

# **Civil Written Discovery: Balancing Obligations and Duties**

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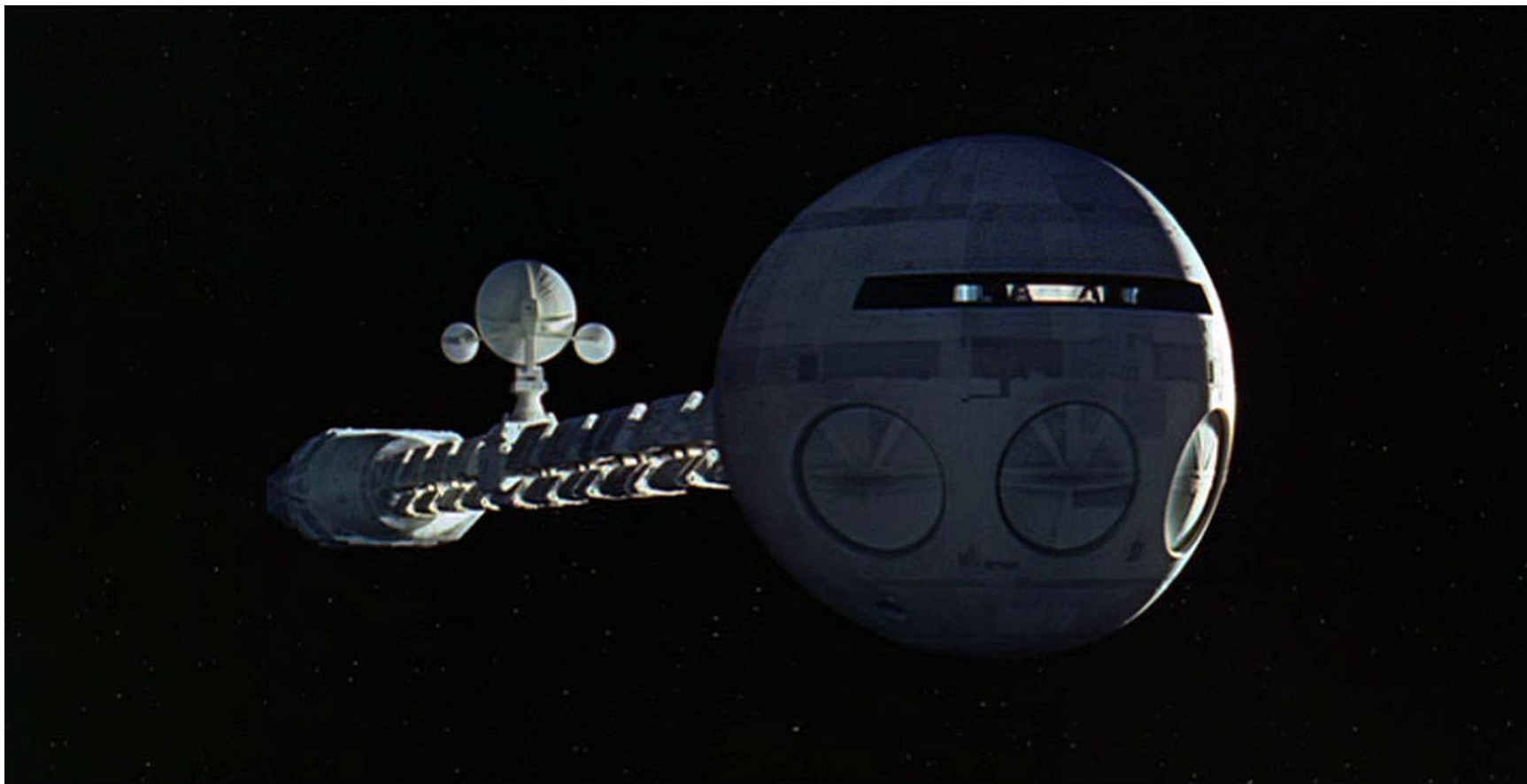
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# Discovery



# Learning Goals

- Scope of discovery under K.S.A. 60-226
- Complying with the requirements
- Proper objections
- Sanctions for noncompliance
- Ethical obligations
- Best practices

# Scope of discovery under K.S.A. 60-226



# Scope of discovery under K.S.A. 60-226

b) Discovery scope and limits.

(1) Scope in general. Unless otherwise limited by court order, the scope of discovery is as follows:

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.**

# Scope of discovery under K.S.A. 60-226

Proportionality Requirement—2017 amendments

Before the amendments, there was no such requirement, and the scope was far more broad,

Cost considerations were even more important than today

Anecdote:

“If an attorney can think to ask it, then it is discoverable.”

# Scope of discovery under K.S.A. 60-226

- Nonprivileged matters relevant to claims or defenses
- Proportionality factors:
  - importance
  - amount in controversy
  - access
  - burden vs. benefit
- Information need not be admissible to be discoverable

# Scope of discovery under K.S.A. 60-226

- Proportionality examples
  - “each and every policy of the hospital”
  - “records of every patient who was at the hospital when plaintiff was there”
  - “all text messages sent to or from Dr. \_\_\_\_\_ during the month of May”

# Scope of discovery under K.S.A. 60-226

- Practical Use for Attorneys
  - Understanding proportionality objections helps lawyers manage costs and comply with discovery obligations effectively.
- Judicial Expectations
  - Courts require factual support for proportionality claims and expect well-reasoned discovery arguments.

# Complying with the requirements



# Complying with the requirements

- Responding to Interrogatories – K.S.A. 60-233(b)
- Each interrogatory must be answered fully and separately in writing under oath unless a specific objection is raised.
- Objections must be stated specifically and timely; otherwise, they are waived, and you lose any protection against broad discovery.
- Partial or evasive answers are treated as failures, risking motions to compel and sanctions under KSA 60-237.
- Answers must be signed under oath by the party and objections signed by the attorney, reinforcing shared accountability.

# Complying with the requirements

- 60-233(a)(2)
  - An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

# Complying with the requirements

- Request for Production
- K.S.A. 60-234(b)(2):
  - Written response required within statutory time
  - Objections within statutory time
  - State whether documents will be produced or objected to
  - Must disclose if materials are being withheld

# 60-236 Request for Admissions

A party may serve ... a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of K.S.A. 60-226, and amendments thereto, relating to:(A) Facts, the application of law to fact or opinions about either; and(B) the genuineness of any described documents.

