violate Kansas Constitution Section 5 (right to jury trial) and Section 18 (right to judicial remedy for injury) in the medical malpractice context. In *Hilburn*, the Court will consider if the caps are constitutional in the personal injury and automobile insurance contexts.

Tim Finnerty, of Wallace Saunders, filed an amicus brief on behalf of the KADC in January. It was one of three amicus briefs filed, in addition to amicus briefs filed by the Kansas Trial Lawyers Association and the Kansas Chamber of Commerce. Andrew Holder, of Fisher Patterson Sayler & Smith, represents Enerpipe, Ltd., which prevailed at the court of appeals. Holder argued the case before the Kansas Supreme Court on January 25. After the oral argument, however, the Court informed the appellant that it failed to follow Kansas Supreme Court Rule 11.01, which requires notice to the Attorney General when filing a brief that calls

into doubt the validity of any Kansas statute on grounds that the law violates the state constitution. After receiving the notice, the Attorney General filed a motion to intervene and has been granted the opportunity to file a brief in the matter. The parties will have the opportunity to respond. As a result, the Court has reset oral argument for May 3 with the Attorney General's office expected to participate.



Eric Turner
Foulston Siefkin LLP

In March, Lyndon Vix and Brian Vanorsby—of Fleeson, Gooing, Coulson & Kitch, L.L.C.—filed an amicus brief on behalf of the KADC in *Kudlacik v. Johnny's Shawnee, Inc.*, where the Kansas Supreme Court will review whether an establishment serving alcohol can be held liable for injuries caused by an intoxicated customer. The KADC submitted one of the five amicus briefs filed. The others were filed by the Kansas Restaurant & Hospitality Association, the Kansas Trial Lawyers Association, Mothers Against Drunk Driving, and the Kansas Emergency Medical Services Association. KADC members Todd Thompson and Sarah Warner, of Thompson Warner, P.A., represent co-defendants Barley's, Ltd. The matter is fully briefed. Oral argument has not yet been set but is expected to be set for the fall.

KADC YOUNG LAWYERS REPORT

Trial experience – the holy grail of litigation associates. Presently, young lawyers seem to face a catch-22 in their professional development. Clients want to assign cases directly to lawyers who have trial experience, and thus by extension, partners are resistant to allow young lawyers to gain such experience on their cases.

While civil trial opportunities will be difficult to come by for the foreseeable future, young lawyers can find other ways to sharpen their trial skills for when the opportunity arises.

One such opportunity is through the International Association of Defense Counsel's Trial Academy. I had the good fortune of attending last year's Trial Academy, following in the footsteps of attorneys in our firm who have gone before me.

Held at Stanford Law School in Palo Alto, California, the IADC's annual Trial Academy provides a week-long combination of lectures, workshops, and small group exercises for training defense counsel in each stage of trial.

With approximately 100 attendees from all over the country (and from other countries, including Brazil, Canada, and Mexico), the collaboration with diverse styles and experiences enriches the experience. The faculty also includes seasoned trial lawyers from across the country, who participate in live demonstrations and leading small-group workshops.

Where the Trial Academy truly provides its value is within the small group exercises. Prior to the Trial Academy, students

are given case materials containing pleadings and depositions. Our materials featured a personal injury case and an employment discrimination case. Each student prepares an opening statement, direct and cross examinations of lay and expert witnesses, and a closing argument using the case materials. Local professional actors and members of expert consulting groups play the witnesses during the examination exercises. For example, a national expert economist group supplied the expert economists for our cross-examination exercises.

In addition to performing the exercises, students are observed by a faculty member and video recorded. Faculty and students then have follow-up film sessions, providing the opportunity to observe their presentations from a jury's perspective.

Though obviously not the focus, Stanford Law School is a terrific host for the event. The facilities and food are top-notch. Typically held in late July/early August, the Palo Alto backdrop was an appreciated reprieve from Kansas' summer weather.

