CIVIL DISCOVERY MOTIONS

For the most part, since our state civil procedure rules are identical to federal rules, there are an abundance of federal decisions interpreting most of the discovery issues that typically arise. However, as a starting point, when a case becomes particularly contentious, the court should identify: (1) is there compliance with a duty to confer and (2) is the discovery issue ripe or properly submitted. Very often, these two requirements are not present. Of course, the discovery dispute may be worth resolving expeditiously to avoid having it bog down the case in other respects. Often, anticipated problems can be handled at the Case Management Conference in the "Orders" section, particularly if it involves the need for a protective order or some unique question or need for an Independent Medical Examination.

A. Have the Parties Conferred Before Bringing the Dispute to Court?

This duty to confer before bringing a motion to compel is clearly outlined in K.S.A. 60-237(a)(1) which provides that the "motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action and must describe the steps taken by all attorneys or unrepresented parties to resolve the issues in dispute." The comparable federal local and procedural rules require that parties certify they have "in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. See Fed. R. Civ. P. 37(a)(1); D. Kan. Rule 37.2.

- Include information regarding phone calls, emails or any other contact in furtherance of resolving the issue in the letter as required by K.S.A. 60-237 (a)(1).

- Recommend sending the golden rule letter through regular mail. Emails can sometimes be overlooked, accidently deleted or sent to wrong email address.

1. A single communication or golden rule letter is not enough

Federal magistrate decisions emphasize, repeatedly, that one attempt is not sufficient:

Often, if the problem can be quickly resolved, the court may find it expedient to handle discovery disputes by phone, particularly if it means avoiding the postponement of a deposition or holding up the case on other issues. Judges may address such disputes, after counsel have e-mailed a position statement no more than one or two pages single-spaced and then will follow up with a phone conference and make a preliminary ruling.

**B. The Broad Scope of Relevancy and Discovery**

Some of the thornier discovery issues arise when attorney-client and work product privileges are injected as objections or, when counsel assert blanket or general objections to discovery in the front end of any responsive, in light of the broad scope of discovery.

Under our discovery rules, K.S.A. 60-226(b) controls the scope of discovery and provides:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.


**C. Particular Problem Areas with Discovery**

1. **Requiring discovery on every allegation in a pleading.**
One of which is the contention interrogatory that asks for everything under the sun that has been alleged in some interrogatory or request for production of documents. A good example is to provide "everything that relates to your claims in the petition." While a party is entitled to be apprised of the facts upon which the plaintiff bases particular allegations or claims, *Cont’l Ill. Nat’l Bank & Tr. Co. of Chicago v. Caton*, 136 F.R.D. 682, 688 (D. Kan. 1991), an interrogatory seeking a narrative disclosure of all evidence supporting any allegation is too broad. "Some lawyers attempt to use contention interrogatories to require the opponent to state every fact, identify every witness, and specify each document supporting each allegation of the complaint or answer. Such blunderbuss interrogatories are likely to be found objectionable and should not be used." *Lawrence v. First Kan. Bank & Tr. Co.*, 169 F.R.D. 657, 663 (D. Kan. 1996).

2. Objections that something is "overly broad" or burdensome

Often, objecting parties simply throw out objections that the discovery sought is overly broad or unduly burdensome. This is not enough. *Oleson v. Knart Corp.*, 175 F.R.D. 570, 571 (D. Kan. 1997). The objecting party ordinarily must specifically show how each request is overly broad, burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. *Id.*

3. Privilege issues

In all privilege objections, the thing to keep in mind is that the party invoking the privilege has the burden to demonstrate its applicability. *Adams v. St. Francis Reg’l Med. Ctr*, 264 Kan. 144, 955 P.2d 1169 (1998).

a. Distinguishing attorney-client and work product privileges

If interrogatories seek information the attorney possesses about the case, which is otherwise relevant, the same cannot be privileged as either attorney client or work product information. Counsel’s strategies and thoughts contained in documents, however, are work product.

In *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 200 (D. Kan. 1996), the court held:

Interrogatories 16 and 17 do not transgress areas of inquiry protected by the attorney-client privilege. They seek only the factual information obtained from persons interviewed by IBP, identification of such persons, and identification of documents relating to the factual information. The objection of work product also fails. Within the meaning of Fed. R. Civ. P. 26(b)(3), work product refers to documents and tangible things, prepared in anticipation of litigation or for trial, and prepared by or for a party or by or for a representative of that party. *Jones v. Boeing Co.*, 163 F.R.D. 15, 17 (D. Kan. 1995). "There is a distinction between documents that a party has assembled and the facts he has learned from those documents. ‘The courts have consistently held that the work-product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party’s lawyer has learned, or the person from whom he has learned such facts, or the existence or
non-existence of documents, even though the documents themselves may not be subject to
discovery."