# Proper subjects of RFA

- **FACTS**
  - Was Dr. \_\_\_\_\_ the physician on call
- **OPINIONS**
  - Is it likely Dr. \_\_\_\_\_ would have come to the hospital if he received a call from the ER?
- **LAW**
  - Would federal law require him to examine the patient?
- **LAW → FACT**
  - Would a failure to come to the ER if called be negligent?

# Complying with the requirements

- Obligation to produce harmful information
- Strategic harm is not more important than relevance and proportionality
- No right to withhold unfavorable evidence
- Failure risks sanctions

# Complying with the requirements

- Examples of producing information or documents that harm your client
  - Text messages from client's phone (destroyed credibility)
  - Documentation of an admission against interest (ruined a defense)
  - Different version of a document that was produced originally by defendant before suit was filed (destroyed credibility)
    - Always a concern when defending a doctor or hospital
- I ask for anything that the other side might use against me.

# K.S.A. 60-226(e): Supplementation

(1) In general.

A party who has made a disclosure under subsection (b)(6), or who has responded to an interrogatory, request for production or request for admission, **must supplement** or correct its disclosure or response:

(A) In a timely manner if the party learns that in some material respect the disclosure or response is **incomplete** or **incorrect**, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

# K.S.A. 60-226(e): Supplementation

- Duty to supplement or correct discovery responses
- Applies to incomplete or incorrect information
- Triggered by new information learned
- Practice tip: always send a reminder to the other side to supplement.

# Proper objections



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# How to Properly Object to Discovery

- Relevance is not an objection
- Tie objections to proportionality and privilege
- Avoid boilerplate objections
- Rarely is overbreadth an objection
- “Premature” is not an objection
- State the objection specifically

# Proper objections

- RFP KSA 60-234(b)(2)
- Objection Transparency:
  - Specify if any responsive materials are withheld:
    - Prevents allegations of concealment
    - Enables court and adverse counsel to make an assessment of propriety of withholding them.
- Objections must:
  - Say exactly why the responsive materials are withheld, and produce non-objectionable portions

# Proper objections

- 60-226(b)(1): Nonprivileged matters relevant to claims or defenses
- 60-226(b)(7) Claiming privilege or protecting trial preparation materials.
  - (A) Information withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:(i) Expressly make the claim; and(ii) describe the nature of the documents, communications or things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

# Improper Objections

- Basic facts
  - INTERROGATORY NO. 1: State your name, residence address, business address, Social Security number (last 4 digits), medical license number(s), DEA number(s), and date of birth.
  - ANSWER: Defendant objects to this interrogatory as the information requested is irrelevant and not proportional to the needs of the case.  
Notwithstanding said objection,
  - [name, business address]
  - [nothing else provided].

# Improper Objections

- Contention interrogatories
  - INTERROGATORY number 22: Please state the factual basis, for each and every affirmative defense that Defendant listed in his Answer to Plaintiff's Petition.
  - ANSWER: Defendant objects to this interrogatory because it is premature, as discovery has just commenced and the full basis and facts supporting his affirmative defenses will be developed throughout discovery.

# Improper Objections

- The most common unjustified objections
  - Too early to give a full answer
  - Work product or attorney client
    - Something I discovered through my own hard work that I don't feel inclined to share with you (yet)
    - Something my client told me that I want to keep to myself

# Improper Objections

- OBJECTION
  - “Defendant cannot answer fully at this time because discovery is just beginning. This answer may be supplemented later, at the close of discovery, or at the time of the Final Pretrial Conference.”
- TRANSLATION
  - “Answering this question truthfully would give the other side an advantage because they could use the information to develop a better case against us”
- CORRECT ANSWER
  - “Here is what we know right now.”
  - No objections; no statement that it may be supplemented

# Improper objections

- OBJECTION
  - “Calls for work product and/or attorney/client privileged information
- TRANSLATION
  - “Answering this question truthfully might let the other side know how I (the attorney) view the case, and might give a clue as to the tricks I have up my sleeve (e.g., the information I want to spring on them during a deposition)”

# Improper Objections

- Example
  - RFP:
    - “Any and all statements, as defined by 60-226(b)(4)(C) preserved in any form, purportedly taken from any agent employee, or representative of [Defendant Hospital]”

# Improper Objections

- Response:
  - “Plaintiff objects to this request as it calls for attorney client privileged and work product privileged documents”
- What are the privileged documents?
- How is a statement from your adversary an attorney/client communication?
- A party can always obtain a copy of that party’s own statement.

# 60-226(b)(4)(C)

- (C) Previous statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and K.S.A. 60-237, and amendments thereto, applies to the award of expenses.
- A previous statement is either:(i) A written statement that the person has signed or otherwise adopted or approved; or(ii) a ... recording, or a transcription of it, that recites substantially verbatim the person's oral statement.

# Improper Objections

- “GENERAL OBJECTIONS
  - Plaintiff objects to these RFP to the extent they seek documents and/or information that are not relevant to the claims or defenses of the parties nor reasonably calculated to lead to the discovery of admissible evidence”
- Not really an objection, just a restatement of 60-226
- Not precise, specific
  - Explain why not relevant
- It’s a CYA.
  - When caught later with something that was responsive, Party might later claim they did not waive.

# Improper Objections

- “GENERAL OBJECTIONS
  - Plaintiff objects to these RFP of Documents to the extent they seek documents and/or information protected from discovery from the attorney-client and work product privileges.”
- Not specific, blanket assertion of privilege
- Does not describe what is withheld
- May constitute a waiver of the privilege

# Improper Objections

- “Without waiving this objection, Plaintiff will produce [non-objectionable documents] pursuant to the Court’s discovery timetable.”
- What is the “timetable” for producing a document for which there is no objection?
- What are the non-objectionable documents
- What are the objectionable documents?
- By saying “without waiving,” yet producing some documents, the party has waived the objection completely.

