KADC

Winter 2009

Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*

THE TIME-TESTED USE OF *EX PARTE* COMMUNICATIONS: INTERVIEWING A PLAINTIFF'S HEALTH CARE PROVIDERS AS A VITAL MEANS OF DISCOVERY

I. Introduction

Attacks on the use of *ex parte* contact between defense counsel and a personal injury plaintiff's treating health care providers are not new. However, the arguments have evolved as plaintiffs' attorneys attempt to gain a stranglehold on the ability to communicate with a plaintiff's treating health care providers, *ex parte*. This article identifies common arguments used by the plaintiff's bar when challenging *ex parte* interviews and provides counter arguments to the same.[1]

II. "My client did not unconditionally waive the physician-patient privilege when she filed her personal injury lawsuit and she does not consent to defense counsel interviewing her physicians outside my presence."

Kyle J. Steadman
Foulston Siefkin LLP

Although plaintiffs' counsel commonly assert the above argument when challenging *ex parte* interviews, such argument wholly ignores the key exception to the physician-patient privilege for personal injury litigants. K.S.A. 60-427(d) states as follows:

> There is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of

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JOHN HAYES: LEADERSHIP BY EXAMPLE

by Sheryl F. French, CLA, *Gilliland & Hayes, P.A.*

At the 2008 KADC Annual Conference, our association conferred its highest award, the William Kahrs Lifetime Achievement Award, on John Hayes of Gilliland & Hayes, P.A. Mr. Hayes is a founding member and past president (1971 to 1972) of the Kansas Association of Defense Counsel. He is a member of the American Board of Trial Advocates and International Association of Defense Counsel and is a Fellow of the American College of Trial Lawyers, the Kansas Bar Foundation and the American Bar Foundation. The following is a biographic summary of Mr. Hayes' professional accomplishments.

John Hayes was born in Salina, Kansas but moved to Hutchinson at an early age and was in Wesley Brown's Boy Scout Troop. After graduating from Hutchinson Community Junior College he attended Washburn University. He served his country with distinction during World War II in the U.S. Army as Captain, serving nearly four years with two and a half years overseas. Mr. Hayes returned to Washburn School of Law under the GI Bill and began his career as a trial attorney after graduating with an LLB in 1946. Mr. Hayes was admitted to practice in Kansas in 1946 and is also admitted to practice in Missouri and the United States Supreme Court.

The following are some remarks by John's long-time law partner and close friend, Bob Gilliland, at Bob's retirement in 2003:

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PRESIDENT'S MESSAGE

David A. Rameden
Shook, Hardy & Bacon LLP

Dear KADC Friends,

This being my first message to you, I wanted to take the opportunity to thank my predecessor, **Anne Kindling**, for her superb leadership and mentoring throughout the past year. Anne's involvement over the past year involved every aspect of KADC, from its legislative efforts, Annual Meeting, membership initiatives, trial skills workshop and general administration to strategic and long range planning efforts. Anne has been a long-time contributor to our organization and I will certainly lean on her in the coming year.

Last year, the Board proposed changes to our Bylaws and Articles of Association to update and modernize them. The membership at large approved these changes at our Annual Meeting in December. You can find a copy of the amended Bylaws and Articles at the KADC website, http://www.kadc.org/Bylaws.htm. Among other things, the changes created a new "law student" non-voting category at a substantially reduced membership fee. Become a KADC recruiter – ask a law student to join.

Speaking of the Annual Meeting, **Tracy Cole**, our President-Elect, gets all the kudos for a wonderfully planned and executed Annual Meeting. The evaluations you provided indicated that the entire program was well-received and ranked among the best ever. *Thank you Anne and Tracy!* Many of our members made presentations at the Annual Meeting and the KADC staff made everything happen – thank you one and all.

Our Trial Skills Workshop continues to be a hit with the associates who participate. If you haven't participated as either a student or faculty member, you are missing out on a great experience. As in the prior year, students who also registered for the Annual Meeting (held the next day) received free tuition! Who says you can't get somethin' for nuthin'? The laboring oar for this year's Trial Workshop was manned by **Scott Nehrbass** and **David Cooper,** who adeptly planned and executed the event. **Lisa McPherson** and **Tony Rupp** served as primary faculty, assisted by Scott, David and Anne.

We also welcome to this year's KADC leadership group, two new officers, **Dustin Denning** (Treasurer) and **Jim Robinson** (Secretary), who are transitioning from the Board. Jim will be planning this year's Annual Meeting and has a tough act to follow but already has a great start. If you have ideas or suggestions for topics or speakers, let Jim know. We also welcome several new Board members, including David Cooper (who returns after a hiatus), **Rita Noll**, **William Townsley** and **Harold Youngentob**. We also say goodbye to two departing Board members, **Bradley Ralph** and **Wendel Wurst**. Thank you, Brad and Wen. Returning Board members include **Vaughn Burkholder**, **William Heydman**, **Patrick Murphy**, **Shon Qualseth** and **Amy Morgan** (who doubles as our ever tireless editor of the *Kansas Defense Journal*). Whenever I look at the *Journal*, I am always amazed and at the very high quality of our publication. We should all be proud of the work Amy does to ensure that the content and layout of this publication is unmatched by any other similar organization. For all those who contributed with an article in 2008 – you're the best. For the rest of you, we are looking for authors for 2009. . . .

2009 will be a challenging year for all of us in many respects, given the general state of the economy and the uncertainty our clients (and law firms) may face. The leadership at KADC

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

understands that you have choices to make on how to spend your dollars and we sincerely thank you for your continuing support of our organization by renewing your memberships, attending our events, being sponsors, and volunteering your time. KADC strives to remain relevant to you and your practice and to provide you with high value for your membership dues. Speaking of dues, you will be receiving a supplemental invoice for $15 from KADC. Last year, the Board approved a $15 increase in membership dues, the first such increase in several years. Unfortunately, due to a billing error, invoices were sent out using the 2008 dues, not the Board-approved 2009 due structure. We regret the error and inconvenience caused by a supplemental billing.

Besides building on the great successes of 2008 with second-to-none CLE programs at the Annual Meeting and a bargain-priced (free for many) Trials Skills Workshop, we are going to try something new this year. We are planning a "Mid-Year Meeting" to be held in Wichita in May or June. This will include approximately 3.0 CLE hours, including ethics, as well as an open forum with the Board to meet them and share your ideas, and social/networking opportunities. We recognize that not everyone is able to travel to Kansas City every year for the Annual Meeting and hope to this Mid-Year Meeting becomes an annual event that extends our reach to as many members as possible. Watch for a "save the date" announcement very soon.

See you at the Mid-Year Meeting!▲

KADC AMICUS COMMITTEE REPORT

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

The KADC has already filed two amicus briefs this year, and more briefs are in the works to be filed in the upcoming months.

Kyle Steadman of Foulston Siefkin, LLP filed an amicus brief on January 21st in *Foster v. Klaumann, M.D.*, No. 100286, a case dealing with *ex parte* communications with medical care providers. The case was appealed from the Sedgwick County District Court, and involved a challenge by a minor personal injury plaintiff and her parents to *ex parte* communication between defense counsel and the plaintiff's treating physician as permitted by court order. An article by Kyle addressing the issue in detail is provided elsewhere in this newsletter, and a copy of his brief is available on the KADC web site.

