KADC

Spring 2009

Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*

E-DISCOVERY UPDATE: FEDERAL RULE OF CIVIL PROCEDURE 26(G), E-DISCOVERY'S NEW RULE 11?

David J. Waxse, U.S. Magistrate Judge

Brenda Yoakum-Kriz, Law Clerk to U.S. Magistrate Judge Waxse

Sometimes lesser-known rules are given new significance in the realm of e-discovery. One such rule is Federal Rule of Civil Procedure 26(g). Although enacted more than 25 years ago, it is probably one of the least understood or followed of the discovery rules. The objectives identified by the drafters of Rule 26(g) – to deal with overdiscovery and guard against redundant or disproportionate discovery – are even more relevant and pertinent in today's e-discovery litigation environment. As a result of the high volume of electronically stored information ("ESI") in many cases, the cost of gathering and reviewing ESI has become very costly. Rule 26(g) is one option available to courts to attempt to control these costs.

I. Overview

This article revisits Rule 26(g) and its certification requirements for attorneys in signing disclosures, and discovery requests, responses, and objections. Next, it discusses Magistrate Judge Grimm's 2008 decision, *Mancia v. Mayflower Textile Services Co.*,[1] which casts renewed attention on the role of

(Continued on page 8)

TESTING THE LIMITS OF *BATES V. HOGG*

Lyndon W. Vix, *Fleeson, Gooing, Coulson & Kitch, L.L.C.*

One of the key elements of any personal injury case is the amount of the medical expenses incurred by the plaintiff. Insurance companies, as well as attorneys, use the "medical specials" as the starting point for evaluating a case for settlement purposes. It is widely assumed that, in the absence of a challenge to the reasonableness of the expenses, a jury will award at least that amount, and will then be guided by that amount in making an award of non-economic damages. Accordingly, determining the amount of medical expenses that can be submitted to the jury often drives the value of the entire case.

In the 1996 case of *Bates v. Hogg*,[1] the Kansas Court of Appeals, in a 2-1 decision, held that when a portion of a plaintiff's medical expenses has been "written off" pursuant to a health care provider's contract with Medicaid, the written-off portion cannot be claimed as damages by the plaintiff in a personal injury lawsuit. In other words, the amount actually paid for the services rendered becomes the measure of recoverable damages.

The plaintiff in *Bates* argued that the collateral source rule should prohibit the reduction in her damages. The Court, however, held that the collateral source rule is not applicable under these circumstances because the plaintiff was still allowed to

(Continued on page 12)

NEWSLETTER EDITOR
Kansas Defense Journal is a quarterly publication of the Kansas Association of Defense Counsel. If you have any questions, comments, or ideas for future articles, please contact the *Journal*'s editor:

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PRESIDENT'S MESSAGE

David A. Rameden
Shook, Hardy & Bacon LLP

Dear KADC Friends,

This is an exciting time for our organization. In a few days, **May 15**, we will be holding our **Mid-Year Meeting** in Wichita at the Courtyard Wichita at Old Town. We have put together an affordable afternoon of CLE (3.0 hours for $75, including 1 hour ethics), along with an Open Forum with the Board and a member reception afterwards. I hope all of you will join us in this inaugural event. Our hope is to provide an additional service to members who are unable to regularly attend the Annual Meeting in Kansas City with an annual Mid-Year Meeting in Wichita. The schedule and registration is available online at www.kadc.org . See you there!

As many of you know, **Dick Hite's** eight-year term on the Supreme Court Nominating Commission is coming to end (he has served the maximum allowed). Dick skillfully guided the Commission through a period in which the Commission's role in selecting appellate judges was being challenged by some members of the Kansas Legislature. Please extend your personal thanks to Dick for his extraordinary commitment to public service when you see him next. The KADC Board, after discussing and debating a number of possible candidates, has endorsed **Warren McCamish** to succeed Dick as the Chair. If you haven't not already done so, please locate your ballot and cast your vote for Warren. (Deadline for voting is May 15.)

KADC needs your continued support in donating your time and skills. There are lots of ways to get involved. Our needs for people to write amicus briefs on behalf of defense issues continues to grow. Unfortunately, with limited resources, KADC cannot afford to pay attorneys the usual and customary fees for legal services. As an organization, we have decided to cap the amount of money that we pay to attorneys/firms that prepare amicus briefs for KADC. This should be viewed as an honorarium, not legal fees for services. In the past, even with the generous discounts offered by the brief writers, we could only afford to underwrite one or two briefs per year. By capping the honorarium, we can now weigh in on many more important issues. For those of you who have written amicus briefs in the past – THANK YOU!. For the rest of you, please give some consideration to supporting KADC by volunteering to participate in our amicus program. These brief-writing opportunities can give you and your firm statewide credibility and recognition on issues that affect your practices. If you would like to become involved, contact **Anne Kindling**.

As you know, KADC also provides each of you with a weekly email notice of published and unpublished opinions from the Kansas Supreme Court and the Kansas Court of Appeals that are of interest to the defense bar. Because these are "hot off the press," they currently arrive without any descriptions or comments. The only way you know what is in the cases is to read them in their entirety or wait until December when **Steve Kerwick** provides us with a colorful and insightful review of Kansas cases at the Annual Meeting (which by itself is worth the price of admission). Anyway, we have had a suggestion from members about whether we could include a blurb or two about each case with the weekly email report from KADC so that members will know instantly whether the cases have a particular interest to them and their practice without having to read them first. It is a perfectly wonderful concept – all we need now is a VOLUNTEER who would read the four or five cases each

(Continued on page 3)

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

week and write a one or two sentence summary about the case or the holding. This is a great opportunity for a younger KADC member to get involved in serving the organization while also earning some individual recognition (as well becoming more knowledgeable about Kansas law). Who knows? You could be groomed to replace Steve Kerwick when he retires in about 20 years. I haven't verified this with the CLE Commission, but you might well qualify for CLE "teaching" credit by preparing such mini-summaries for KADC.