# Improper Objections

- *Sprint Communs. Co., L.P. v. Comcast Cable Communs., LLC*, No. 11-2684-JWL, 2014 U.S. Dist. LEXIS 16938, at \*7 (D. Kan. Feb. 11, 2014)
- Sprint objected to each of these requests on the basis that they sought privileged information. Despite its objections, however, for each of these requests Sprint stated, "Subject to and without waiver of the foregoing objections . . . Sprint will produce non-privileged responsive documents within its custody and control after a reasonably diligent search."

# Improper Objections

- The court recognizes that it has become common practice among many practitioners to respond to discovery requests by asserting objections and then answering "subject to" or "without waiving" their objections. This practice, however, is manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure. The court joins a growing number of federal district courts in concluding that such conditional answers are invalid and unsustainable.
- *Sprint Communs. Co., L.P. v. Comcast Cable Communs., LLC*, 2014 U.S. Dist. LEXIS 16938, at \*8

# Improper Objections

- A litigant with any viable objection to a discovery request would make that objection and then produce whatever portion of otherwise responsive documents it wished to produce. Under this approach, a party would have no obligation to indicate that its production was partial, and the opposing party would have no way of knowing the production was partial. Absent an indication of what, exactly, the responding party was objecting to, courts would have no way of assessing the propriety of the objections. Instead, courts would be flooded with motions to compel by litigants seeking to confirm that undisclosed responsive documents did not exist. And courts would then be forced to ask counsel, over and over again, "Do other documents exist?"
- *Sprint Communs. Co., L.P. v. Comcast Cable Communs., LLC*, at \*12

# To avoid waiver

- State
  - the objection;
  - what documents it applies to (and describe them sufficiently); and
  - produce the non-objectionable documents or information;
  - Put the objectionable and non-objectionable in different buckets and describe both.

# Privileges



# Privileges

- Keeping things secret from prying eyes?
- Hiding evidence from the other side?
- Legitimate protection of confidential communication

# Privileges

- Privileges are vitally important
- Legitimate protection of confidential communication

# Common privileges

- Attorney/client privilege
- Physician/patient privilege
- Risk management privilege
- Peer review privilege

# Privileges

- Communication privileges
  - K.S.A. 60-426 Attorney/client privilege
  - K.S.A. 60-427 Physician/patient privilege
  - K.S.A. 60-428 Marital privilege
- Document/opinion privileges
  - K.S.A. 60-226(b)(4) Work Product
  - K.S.A. 65-4922 and 4925 Risk management privilege
  - K.S.A. 65-4915 Peer review privilege

# Privileges

- Using assertion of Work Product as a shield from responding
  - “OBJECTION: Calls for work product and/or attorney/client privileged information”
  - TRANSLATION
    - “Answering this question truthfully might let the other side know how I (the attorney) view the case, and might give a clue as to the tricks I have up my sleeve (the information I want to spring on them during a deposition)”

# K.S.A. 60-226(b)(4): Work Product

4) Trial preparation; materials.

(A) Documents and tangible things.

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent. But, subject to subsection (b)(5), those materials may be discovered if: (i) They are otherwise discoverable under paragraph (1); and (ii) the party 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.

# K.S.A. 60-226(b)(4): Work Product

- (B) Protection against disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation.
- Rightly or wrongly, this approach is used with many privileges.

# Privileges

- According to many courts:
  - Facts are discoverable.
  - Opinions and conclusions are not
- This approach may go against statutory language
  - Adams v. St. Francis

# Privileges

- Confidential communications may be more truthful than practiced testimony
- In hospitals, when an incident occurs, it results in a report. There is a strict statutory privilege—the risk management privilege
- It is as broad as attorney client privilege

# Properly asserting privileges

- INTERROGATORY NO. 1: Please state whether or not you or any agent or employee of yours ever made or gave any statement, whether orally or in writing, to anyone regarding the care and treatment provided to [Plaintiff] (If the statement is claimed to be privileged, please provide only the person's name and date the statement was given). If your answer is in the affirmative, please state:
  - a. the name and address of each person to whom such statement was given;
  - b. the date each statement was made;
  - c. the form of each such statement—whether oral, in writing, stenographic transcription or otherwise;
  - d. the name and address of each person now having possession or custody of each statement; and,
  - e. the substance and content, as best as you recall, of each statement.

# Privileges

- ANSWER: None. The hospital has searched its files and found no documents evidencing a risk management or peer review investigation. [Liability insurer] did not take statements, but it has communicated with its insured. Those conversations are protected by the work product privilege.

# Privileges

- Proper privilege description/objection
  - “Objection: the request seeks privileged documents. See objection to Interrogatory --, which is incorporated herein by reference as though fully set forth. See also privilege log, provided with these responses.”
  - Interrogatory objection: “Risk management documents and/or peer review documents, which are privileged pursuant to KSA 65 – 4915, et seq. and KSA 65 – 4921, et seq. Defendant objects to the production of any such documents, but identifies the documents set forth in the privilege log.”

# Privilege Log

*Bennett v. Fieser*, No. 93-1004-MLB, 1993 U.S. Dist. LEXIS 21589  
(D. Kan. Oct. 25, 1993)

Defendants have asserted claims of privilege as to the following interrogatories:

Has your license to practice medicine ever been revoked, suspended, limited or altered in any fashion? If so, please state the specific details involved.

Have you ever had your staff privileges revoked, suspended, terminated, limited and/or altered in any fashion at any hospital? If so, when, where and why?

Have you ever been reprimanded, criticized or censured by any local, county, state or national medical organization? If so, please give details.

# Privilege Log

*Bennett v. Fieser*, No. 93-1004-MLB, 1993 U.S. Dist. LEXIS 21589 (D. Kan. Oct. 25, 1993)

Defendants have clearly failed to meet their burden of proof as to the risk management privilege. All that they have done at this point is to make a blanket claim that the documents requested are privileged. In order for the court to determine whether the documents are privileged, the court will require defendant ... to prepare a summary of each document for which a privilege or privileges has been asserted. See *Snowden v. Connaught Laboratories, Inc.*, 137 F.R.D. 325, 334 (D. Kan. 1991).