(citing 8 Charles A. Wright et al., Federal Practice and Procedure § 2023 (1977) & (Supp. 1978)).

"Parties objecting to discovery on the basis of the attorney-client privilege bear the burden of


b. Self-critical analysis privilege

One of the more nebulous privileges is something called the self-critical analysis privilege, which, like most privileges, may be subject to a balancing of interests.

This self-evaluation has recently been recognized as a privilege designed to encourage self-analysis and self-criticism. Under this theory, it is believed the benefits from corporate internal reviews may outweigh the value of discovery of such reviews. Murphy, The Self-Evaluative Privilege, 7 J. Corp. Law 489 (1982). Originally, the privilege was applied in a medical malpractice action, Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.D.C.1970), in which the petitioner sought to compel discovery of a hospital committee investigatory report. The court denied discovery based on the rationale that a release of the report would "end candor and criticism in self-deliberations, which the court found necessary to continued improvements in patient care." Note, The Self-Critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits, 83 Mich.L.Rev. 405, 408-09 (1984).


KG & E relies upon Berst v. Chipman, 232 Kan. 180, 653 P.2d 107 (1982). The issue in Berst was whether information obtained in the course of a confidential investigation could be discovered. The National Collegiate Athletic Association (NCAA) had obtained documents in the course of an investigation of possible NCAA violations at the University of Alabama. 232 Kan. at 181, 653 P.2d 107. An Alabama newspaper sought discovery of the documents to aid in its defense of a libel suit. We recognized the NCAA as a voluntary organization whose self-policing function was to enforce NCAA regulations. 232 Kan. at 184, 653 P.2d 107. The NCAA argued that confidentiality was central to its success as a
self-policing system and that a loss of confidentiality in its investigative files and identities of sources would destroy that system. 

In Berst, we stated four conditions necessary to establish a qualified privilege against disclosure of confidential communications: (1) the communications must originate in a confidence they will not be disclosed; (2) the element of confidentiality must be essential to the maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury caused by disclosure must be greater than the benefit gained for the correct disposal of litigation. 232 Kan. at 189, 653 P.2d 107 (citing 8 Wigmore on Evidence § 2285 [McNaughton rev.1961]). The Berst court cited numerous cases in which the public interest in maintaining confidentiality of certain types of reports outweighed the need for disclosure. Nevertheless, the court concluded that the strong interest in confidentiality was outweighed because the information sought went to the "heart" of the issues. 232 Kan. at 193, 653 P.2d 107.

To decide this issue we apply a balance of interests test: Is the injury caused by disclosure of the Quality First files greater than the benefit conferred? This balancing test has been utilized many times to determine whether a qualified privilege exists against disclosure of confidential communications. Gray v. Bd. of Higher Educ., City of New York, 692 F.2d 901 (2d Cir.1982); Zerilli v. Smith, 656 F.2d 705 (D.C.Cir.1981). We employed the balancing test in Berst and approved it in Wesley Med. Ctr. v. Clark, 234 Kan. 13, 25, 669 P.2d 209 (1983).

It is a well established principle that the public has a right to every man's evidence. United States v. Bryan, 339 U.S. 323, 331, 70 S. Ct. 724, 730, 94 L.Ed. 884, reh. denied 339 U.S. 991, 70 S. Ct. 1018, 94 L.Ed. 1391 (1950). Any exceptions to the demand for every man's evidence are not lightly created nor expansively construed since they are in derogation of the search for truth. United States v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108-09, 41 L.Ed.2d 1039 (1974). In Nixon, the United States Supreme Court ruled that, although the interest in preserving presidential confidentiality was weighty, it did not prevail over the due process of law in requiring the President to turn over certain tape recordings and documents in a criminal proceeding. 418 U.S. at 712, 94 S. Ct. at 3109-10.