On **extremely** short notice, Lyndon Vix of Fleeson, Gooding, Coulson & Kitch, L.L.C. prepared and filed an amicus brief on February 20th in *Martinez v. Milburn Enterprises, Inc.*, No. 08-100865-S, as case involving collateral source rule issues. The case originated in the District Court of Rice County, and addresses the question of what amount a plaintiff can recover for medical expenses – the amount charged by the provider, or the amount actually paid. An interlocutory appeal was granted last August, and the case was transferred to the Supreme Court in December. Because the case involves private insurance, the opinion seems likely to provide some additional rules and clarity on the medical expenses and collateral source issue.

KADC will soon file amicus briefs in two cases in which the plaintiffs are challenging the caps imposed on non-economic

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KADC MEMBERSHIP COMMITTEE UPDATE

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

There's a good news/bad news angle to this edition of the KADC Membership Committee update. Here are the membership numbers for each of the last six years:

2003	235
2004	238
2005	239
2006	235
2007	238
2008	240

The good news: KADC membership is at an all-time high of 240 members. I figure this accomplishment is due to either the tireless and ingenious efforts of the Membership Committee – or from blind, random chance. It's also swell that we've stayed at a consistent membership level for the last six years.

However, the bad news is that we haven't increased our membership as much as we would have liked. We will be trying to increase our numbers in a couple of way over the coming weeks. First, we plan on pitching the benefits of KADC membership to law firms and/or companies that are non-members, and to firms that may be under-represented in the KADC. The Committee will be meeting to discuss which firms, companies, and individual attorneys to target for KADC membership. If you have any potential members in mind, please let me know.

Second, we have already targeted Kansas attorneys who are members of DRI, but who are not members of KADC. We plan on keeping an eye out for new Kansas members of DRI. Then we will use threats and intimidation to get those new DRI members to sign up for the KADC in what the Committee has termed a "shock and awe" membership campaign. Taunting will also be an integral part of recruitment. Or, we may choose to approach potential KADC members with reason and logic by extolling the virtues of KADC membership. It could really go either way.▲

WELCOME NEW KADC MEMBERS

Bill Hays - Shook Hardy & Bacon LLP, Kansas City
Christine Louis - Foulston Siefkin LLP, Wichita
Bradley Mirakian - Foulston Siefkin LLP, Wichita
Clayton Norkey - Shook Hardy & Bacon LLP, Kansas City
Kristen Page - Shook Hardy & Bacon LLP, Kansas City
Sylvia Penner - Fleeson, Gooing, Coulson & Kitch, Wichita
Kristen Trainor - Shook Hardy & Bacon LLP, Kansas City

EXECUTIVE DIRECTOR'S REPORT

Scott Heidner
Executive Director

Greetings from KADC headquarters!

It hardly seems possible, but the 2009 legislative session is well underway. There are many new faces at the Capitol after the November elections, as well as a new leadership team in the House. This will change the complexion and priorities of the legislature, although it's hard to say how much at this early juncture.

The two most important changes from the KADC perspective, on the other hand, are easy to identify. First, longtime KADC member Mike O'Neal is the new Speaker of the House. Second, we have new leadership on the Judiciary committees in both the House and the Senate. Gone are long time Chairs Mike O'Neal and John Vratil (Senator Vratil is now Vice Chair of two committees: Education and Ways and Means), as well as Senate Vice Chair Terry Bruce. In their place are the following:

SENATE
Senator Tim Owens, Chair
Senator Derek Schmidt, Vice-Chair
Senator David Haley, Ranking Minority

HOUSE
Representative Lance Kinzer, Chair
Representative Jeff Whitham, Vice-Chair
Representative Jan Pauls, Ranking Minority

While this is a new lineup, it is certainly not lacking in experience. Senator Owens served on the House Judiciary committee for many years before moving to the Senate this year. Senator Schmidt is a long time member of the Senate Judiciary Committee as well as being Senate Majority Leader. Representative Kinzer has been Vice-Chair of Judiciary the past two years, and Representative Pauls has been a long time member of House Judiciary.

Having said that, the committees are sure to have a different look and style. Senator Vratil and Speaker O'Neal were very strong committee chairs, moving a large amount of material through the committees efficiently and effectively. The new committee leadership have very large shoes to fill.

KADC has already provided testimony on legislation, which you can review at www.kadc.org. Stay tuned to the weekly legislative bulletin throughout the session to stay abreast of what happens, and as always, nurture those relationships with your Representative and Senator.....they are invaluable to your profession and your professional association!▲

CONGRATULATIONS TO OUR 2008 AWARD RECIPIENTS

John Hayes, recipient of the Kahrs Award for Lifetime Achievement
This award is named after a co-founder of the KADC and longtime Wichita attorney, William A. Kahrs, of the Kahrs, Nelson, Fanning & Hite firm. Mr. Kahrs had a long and distinguished legal and public service career spanning five decades.

David Cooper, recipient of the Distinguished Service Award
This award is given to a KADC member for his or her exceptional service to KADC.

Scott Heidner, recipient of the Silver Helmet Award
This award is given to a person who has made great contributions in legislative matters.

Congratulations to all these deserving award recipients!

2008 KADC ANNUAL CONFERENCE HIGHLIGHTS

Lisa L. DeCaro and Leonard Matheo
Courtroom Performance, Inc.

Kurt B. Gerstner
Campbell Campbell Edwards & Conroy

Jeffrey A. Pike
FORCON International

Lew Perkins
Director of Athletics, University of Kansas

Michael G. Jones
Martin, Pringle, Oliver, Wallace & Bauer, L.L.P.

Anne Kindling receives plaque for her service as KADC President in 2008

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:

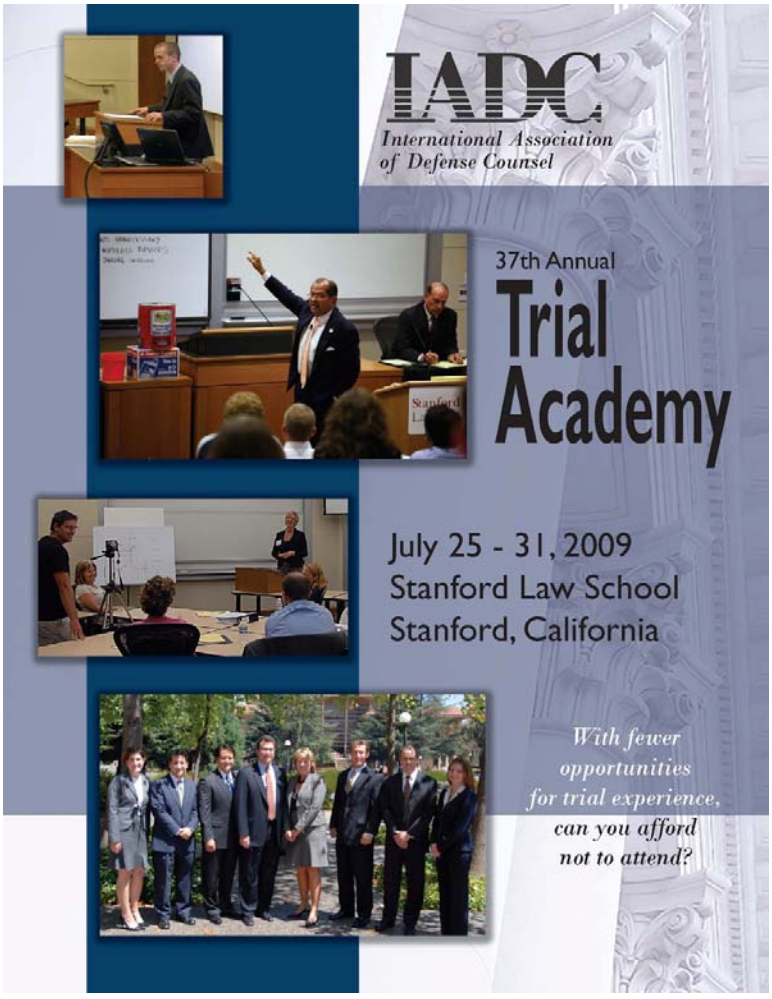
Practice makes perfect.