# Privilege Log

*Bennett v. Fieser*, No. 93-1004-MLB, 1993 U.S. Dist. LEXIS 21589  
(D. Kan. Oct. 25, 1993)

That summary must contain the following:(1) a brief description or summary of the contents of the document,(2) the date the document was prepared,(3) the person or persons who prepared the document,(4) to whom the document was directed, or for whom the document was prepared,(5) the purpose in preparing the document,(6) the privilege or privileges asserted as to that document,(7) how each element of the privilege or privileges is/are met as to that document.

# Sample Privilege Log

## PRIVILEGE LOG

Med Mal Plaintiff V. DEFENDANT HOSPITAL ET AL

### Abbreviation Guide and Elements of privileges asserted

**RM:** Risk Management Privilege pursuant to K.S.A. 65-4921, et seq.: Documents generated by or provided to a risk management officer or committee

**PR:** Peer Review Privilege pursuant to K.S.A. 65-4915, et seq.: Documents generated by or provided to a peer review officer or committee

Date	Bates #	RFP #	Author/Source	Recipient(s)	Purpose	Description/Summary	Privilege Asserted	Privilege Elements
May 9, 2024	0081-83	17, 25 28, 29	XXXXX XXXX	RM File/log	Incident report	Incident report prepared by XXXXX XXXX, RN at 0524 on May 9, 2024	RM	Statement by person involved; provided to risk mgt officer
May 10, 2024	0004	18	XXXXXX XXXXXX	XXXXXX XXXXXX	Follow up on med error	Communication between ER Director and provider re med error	RM	Discussion between PR officer and person involved in incident
May 10, 2024	0012-0016	18	XXXXXX XXXXXX	XXXXX XXXX	Follow up on med error	Communication between ER Director and nurse re med error	RM, PR	Discussion between PR officer and nurse involved in incident
June 20, 2024	0068	17, 25 28, 29	XXXXXXXX XXXX, XXX XXXXXXXX, MD	RM file/log	Summarize involvement of physician after incident	Recounts Dr. XXXXXXX's involvement at the request of XXXXXXX XXXXXXX around 0700 May 8 2024	RM	Generated by risk mgt officer; part of risk management file
June 20, 2024	0068	17, 25 28	XXXXXXXX XXXX, XXXXX XXXXX, DO	RM file/log	Summarize involvement of physician on call for ER	Interview with XXXXX XXXXX, DO regarding conversations she had with XXXXXXX XXXXXXX	RM	Statement by person involved in care; generated by risk mgt officer; part of RM file

# Sanctions for Noncompliance



# Motions to Compel & Sanctions – K.S.A. 60-237

- Evasive responses treated as failures
- Sanctions include fees, preclusion, dismissal
- Good faith meet-and-confer required

# Motions to Compel & Sanctions – K.S.A. 60-237

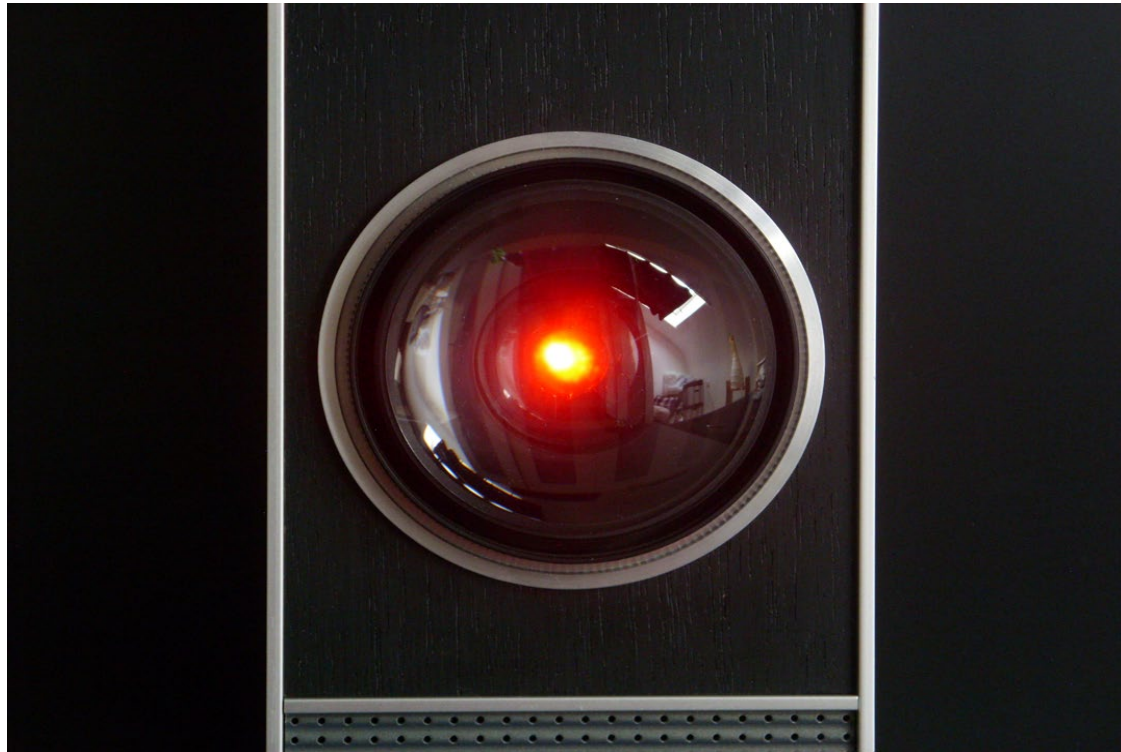
- (5) Payment of expenses; protective orders.
- (A) If the motion is granted, or disclosure or discovery is provided after filing. If the motion is granted, the court must, and if disclosure occurs before the motion is granted, the court may, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.
- But the court must not order this payment if:(i) The movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;(ii) the opposing party's nondisclosure, response or objection was substantially justified; or(iii) other circumstances make an award of expenses unjust.

# Motions to Compel & Sanctions – K.S.A. 60-237

(2) Sanctions ...