Annual Meeting Teaser: **Jim Robinson** is already hard at work planning our December Annual Meeting. One of the certain highlights will be the appearance of nationally-renowned legal humorist, Sean Carter (aka "American's Funniest Lawyer"). We are also trying to coordinate with our brethren on the other side of the aisle (KTLA) for a joint function with Mr. Carter so keep a look out for announcements in the coming months. This promises to be one of the best Annual Meetings ever.

Remember to register for and attend the Mid-Year Meeting May 15. Bring a friend and bring your questions, ideas and suggestions for the Open Forum with the Board.▲

KADC AMICUS COMMITTEE REPORT

Todd N. Thompson
Thompson Ramsdell & Qualseth, P.A.

During April the KADC filed two briefs as amicus curiae. *Miller, et al. v. Johnson*, No. 99818, and *McGinnes, et al. v. Zayat*, No. 99896, are medical malpractice cases that raise constitutional challenges to the KSA 60-1903 and 60-19a02 caps on non-economic damages.

Tim Finnerty of Wallace, Saunders, Austin, Brown & Enochs, Chartered authored the two briefs. He reports that while *Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 789 P.2d 541 (1990), overruled on other grounds, *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176, 1181 (1991), was a challenge based on the right to trial by jury, *Miller* and *McGinnes* challenge the caps on due process, separation of powers, and equal protection grounds. Due to the numerous defendant parties and other amici, the KADC brief focuses on broad policy considerations consistent with its members' representation of defendants in tort cases. The brief addresses early Kansas history which led to the adoption of English common law for the state, the respective roles of the legislative and judicial branches in the modification of law, and the effect of *Samsel* in settling the role of the legislature on questions of common law rights. The brief points out that the legislature and the courts have unique strengths in dealing with policy, on the one hand, and with the rights of individuals in particular circumstances, on the other. The brief reviews case law from several jurisdictions that reflect similar judgments about the legislature's role in defining individuals' rights to remedy in tort.

The *Miller* case has been transferred to the Supreme Court on the Court's own motion. The plaintiff has filed motions to supplement her brief and to respond to all amicus briefs. The case has not yet been set for argument.

(Continued on page 4)

Amicus Committee Report *(Continued from pg 3)*

The amici in both cases include The Kansas Chamber of Commerce, the Kansas Medical Association, and the Kansas Hospital Association. Finnerty notes that the various amici "managed to find separate voices which were nevertheless in harmony."

Thanks are due to Toby Crouse of Foulston Siefkin LLP who directed Tim's attention to a brief filed several years ago in *Arbino v. Johnson & Johnson*, in which the US Chamber addressed a challenge to Ohio's tort caps.

With regard to briefs previously filed on behalf of the KADC, *Foster v. Klaumann, M.D.*, No. 100286, is set for oral argument on June 2nd at the Butler County Courthouse in El Dorado. That case involves a challenge by a minor personal injury plaintiff and her parents to *ex parte* communication between defense counsel and the plaintiff's treating physician. Kyle Steadman authored KADC's amicus brief, and he discussed the issues in detail in his article in the winter KADC Newsletter.

If any member has a request for amicus support, please contact me by phone at (785) 841-4554, or via e-mail at tlegal@aol.com.▲

SHARE YOUR TRIAL RESULTS

with Fellow Members of the
Kansas Association of Defense Counsel

Provide a summary of your trial so that it may be published in the *Kansas Defense Journal*.

Please include the following information:

- Type of Suit
- Case Title
- Court Docket No.
- Attorneys for each party
- Date Decided
- Result
- Significant Holding or Finding
- Liability and Injury Facts
- Verdict or Settlement Amount
- Comments

Email to: Amy E. Morgan, Editor, Kansas Defense Journal
AMorgan@Polsinelli.com

EXECUTIVE DIRECTOR'S REPORT

Scott Heidner
Executive Director

Greetings from KADC HQ! I hope you are all enjoying this very wet spring! Things in Topeka are frantic at the time of this writing with a change of Governor, a budget crisis of epic proportion, and a still raging fight over the future of coal plants in Holcomb, Kansas. I often use this space to share information about legislative efforts such as these, or KADC legislative initiatives. However, today I'd like to talk to you about several upcoming KADC meetings.

There are various services provided by KADC that bring value to your membership, including legislative reports, sending out unpublished court opinions, a list serve to solicit information from your colleagues, a great newsletter (thank you for your hard work, Amy Morgan!), amicus briefs, support of the National Foundation of Judicial Excellence and other worthy causes, and much more. Some of the greatest opportunities KADC provides, however, are our meetings. The very mention of the word "meetings" makes most of us flinch as we fight to keep our calendars clear for productive work time. However, there is great professional value in the continuing education programs that come with KADC and DRI membership, and even more value in the relationships that are built at those meetings. Ask any current or past KADC officer, and they will readily attest to that fact.