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. Register prior to March 16 and save $500 per registration. For more information, visit www.iadclaw.org. ▲

Amicus Committee Report *(Continued from pg 3)*

damages. *Miller, et al. v. Johnson*, No. 99818, and *McGinnes, et al. v. Zayat*, No. 99896, are medical malpractice cases; the former involves removal of the wrong ovary, and the latter involves a wrongful death claim. Tim Finnerty of Wallace, Saunders, Austin, Brown & Enochs, Chartered will be authoring the amicus briefs for KADC. The Kansas Chamber of Commerce, the Kansas Medical Society, and the Kansas Hospital Association are also amici in both cases.

If you see Kyle, Lyndon or Tim, please thank them for their efforts. Kudos go to all members who write briefs for the KADC, but our authors this year get special recognition – Kyle and his firm for waiving the usual honorarium paid to authors, and Lyndon for putting the brief together and getting it filed in such a narrow time frame.

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

Ex Parte Interviews *(Continued from pg 1)*

> the patient through a contract to which the patient is or was a party.[2]

The statute makes clear that by filing a personal injury lawsuit, a plaintiff places her medical and mental conditions at issue. And a personal injury plaintiff cannot prevent her health care providers from disclosing her health information by asserting that such disclosure would violate the physician-patient privilege, as codified in K.S.A. 60-427. Significantly, the physician-patient privilege did not exist at common law. The physician and the patient could be compelled to testify regarding their interactions. The physician-patient privilege in Kansas is a creature of statute and must be strictly construed.[3]

The physician-patient privilege in Kansas is a creature of statute and must be strictly construed.

Members of the plaintiff's bar sometimes argue that the Legislature's inclusion of "no privilege" in K.S.A. 60-427(d) is meaningless and that the privilege continues to exist upon the filing of a personal injury lawsuit. Such an interpretation of K.S.A. 60-427(d) – that the physician-patient privilege continues to exist and as a result only a plaintiff has unfettered access to a personal injury plaintiff's physician – is inconsistent with the plain and unambiguous language of K.S.A. 60-427(d).

Moreover, the Kansas Code of Civil Procedure is to "be liberally construed and administered to secure the just, speedy and inexpensive determination of every action or proceeding."[4] A plaintiff's argument that the physician-patient privilege continues to exist after the filing of plaintiff's personal injury lawsuit is contrary to K.S.A. 60-102. Forcing one litigant to conduct formal discovery to gather non-privileged information from a fact witness does not encourage the just, speedy or inexpensive determination of a pending personal injury lawsuit. Such an interpretation affords a plaintiff with the right to contact a treating physician *ex parte* to schedule meetings; to informally interview the physician to determine if he or she has relevant information; to informally call to find out what a physician's unreadable written entry means in the plaintiff's medical record; to inform the physician of trial appearances; and to discuss the physician's trial testimony. Notably, if the plaintiff's bar's interpretation of K.S.A. 60-427(d) was accepted, defense counsel could not accomplish any of the foregoing tasks without the involvement, consent and supervision of plaintiff's counsel.

Allowing one party unsupervised access to a fact witness

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Ex Parte Interviews *(Continued from pg 8)*

possessing non-privileged information and placing conditions on the another party's access to the same fact witness gives one party an unfair advantage and is not just. If defense counsel is prohibited from conducting *ex parte* interviews of a personal injury plaintiff's treating health care providers, defendants will be required to conduct expensive time-consuming and disruptive depositions. It is often impossible to know whether a health care provider has relevant information without speaking with the health care provider. A short informal interview may quickly rule out a health care provider as a witness. Many times it is difficult to read and understand the handwritten entries of physicians and other health care providers. Once again a brief interview with the physician can provide an explanation regarding what the physician's scribble on specific medical record is attempting to record.

If defense counsel's *ex parte* interviews are prohibited, defendants will be required to incur substantial and unnecessary transactional costs to determine whether a personal injury plaintiff's treating health care provider even has knowledge or information which is probative of the plaintiff's personal injury claim. The cost of a telephone call to a treating physician to informally gather non-privileged information will be replaced with court reporter deposition costs and increased attorney fees. Depositions are expensive for parties and often cause great disruption to a physician's schedule, which could result in delayed treatment for patients who need care. Informal interviews are a far superior method of making preliminary inquiries of a physician.

The question is not the degree to which the physician-patient privilege survives the filing of a personal injury lawsuit.

Another important counter-argument is to remind the court that it is common for a plaintiff to name multiple defendants in a personal injury case and a personal injury plaintiff may have multiple treating health care providers. A large number of defendants and health care providers can make it extremely difficult to coordinate and schedule depositions of a plaintiff's treating physicians at a time when plaintiff's attorney, defendants' attorneys and a plaintiff's physician are available. The pace of discovery will be reduced if depositions replace informal interviews. Defendants will incur additional attorney fees as their attorneys are forced to spend unnecessary time coordinating the schedules of multiple attorneys and physicians to find available times for the deposition of a physician. Such results are not what the Legislature intended when they enacted K.S.A. 60-427(d) and do not encourage the just, speedy and inexpensive determination of personal injury lawsuits, pursuant to K.S.A. 60-102.

III. "My client suffered a broken arm and that is the only condition that is at issue in her personal injury claim, so defendant should not be allowed to conduct *ex parte* interviews with any physician who treated my client for conditions unrelated to her broken arm."

The question is not the degree to which the physician-patient privilege survives the filing of a personal injury lawsuit. There is no physician-patient privilege "in an action in which the condition of the patient is an element or factor of the claim or defense of the patient."[5] As a result, none of a personal injury plaintiff's medical information is protected by the physician-patient privilege.

To state the obvious, every personal injury claim includes a claim for pain, suffering, and mental anguish. By making such claims, not only is the claimed physical injury an element of her personal injury claim, but so is her mental state before and after an injury causing event. And any treating health care providers potentially have information relevant to a plaintiff's non-economic damage claim.