(A) For not obeying a discovery order. If a party ... fails to obey an order to provide or permit discovery, ... the court .. may issue further just orders. They may include the following:(i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;(iii) striking pleadings in whole or in part;(iv) staying further proceedings until the order is obeyed;(v) dismissing the action or proceeding in whole or in part;(vi) rendering a default judgment against the disobedient party; or(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

# Ethical Obligations



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# Ethical Duties in Discovery

- Fairness to opposing counsel (KRPC 3.4)
  - A lawyer shall not:
    - (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; ....
    - (d) 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;

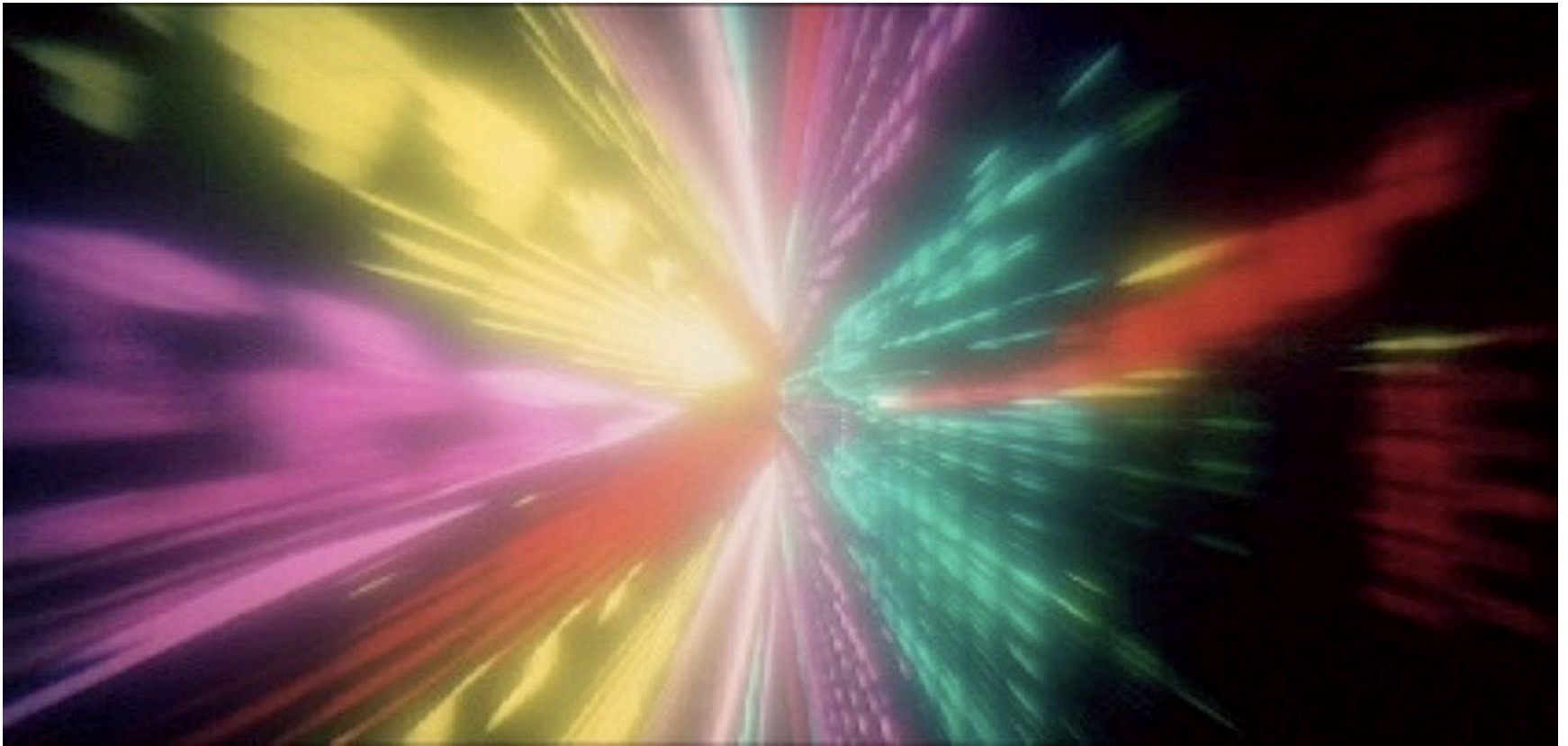
# Duty of Candor

- Zealous advocacy is required
- It is limited and must be balanced by the duty of candor to tribunal (KRPC 3.3):
  - (a) A lawyer shall not knowingly: (1) **make a false statement of fact** or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

# Balancing Zeal and Candor

- Object strategically but honestly
- Counsel clients about disclosure risks
- Counsel clients about non-disclosure risks
- Maintain credibility with the court

# Best practices



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# Best practices

- Good Faith and Compliance
- Producing non-objectionable information and clearly identifying withheld content.
- Explain burden or proportionality concerns

# Best practices

- American College of Trial Lawyers
- Code of Pretrial and Trial Conduct

# Best practices

1. A lawyer should conduct discovery efficiently to elicit relevant facts and evidence and not for an improper purpose, such as to harass, intimidate, unduly burden another party or a witness or to introduce unnecessary delay.

Overly broad document requests should be avoided by focusing on clear materiality and a sense of cost/benefit.

# Best practices

2. A lawyer should respond to written discovery in a reasonable manner and should not interpret requests in a strained or unduly restrictive way in an effort to avoid responding or to conceal relevant, nonprivileged information.

# Best practices

3. Objections to interrogatories, requests for production, and requests for admissions must be made in good faith and must be adequately explained and limited in a manner that fairly apprises the adversary of the material in dispute and the bona fide grounds on which it is being withheld.

# Best practices

4. When a discovery dispute arises, opposing lawyers must attempt to resolve the dispute by working cooperatively together. Lawyers should refrain from filing motions to compel or for court intervention unless they have genuinely tried, but failed, to resolve the dispute through all reasonable avenues of compromise and resolution.

# Best practices

5. Lawyers should claim a privilege only in appropriate circumstances. They must not assert a privilege in an effort to withhold or to suppress unprivileged information or to limit or delay a response.

# Complete discovery



# Thank you

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(Cite as: **2014 WL 545544 (D.Kan.)**)

## H

Only the Westlaw citation is currently available.