With that in mind, I wanted to remind you of a great slate of meetings and continuing education opportunities that are available to KADC members over the next seven months. The first opportunity is May 15 in Wichita, where we will have our Midyear Meeting. The meeting starts with a 30 minute open forum for members to talk to KADC Board members. While any KADC Board member is always happy to talk to a KADC member, this is a unique opportunity to have the entire Board in one setting to take questions. That will be followed by three great educational sessions, including an hour of ethics. The meeting will conclude with a reception. Spots are still available, and you can register by going to the following website at www.kadc.org.

In June, there will be a meeting of the six states of the DRI Mid Region in Des Moines. This meeting is well attended by KADC officers, but all members are welcome. It is worth noting that the six participating states have a reciprocity agreement in place that allows anyone attending the Mid Region meeting to attend an Annual Meeting of any of the six states "at cost." This is a great value.

That is followed by the DRI Annual Meeting October 7-11 in Chicago. These meetings are always packed with high caliber speakers, great social activities, and unparalleled opportunity to network with peers from around the country.

Lastly, the most important meeting of the year is our own KADC Annual Conference. This year that conference will be December 4-5 at the Hyatt Regency Crown Center in Kansas City, Missouri. While the official agenda has not been completed, top caliber speakers have already been confirmed, and there are other surprises in store. It's a great opportunity to get your CLE at the end of the year, and also a chance to take the family to the great shows and shopping in the area. All at a cost that can't be beat.

So, mark your calendars and plan to make one or more of these great opportunities. You're leaving a lot of great value from KADC membership on the table if you don't!▲

WELCOME NEW KADC MEMBERS

Lisa McPherson - Martin Pringle Oliver Wallace & Bauer LLP, Wichita

Bruce Woner - Woner, Glenn, Reeder, Girard & Riordan, P.A., Topeka

KANSAS ASSOCIATION OF DEFENSE COUNSEL
MID-YEAR MEETING AND CLE

Friday, May 15, 2009
Courtyard by Marriott – Wichita at Old Town
820 East Second Street North
Wichita, KS 67202

SEMINAR SCHEDULE

1:30-2:00 p.m. President's Welcome and Open Forum with KADC BOARD

2:05-2:55 p.m. CLE Session I: **Do I Really Need to Cross-Appeal When I Have Already Won?**
Presented by James Oliver, partner, Foulston and Siefkin, LLP
Mr. Oliver will discuss the Kansas Supreme Court decision, *Cooke v. Gillespie*, 285 Kan. 748 (2008), and its implications for appellees and provide practice pointers to avoid appellate traps. Mr. Oliver's March 2009 KBA Journal article will serve as the backdrop for his presentation.

3:00-3:50 p.m. Session II: **Trying the Trade Secrets Case**
Presented by Thomas Buchanan, of McDowell, Rice, Smith & Buchanan, P.C.
Mr. Buchanan will discuss the substantive elements of trade secrets claims, evidentiary issues and matters of proof, and practice pointers for trying or defending trade secrets claim. Mr. Buchanan's recent $ 17 million jury verdict in a Kansas federal court will serve as the backdrop for his presentation

3:50- 4:05 p.m. Break

4:10-5:00 p.m. CLE Session III: **Ethics in Settlement and Mediation**
Presented by David Rameden, partner, Shook, Hardy & Bacon LLP
Mr. Rameden will discuss common ethical issues and problems which arise in settlement negotiations and mediation, including communications with adverse parties, misrepresentations and nondisclosures, threats, confidentiality, "changing the deal," fee conflicts, and a variety of related issues arising under the Model Rules of Professional Responsibility.

5:00-6:30 p.m. Reception

Kansas CLE Approved.

Sleeping rooms are available at the Courtyard Marriott at a rate of $119. Reservations can be made in the KADC block by calling 1-800-321-2211 or 316-264-5300. **The deadline for reservations at this rate is Friday, May 8th.**

Registration available at www.kadc.org

IADC TRIAL ACADEMY: TAKE YOUR LAWYERS TO THE NEXT LEVEL IN THE COURTROOM

In these challenging economic times, it is more important than ever to have experienced and skilled lawyers working for your firm. The problem is that most clients do not pay for courtroom education of your less-experienced attorneys. Therefore, you need a tried and true source to provide this vital courtroom experience.

The International Association of Defense Counsel offers its 37th annual Trial Academy on July 25-31, 2009 at Stanford Law School in California. The IADC Trial Academy is one of the most well respected sources for trial practice and is a critical piece of education for your lawyers. The return on investment to your firm is immediate and great because:

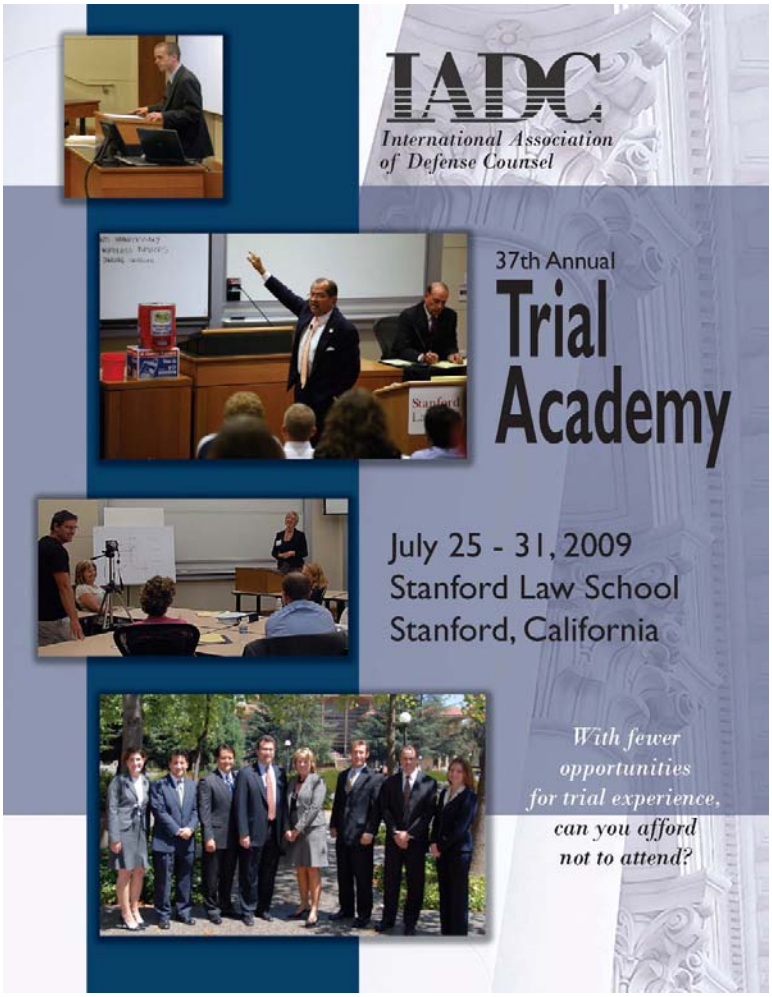
Practice makes perfect.

If you need support in the courtroom, you can't wait for less experienced attorneys to slowly gain experience. There simply aren't enough cases for that. You need people to get up to speed quickly. The Trial Academy is a week of both observing the best trial attorneys in faculty demonstrations and then practice, practice, and more practice for attendees. Karen Simpson, The 2008 Foundation of the IADC Gary Walker Scholarship Winner, noted "…I was surprised to see the progress that I made in only one week. During the opening statement, I was extremely nervous and tethered to the podium and my notes. By Friday morning when we did closing argument, my nervousness diminished to an excited energy and I left the podium and my notes behind and even incorporated PowerPoint into the presentation."

Her faculty advisor, Jaime A. Saenz, agreed with her assessment. "She improved significantly in just the one short week. She will be a very good trial lawyer."

Videos don't lie.

Attendees are videotaped while practicing each major part of a trial. Attendees sit down with their faculty advisors and review their performances. The faculty members provide one-on-one guidance and constructive criticism that result in immediate and vast improvement in performance throughout the week.



"Nothing trains you how to give a closing argument like seeing yourself on video," said Kevin Baskette, Thomason, Hendrix, Harvey, Johnson & Mitchell. Another attendee noted on the post-meeting evaluation that she had already used what she practiced to prepare a witness for a deposition soon after leaving the Academy.

You gain important contacts.

The IADC Trial Academy brings together 17 of the best IADC members as faculty and 105 of the most talented and promising lawyers as attendees. The group forms during the week to become a powerful network of colleagues who serve as resources for knowledge, insight, and referrals as well as becoming friends.

"I feel very privileged to have had the opportunity to attend the Trial Academy. It truly was the best and most memorable week of my entire career. I will forever be grateful to the Trial Academy for what I learned from some of the most experienced and talented defense trial attorneys throughout the country and for the friendships I made," said Holly S. Bell, Norman, Wood, Kendrick & Turner.

Start making plans to take your lawyers to the next level to help your practice thrive. Registration is now open. For more information, visit www.iadclaw.org.▲

E-Discovery Update: Federal Rule of Civil Procedure 26(g), E-discovery's New Rule 11?
(Continued from pg 1)

Rule 26(g) in e-discovery. Finally, the article offers five practical suggestions for attorneys drafting discovery requests likely to call for the production of electronically-stored information, and for drafting responses and objections to those discovery requests.

II. Federal Rule of Civil Procedure 26(g)

Federal Rule of Civil Procedure 26(g) was amended in 1983 to add a provision governing the signing of disclosures and discovery requests, responses, and objections. Rule 26(g) imposes a simple, but important, requirement. It requires that every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection be signed by at least one attorney of record or by the *pro se* party.[2] Like Rule 11, the signature requirement of Rule 26(g) has legal significance. With respect to a disclosure, the signing attorney or *pro se* party is certifying to the best of his or her "knowledge, information, and belief formed after a reasonable inquiry" that the disclosure is "complete and correct as of the time it is made."[3] With respect to a discovery request, response, or objection, the signing attorney or *pro se* party makes three certifications to the best of his or her "knowledge, information, and belief formed after a reasonable inquiry." The first is that the request, response or objection is "consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law."[4] Second, the signer is certifying that the request, response or objection is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[5] Finally, the signer is certifying that the request, response or objection is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[6]

Like Rule 11, the signature requirement of Rule 26(g) has legal significance.