III. "A Kansas District Court cannot authorize *ex parte* contact."

If a personal injury lawsuit is filed in one of the Kansas judi-

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Ex Parte Interviews *(Continued from pg 9)*

cial districts that currently have local rules permitting *ex parte* interviews of treating physicians, a plaintiff will likely argue that the court lacks authority to authorize *ex parte* interviews because the same are not a recognized means of discovery under the Kansas Rules of Civil Procedure and a district court is not allowed to create a new method of discovery by establishing a local rule which is inconsistent with the Kansas Code of Civil Procedure.[6]

Kansas Supreme Court Rule 105 encourages the creation of local rules and only requires that the local rules not be inconsistent with Kansas statutes or the Kansas Supreme Court Rules. A local rule allowing *ex parte* interviews of a personal injury plaintiff's treating physician by counsel is consistent with K.S.A. 60-427(d) and K.S.A. 60-102, and does not run afoul with any rule of the Kansas Supreme Court.

For example, the Third, Sixth, Eleventh, Fourteenth, Eighteenth and Twenty-Third Judicial Districts expressly allow *ex parte* discussions with treating physicians. *See* DCR 3.212 of the Third Judicial District (Shawnee County)[7]; Rule 14 of the Sixth Judicial District (Miami, Linn and Bourbon Counties)[8]; Rule 28 of the Eleventh Judicial District (Crawford, Cherokee and Labette Counties)[9]; Rule 38 of the Fourteenth Judicial District (Montgomery and Chautauqua Counties)[10]; Rule 208(a) of the Eighteenth Judicial District (Sedgwick)[11]; and Rule 213 of the Twenty-Third Judicial District (Ellis, Gove, Rooks and Trego Counties).[12]

Local rules authorizing ex parte contact do not create a new method of discovery. They simply recognize that no physician-patient privilege exists upon the filing of a personal injury lawsuit.

Local rules authorizing *ex parte* contact do not create a new method of discovery. They simply recognize that no physician-patient privilege exists upon the filing of a personal injury lawsuit. If no privilege exists, nothing prevents the physician from engaging in *ex parte* interviews with either litigant's counsel, if the physician consents to such informal discussions.

The Kansas Supreme Court has commented on the use of *ex parte* interviews of treating health care providers.[13] In *Wesley Medical Center v. Clark*, 234 Kan. 13, 20 (1983), the court stated that a physician, absent statutory authority, cannot reveal, *ex parte*, information protected from disclosure by the physician-patient privilege.[14] The *Wesley* court noted that the Kansas Code of Civil Procedure does not contain a statute that specifically authorizes *ex parte* interviews of witnesses, however, *ex parte* interviews of physicians are available when statutory authority is present.[15] K.S.A. 60-427(d) provides the "statutory authority" for *ex parte* interviews once a personal injury lawsuit is filed. A local rule acknowledging the "statutory authority" allowing *ex parte* contact with a plaintiff's treating health care providers is consistent with K.S.A. 60-427(d) and K.S.A. 60-102.

If a personal injury lawsuit is filed in any judicial district without a local rule, a plaintiff will argue that the court lacks the authority to enter an Order authorizing *ex parte* interviews and that the Kansas Code of Civil Procedure does not contemplate such interviews as a means of permissible discovery. This argument misses its mark for several reasons.

First, the "statutory authority" of K.S.A. 60-427(d) transforms a physician as a witness possessing information privileged from discovery to a witness possessing non-privileged information. Discovery of information known by a witness possessing non-privileged information can be accomplished without the necessity of using the means of formal discovery if the fact witness consents.

A Kansas district court has the authority to enter an order permitting all personal injury litigants to have equal access to fact witnesses based on its inherent authority to control discovery and to compel discovery under K.S.A. 60-237(a). K.S.A. 60-234(a) permits a defendant to request documents "which are in the possession, custody, or control of the party upon whom the request is served . . . ."

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If a district court can compel a plaintiff to produce medical records or sign an authorization allowing a defendant to independently collect a plaintiff's medical records, then certainly a district court has the authority to permit informal ex parte contacts with a personal injury plaintiff's treating health care providers.

Ex Parte Interviews *(Continued from pg 10)*

A personal injury plaintiff has control over her health information. A plaintiff routinely grants her counsel full access to her health information, including the ability to communicate with her physicians without her presence. Plaintiffs generally do not complain about allowing a defendant the ability to collect the plaintiff's medical records, but they object to allowing a defendant the right to communicate *ex parte* with a plaintiff's health care providers. A district court has authority pursuant to K.S.A. 60-237 to issue an order allowing *ex parte* interviews because the information sought is similar to documents responsive to a K.S.A. 60-234 request. If a district court can compel a plaintiff to produce medical records or sign an authorization allowing a defendant to independently collect a plaintiff's medical records, then certainly a district court has the authority to permit informal *ex parte* contacts with a personal injury plaintiff's treating health care providers.

IV. "HIPAA prohibits a defendant from interviewing my client's physicians *ex parte*."

Plaintiffs routinely argue that the privacy rules of the Health Insurance Portability and Accountability Act (45 C.F.R. § 164.512) preempt Kansas law and therefore prohibit *ex parte* interviews. Clearly, the federal government has enacted a set of regulations commonly referred to as the HIPAA privacy rules. HIPAA affords litigants access to personal health information if certain procedural requirements are met.[16] The question is where do HIPAA's minimum required standards fit into Kansas' scheme governing informal discovery from those who may have protected health information.

The key to answering this question is understanding that HIPAA's national minimum privacy standard as contained in 45 C.F.R. § 164.412(e) is a procedural safeguard only. "All that 45 C.F.R. § 164.512(e) should be understood to do, therefore, is to create a procedure for obtaining authority to use medical records in litigation. Whether the records are actually admissible in evidence will depend among other things on whether they are privileged."[17] The HIPAA privacy standard applicable to a defendant's motion to collect the protected health information of a plaintiff, including the ability to conduct *ex parte* interviews, provides in part:

> (e) Standard: Disclosures for judicial and administrative proceedings.
>
> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
>
> (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
>
> (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(l)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) The covered entity receives satisfactory assur-

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Ex Parte Interviews *(Continued from pg 11)*

> ance, as described in paragraph (e)(l)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.[18]

The "or" in the regulation, highlighted above, is significant and should not be overlooked. Disclosure may occur (i) in response to an order of the court, or (ii) in response to a subpoena, discovery request or other lawful process not accompanied by an order of a court. If it is one of the latter methods and there is not a court order, either of the conditions set forth in (A) or (B) also must be satisfied. Conversely, if there is an order from the court, neither of the conditions set forth in (A) or (B) need be satisfied. In other words, if defense counsel files a motion to collect the private health information of plaintiff which includes the ability to interview a plaintiff's treating physicians *ex parte*, defense counsel has satisfied the procedural requirements of HIPAA.

If a court authorizes such contact by issuing an order, there is no requirement whatsoever that a health care provider be given "satisfactory assurance" that reasonable efforts have been made to give the patient notice of the request. Nor is there a requirement that a health care provider be given "satisfactory assurance" that reasonable efforts have been made to get a qualified protective order. The minimum procedural privacy protection required by HIPAA is the existence of a court order, and nothing else.

HIPAA expressly authorizes the disclosure of health information if it is done pursuant to a court order.

