

Expert Witnesses: Using Kansas Court Rules to Your Advantage

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Holiday Inn Overland Park-West, 8787 Reeder Street, Overland Park, KS 66214

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VI. Ethical Considerations for Working with Experts

3:30 p.m. – 4:30 p.m.

- A. Confidentiality and Privileged Communications with Experts
- B. Work Product Doctrine
- C. Fees and the Expert Opinion
- D. Avoiding Conflicts of Interest
- E. Practical Examples – Real Life Scenarios

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VI. Ethical Considerations for Working with Experts

3:30 p.m. – 4:30 p.m.

In using the Kansas court rules to your advantage, the ethical considerations for working with experts involve a review of: (1) pertinent ethical rules pertaining to the practice of law, (2) their particular application to the practice of law when experts are involved, and (3) some pertinent rules of procedure with respect to experts.

A. Confidentiality and Privileged Communications with Experts

Am I supposed to keep my client's information confidential? How can I ethically keep my client's information confidential, yet at the same time work with outside experts who might assist in advancing my client's interests? If I can ethically work with experts, how can I keep my work with those experts confidential and privileged, thus ultimately also keeping my client's information confidential?

KANSAS RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[4] . . . A lawyer should keep in **confidence** information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[8] . . . So also, a lawyer can be sure that preserving client **confidences** ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

**KRPC 1.6. CLIENT-LAWYER RELATIONSHIP:
CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are **impliedly authorized** in order to carry out the representation, and except as stated in paragraph (b).

. . .

(c) A lawyer shall make reasonable efforts to **prevent** the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

KRPC 1.1. COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal **knowledge**, **skill**, thoroughness and preparation reasonably necessary for the representation. . . .

Comment

. . . [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of **changes in the law** and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all **continuing education requirements** to which the lawyer is subject.

Summary:

Above are some of the more pertinent rules pertaining to experts and confidentiality, summarized as:

- (1) Keep client's information confidential for the good of the client and the public;
- (2) Some disclosures are impliedly authorized;
- (3) Make efforts to prevent unauthorized disclosure; and
- (4) Keep abreast of changes in the law.

60-226. General provisions governing discovery

... (b) *Discovery scope and limits.* ...

(5) *Trial preparation; experts.* ...

(C) *Trial-preparation for communications between a party's attorney and expert witnesses.* Subsections (b)(4)(A) [documents and tangible things] and (b)(4)(B) [mental impressions] protect **communications** between the party's attorney and any witness about whom disclosure is required under subsection (b)(6), regardless of the form of communications, except to the extent that the communications:

- (i) Relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

B. Work Product Doctrine

If communications are authorized, and protected by K.S.A. 60-226(b)(5)(C), what about work product?

60-226. General provisions governing discovery

. . . (b) *Discovery scope and limits.* . . .

(5) *Trial preparation; experts.* . . .

(B) *Trial-preparation protection for draft disclosures.* Subsections (b)(4)(A) [documents and tangible things] and (b)(4)(B) [mental impressions] protect **drafts** of any disclosure required under subsection (b)(6), and drafts of a disclosure by an expert witness provided in lieu of the disclosure required by subsection (b)(6), regardless of the form in which the draft is recorded.

Practice pointer:

It appears that I inadvertently received communications and/or work product between the other side and its experts. What now?

KRPC 4.4. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS; RESPECT FOR RIGHTS OF THIRD PERSONS

. . . (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Practice pointer/question:

If K.S.A. 60-226(b)(5)(B) and (C) protect most communications and work product with respect to experts, how “safe” are you? Consider the interplay of “retained” experts, treating physicians, and local rules regarding interviewing health care providers. See Section E. Real Life Scenarios below.

C. Fees and the Expert Opinion

Can I pay ethically an expert? If so, can I also fee share with an expert? Can I pay an expert to do things I could not otherwise do as a lawyer? How do I charge the client for an expert? And other ethical questions pertaining to fees?

-- PAYING AN EXPERT – IN GENERAL --

KRPC 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not: . . .

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; . . .

Comment

. . . [3] With regard to paragraph (b), **it is not improper** to pay a witness's expenses or **to compensate an expert witness on terms permitted by law**. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is **improper to pay an expert witness a contingent fee**.

-- PAYING AN EXPERT – FEE SHARING GENERALLY PROHIBITED --

KRPC 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: .
..

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement
.....

-- PAYING AN EXPERT - OTHER ETHICAL CONSIDERATIONS --

**KRPC 5.3. LAW FIRMS AND ASSOCIATIONS:
RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

...

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved

Comment

[1] . . . Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Practice pointer/summary:

A lawyer cannot circumvent ethical rules by hiring an expert to do that which the lawyer cannot not otherwise do in the first place, and then assert as a defense that the deed was done by a nonlawyer, who is not bound by a lawyer's ethical rules.

-- CHARGING THE CLIENT FOR PAYING AN EXPERT--

KRPC 1.5. FEES

(a) A lawyer's fee shall be reasonable. . .

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery. **All such expenses shall be deducted before the contingent fee is calculated.**

Comment

. . . [5] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule.

Practice pointer / question:

May the contingency percentage reflect a situation in which the lawyer expects to expend a significant amount on expert expenses? See Section D. Avoiding Conflicts of Interest below.