If an attorney or *pro se* party makes a Rule 26(g) certification that violates the rule and the violation is "without substantial justification," the court, on motion or *sua sponte*, "*must* impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both."[7] Such a sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.[8]

The advisory committee's notes to the 1983 amendments to Rule 26(g) explain that the rule "imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37," and "is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions."[9] It "provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."[10] The certification duty is not meant to discourage or restrict necessary and legitimate discovery, but to require attorneys to "pause and consider" the reasonableness of the discovery request, response, or objection by making a reasonable inquiry into the factual basis therefor.[11] The advisory committee's notes compare the reasonable inquiry to the standards imposed by Rule 11.[12] The attorney's duty to make a reasonable inquiry under Rule 26(g) "is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances."[13] "In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances."[14]

While Rule 11 provides for sanctions on motions relating to discovery, Rule 26(g), along with Rules 37(a)(4) and 37(c)(1), establish sanctions

(Continued on page 9)

Rule 26(g) imposes an affirmative duty on counsel to behave responsibly during discovery, and to ensure that it is conducted in a way that is consistent "with the spirit and purposes"

E-Discovery Update: Federal Rule of Civil Procedure 26(g), E-discovery's New Rule 11?
(Continued from pg 8)

for violation of the rules regarding disclosures and discovery matters.[15] The advisory committee's notes to the 1993 amendments to Fed. R. Civ. P. 26(g) make it clear that Rule 11 no longer applies to such violations.[16]

III. Reviving Rule 26(g) - *Mancia v. Mayflower Textile Services Co.*

In 2008, Magistrate Judge Paul W. Grimm, who has written several significant opinions regarding e-discovery issues in the federal courts, reminded attorneys of their obligations under Federal Rule of Civil Procedure 26(g). In *Mancia v. Mayflower Textile Services Co*., Judge Grimm observes that "[t]he failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive-to the point of pricing litigants out of court."[17] He describes some of the common discovery abuses that hinder the adjudication process, such as

> [a] lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage . . . .[18]

His opinion is a must-read for every attorney who practices in federal court. It provides three "take away points" from Rule 26(g) that ought to regulate the way discovery is conducted.[19] The first point is that Rule 26(g) imposes an affirmative duty on counsel to behave responsibly during discovery, and to ensure that it is conducted in a way that is consistent "with the spirit and purposes" of the discovery rules.[20] This requires the cooperation of counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionally large to what is at stake in the litigation.[21] Counsel cannot behave responsibly during discovery unless they do both, which requires "cooperation rather than contrariety, communication rather than confrontation."[22] The second take away point is that Rule 26(g) is intended to curb discovery abuse by requiring the court to impose sanctions if it is violated, absent "substantial justification," and those sanctions are intended to both penalize the noncompliant attorney or unrepresented client, and to deter others from noncompliance.[23] The third point is that the rule aspires to eliminate the prevalent, kneejerk discovery requests served without consideration of cost or burden to the responding party.[24] These discovery requests are often far broader, more redundant and burdensome than necessary to obtain sufficient facts to enable the party to resolve the case through motion, settlement, or trial.

In light of Judge Grimm's excellent take away points from Rule 26(g) set out in *Mancia,* courts are likely to take a closer look at discovery requests, responses and objections and the certification requirements of Rule 26(g). In particular, the provisions of Rule 26(g)(1)(B)(iii), which require a certification that discovery requests, responses, and objections are "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action," seem to have particular applicability to e-discovery.

IV. Five Practical Suggestions

Historically, requests for sanctions under Rule 26(g) have not received much attention and courts generally have been cautious in imposing sanctions. This may be due to the subjec-

(Continued on page 10)

E-Discovery Update: Federal Rule of Civil Procedure 26(g), E-discovery's New Rule 11?
(Continued from pg 9)

tive nature of the certification requirements. It is not always glaringly apparent that counsel has an improper purpose in propounding or responding to a discovery request. Most attorneys do not draft discovery requests, responses, or objections with an improper purpose in mind. More likely, the problems begin in a more innocent fashion with poorly thought out or poorly drafted discovery requests. Common problems are vague and ambiguous language, lack of knowledge of the critical issues in the case or the opposing party's information management system, or purposefully broad wording. Sometimes the problem is not in the discovery request, but in the response or objection to it, in the form of poorly drafted, evasive, non-committal, or outright misleading responses and objections.

While reminding attorneys of their Rule 26(g) obligations, this article would also like to provide five practical suggestions for attorneys to safely navigate the requirements of Rule 26(g). First, before signing the discovery requests, responses or objections, review Rule 26(g) to make sure the requests, responses or objections are:

> (i) consistent with [the Federal Rules of Civil Procedure] and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
>
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[25]

Attorneys responding to discovery requests should be cautious that they are not making boilerplate objections to discovery requests without particularizing the basis for the objection, or providing evasive or incomplete discovery responses.

Second, before the Rule 26(f) planning conference, begin thinking about what information you intend to seek during discovery and where that information may be stored. If the information is likely to be electronically stored, think about where that information may be located on the opposing party's information management system. Then during the planning conference, ask questions about the opposing party's information management systems that will aid in drafting focused and clearly defined discovery requests. As the responding party, think about what information will likely be sought from you during discovery and where you can locate that information.

Third, review discovery requests, responses, or objections with an objective eye. Does the request give the appearance of being of being served for an improper purpose, or seem unreasonable, unduly burdensome or expensive, given what is at state in the litigation? Likewise, attorneys responding to discovery requests should be cautious that they are not making boilerplate objections to discovery requests without particularizing the basis for the objection, or providing evasive or incomplete discovery responses. This may give the appearance that the party is seeking to delay the completion of discovery to garner more time to gather the discovery, or to prolong the litigation, and thereby increase litigation costs, in order to achieve a tactical advantage. Judge Grimm found it difficult to dispute the notion that a boilerplate objection is *prima facie* evidence of a Rule 26(g) violation.[26]

Fourth, reevaluate whether over-inclusive wording of discovery requests is necessary. The typical over-inclusive nature of discovery requests may give the appearance of a discovery fishing expedition. In the e-discovery age, attorneys need to reevaluate whether over-inclusive discovery requests are worth (1) the likely battle in getting the information produced, and (2) the likelihood they may get terabytes of information that they then have to process, man-