Fellow young lawyers – if you have any interest at all in finding ways to develop your trial skills, I highly recommend the IADC Trial Academy. Your firm will undoubtedly benefit from the investment in your professional development.

Stephen Netherton

Hite, Fanning & Honeyman,

ORDER OF THE COURT: RESTORING THE ORDER OF EXPERT WITNESS DISCOVERY

By Lisa Brown¹

The order of the disclosure of expert witnesses in civil litigation has become such a universal procedure that most litigators have likely never given it a second thought. Under the “traditional” model for expert discovery, the order is as follows:

- ◆ Plaintiff serves his expert disclosure
- ◆ Defendant deposes plaintiff’s expert
- ◆ Defendant serves his expert disclosure
- ◆ Plaintiff deposes defendant’s expert
- ◆ Plaintiff designates rebuttal expert testimony, if necessary

For many of us, this is probably something we take for granted and have never really questioned. Recently,² however, there has been a push by certain members of the plaintiff’s bar to disrupt the traditional schedule of expert discovery. Plaintiffs are now requesting courts to issue orders directing that no expert depositions be taken until both parties have disclosed

their experts. Under this new proposal, the schedule takes on a different flavor:

- ◆ Plaintiff serves his expert disclosure
- ◆ Defendant serves his expert disclosure³
- ◆ Defendant deposes plaintiff’s expert
- ◆ Plaintiff deposes defendant’s expert

Upon receipt of such a request from opposing counsel, the defense is now forced to consider a procedure they have long used but never given much thought to. This article will attempt to provide insight into the general tactics being used by the plaintiff’s bar to advance this new strategy, and it will hopefully provide direction on what defense counsel should do when faced with such a motion based on a strategy that has found success in Shawnee and other counties.⁴

Why Should the Defense Care?

Litigation can often be more about choosing which battles to fight or not to

fight than it is about fighting the battles themselves. So, it is only rational that when such a motion or request is presented to defense counsel, the attorney will immediately begin a balancing test. The rules of civil procedure generally do not dictate that one party should conduct discovery before the other⁵. Why should expert discovery⁶ be any different?

The answer is really quite simple. For much the same reason the plaintiff presents his case in chief at trial before the defendant has an obligation to present any evidence, a plaintiff’s expert should be disclosed and deposed before the disclosure of the defendant’s expert. The burden of proof lies with the plaintiff, and the defense loses a great tactical advantage built into the system if this order is disrupted.



Lisa Brown
Foulston Siefkin

¹Special thanks to KADC members Tom Theis of Foulston Siefkin LLP and Dave O’Neal of Goodell, Stratton, Edmonds & Palmer, LLP for lending me their insight and experience into this issue.

²It appears that this newer procedure has become more standard in Sedgwick County, but thus far, the 18th Judicial District appears to have been the only District to adopt the new procedure as standard.

³It is unclear how rebuttal evidence pursuant to K.S.A. 60-226(b)(6)(C)(ii) is intended to be used under the new procedure.

⁴For examples of a few cases in which counsel has been successful in maintaining the “traditional” order of expert discovery, see: *Heitsman v. Lovelle*, Harvey County, Kansas Case No. 13-CV-100; *Bradshaw v. Baraban*, Shawnee County, Kansas Case No. 2014-CV-1002; *Richard v. Figuerres*, Shawnee County, Kansas Case No. 2016-CV-453.

⁵“Methods of discovery may be used in any sequence; and ... discovery by one party does not require any other party to delay its discovery.” See K.S.A. 60-226(d)(1)-(2)

⁶In fact, the 1993 comments to Rule 26 of the Federal Rules of Civil Procedure specifically contemplated that “in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue.”

Continued from page 5

What Are the Plaintiff's Arguments?

The typical⁷ argument for the altering of the traditional expert discovery schedule seems to rely on two issues: fairness and judicial economy.

Plaintiffs propose that defendants receive an unfair advantage by allowing the defense expert to have both plaintiff's expert report and plaintiff's expert's deposition before submitting the defendant's expert report. Theoretically, when a plaintiff's expert is deposed before seeing the defendant's expert's opinions, she may be precluded from addressing those issues.