In the present case, KG & E strenuously argues that confidentiality is essential to the Quality First program. Wolf Creek personnel were encouraged to discuss safety concerns with a promise of confidentiality. KG & E contends disclosure would thwart the shared goal of KG & E and appellants to maintain the safe operation of Wolf Creek and thereby promote public safety. KG & E also claims that harm by loss of the program outweighs the harm of nondisclosure because the information is available through alternative mechanisms, such as the NRC and KCC, without the threat of losing confidentiality.

Appellants assert that self-critical analysis should not be used to shield the public from vital information concerning the safety of nuclear power plants. It is generally recognized that the maintenance of confidential communications is an important aspect of self-critical analysis and whistle-blower programs. Nevertheless, we believe the public has an overriding interest in the dissemination of information related to costs, construction, and safety practices of nuclear power plants. The Three Mile Island

5 "Sedulous" is an adjective defined as "persevering and constant in effort or application, assiduous." THE AMERICAN HERITAGE COLLEGE DICTIONARY, 1233 (3rd ed. 1997).
and Chernobyl accidents illustrate the potential public hazard contained in each nuclear plant.
The United States Supreme Court has stated that society has a strong interest in the free flow of commercial information. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). So too does society have an interest in the free flow of information regarding potentially harmful and dangerous nuclear power plants. Appellants allege the Quality First files contain information about federal law violations, falsification of documents, and intimidation and harassment of power plant inspectors. Similar to the rationale of *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, release of the information contained within the Quality First files is one manner by which KG & E, manager of a potentially dangerous plant, can be held accountable to the public.

*Id.* at 428, 789 P.2d at 1168.

c. Physician-patient privilege/blood tests in DUI cases

The physician-patient privilege outlines in K.S.A. 60-427(a)(2) defines a "physician" as "a person licensed or reasonably believed by the patient to be licensed to practice medicine or one of the healing arts as defined in K.S.A. 65-2802...." K.S.A. 65-2802(a) defines the healing arts as including but not limited to those who practice medicine and surgery, osteopathic medicine and surgery, and chiropractic.

The privilege does not exist "in an action in which the condition of the patient is an element or factor of the claim or defense of the patient...." K.S.A. 60-427(d). In *State v. Pitchford*, 10 Kan. App.2d 293, 697 P.2d 896 (1985), the court addressed the application of such a privilege when an intoxicated and combative defendant was taken to the hospital while under arrest and told to submit to a blood test. He did not consent. *Id.* at 295.

*Pitchford* addressed the mechanics of the privilege and whether a communication and examination had occurred. The court had no difficulty reasoning that when a blood test is ordered, it constitutes an examination of the patient and its results are confidential. 10 Kan. App. 2d at 296 (citing *Branch v. Wilkinson*, 256 N.W. 2d 307 (Neb. 1977)). Principally, the court in *Pitchford* noted that even though the defendant was combative and fighting both the police and health care providers, he, nonetheless, was given treatment because the drug and alcohol screen was necessary to avoid a potential conflict in drug therapy that might be ordered "to ease the defendant’s pain and suffering and bleeding." *Id.* This, then, met the second and third condition of the statute. *Id.* at 297.

The main issue in dispute, then, was whether the defendant was a "patient," because he had not consulted the physician voluntarily. The court rejected the state’s argument in this respect because it would "render the physician-patient privilege inapplicable to many persons needed medical treatment the most." 10 Kan. App. 2d at 297. The court also cited *Branch*, a second time, for this proposition, where the evidence was held privileged even though the patient was unconscious. *Id.* at 298.
In *Branch*, plaintiff sought to admit defendant’s medical records regarding his blood alcohol content at the time of the accident, arguing that the physician/patient privilege did not exist because Nebraska, like Kansas, had in effect an implied consent statute that excludes blood samples secured pursuant to the statute from the privilege for purposes of prosecuting DUI cases. However, the Nebraska Supreme Court noted that the provision of the implied consent statute did not have any application in the civil context; therefore, the physician/patient privilege was not waived under the implied consent statute, and the test results were protected from disclosure pursuant to the physician/patient privilege.

In *Pitchford*, the court said that "whether the defendant was a ‘patient’ does not turn on whether he voluntarily consulted a physician. The controlling fact is that the defendant was taken to the hospital for purposes of treatment. *See* McCormick on Evidence § 99, p. 247, n. 4 (3rd ed. 1984). Here, the defendant needed medical aid; acting on this belief, they transported him to the hospital. Once at the hospital, Dr. McGovern treated the defendant." *Id.* at 298.