(Continued on page 11)

E-Discovery Update: Federal Rule of Civil Procedure 26(g), E-discovery's New Rule 11?
(Continued from pg 10)

age, and review. Attorneys often seem surprised and overwhelmed with the electronic information provided to them in response to a discovery request. Or they are surprised at the form in which the information is produced and realize belatedly that they are now the ones burdened with having to manage and review large amounts of information. The words of Justice Jackson, written in 1953, continue to have a relevant message today in e-discovery: "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[27]

Fifth, be clear, non-evasive, and complete in your responses and objections to discovery requests. It may end up costing your client more to defend questionable objections or to explain confusing responses than to simply produce the information requested. Also, refrain from using "to the extent" language in discovery responses and objections. Such general objections may be viewed with disfavor and may not preserve the asserted challenge to production.[28]

It may end up costing your client more to defend questionable objections or to explain confusing responses than to simply produce the information requested.

These are only a few suggestions to navigate the requirements of Rule 26(g). In reality, counsel's obligation to act as advocates for their clients and to use the discovery process for the fullest benefit of their clients must be balanced against their duties imposed by the certification requirements under Rule 26(g).

The ideal of a "just, speedy, and inexpensive determination" of every action and proceeding is an often stated goal of the judiciary, borrowed from Rule 1 of the Federal Rules of Civil Procedure, which mandates that the rules be construed and administered to secure the "just, speedy, and inexpensive determination of every action and proceeding." In the last decade, e-discovery has become one of the largest obstacles to all three of these goals. A renewed emphasis on the certification requirements of Rule 26(g) for attorneys signing disclosures, and discovery requests, responses, and objections may be one way to remove some of the obstacles to the "just, speedy, and inexpensive determination" of every action and proceeding.▲

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1. 253 F.R.D. 354 (D. Md. 2008).
2. Fed. R. Civ. P. 26(g)(1).
3. Fed. R. Civ. P. 26(g)(1)(A).
4. Fed. R. Civ. P. 26(g)(1)(B)(i).
5. Fed. R. Civ. P. 26(g)(1)(B)(ii).
6. Fed. R. Civ. P. 26(g)(1)(B)(iii).
7. Fed. R. Civ. P. 26(g)(3) (emphasis added).
8. *Id.*
9. Fed. R. Civ. P. 26(g) advisory committee's notes to the 1983 amendments.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Fed. R. Civ. P. 26(g) advisory committee's notes to the 1993 amendments.
16. *Id.*
17. *Mancia*, 253 F.R.D. at 359.
18. *Id.* at 362.
19. *Id.* at 357-58.
20. *Id.* at 357.
21. *Id.* at 357-58.
22. *Id.* at 358.
23. *Mancia*, 253 F.R.D. at 358.
24. *Id.*
25. Fed. R. Civ. P. 26(g)(B)(i)-(iii).
26. *Mancia,* 253 F.R.D. at 359.
27. *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J.).
28. *See Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661, 667 (D. Kan. 2004) (holding that "a general objection which objects to a discovery request 'to the extent' that it asks the responding party to provide documents or information protected by the attorney-client privilege or work product immunity is tantamount to asserting no objection at all."); *Johnson v. Kraft Foods N. Am., Inc.,* 236 F.R.D. 535, 538 (D. Kan. 2006) (holding that a general objection which objects to a discovery request "to the extent" that it asks the responding party to provide certain categories of documents or information does not preserve the asserted challenge to production).

Testing the limits of Bates v. Hogg
(Continued from pg 1)

recover damages that were paid by a collateral source. The measure of the damages was simply limited to the amount actually received which, in essence, defined the reasonable value or "customary charge" of the services.[2]

In the wake of Bates, questions remained as to whether the same reasoning would apply to write-offs compelled by a health care provider's contract with Medicare or a private health insurer.

In the wake of *Bates*, questions remained as to whether the same reasoning would apply to write-offs compelled by a health care provider's contract with Medicare or a private health insurer. These questions were first addressed by the federal courts. In *Strahley v. Mercy Health Center of Manhattan*,[3] United States District Court Judge Kathryn T. Vratil addressed private insurance write-offs and held that "[a]lthough *Bates* addressed only a Medicaid write-off, the same reasoning applies to amounts written off in conjunction with private health care insurance. No one, including plaintiffs, is liable for the amount of the write-offs. Therefore, they do not represent losses."[4]

A little over a year later, United States District Magistrate Judge David J. Waxse dealt with Medicare write-offs in *Wildermuth v. Staton*.[5] Judge Waxse concluded that the rationale of *Bates* applied equally to Medicare write-offs and that the collateral source rule was not violated. In particular, the Court found that "[t]he collateral source rule only excludes 'evidence of benefits *paid* by a collateral source.' . . . Because a write-off is never paid, it cannot possibly constitute *payment* of any benefit from a collateral source."[6] Moreover, Judge Waxse held that "[p]ermitting Plaintiffs in this case to enter into evidence medical bills for which neither Plaintiffs nor a collateral source had any responsibility to pay and allowing Plaintiffs to recover that amount does not further the purpose of the collateral source rule" and would result in a windfall.[7]