As to the issue of judicial economy, plaintiffs take the position that the traditional method for discovery of expert witnesses increases the cost of litigation. According to the proffered arguments, the traditional method creates a much greater need for supplemental and rebuttal expert reports and their corresponding depositions.

How Should the Defense Respond?

In responding to such a motion from a plaintiff, defense counsel should consider including the following five basic arguments in their response:

Fairness. Although plaintiffs will likely rely on a fairness argument, the issue of fairness can also weigh in the defendant's favor. A defendant's role in litigation is to respond to the claims made against him. The breadth and scope of an expert's opinions are not apparent until that expert has been

examined under oath. Without the opportunity to depose the plaintiff's expert, a defendant is left to speculate as to the specific claims made against him. This is fundamentally unfair, requiring the defendant to essentially read the mind of plaintiff and his experts.

Burden of Proof. It is well established that the plaintiff bears the burden of proof in litigation. As such, the defendant is entitled to defend his claim solely on the basis that plaintiff has failed to meet his burden. The defendant is not required to present any affirmative evidence. Particularly in a medical negligence action, where expert testimony is required, the defendant may defend the case solely on the plaintiff's failure to provide viable expert opinions, and the defendant can only make that determination upon deposition of the plaintiff's expert. Forcing the defendant to produce his expert report prior to deposing the plaintiff's expert report essentially puts the defendant in the position of proving a negative rather than addressing the claims against him.

Rebuttal Testimony. The procedure for a plaintiff to respond to an opinion proffered by the defendant's expert is built directly into the existing rules of civil procedure. K.S.A. 30-226(b)(6)(C)(ii) permits a party to present evidence "intended solely to contradict or rebut evidence on the same subject matter" identified by another party pursuant to the rules for the discovery of expert witnesses within 30 days of the other party's disclosure.

Just as the plaintiff is permitted a rebuttal after a defendant presents his evidence at trial, the plaintiff is permitted to submit rebuttal expert testimony after the defendant.

The Work-Product Doctrine. The proposed alteration to the traditional schedule of expert disclosures runs the risk of forcing a violation of the defendant's work-product privilege. Because the defendant does not know the specific claims being made against him, the expert must use a shotgun approach and create an overly broad report. This can give plaintiff's counsel an insight into the defense counsel's thought process, forcing defense counsel to be its own "devil's advocate" in anticipating all potential issues. Thus, the defendant could be forced to produce opinions which would not ordinarily have been disclosed under the work-product privilege.

Judicial Economy. This issue applies more prevalently in medical negligence cases and cases where expert testimony is required. In such cases, a plaintiff can only meet his burden of proof through expert testimony. Therefore, if a plaintiff fails to present sufficient expert testimony, the defendant may seek summary judgment. Under the proposed alteration to the traditional schedule, the defendant would be forced to undergo the expense of retaining experts and preparing disclosures on issues that would not even be issues if given the opportunity to depose the plaintiff's expert.

⁷ Every motion is different, but we have seen plaintiff's counsel cite to a decision by Judge Fowler in Lyon County (*Salazar v. Harris*, Case No. 2014-CV-107) and a decision by Judge Yost in Sedgwick County (*Williams v. Wesley Medical Center*, Case No. 2013-CV-3441) in support of their push to change the standard procedure for expert discovery.

DON'T LET INADMISSIBLE CHARACTER EVIDENCE DERAIL YOUR MEDIATION

Stephen Netherton

Hite, Fanning & Honeyman,

Given the disappearance of the civil jury trial, litigation frequently steers in the direction of leveraging as many helpful facts as possible prior to mediation. When this occurs, litigators may encounter a "tail wagging the dog" scenario in which facts that bear little relevance to the case's critical issues take up an inordinate amount of attention.