United States District Court,  
D. Kansas.  
**SPRINT COMMUNICATIONS CO., L.P.**, Plaintiff,  
v.  
**COMCAST CABLE COMMUNICATIONS, LLC**,  
et al., Defendants.  
**Sprint Communications Co., L.P.**, Plaintiff,  
v.  
Cable One, Inc., Defendant.  
**Sprint Communications Co., L.P.**, Plaintiff,  
v.  
Time Warner Cable, Inc., et al., Defendants.

Nos. 11–2684–JWL, 11–2685–JWL, 11–2686–JWL.  
Feb. 11, 2014.

Aaron E. Hankel, Ryan D. Dykal, B. Trent Webb, Shook, Hardy & Bacon LLP, Kansas City, MO, Robert H. Reckers, Shook, Hardy & Bacon LLP, Houston, TX, for Plaintiff.

David J. Lisson, Davis, Polk & Wardwell LLP, Alex H. Hu, Alyse L. Katz, Anna M. Ison, Julie S. Epley, Nathan L. Lipscomb, Anthony I. Fenwick, Shiwoong Kim, Matthew B. Lehr, Menlo Park, CA, John A. Watt, Michael J. Serra, Paul S. Penticuff, Thomas N. Sterchi, Baker, Sterchi, Cowden & Rice, LLC, Kansas City, MO, Edward Fu, Davis Polk & Wardwell, New York, NY, for Defendants.

### ORDER

**JAMES P. O'HARA**, United States Magistrate Judge.

\*1 These consolidated cases involve claims by **Sprint** Communications Company, L.P. that defendants are infringing twelve patents related to broadband and packet-based telephony products. Defendants

have filed a motion to compel **Sprint** to produce documents on four topics about which **Sprint** in-house attorneys testified in a separate patent-infringement lawsuit brought by **Sprint** against Vonage Holdings Corp. and Vonage America, Inc. (collectively, “Vonage”) (ECF doc. 153). In response to defendants' document requests seeking these documents, **Sprint** objected on the grounds that the documents were protected from disclosure by either the attorney-client privilege or the work-product doctrine. Defendants argue that to the extent the documents were once privileged, **Sprint** waived that privilege via the testimony in the *Vonage* trial. Because the undersigned U.S. Magistrate Judge, James P. O'Hara, finds that **Sprint's** response to the document requests waived any objection **Sprint** had to producing documents on two of the topics, the motion is granted in part. But because **Sprint's** objections were proper as to two of the topics, the motion also is denied in part.

### I. Background

In September 2007, U.S. District Judge John W. Lungstrum presided over a jury trial in the case of *Sprint Communications Company LP v. Vonage Holdings Corp.*,<sup>FN1</sup> involving claims by **Sprint** that Vonage had infringed patents from two related families of patents issued to named inventor Joseph Christie (the “Christie Patents”). During the *Vonage* trial, **Sprint** called two in-house attorneys, Michael Setter and Harley Ball, to testify about Christie's inventions, **Sprint's** evaluation of their patentability, **Sprint's** patent applications, and **Sprint's** decision to sue Vonage for infringement. **Sprint's** trial counsel, B. Trent Webb, also discussed these topics in his opening statement and closing argument.

FN1. Case No. 05–2433.

In these consolidated cases, seven Christie Patents are at issue, including five that were at issue in

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

*Nonage*.<sup>FN2</sup> On May 10, 2013, defendants served their First Set of Common Requests for Production to **Sprint**. A number of the specific requests sought documents relating to the subject matter of **Sprint's** disclosures during the *Nonage* trial.<sup>FN3</sup> Defendants accurately characterize these requests as seeking information related to the following four topics: “(1) assessments by **Sprint's** legal department of the patentability of Mr. Christie's purported inventions; (2) the preparation or prosecution of patent applications for such inventions (including instructions and other communications of **Sprint's** legal department relating thereto); (3) communications and analysis of **Sprint's** legal department concerning its pre-suit investigation into whether Vonage infringed the patents concerning Mr. Christie's purported inventions; and (4) communications among **Sprint's** legal department and its executives regarding authorization to contact Vonage about alleged infringement of such patents and to sue Vonage for such alleged infringement.”<sup>FN4</sup>

<sup>FN2</sup>. The five patents asserted both here and in *Nonage* are U.S. patent numbers 6,633,561, 6,463,052, 6,452,932, 6,473,429, and 6,298,064. The two additional Christie Patents asserted here are U.S. patent numbers 6,343,084 and 7,286,561. **Sprint** also asserts infringement by defendants of U.S. patent numbers 6,262,992, 6,330,224, 6,563,918, 6,697,340, and 6,639,912.

<sup>FN3</sup>. ECF doc. 155–3, Request Nos. 18–20, 23, 43, 45.

<sup>FN4</sup>. ECF doc. 154 at 6–7.

\*2 **Sprint** responded to the document requests on June 13, 2013, asserting objections on several grounds, including (as relevant here) that the information sought was “protected from discovery by the attorney-client privilege, work product doctrine, and/or any other applicable privilege or immunity.”

<sup>FN5</sup> But with respect to three requests which sought information on topics one and two above, **Sprint** stated that it would produce non-privileged and responsive documents “subject to and without waiving” its objections.<sup>FN6</sup>

<sup>FN5</sup>. ECF doc. 155–6.

<sup>FN6</sup>. *Id.* at responses to Request Nos. 18–20.

Defendants now move the court to compel **Sprint** to produce documents related to the four topics at issue, asserting that **Sprint's** presentation in the *Nonage* trial waived any attorney-client or work-product protection to which the documents were otherwise entitled.

## II. Waiver of Discovery Objections

Defendants' document requests numbered 18–20 sought documents that relate to **Sprint's** meetings with Christie, **Sprint's** assessment of the patentability (including the search for and analysis of prior art) of purported inventions in the **Sprint** Patent Family, and **Sprint's** prosecution of patent applications for Christie's inventions (i.e., topics one and two). As noted above, **Sprint** objected to each of these requests on the basis that they sought privileged information. Despite its objections, however, for each of these requests **Sprint** stated, “Subject to and without waiver of the foregoing objections ... **Sprint** will produce non-privileged responsive documents within its custody and control after a reasonably diligent search relating to the non-privileged facts discussed during the *Sprint v. Vonage trial* (if any).”<sup>FN7</sup> This purported reservation of rights by **Sprint** was improper and ultimately has the effect of waiving **Sprint's** objections to these specific document requests.

