

# **NUTS & BOLTS OF ETHICALLY USING EXPERT WITNESSES KANSAS AND FEDERAL LAW**

**Johnson County Bar Association CLE  
Thursday, June 13, 2019**

## **ETHICAL CONSIDERATIONS**

### **A. Hiring an Expert**

#### **Kansas Rules of Professional Conduct:**

##### **Rule 1.1 Competence**

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

***In re Zimmerman, 270 Kan. 855, 19 P.3d 160 (2001).***

An attorney was retained by a client who had been injured in a car accident. The client sued General Motors, alleging that seat belts General Motors installed in her car were defective and contributed to her car accident injuries. General Motors hired an expert, who provided an affidavit. In the affidavit, the expert for General Motors stated that he examined the seat belts and that they were not defective.

In a subsequent discipline proceeding against the attorney, the Kansas Supreme Court held that: “The [attorney] violated KRPC 1.1 by failing to hire an expert witness, by failing to respond to the Motion for Summary Judgment . . . , and by failing to timely file the Notice of Appeal.”

### **B. Designating an Expert Witness**

#### **Kansas Rules of Professional Conduct:**

##### **Rule 3.4(d) Advocate: Fairness to Opposing Party and Counsel**

A lawyer shall not: . . . in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. . . .

***In re Druten, 297 Kan. 432, 301 P.3d 319 (2013).***

The Kansas Supreme Court found that an attorney violated KRPC 3.4(d) when he failed to comply with discovery requests, failed to timely designate his expert witnesses, and failed to provide his expert witnesses’ reports.

### **C. Communicating with Your Clients about Expert Witnesses**

#### **Kansas Rules of Professional Conduct:**

##### **Rule 1.4 Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

#### ***In re Capps*, 262 Kan. 833, 942 P.2d 588 (1997).**

The plaintiff's attorney missed deadlines for disclosing an expert witness. The defendant's attorney filed a motion to exclude expert witnesses, which the court granted. Missing the deadline left the plaintiff without evidence in its CERCLA case. The plaintiff's attorney did not communicate to his client the serious adverse impact missing the deadline for disclosing an expert witness had on the plaintiff's case.

In a discipline proceeding, the Kansas Supreme Court found that the plaintiff's attorney's conduct violated KRPC 1.1 (Competence) by missing filing and response deadlines. The attorney's conduct also violated KRPC 1.4 (Communication) by failing to timely inform his client about the motion to exclude expert witnesses, and the "drastic adverse impact" on the plaintiff's case.

### **D. Exaggerating Expert Qualifications**

#### **Kansas Rules of Professional Conduct:**

##### **3.3(a)(3) Advocate: Candor Toward the Tribunal**

A lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

#### **Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465 (1999).**

"[E]xperts must be both qualified and independent. It is therefore unethical for a lawyer to tamper with the independence of an expert's views by attempting to persuade her to exaggerate her qualifications to give opinions outside her expertise."

## **KANSAS AND FEDERAL RULES**

### **A. Discovery Scope and Limits**

#### **Non-testifying experts**

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial, unless discovery is provided for in Rule 35(b) or there are “exceptional circumstances.” *See* Fed. R. Civ. P. 26(b)(4)(D); KSA 60-226(b)(5)(D).

#### **Testifying experts**

##### ***Depositions***

Under both Kansas and federal law, a party may depose any person who has been identified as an expert whose opinions may testify at trial. Fed. R. Civ. P. 26(b)(4)(A); KSA 60-226(b)(5)(A).

##### ***Attorney-Expert Communications***

In general, communications between the party’s attorney and an expert who may present testimony at trial are protected from discovery, “regardless of the form of the communications.” Fed. R. Civ. P. 26(b)(4)(C); KSA 60-226(b)(5)(C).

There are three exceptions to the general rule. Attorney-expert communications are not protected from discovery if they (1) relate to compensation for the expert’s study or testimony, (2) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed, or (3) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed. Fed. R. Civ. P. 26(b)(4)(C)(i)–(iii); KSA 60-226(b)(5)(C)(i)–(iii).

##### ***Client-Expert Communications***

Neither the Federal nor the Kansas rules provide protection from discovery for client-expert communications. Courts have held that expert communications with non-attorneys are not protected. *See Whole Women’s Health v. Lakey*, 301 F.R.D. 266, 270 (W.D. Tex. 2014). Indeed, the Advisory Committee Notes “(1) encourage broad discovery into the opinions held by a testifying expert” while (2) limiting “the protection to the opinion work-product of attorneys.” *Id.*

##### ***Drafts of Expert Reports***

The work-product doctrine applies to all drafts of expert reports. Fed. R. Civ. P. 26(b)(4)(B); KSA 60-226(b)(5)(B). Furthermore, drafts of expert reports are protected from discovery “regardless of the form in which the draft is recorded.” *Id.*

The work-product protection for expert drafts can be overcome if the party seeking discovery shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. Fed. R. Civ. P. 26(b)(3)(A); KSA 60-226(b)(4)(A).

What constitutes a draft expert report is unsettled law. The scope of the protection is unclear for expert-prepared materials such as notes, preparatory materials, and preliminary evaluations. Some federal courts have held that an expert's notes, memoranda, and draft letters are not protected because they are not draft reports. See *In re Application of the Republic of Ecuador*, 280 F.R.D. 506, 512–14 (N.D. Cal. 2012), *aff'd sub nom. Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014). Other federal courts have adopted a more expansive interpretation and held that an expert's "working notes" were protected drafts. *Etherton v. Owners Ins. Co.*, No. 10-cv-00892-MSKKLM, 2011 WL 684592 (D. Colo. Feb. 18, 2011).

## **B. Disclosure Requirements**

### **Kansas Law**

**Required Disclosures:** The identity of any witness a party may use at trial to present expert testimony, the subject matter on which the expert is expected to testify; and the substance of the facts and opinions to which the expert is expected to testify. KSA 60-226(b)(6). The disclosure must also give a summary of the grounds for each opinion if the expert is either "retained or specially employed to provide expert testimony in the case, or is one whose duties as the party's employee regularly involve giving expert testimony." KSA 60-226(b)(6). Disclosures must be in writing, signed and served, and filed with the court in accordance with KSA 60-205(d).

**Timing.** If there is no court order, at least 90 days before trial or 30 days after the other party's disclosure, if the evidence is intended solely to contradict or rebut evidence in another party's expert disclosure.

### **Federal Law**

The federal rules have heightened disclosure requirements if the expert is retained, specially employed, or is one whose duties as the party's employee regularly involve giving expert testimony. While the Kansas rules require disclosing a "summary of the grounds for each opinion," the federal rules require a more extensive expert report. Compare KSA 60-226(b)(6)(B) with Fed. R. Civ. P. 26(a)(2)(B).

The report must contain: a complete statement of all opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; any exhibits that will be used to summarize or support them; the witness's qualifications, including a list of all publications authored in the previous 10 years; a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and a statement of the compensation to be paid for the study and testimony in the case. Fed. R. Civ. P. 26(a)(2)(B).