The Kansas Attorney General has made the same conclusion. In Attorney General Opinion No. 2004-21 (July 7, 2004), the Kansas Attorney General made it clear that 45 C.F.R. § 164.512(e) provided procedural protections only which preempt any less stringent state law procedural protection, but which did not preempt the substantive waiver of privilege as set forth in K.S.A. 60-427, so long as the procedural safeguard was met. In analyzing 45 C.F.R. § 164.512(e), the Attorney General cited the commentary of Health and Human Services: "When a request is made pursuant to an order from a court or administrative tribunal, a covered entity may disclose the information requested without additional process."[19]

In discussing the specific issue of preemption, the Attorney General adopted the language of *Northwestern Memorial Hospital*[20] that "all that 45 C.F.R. § 164.512(e) should be understood to do . . . is to create a procedure for obtaining authority . . . ."[21] Thus, because 45 C.F.R. § 164.512(e) requires a court order, the Attorney General wrote, HIPAA's privacy standard preempts K.S.A. 60-427(c), but only "in relation to the procedure required before a patient's health information may be disclosed."[22] Therefore, once "HIPAA's procedural 'baseline'" has been reached, "a health care provider becomes authorized under [K.S.A. 60-427] to disclose health information."[23]

In other words, a fully compliant HIPAA order does not stand as a bar to the *ex parte* communications sought by a defendant in a personal injury action. In fact, HIPAA expressly authorizes the disclosure of health information if it is done pursuant to a court order. Health information is not disclosed to any greater extent because it is verbal. Indeed, the very definition of health information does not distinguish by form or source:

> *Protected health information* means individually identifiable health information:
>
> (1) Except as provided in paragraph (2) of this definition, that is:
>
> (i) Transmitted by electronic media;
>
> (ii) Maintained in electronic media; or

(Continued on page 13)

Ex Parte Interviews *(Continued from pg 12)*

(iii) Transmitted or maintained in any other form or medium.

(2) Protected health information excludes individually identifiable health information in:

(i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g:

(ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and

(iii) Employment records held by a covered entity in its role as employer.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the pr vision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.[24]

The U.S. District Court for the District of Kansas has consistently found that HIPAA does not prohibit the continued use of ex parte interviews of a personal injury plaintiff's treating health care providers.

The U.S. District Court for the District of Kansas has consistently found that HIPAA does not prohibit the continued use of *ex parte* interviews of a personal injury plaintiff's treating health care providers. In *McGee v. Stonebridge Life Insurance Company,*[25] defense counsel honored the procedural requirements of HIPAA and obtained an order allowing *ex parte* interviews with a decedent's health care providers. The court granted the motion, rejecting plaintiffs' argument that defendant should be required to gather the evidence pursuant to the Federal Rules of Civil Procedure. While the rules do provide for formal discovery procedures, they do not bar informal discovery. The court also cited the argument that *ex parte* communications should be permitted because of the increased time and expense involved in deposing various health providers. Ultimately, the *McGee* court granted a motion to gather protected health information, citing cases and public policy in support of the defendant's position.

In *G.A.S. v. Pratt Regional Med. Ctr., Inc.,*[26] Magistrate Judge Karen Humphreys permitted *ex parte* communications and ruled that HIPAA does not prohibit such communication. Pursuant to HIPAA rules, the defendant moved for a court order permitting access to the plaintiff's health information and allowing *ex parte* communications. The court first noted that the district has a "long-established rule permitting *ex parte* interviews with treating physicians." Next, the court addressed whether HIPAA prohibits *ex parte* contacts, stating: "The problem with plaintiff's objection is that a citation to HIPAA, standing alone, does not provide the court with sufficient grounds for denying defendant's request for an order to disclose medical information." The court rejected the objection's implicit suggestion that *ex parte* contacts are inherently wrong. Because the defendant satisfied the procedural requirements found in HIPAA, the objection was overruled and *ex parte* communications were permitted. Judge Humphreys affirmed her position on this issue by ruling that *ex parte* orders were appropriate in *Harris v. Whittington*.[27]

In *McCloud v. Board of Directors of Geary Community Hospital,*[28] Magistrate Judge Donald Bostwick found that under Kansas law the physician-patient privilege is waived when a plaintiff files a medical malpractice wrongful death suit. *Id.* The court ruled that defendants, by seeking an order from the court allowing the production of medical information and *ex parte* interviews with decedent's treating health care providers, complied with the HIPAA privacy regulations.

The sound reasoning set forth in these federal cases reflects the unambiguous statutory intent, good public policy, and basic judicial fairness underlying the approval of *ex parte* communications to give the parties

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As officers of the court, plaintiff's and defense counsel have a duty to refrain from pressuring or coercing fact witnesses during ex parte interviews.

Ex Parte Interviews *(Continued from pg 13)*

equal access to fact witnesses.

V. "*Ex parte* interviews are contrary to Kansas public policy."

The proponents of ending Kansas' long standing tradition of allowing *ex parte* interviews with a personal injury plaintiff's treating health care providers infer that defense counsel have used *ex parte* interviews with improper motives to influence these fact witnesses to support defendants and not to testify in a manner which supports a plaintiff's personal injury lawsuit. The proponents offer no evidentiary proof when calling into question the ethical obligations of their colleagues within the personal injury defense bar.

The proponents further argue that without formal discovery there are no checks and balances policing the defense bar during their *ex parte* interviews with fact witnesses. This argument ignores the fact that the plaintiff's bar can explore with a plaintiff's treating physicians during their *ex parte* interviews the scope of defense counsel's interview with the treating physician and bring improprieties to the trial court's attention. Personal injury plaintiff and defense attorneys are mindful that their opponent can discover the scope of his adversary's communication with a treating health care provider. As to the possibility of intentional misconduct during *ex parte* interviews, courts should not add to the paranoia and should avoid speculating about or imputing such sinister motives to plaintiff's counsel, defense counsel or to a plaintiff's treating physician. As officers of the court, plaintiff's and defense counsel have a duty to refrain from pressuring or coercing fact witnesses during *ex parte* interviews. Besides the inherent duties of all counsel to behave ethically, a proper check and balance is afforded by opposing counsel's permitted inquiry into the substance of any *ex parte* communication. *Ex parte* interviews of fact witnesses are an efficient method of discovery for plaintiffs and defendants and to prohibit the tool smacks of throwing out the baby with the bath water.

The plaintiff's bar's public policy argument is effectively countered by directing a court's attention to K.S.A. 60-427(d). The true public policy is that when a plaintiff files a personal injury lawsuit, any statutory privilege which could prevent a treating physician from disclosing confidential information is extinguished. The Kansas Legislature spoke and decided that the privilege would expire when a personal injury plaintiff files suit. Attempts by the plaintiff's bar to amend K.S.A. 60-427 to eliminate *ex parte* interviews have failed.

In 1992, the Kansas Trial Lawyers Association (now the "Kansas Association for Justice") attempted to amend K.S.A. 60-427(d) by prohibiting *ex parte* communications between a personal injury plaintiff's treating physician and a defendant or defense counsel.[29] The requested amendment sought to prohibit "oral or written communication between a physician and an adverse party or the party's attorney outside the presence of the patient or the patient's attorney without specific written authorization by the patient."[30] The legislative attempt to amend K.S.A. 60-427(d) and prohibit informal discovery failed.