It appeared the Kansas Supreme Court would have an opportunity to address these issues in 2003[8] in *Rose v. Via Christi Health System, Inc.*[9] In that case, Lyle Rose fell out of bed while he was a patient at Via Christi Medical Center. As a result of the fall, he developed a subdural hematoma and spent over a month in Via Christi's intensive care unit before dying from the hematoma and other complications.[10] The post-fall care resulted in $242,104.84 in medical billings. Of this amount, Medicare paid a portion and Via Christi wrote off the remaining $154,193.24.[11]

Rose's family sued Via Christi for negligence, and an issue arose as to what amount of medical expenses they could claim as damages. In its initial opinion (*Rose I*), entered on October 31, 2003, the Supreme Court, by a 4-3 margin,[12] held that the plaintiffs could claim all $242,108.84 and, in so doing, distinguished Medicare (and private insurance) write-offs from the Medicaid write-offs involved in *Bates*.[13] The majority ultimately concluded that the public policy behind the collateral source rule compelled the conclusion that "any windfall from the injured party's collateral sources should benefit the injured party rather than the tortfeasor, who should bear the full liability of his or her tortious actions without regard to the injured parties' method of financing his or her medical treatment."[14]

Via Christi filed a motion for rehearing, which was granted.[15] While the matter was pending on rehearing, the Kansas Court of Appeals took action on two pertinent cases pending before it. In *Liberty v. Westwood United Super, Inc.*,[16] the Court of Appeals extended its prior holding in *Bates* to Medicare writeoffs. In *Fischer v. Farmers Insurance Co., Inc.*,[17] the same panel reached the same holding with regard to private insurance writeoffs. In both cases, the Court recognized that the issue before it was pending in *Rose*, but stated, "we have afforded our high court the deference of delaying our decision in the hope that a rehearing decision would be forthcoming. However, we now choose to proceed, based upon *Bates* and upon our

(Continued on page 13)

Testing the limits of Bates v. Hogg
(Continued from pg 12)

firm belief that the collateral source rule has no place in the determination of the proper measure of damages to be applied to all plaintiffs' economic damages."[18]

In *Fischer*, the Court discussed the "principle of restoration" and demonstrated that if *Bates* were not applied to all plaintiffs, those with Medicare or group insurance would "pocket" more for the same injuries than uninsured plaintiffs or those with Medicaid. The Court concluded that "applying *Bates* to all plaintiffs effects their restoration to pre-accident status without arbitrarily overcompensating some injured persons."[19]

In June of 2005 the Supreme Court issued its rehearing opinion in *Rose*. However, rather than address the broader question of whether the *Bates* rationale applies to Medicare and/or private insurance writeoffs, the Court issued a very fact-specific opinion. In a 4-2 decision,[20] the Court held that because the alleged tortfeasor, Via Christi, was also the medical provider that had written off a large portion of Mr. Rose's medical expenses, the plaintiffs could not recover those expenses as damages. In essence, the Court held that plaintiffs had already received a benefit from Via Christi by virtue of the write-off, and to allow them to collect the same amount as damages would be a double recovery.[21]

The Court emphasized the narrowness of its opinion and was careful to point out that the question everyone wanted an answer to – the extent of *Bates*'s reach – was not being addressed:

> Because we are affirming the trial court's ruling, we do not reach the issue on the cross-appeal of whether evidence of medical charges that are written off by a health care provider pursuant to a contract with Medicare is admissible at trial as evidence of economic damages. Thus, we do not reach the broader issue of whether Medicare or a Medicare write off, when the services are provided by a health care provider that is not a defendant, is a collateral source. We recognize that this issue has a broader application than the narrow holding we reach today, which is limited to the relatively rare factual situation of a tortfeasor providing the posttort medical treatment which underlies the economic loss. However, given the nature of the trial court's ruling and the unique facts of this case, the broader issue is not before us and, therefore, we refrain from reaching it.[22]

The Supreme Court later attempted to take up the broader question it avoided in *Rose II* by granting a petition for review in *Fischer*. However, the case was dismissed by stipulation before oral argument.

Barring some similar unexpected turn of events, the Supreme Court will finally get to address the question of how far Bates extends in the case of Martinez v. Milburn Enterprises, Inc., now pending before it.[23]

Barring some similar unexpected turn of events, the Supreme Court will finally get to address the question of how far *Bates* extends in the case of *Martinez v. Milburn Enterprises, Inc.*, now pending before it.[23] In that case, Karen Martinez was injured when she slipped and fell while shopping at Milburn's premises. As a result, she underwent back surgery and incurred medical expenses at Wesley Medical Center, which were billed by the hospital in the amount of $70,498.15. Martinez had private health insurance with Coventry Health Systems. Pursuant to its contract with Coventry, Wesley accepted $5,310.00 plus a deductible paid by Martinez, in complete satisfaction of its charges.

Martinez subsequently brought a negligence suit against Milburn in Rice County District Court. Prior to trial, Milburn filed a motion in limine, arguing that Martinez's claim for medical expenses should be limited to the $5,310.00 paid by Coventry and accepted by Wesley. The district court granted the motion in reliance on *Bates,* but certified its ruling for interlocutory appeal. The Court of Appeals accepted

(Continued on page 14)

Testing the limits of Bates v. Hogg
(Continued from pg 13)

the appeal and the matter was ultimately transferred to the Supreme Court on that Court's own motion.

Oral argument in the case was held on March 24, 2009. The arguments presented to the Court were consistent with those made in previous cases dealing with the scope of *Bates*. The many questions posed by the Court ran the gamut of hypotheticals, theories and counter-theories, with all of the justices participating.[24]

Plaintiff and *amicus curiae* Kansas Association for Justice have attempted to characterize an extension of *Bates* as an attack on the collateral source rule. They contend that if the *Bates* rule is extended to private insurance writeoffs, the plaintiff will be improperly deprived of the benefit of the health insurance that she had the foresight to purchase.