<sup>FN7</sup>. *Id.*

The court recognizes that it has become common practice among many practitioners to respond to

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

discovery requests by asserting objections and then answering “subject to” or “without waiving” their objections. This practice, however, is manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure. The court joins a growing number of federal district courts in concluding that such conditional answers are invalid and unsustainable.

In this district, U.S. Magistrate Judge David J. Waxse explained the confusing nature of conditional answers. In *Pro Fit Management, Inc. v. Lady of America Franchise Corp.*, the defendant asserted privilege objections to the plaintiff’s document requests, but then stated, subject to its objections, it would produce responsive, non-privileged documents.<sup>FN8</sup> The plaintiff filed a motion to compel, arguing that such conditional responses “obscure[ ] potentially discoverable information” and leave the requesting party “with reason to believe that important documents have not been produced without a mechanism to compel production.”<sup>FN9</sup> Judge Waxse agreed with the plaintiff, ruling that when a party responds that it is producing documents “subject to and without waiving its objections,” the requesting party “is left guessing as to whether [the producing party] has produced all documents, or only produced some documents and withheld others on the basis of privilege.”<sup>FN10</sup> Federal district courts in Florida have reached the same conclusion. For example, in *Consumer Electronics Association v. Compras and Buys Magazine, Inc.*, the court held that objections followed by an answer “preserve[ ] nothing and serve [ ] only to waste the time and resources of both the Parties and the Court.”<sup>FN11</sup> The court reasoned that “such practice leaves the requesting Party uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered.”<sup>FN12</sup>

FN8. No. 08–2662, 2011 WL 939226, at \*7–9 (D.Kan. Feb. 25, 2011).

FN9. *Id.* at \*8.

FN10. *Id.* at \*9. See also *Strasburg–Jarvis, Inc. v. Radiant Sys., Inc.*, No. 06–2552, 2009 WL 129361, at \*5–6 (D.Kan. Jan. 20, 2009) (holding that an interrogatory response stating, “subject to the foregoing objections,” the responding party “has or will produce the documents in its possession,” was insufficient because “it is unclear whether [the producing party] has fully complied with this interrogatory”).

FN11. No. 08–21085, 2008 WL 4327253, at \*2 (S.D.Fla. Sept. 18, 2008); see also *Mann v. Island Resorts Dev., Inc.*, No. 3:08cv297/RS/EMT, 2009 WL 6409113, at \*2–3 (N.D.Fla. Feb. 21, 2009) (holding objection waived where party answered in spite of objection).

FN12. *Consumer Elec. Ass’n*, 2008 WL 4327253, at \*2.

\*3 In addition to their failure to convey any information, conditional responses are not permitted by the Federal Rules of Civil Procedure. Rule 34(b)(2) permits only three responses to a request for production of documents: produce the documents as requested, “state an objection to the request” as a whole, or state an “objection to part of [the] request” provided that the response specifies the part objected to and responds to the non-objectionable portion.<sup>FN13</sup> “Objecting but answering subject to the objection is not one of the allowed choices under the Federal Rules.”<sup>FN14</sup> Thus, no objections maybe “reserved” under the rules; “they are either raised or they are waived.”<sup>FN15</sup>

FN13. *Haeger v. Goodyear Tire & Rubber Co.*, 906 F.Supp.2d 938, 976 (D.Ariz.2012) (quoting Fed.R.Civ.P. 34(b)(2)).

FN14. *Tardif v. People for the Ethical*

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

*Treatment of Animals*, No. 2:09-cv-537-FtM-29SPC, 2011 WL 1627165, at \*1 (M.D. Fla. April 29, 2011); see also *C.T. v. Liberal Sch. Dist.*, Nos. 06-2093, 06-2360, 2008 WL 394217, at \*5 (D.Kan. Feb. 11, 2008) (holding that response listing various objections but stating that documents would be produced “without waiving said objections” was improper because it “is neither an objection, nor an adequate identification of the responsive document”); *Haeger*, 906 F.Supp.2d at 976 (“What Goodyear could not do, but what it did, was combine its objections with a partial response without any indication that the response was, in fact, partial.”).

FN15. *Tardif*, 2011 WL 1627165, at \*2.

Finally, courts have recognized that conditional responses violate common sense. In *Haeger v. Goodyear Tire and Rubber Co.*, U.S. District Judge Roslyn O. Silver of the District of Arizona concluded that if Rule 34 were read to allow parties to combine objections with a partial response that does not specify whether other potentially responsive material is being withheld, “discovery would break down in practically every case.”<sup>FN16</sup> Judge Silver explained,

FN16. 906 F.Supp.2d at 977.

A litigant with any viable objection to a discovery request would make that objection and then produce whatever portion of otherwise responsive documents it wished to produce. Under this approach, a party would have no obligation to indicate that its production was partial and the opposing party would have no way of knowing the production was partial. Absent an indication of what, exactly, the responding party was objecting to, courts would have no way of assessing the propriety of the objections. Instead, courts would be flooded with motions to compel by litigants seeking to confirm that undisclosed

responsive documents did not exist. And courts would then be forced to ask counsel, over and over again, “Do other documents exist?”<sup>FN17</sup>

FN17. *Id.*

Similarly, though more succinctly, the *Tardif* court concluded, “answering subject to an objection lacks any rational basis. There is either a sustainable objection to a question or request or there is not.”<sup>FN18</sup>

FN18. *Tardif*, 2011 WL 1627165, at \*2.

For these reasons, the court follows its sister courts in holding, “whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands.”<sup>FN19</sup> Applying this rule, **Sprint's** conditional answers to defendants' document requests numbered 18–20 waived any objections **Sprint** had to those requests.<sup>FN20</sup> **Sprint's** objections to the requests, accordingly, are overruled, and defendants' motion to compel is granted to the extent that it seeks responses to these requests. **Sprint** is ordered to produce information related to (1) assessments by **Sprint's** legal department of the patentability of the Christie Inventions, and (2) the preparation or prosecution of patent applications for such inventions.