In 2008, a Senate Bill was introduced which in part sought to amend K.S.A. 60-427(d) by providing that "except for opinions dealing with the medical standard of care and causation" that no physician-patient privilege would exist after the filing of a personal injury lawsuit.[31] The KADC opposed the amendment, arguing that it would render K.S.A. 60-427(d) meaningless because an essential element in every personal injury case is causation and the proposed amendment would thwart the legislative intent of K.S.A. 60-427(d), which was to afford all

(Continued on page 15)

Ex Parte Interviews *(Continued from pg 14)*

litigants the same unfettered access to facts relevant to a plaintiff's personal injury claim. Also, standard of care and causation opinions do not meet the definition of "confidential communication" as defined by the Kansas physician-patient privilege statute. Finally, the KADC pointed out that such an amendment would allow a plaintiff to waive the privilege when she believed her physician's standard of care or causation opinions aided her claims and to assert the privilege to prevent her physician from providing opinions unfavorable to her case.[32] The Senate Judiciary Committee opposed the proposed amendment to K.S.A. 60-427(d).[33]

The fact that the Legislature has refused to amend K.S.A. 60-427(d) multiple times to eliminate the statutory authority for *ex parte* interviews is persuasive that *ex parte* interviews do not violate Kansas public policy.

Another strong public policy argument favoring *ex parte* interviews is that all litigants should have equal access to the evidence and fact witnesses. Why should a plaintiff's attorney be afforded preferential access to a fact witness? If *ex parte* interviews between defense counsel and a treating physician create an environment for potential misconduct, cannot the same argument be made regarding *ex parte* interviews between plaintiff's counsel and a treating physician?

All litigants should have equal access to the evidence and fact witnesses.

VI. Conclusion

We should all expect continued attacks on the time-tested use of *ex parte* interviews. To counter such attacks, defense counsel must continue to direct the court's attention to the plain and unambiguous language of K.S.A. 60-427(d). The statute provides the statutory authority for the continued use of this economical and efficient means of discovery. Neither party to a personal injury lawsuit should be allowed to exercise sole ownership over a fact witness.

The author credits current and former members of KADC who contributed to this article by sharing their work product on this topic in years prior. Specifically, Nancy Ogle of Ogle Law Office, LLC and Jim Hernandez of Woodard, Hernandez, Roth & Day, LLC deserve credit and recognition for previously sharing their briefing on *ex parte* communications. Certain portions of this article were published in "*Ex Parte* Interviews With Health Care Providers," authored by Caleb Stegall in the Spring 2005 edition of the KADC *Legal Letter*, which offers an expanded analysis of HIPAA's correlation with *ex parte* communications. KADC members can access this article and others online at www.kadc.org.

1. The debate over *ex parte* interviews of treating physicians will be taken up by the Kansas Court of Appeals in the case of *Foster v. Klaumann*, 08-100286-A. The KADC was granted leave to file an *amicus* brief and filed the same on January 21, 2009. Our *amicus* brief addressed whether *ex parte* communications between a party's counsel and a personal injury plaintiff's treating physician should continue to be viewed as a proper, valuable means of discovery, supported in the State of Kansas.
2. K.S.A. 60-427(d) (emphasis added).
3. *Bryant v. Hilst*, 136 F.R.D. 487, 490 (1991) (citing *Armstrong v. Topeka Ry. Co.*, 93 Kan. 493, 144 P. 847 (1914); 1 Gard's Kansas C.Civ.Proc.2d Annot. 60-427 (1979)).
4. K.S.A. 60-102.
5. *State v. Campbell*, 210 Kan. 265, 281 (1972).
6. Kansas Supreme Court Rule 105.
7. DCR 3.212 states in relevant part: "In any case in which the condition of a patient, as defined by K.S.A. 60-427(a)(1), is an element or factor of the claim or defense asserted by or on behalf of the patient, the attorneys representing the

(Continued on page 16)

Ex Parte Interviews *(Continued from pg 15)*

parties may interview any treating health care provider, as defined by K.S.A. 40-3401, or their employees without leave of the court."

8. Rule 14 states in relevant part: "In any case in which the condition of a patient, as defined by K.S.A. 60-427(a)(1), is an element or factor of the claim or defense asserted by or on behalf of the patient, the attorneys representing the parties may interview any treating health care provider, as defined by K.S.A. 40-3401, or their employees without leave of the court."

9. Rule 28 states: "When the physician-patient privilege has been waived or does not exist under the terms of K.S.A. 60-427, lawyers may interview treating physicians outside the presence of the patient or opposing counsel, providing the physician is supplied with a written consent by the person holding the privilege or by a qualified Protective Order of this court that incorporates the applicable provisions of HIPPA (sic) (42 U.S.C. 1320d et seq.) and regulations promulgated pursuant to HIPPA (sic). Lawyers may not interview any expert witness who has been retained or specially employed by another party in anticipation of litigation or preparation for trial with out consent of counsel or order of the court."

10. Rule 38 states: "When the physician-patient privilege has been waived or does not exist under the terms of K.S.A. 60-427, lawyers may interview treating physicians outside the presence of the patient or opposing counsel, providing the physician is supplied with written consent by the person holding the privilege or by an order of the court authorizing the interview, providing the treating physician consents to the interview. Lawyers may not interview any expert witness who has been retained or specially employed by another party in anticipation of litigation or preparation for trial without consent of counsel or order of the court."

11. Rule 208(a) states in relevant part: "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."

12. Rule 213 states: "In any case in which the condition of a patient, as defined by K.S.A. 60-427(a)(1), is an element or factor of the claim or defense asserted by or on behalf of the patient, the attorneys representing the parties may interview any treating health care provider, as defined by K.S.A. 40-3401, or their employees without leave of court, but only with the consent of the person or persons to be interviewed."

13. *Wesley Medical Center v. Clark*, 234 Kan. 13, 20 (1983).

14. *Id.*

15. *Id.*

16. 45 C.F.R. § 164.512(e).

17. *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F. 3d 923, 925-26 (7th Cir. 2004) (later describing 45 C.F.R. § 164.512(e) as having a "purely procedural character").

18. 45 C.F.R. § 164.512(e)(l)(i) & (ii) (emphasis added).

19. 65 Fed. Reg. 82529 (Dec. 28, 2000), Health and Human Services Commentary on HIPAA final privacy rule (*quoted in* Atty. Gen. Op. No. 04-21 at 7).

20. *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F. 3d 923, 925-926 (7th Cir. 2004) (later describing 45 C.F.R. § 164.512(e) as having a "purely procedural character").

21. Atty. Gen. Op. No. 2004-21 at 9 (emphasis added).

22. *Id.* at 11 (emphasis added).

23. *Id.*

24. 45 C.F.R. § 160.103 (emphasis added).

25. 2006 U.S. Dist. LEXIS 62836, No. 05-4002-JAR (D. Kan. 2006).

26. 2006 U.S. Dist. LEXIS 95416, No. 05-1267-JTM (D. Kan. 2006).

27. 2007 WL 164031, No. 06-

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1179-WEB (D. Kan. 2007).