K.S.A. 60-427(e) now states that "[t]here is no privilege under this section: (1) As to blood drawn at the request of a law enforcement officer pursuant to K.S.A. 8-1001 and amendments thereto; and (2) as to information which the physician or the patient is required to report to a public official..."

d. *Insurance claims file discovery*

Our courts have held, long ago, that insurance claims files, by themselves, do not constitute work product and are not covered by what insurance adjusters do every day, unless an attorney directs the conduct of such adjuster. *Alseike v. Miller*, 196 Kan. 547, 412 P.2d 1007 (1966) and *Henry Enter. v. Smith*, 225 Kan. 615, 592 P.2d 915 (1979). Sometimes, however, case reserves and other determinations simply do reflect a matter that is reasonably calculated to lead to the discovery of admissible evidence. There are provisions, however, that make certain insurance information subject to a privilege if prepared in anticipation of litigation by an insurance representative. K.S.A. 60-226(b)(4).

In *Alseike*, the court made clear that statements taken by a claims adjuster on behalf of an insurance carrier which are not taken under the supervision of an attorney in preparation for trial, are not protected by the work product privilege referenced in K.S.A. 60-226(b). At that time, the statute included language that precluded a party from requiring "a deponent to produce, or submit for inspection any writing prepared by, or under the supervision of, an attorney in preparation for trial." *Id.* at 557. The court there relied upon *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), but recognized that in Kansas "our rule differs from the more flexible federal rule on the subject laid down in the *Hickman* case wherein some discretion is left to the trial judge to weigh the need for the material against the policy consideration protecting it as a product of trial preparation." *Id.* Essentially, *Alseike* found no lawyer-client privilege for matters generated by a claim adjuster. *Id.* at 559.

Later, in *Henry Enterprises*, the court discussed discovery of witness statements taken by insurance or other investigators, after amendments to K.S.A. 60-226(b). It focused squarely on
materials produced by non-lawyers and what was then 226(b)(3) [now (b)(4)] which allowed for
discovery of materials produced in anticipation of litigation by "another party or by or for that
other party’s representative (including his attorney, consultant, surety, indemniteor, insuror or
agent) only upon a showing that the party seeking discovery has substantial need...." It then
allowed for protection of mental impressions, conclusions, opinions "of an attorney or other
representative of a party concerning the litigation." 225 Kan. at 618. It was recognized that
changes in both the federal and identical state rules of civil procedure were intended to "make
discovery of work product subject to the rule of Hickman v. Taylor." Id. at 619 (citation omitted).

The court in Henry Enterprises rejected a treatise’s suggestion that these new changes
allowed for immunity for communications between an insured and insurer and then proceeded to
make clear that unless an attorney is involved who is directing or guiding any investigation, the
materials obtained are not privileged. 225 Kan. at 620-21. It rejected a "substantial need" showing
for statements and information generated after an accident. Id. at 622. Instead, the court found
that even though litigation is "ever on the horizon," Id. at 623, such gathered information is merely
done within the regular course and conduct of the insurance business.

D. Drafting a Motion to Compel.

1. Motion should be specific as to which interrogatories or request for documents
   is being sought.

2. The purpose the information or document is sought.

E. Protective Orders and Parties’ Attempts to Seal Information

In many discovery cases, the parties will seek to have a protective order entered that allow
them to freely exchange information and exhibits that precludes the public from obtaining any
information that the parties regard as confidential, etc. It should be noted that good cause is the
standard for a protective order which anticipates a particular and specific demonstration of fact as
opposed to "stereotyped and conclusory statements." Day v. Sebelius, 227 F.R.D. 668, 677 (D.
Kan. 2005).

The legislature has stepped into the fray of protective orders or motions to seal information
and expressly recognize a right of access to court proceedings [which is a First Amendment right
as courts are public forums] and records. Accordingly, K.S.A. 60-2617 now requires that before
granting any order to seal or redact (strike) information, "the public has a paramount interest in all
that occurs in a case, whether at trial or during discovery and in understanding disputes that are
presented to a public forum for resolution." K.S.A. 60-2617(c). Likewise, good cause must be
demonstrated to justify some identifiable "safety, property or privacy interest of a litigant or a
public or private harm that predominates the case" that outweighs "the strong public policy interest
in access to the court record and proceeding." K.S.A. 60-2617(d). If counsel fails to even cite this
statute, the court may legitimately question whether they have weighed the public policy that
requires a court to reject any proffered order that restricts information from the public.