Let me give an example. Suppose you represent a nursing home in a medical negligence suit. Invariably, during discovery, plaintiff's counsel obtains employee files. This treasure trove reveals that some of the nurses have a checkered past. Plaintiff's counsel seemingly insists on referring to this evidence at every opportunity. Meanwhile, as counsel for the nursing home, you can already picture the potential parade of horribles within plaintiff's mediation submission.

Though this evidence may have been discoverable, remember that the determination of what will see the light of day in the courtroom is vastly different. Application of the rules pertaining to character evidence can help thwart counsel's attempt to persuade the mediator that your client is in big trouble if the case goes to trial.

While there are many rules pertaining to the admissibility of character evidence, a few that frequently apply, and are the subject of some confusion, are K.S.A. 60-422(c) and (d), and K.S.A. 60-455(a) and (b). The rules provide as follows:

K.S.A. 60-422 Further limitations on admissibility of evidence affecting credibility

"As affecting the credibility of a witness... (c) evidence of traits of his or her character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his or her conduct relevant only as tending to prove a trait of his or

her character, shall be inadmissible."

K.S.A. 60-455 Other crimes or civil wrongs

"Subject to K.S.A. 60-447, and amendments thereto, evidence that person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion."

Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Beginning with K.S.A. 60-422, this rule focuses on two types of evidence: (1) character traits; and (2) specific instances of conduct. For the former, the rule limits the evidence to character traits of honesty/veracity or their opposites. But, practically speaking, a witness's character for honesty is almost always determined by specific instances of conduct. That is why subsection (b) is so important – it further restricts the use of character-attacking evidence by excluding specific instances of conduct. This restriction includes specific instances of conduct intended to attack the witness's credibility. See *Frans v. Gauserman*, 27 Kan. App. 2d 518, 524 (Kan. Ct. App. 2000). Therefore, when confronted with a case in which a client's employee has falsely authored a prior record or cheated on a certification exam, remember that K.S.A. 60-422(d) makes such evidence difficult to properly admit.

Next, K.S.A. 60-455 further addresses evidence of specific instances of conduct but has left many lawyers scratching their heads for years. See other misconduct evidence: rethinking kansas statutes annotated section 60-455, 49 kan. l. rev. 145 (2000). To add to the confusion is the rule's

terminology. For example, a "crime" under K.S.A. 60-455(a) does not require a conviction. *State v. Myrick & Nelms*, 228 Kan. 406, 420 (1980). And a "civil wrong" is defined as a violation of noncriminal law, such as tort, breach of contract, breach of statutory duty, or a defect in performing a public duty. *Gaona v. State*, 2017 Kan. App. Unpub. LEXIS 86, at *9 (Feb. 10, 2017).

While these offenses may not be admissible to prove a person's disposition to commit a similar act, under K.S.A. 60-455(b), the offenses may be relevant to prove a material fact. The statute then offers a non-exclusive list of material facts. Key to navigating this statute (after understanding the breadth of "crime" and "civil wrong") is focusing on what constitutes a "material fact."

Going back to the earlier scenario of the medical negligence claim against the nursing home – what are the material facts? A fact is deemed "material" if it has a "legitimate and effecting bearing on the decision of the case." See, e.g., *State v. Hollingsworth*, 289 Kan. 1250, 1258 (2009). In the medical negligence arena, harkening back to the tort's essential elements should guide the analysis. Does the evidence have a legitimate and effective bearing on determining the existence of a duty of care, whether such duty was breached, or the nature and extent of plaintiff's recoverable damages? Or, does the evidence just make the witness look bad or sloppy on some prior occasion?

The final step in the 60-455(b) analysis is to determine whether the material fact is disputed, whether the proposed evidence has any tendency in reason to prove the disputed material fact, and finally, whether the evidence's probative value outweighs the potential for causing undue prejudice. *Hollingsworth*, 289 Kan. at 1258.

In conclusion, while every case has its warts, not all will be visible to the jury. Educating your mediator on what is, and what is not, admissible will help prevent unnecessary distraction.

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