28. 2006 WL 2375614 *2, 2006 U.S. Dist. LEXIS 58087, No. 06-1002-MLB (D. Kan. 2006).
29. Kansas House Bill No. 3044 (1992 Session).
30. *Id*.
31. Kansas Senate Bill No. 537 (2008 Session).
32. Testimony of KADC President Anne M. Kindling before the Kansas Senate Judiciary Committee (February 21, 2008).
33. "The Committee agreed that subsection (d), as currently written, creates a logical and necessary exception to the [physician-patient] privilege – where the patient brings an action in which his or her medical condition is an element of the claim or raises the issue in a defense, it is appropriate that any existing privilege would be waived. The Committee is opposed to the proposed amendment to K.S.A. 60-427(d) as set forth in Section 1 of SB 537." Memorandum of the Civil Code Advisory Committee regarding 2008 Kansas Senate Bill No. 537 (December 9, 2008).▲

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

John Hayes *(Continued from pg 1)*

> The Martindell firm was the largest office in town at the time. The main members were D.C. Martindell, Bill Carey, Wes Brown, and Ed Brabets. John Hayes was in the military approximately during the same dates that I was, but he had to go back to Washburn Law School for a time. He passed the bar exam in September and joined the Martindell Carey firm right behind me. John and I practiced with the Martindell firm for eleven years. About two years after we were there, Bill Miller came into the firm. John, Bill and I worked in the firm until January 1, 1959, when we formed our own firm. ... John, Bill and I learned a lot from Don Martindell, Bill Carey, and Wes Brown. Wes Brown was ten years older than we were. In 1958, Wes was appointed by a democratic president to be the bankruptcy referee in the federal court in Wichita. Bill Carey was a Rhodes Scholar and a wise attorney. However, he was becoming less involved with the firm at this time and we decided to form our own firm. This was in 1959. The three of us started up as a new firm.

During this time, Mr. Hayes also traveled to Europe with Bill Carey, Jr., not yet being married. He met Elizabeth Ann (Betty) in 1949, and they married in August 1950, at Columbus, Kansas. John and Betty went to the 1952 National Republican Convention, where John served as a District Delegate. John served in the Kansas House of Representatives from 1953 to 1955 and from 1967 to 1979 and was the Majority Leader in 1979. He was Chairman of the Insurance Committee 1971 to 1973 and Chairman of the Judiciary Committee 1973 to 1977.

Outside the legislative halls, Hayes enjoyed nothing better than to crowd around a piano with his friends and croon repeated choruses of "Rambling Rose."

John Petterson reported in *The Wichita Eagle and Beacon* on April 9, 1978:

> In his year in the House, Hayes was a delight to watch. When he had a program, it remained alive until the final gavel. If it were killed in one place, it would spring to life in another a few days later and Hayes would be in the background displaying his paternal grin.
>
> Hayes had more routes than a Kansas road map. He knew the legislative rules and maneuvered them to his advantage while opponents still were thumbing through the rule book.
>
> He had been instrumental in the passage of legislation creating Sand Hills State Park at Hutchinson and establishing the Law Enforcement Training Center at Hutchinson. He also was deeply involved in the passage of the no-fault insurance law and in court unification.
>
> While Hayes worked on the floor of the House, his wife Betty, maintained an almost constant vigil in the gallery. She probably understood the workings of the Legislature better than many of those who were elected to serve.
>
> Outside the legislative halls, Hayes enjoyed nothing better than to crowd around a piano with his friends and croon repeated choruses of "Rambling Rose." His wry humor and scholarly understanding of the legislative process will be hard to replace.

It is impossible to acclaim John's success without including his long-time law partner, Robert J. Gilliland. They were close friends as well as partners until Bob's death in 2007. In researching the firm history archives, it was apparent they held each other with great esteem and have had a good time along the way. To give you a glimpse of their professional practices during the early years of their law practice, Kleila Carlson, in an article in *The Hutchinson News* on May 21, 1989, wrote:

> They (Bob Gilliland and John Hayes) talk about a work week that included Saturday as if it were yesterday, recalling law offices and a courthouse that were fully staffed at least until noon. "The weekend for professional peo-

(Continued on page 19)

Adhering to the adage that old habits die hard, Hayes and Gilliland are in their office before 8 in the morning, and usually the ones to unlock the office doors.

John Hayes *(Continued from pg 18)*

ple didn't start until Saturday noon," Gilliland said.

Adhering to the adage that old habits die hard, Hayes and Gilliland are in their office before 8 in the morning, and usually the ones to unlock the office doors.

These excerpts are from letters from long-time friends and associates presented as a part of a celebration of 50 years of partnership in the practice of law that was held in 1996.

Wesley E. Brown, Senior Judge, U.S. District Court:

My first experiences with Bob and John came when I was County Attorney of Reno County (I served from 1935 to 1939). Bob and John were in my scout troop in Hutchinson. They were fine, outstanding young men at that time. I next knew them when they became members of Martindell, Carey, Brown and Brabets; and I saw their diligence and capable legal abilities. They became members of the firm after the war where both had served with distinction.

During those years from around 1948 to 1958, John helped me when I was trying cases – some of which were quite entertaining.

As the years have gone by, I have watched from afar the success that Bob and John have enjoyed in the practice of law. While I am pleased that, with apologies to Robert Frost, "I chose a different path," I have been particularly happy for their success. It is with admiration, respect, and affection that I wish them well in the years to come.

John H. Shaffer, a fellow attorney in Hutchinson:

Without in any way detracting from Bob's and John's professional practices, my most enjoyable "non-professional" experience with each of them occurred at the State Bar Meeting in Colorado Springs, Colorado too many years ago for this writer to exactly recall. The Reno County Bar presented a skit entitled "the peripatetic Court of Appeals" and I distinctly recall that John and Judge Rogers (who had been recruited to perform with us) performed marvelously with the assistance of a considerable amount of fire water. Bob, of course, was our esteemed director and a good time was had by all participants. Additionally, you could always find Bob and John around a piano with great gusto no matter what the hour or the occasion.

Robert C. Martindell, also a fellow attorney in Hutchinson and with whom John Hayes practiced law while at the Martindell firm:

John and myself were both involved in insurance defense work and my association at the outset was more with John than with Bob. ... One of the things that I remember with great pleasure is our trips to Dodge City to attend meetings of the Southwest Kansas Bar Association usually held in December.

Joseph W. Morris, former Chief Judge, U.S. District Court, Eastern District of Oklahoma:

It was a typical hot, summer Kansas day fifty-five years ago (1941). John Hayes, an active in Phi Delta Theta Fraternity at Washburn University and Bob Anderson, also a Phi Delt, came out to the farm to see me. I was a rushee and lived on the farm with my parents in a modest frame house which sits on the north side (the Rice County side) of the road which runs in front of the house and is the Reno-Rice County line. I had but recently graduated from Nickerson High School and had yet to see the bright lights of Topeka, Kansas.

John had seen the lights. He was a tall, handsome, suave, smooth-talking young man.

(Continued on page 20)

John Hayes *(Continued from pg 19)*

> He conveyed the impression that he had seen a lot of bright lights. That was the first serious encounter I had with John. He told me all of the attributes of Phi Delta Theta. And when my mother came into the room, he immediately stood up. She was impressed and thought he had impeccable manners. ...
>
> John Hayes is my brother lawyer, my brother Phi Delt, and my brother in the Free Society of Gnip Gnop. He is an outstanding lawyer, a superb human being, and a cherished friend.
>
> Bob and John both possess those unique qualities of lawyering which should be emulated by all young members of the bar. They know about advocacy; they know about civility; and they know about loyalty.