-- LAWYERS AS EXPERT WITNESSES ON (THEIR OWN) FEES

KRPC 3.7. LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where: . . .

(2) the testimony relates to the nature and value of legal services rendered in the case . . .

-- WHO MUST PAY EXPERT DEPOSITION FEES --

With respect to **fees**, under K.S.A. 60-226(b)(5)(E)(i), the court must require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsection (b)(5)(A) [deposing the expert] or (b)(5)(D) [expert employed *only* for trial preparation].

-- HIRING OR DEPOSING A KANSAS EXPERT FOR AN OUT-OF-STATE CASE --

**KRPC 1.5. UNAUTHORIZED PRACTICE OF LAW:
MULTIJURISDICTIONAL PRACTICE OF LAW**

. . . (c) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that: . . .

(2) are services in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized

Comment

. . . [10] . . . Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, **including taking depositions** in this jurisdiction.

D. Avoiding Conflicts of Interest

Are there any ethical rules pertaining to conflicts of interest as far as experts?

**KRPC 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS:
SPECIFIC RULES**

. . . (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter

Comment

. . . [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are **virtually indistinguishable from contingent fees** and help ensure access to the courts.

E. Practical Examples – Real Life Scenarios

In keeping with the competence requirement of KRPC 1.1 as it applies to using Kansas court rules to your advantage, a few practical examples or real life scenarios are contemplated.

(1) MOTIONS

With respect to **motions** related to experts, it is arguable that related to experts are in the nature of discovery motions, and therefore, under K.S.A. 60-237(a)(1), most motions related to experts should likely include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action and must describe the steps taken by all attorneys or unrepresented parties to resolve the issue in dispute.

(2) LOCAL RULES

To be competent under KRPC 1.1, it may be helpful to consider not only the Kansas Rules of Civil Procedure and the Supreme Court Rules as they pertain to experts, but also the local rules. Following are some examples from courts in this area:

SEVENTH JUDICIAL DISTRICT (Douglas County) (Lawrence)

[None].

TENTH JUDICIAL DISTRICT (Johnson County) (Olathe)

RULE NO. 31 – Screening panel (no experts allowed)

Standard Interrogatories, Appendices A and B – Standard expert interrogatories

TWENTY-NINTH JUDICIAL DISTRICT (Wyandotte County) (Kansas City)

RULE 22, Appendix – Standard expert interrogatories

RULE 103 – INTERVIEWING EXPERTS

(a) Physicians. Lawyers have a right to interview a treating physician once the physician-patient privilege is waived by the filing of a lawsuit, provided the physician is supplied with a written consent waiving the privilege by the person holding the privilege or by Order of the Court. A treating physician may be interviewed outside the presence of parties or other counsel provided the treating physician consents to the interview.

(b) Experts Other Than Treating Physicians. Lawyers may not interview any opposing expert witness who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial, without either consent of counsel or order of the Court.

See also discussion in section (3) below.

EIGHTEENTH JUDICIAL DISTRICT (Sedgwick County) (Wichita)

RULE 207(b), pretrial questionnaire, question 10 – Expert witness limitations

RULE 209 – Screening panel (no experts allowed)

RULE 208 – INTERVIEWING EXPERTS

(a) Physicians. Lawyers have a right to interview a treating physician once the physician-patient privilege is waived by the filing of a lawsuit, provided the physician is supplied with a written consent waiving the privilege by the person holding the privilege or by Order of the Court. A treating physician may be interviewed outside the presence of parties or other counsel provided the treating physician consents to the interview.

(b) Experts Other Than Treating Physicians. Lawyers may not interview any opposing expert witness who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial, without either consent of counsel or order of the Court.

See also discussion in section (3) below.

THIRD JUDICIAL DISTRICT (Shawnee County) (Topeka)

DCR 3.201.6 – Expert deposition limit of four hours

DCR 3.203.8 – . . . Experts shall, upon written request without the necessity of a subpoena, bring to the deposition, the expert’s written report, complete file, documents or other materials reviewed and billing records regarding the compensation to be paid for the study and testimony.

DCR 3.212 – Attorneys may interview health care providers without leave of Court; parties may request agreed Order

DCR 3.211 (EXPERT WITNESSES)

1. Court may limit number at case management conference.
2. Court shall determine the time of identification of experts.
3. Requirement and contents of written report.
4. Calculations and assumptions.
5. Hourly rates and billing statements.
6. Alternative means of discovery of opinions.
7. Treating physicians may be identified as expert without the necessity of a full disclosure as set forth in this rule. However, if counsel anticipates using them for opinions other than causation, the nature and extent of this injury, and the reasonableness and necessity of past medical treatment and expenses, the full disclosure shall be made.

See also discussion in section (3) below.

(3) INTERVIEWING EXPERTS

The ethical rules require lawyers to keep their client's information confidential, but there is likely an implied authorization to work with experts. Moreover, when communications and work product are exchanged with experts, those communications and work product are not discoverable under K.S.A. 60-226, thus continuing the confidentiality of client information.

But what about treating health care providers, who are by nature experts with respect to most aspects of their testimony? Or a police officer who investigated a collision? Is a full disclosure required of these types of witnesses? If so, can an attorney confidently communicate with and/or exchange work product with these types of witnesses, in preparation for the full disclosure, without the possibility that there will be a locally-approved *ex parte* contact with that witness during which the communications or work product will be revealed?