Defendant and *amicus curiae* Kansas Association of Defense Counsel respond that no one is arguing that the plaintiff should not be able to recover the medical expenses paid by her insurance carrier, and that the collateral source rule is therefore not violated. Rather, they contend, the question is simply one of the proper measure of damages. The defense argues that the proper value of medical services, like anything else, is the amount the provider agrees to accept in exchange for the services, and that it is improper to allow a plaintiff to recover amounts that were paid by no one.

The defense argues that the proper value of medical services, like anything else, is the amount the provider agrees to accept in exchange for the services, and that it is improper to allow a plaintiff to recover amounts that were paid by no one.

In essence, each side accuses the other of seeking a windfall.

A compromise suggested with some reluctance in the KADC *amicus* brief seemed to draw interest from the Court at oral argument. As an alternative to its primary position that *Bates* should apply in all situations, the KADC argued that if a plaintiff is allowed to claim the "sticker price" of medical services received as his or her damages, the defendant should then be allowed to introduce evidence of the amount actually accepted in satisfaction of the services. The jury would then be left with the task of considering all of this evidence and determining the proper measure of damages as instructed by PIK Civ. 4th 171.02.

While this solution represents a somewhat appealing middle ground, it makes the work of the jury more complicated, and, consequently, would make the evaluation of cases much more difficult, since the now-relatively stable "medical specials" number would be more of a moving target.

Given the far-reaching effect the Court's decision will have and the internal differences of opinion suggested by the Justices questioning, it seems unlikely that a decision will follow quickly.▲

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1. *Bates v. Hogg*, 22 Kan. App. 2d 702, 921 P.2d, *rev. denied*, 260 Kan. 249 (1997).
2. *Id*. at 705, 921 P.2d at 252-53.
3. *Strahley v. Mercy Health Center of Manhattan*, No. Civ. A. 99-2439-KHV, 2000 WL 1745291 (D. Kan. Nov. 9, 2000).
4. *Id*. at *2.
5. *Wildermuth v. Staton*, No. Civ. A. 01-2418-CM, 2002 WL 922137 (D. Kan. April 29, 2002).
6. *Id*. at *5 (quoting *Wentling v. Medical Anesthesia Servs.*, 237 Kan. 503, 515, 701 P.2d 939 (1985)).
7. *Id*.
8. Shortly after *Bates* was decided, the Supreme Court had seemingly endorsed its holding. In *Jackson v. City of Kansas City*, 263 Kan. 143, 152, 947 P.2d 31, 38 (1997), the Court refused to limit the plaintiff's medical expense damages to the amount he actually paid because there was "no evidence that any of the amounts remaining due on the medical bills have been written off by the medical providers;" the implication being that if there *had* been evidence that the remaining balance had been written off, the plaintiff would not have been allowed to collect those amounts as damages.
9. *Rose v. Via Christi Health System, Inc.,* 276 Kan. 539, 78 P.3d 798 (2003)

(Continued on page 15)

Testing the limits of Bates v. Hogg
(Continued from pg 14)

(*Rose I*), *modified on rehearing*, 279 Kan. 523, 113 P.3d 231 (2005) (*Rose II*).

10. *Rose I*, 276 Kan. at 540-41, 78 P.3d at 800.
11. *Id*. at 541, 78 P.3d at 800.
12. Justice Gernon (who, as a Court of Appeals Judge, wrote the opinion in *Bates*) authored the majority opinion and was joined by Justices Davis, Allegrucci and Beier. Justice Luckert wrote the dissent and was joined by Chief Justice McFarland and Senior Judge Brazil who was sitting in place of Justice Abbott.
13. *Id*. 546, 78 P.3d at 802. ("Based upon the payment of premiums by Medicare participants, we find that Medicare is akin to private insurance and can be distinguished from Medicaid in that regard. Accordingly, we hold that the *Bates* decision is limited to cases involving Medicaid.")
14. *Id*. at 551, 78 P.3d at 806.
15. The Kansas Association of Defense Counsel was granted leave to file an *amicus* brief on rehearing. The Kansas Hospital Association and Kansas Trial Lawyers Association had previously been granted *amicus* status and were allowed to file supplemental briefs on rehearing.
16. *Liberty v. Westwood United Super, Inc.*, No. 89,143, 2005 WL 1006363 (Kan. Ct. App. April 29, 2005).
17. *Fischer v. Farmers Insurance Co., Inc.*, No. 90,246, 2005 WL 400404 (Kan. Ct. App. Sept. 22, 2005).
18. *Liberty*, 2005 WL 1006363, at *5; *Fischer*, 2005 WL 400404, at *5.
19. *Fischer*, 2005 WL 400404, at *2-*3.
20. Justice Luckert wrote the majority decision with Justices Davis and Allegrucci dissenting. Justice Gernon had passed away prior to the rehearing.
21. *Rose II*, 279 Kan. at 529-30, 113 P.3d at 246.
22. *Id*. at 533-34, 113 P.3d at 248.
23. Appeal No. 100,865
24. An audio archive of the oral argument may be heard at:http://judicial.kscourts.org:7780/Archive/2009%20Court%20Hearings/March/100,865.mp3

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 $190.00
    ☐ Admitted to the Bar less than 5 years $100.00
    ☐ Governmental attorney $100.00

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