William B. Swearer, a fellow Hutchinson attorney:

> Bob and John have both contributed to their community in so many ways, John as a member of the House of Representatives of the State of Kansas. Both have been active in civic clubs, such as Rotary, and have worked on countless projects to improve the city of Hutchinson. John has been involved in community development in a variety of ways including the presidency o the Hutchinson Chamber of Commerce.

George Thomas Van Bebber, former Chief Judge, United States District Court, Kansas City, Kansas:

> I am pleased to send greetings and best wishes to Bob and John on the occasion of their having been law partners for 50 years. This is a length of relationship not very frequently attained and is one of which I am sure they are proud. Being someone who has changed jobs a lot, I stand somewhat in awe.
>
> My acquaintance with the Gilliland & Hayes firm has come largely through John F. Hayes. I first met John when I was a young Assistant U.S. Attorney at Topeka. One of the firm's motor carrier clients had run afoul of ICC record-keeping requirements, and we worked out an arrangement for the payment of a small fine by the client. John was as impressive more than 35 years ago as he is today.
>
> Later, John and Betty and I became much closer friends when we served together in the Kansas House of Representatives in the 1970's. That friendship led in turn to friendship with Bob and Ruth Gilliland. I count the four of them as among my most valued friends, both personally and professionally.
>
> I should add, as I am sure others will, that the interests of the firm were never neglected during the many years John served in the Kansas legislature. He was one of the most powerful members of that body through out his tenure. Those billboards erected in Hutchinson during election years which carried the motto "John Hayes – he gets things done," were not idle hyperbole.

Those billboards erected in Hutchinson during election years which carried the motto "John Hayes – he gets things done," were not idle hyperbole.

Richard C. Hite, a long-time friend and fellow attorney:

> You are outstanding lawyers that I have been proud to call friends. ... As important as anything else, you have had a good time and been responsible for many others having a good time. The most recent edition of the Kansas Bar Journal quotes the Shakespeare admonition: "And do as the adversaries do in law, strive mightily, but eat and drink as friends."

Richard D. Rogers, Senior Judge, United States District Court:

> They founded a large, prestigious and outstanding law firm

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With his deep baritone voice and silver-haired, well-dressed appearance in the courtroom, he was in his element.

John Hayes *(Continued from pg 20)*

> that is highly regarded in Kansas and its surrounding states. The growth and success of the firm did not arise by osmosis, but is a reflection of the legal ability and prestige of the two senior partners. The did have one advantage in that they were both fine gentlemen with the ability to make you like them personally. They are overall good guys.

Some of John's many civic and professional honors include past president of Reno County Bar Association, Southwest Kansas Bar Association, SOABS, Rotary Club, Metro Club, GNIP-GNOP, Hutchinson Chamber of Commerce, Hutchinson Town Club, and Prairie Dunes Country Club. He has been a Director of Central Bank and Trust Co. since 1970 and has served as Secretary; as a Director and Vice President of the Kansas Association of Commerce and Industry; Director of Central Financial Corporation of Hutchinson, United Group of Funds, and Waddell & Reed of Overland Park, Kansas. Since 1975, he has been a member of the National Conference of Commissioners on Uniform State Laws, a nationwide body of judges, law professors, and attorneys.

Mr. Hayes is a founding member and past president (1971 to 1972) of the Kansas Association of Defense Counsel. He is a member of the American Board of Trial Advocates and International Association of Defense Counsel and is a Fellow of the American College of Trial Lawyers, the Kansas Bar Foundation and the American Bar Foundation. He is a member of the Reno County, Kansas and American Bar Associations. He was a member of the Kansas Judicial Council from 1973-1977.

Mike O'Neal, a partner of John Hayes, uses a case that John Hayes litigated which involved a crash at in intersection of U.S. 50 and Airport Road in Hutchinson, where he got a good result (either 0-0 or 50-50) as an example of never agreeing to admit liability.

Jim Gilliland, one of John Hayes' law partners observes:

> When my father (Robert Gilliland) and John Hayes formed the Gilliland & Hayes law firm in 1959, John was the primary litigator. He maintained that role until he was well into his 70's. With his deep baritone voice and silver-haired, well-dressed appearance in the courtroom, he was in his element. John loves the practice of law and particularly the chance to advocate for his clients. Even today at 89, John continues to come to the Gilliland & Hayes offices daily always dressed in his coat and tie. John has often expressed the old adage "if a lawyer keeps his office, his office will keep him" and he has certainly proven that expression.
>
> Among the many things John has exemplified to me are the values of community service and the rewards of professional and ethical dealings with other lawyers. "Always take the high road and you will never be sorry," is what John has always exhibited.
>
> John has been a very important example to me during our 37 years of practicing together in Hutchinson, Kansas.

Jerry Green, also one of the partners of John Hayes, comments:

> I owe a lot to many lawyers that I have learned from and have tried to emulate through the years; none more, however, than John Hayes. John has been my senior partner for 28 years. He has been in every sense of the word, a true mentor. From John I have learned much about integrity, professionalism, hard work, diligence and a host of other qualities. While undeniably I have not always lived up to his example, it has always been my goal to do so.
>
> As I think of John's many skills and abilities as a litigator, perhaps the one that most stands out to me is his concise writing and speaking style. John rarely says or writes more than is necessary to make his point, and he almost always does so with precision and clarity. John consistently follows the old adage that often "less is more." John has always represented his clients with a level of professionalism and skill that all lawyers should strive to achieve.
>
> I am indebted to John Hayes for more than I could ever say in an article such as this, and I am proud to know him and proud to be his partner.

John Hayes is from the old school of a proper gentleman. Today, when good manners are

(Continued on page 22)

Post-Verdict Juror Interviews *(Continued from pg 21)*

seldom commonplace, John always is a gentleman. I am reminded of this by this simple example. One time John was in the hospital, and I had stopped by to see how he was and to deliver some work and mail from the office, when the President and CEO of a local bank of which John sits on the Board of Directors also stopped by to see him. John, ever the gracious host, felt compelled to introduce us, "Earl, have you met Mrs. French? She is one of the head paralegals and runs our law office." While nice of John to say, it was quite a stretch of the truth (and I was wondering why John was introducing my mother-in-law, Mrs. French, to him.)

I also recall a time when I had made a computation mistake on a Kansas estate tax return that amounted to a few thousand dollars. John had already written to the client advising the amount of the tax that would be due, and I was dreading telling him that I had found the mistake. However, he was most gracious; he did not raise his voice to me, and obviously I still have my job, and when he wrote to the client, he simply said that the taxing authorities were very thorough and would have found the mistake when the return was filed. I learned a very important lesson that day, and not the least of which was of the character by which Mr. Hayes ran his practice.

John Hayes is a quiet man of few words, but a man who leads by example.

John Hayes is a quiet man of few words, but a man who leads by example. This is evident by the many accolades from his friends and fellow attorneys and the many professional, civic, and government organizations with which he has been associated. Congratulations to John Hayes in receiving this outstanding award and recognition.▲

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