FN19. *Estridge v. Target Corp.*, No. 11-61490, 2012 WL 527051, at \*2 (S.D.Fla. Feb. 16, 2012) (quoting *Tardif*, 2011 WL 1627165, at \*2).

FN20. The same can be said of **Sprint's** conditional response to Request No. 51, which defendants assert also seeks information on the first two topics. See ECF doc. 154 at 11 n. 8.

### III. Applicability of the Attorney–Client Privilege and Work–Product Doctrine

\*4 Defendants' motion to compel also asks the

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

court to compel **Sprint** to produce documents responsive to Request No. 43 to the extent that it seeks documents that relate to communications and analysis by **Sprint's** legal department concerning **Sprint's** investigation into whether Vonage infringed the Christie Patents (topic three); and documents responsive to Request No. 45 to the extent that it seeks documents that relate to communications among **Sprint's** legal department and executives regarding authorization to contact Vonage about alleged infringement of the Christie Patents and to sue Vonage for such alleged infringement (topic four). As it did in response to document Request Nos. 18–20, **Sprint** objected to Request Nos. 43 and 45 on the basis that the requests sought information protected from discovery by the attorney-client privilege and/or the work-product doctrine. However, **Sprint** did not waive its objections in Request Nos. 43 and 45 by conditionally answering this discovery. The court therefore evaluates these objections on their merits.

#### A. Legal Standards

Because this litigation arises out of a federal statutory scheme, federal law governs the application of the attorney-client privilege and work-product doctrine.<sup>FN21</sup> Moreover, because these privilege issues are deemed “procedural matters that are not unique to patent issues,” the law of the circuit in which this court sits (as opposed to Federal Circuit law) applies.<sup>FN22</sup>

FN21. Fed.R.Evid. 501; *New Jersey v. Sprint Corp.*, 258 F.R.D. 421, 425 (D.Kan.2009).

FN22. *In re Pioneer H–Bred Int'l, Inc.*, 238 F.3d 1370, 1374 (Fed. Cir.2001).

Under federal common law, the essential elements of the attorney-client privilege are: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently

protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection is waived.<sup>FN23</sup> The party asserting the privilege bears the burden of establishing that the elements are met.<sup>FN24</sup>

FN23. *New Jersey v. Sprint*, 258 F.R.D. at 425.

FN24. *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 618 (D. Kan.2001).

Defendants argue that the eighth element, absence of waiver, has not been established here. The burden of showing that the attorney-client privilege has not been waived remains with **Sprint**, the party claiming the privilege.<sup>FN25</sup> “Because confidentiality is key to the privilege, ‘[t]he attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party.’”<sup>FN26</sup> However, revealing the general topic of discussion between an attorney and client does not waive the privilege, unless the revelation also reveals the substance of a protected communication.<sup>FN27</sup> Likewise, “[u]nderlying facts are not protected by the privilege” and disclosing them does not waive the privilege over protected communications.<sup>FN28</sup>

FN25. *New Jersey v. Sprint*, 258 F.R.D. at 426; *Lewis*, 203 F.R.D. at 621.

FN26. *In re Quest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1186 (10th Cir.2006) (quoting *United States v. Ryans*, 903 F.2d 731, 741 n. 13 (10th Cir.1990)).

FN27. *Williams v. Sprint/United Mgmt. Co.*, No. 03–2200, 2006 WL 1867478, at \*10 (D.Kan. July 1, 2006).

FN28. *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981)).

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

Like the attorney-client privilege, federal law governs the applicability of the workproduct doctrine in this case.<sup>FN29</sup> For documents to be protected under this doctrine, the party claiming the protection must demonstrate that “(1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party.”<sup>FN30</sup>

FN29. See *Western Res., Inc. v. Union Pacific R.R. Co.*, No. 00–2043, 2002 WL 181494, at \*4 n. 4 (D.Kan. Jan. 31, 2002) (citing *Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134, 139 (D.Kan.1996)).

FN30. *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 247 F.R.D. 656, 657 (D.Kan.2007) (citing *Johnson v. Gmeinder*, 191 F.R.D. 638, 643 (D.Kan.2000)).

\*5 “The privilege derived from the work-product doctrine is not absolute,” however, and may be waived.<sup>FN31</sup> The Supreme Court has recognized that work-product protection is waived at trial when a party elects to call an attorney or his agent as a witness and “attempts to make a testimonial use” of work-product materials.<sup>FN32</sup> In that instance, the party waives the privilege “with respect to matters covered in his testimony.”<sup>FN33</sup> In contrast to the attorney-client privilege, “the party asserting waiver of work product immunity, rather than the party asserting the work product protection, [has] the burden to establish waiver.”<sup>FN34</sup>

FN31. *United States v. Nobles*, 422 U.S. 225, 239 (1975).

FN32. *Id.* at 240 n. 14.

FN33. *Id.* at 239.

FN34. *Western Res.*, 2002 WL 181494, at \*4;

see also *ICE Corp. v. Hamilton Sundstrand Corp.*, No. 05–4135, 2007 WL 4239453, at \*3 (D.Kan. Nov. 30, 2007).

In this case, defendants assert waiver of attorney-client privilege and work-product protection not only as to the actual information disclosed by **Sprint** during the *Nonage* trial, but also to undisclosed information on the same subject matters.<sup>FN35</sup> When a subject-matter waiver has occurred, the waiver extends to subsequent litigation, even if that subsequent litigation involves a new adversary.<sup>FN36</sup>

FN35. See Fed.R.Evid. 502. Under Rule 502(a), subject-matter waiver is limited to situations in which intentionally disclosed communication or information “ought in fairness ... be considered together” with undisclosed communication or information concerning the same subject matter.

Congress enacted Rule 502 on September 19, 2008, and provided that “[t]he amendments made by this Act shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.” Pub.L. No. 110–322 § 1(c). The *Nonage* trial occurred in 2007, but all parties presume Rule 502’s application. Indeed, Congress noted that Rule 502(a) “does not alter the substantive law regarding when a party’s strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context.” Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 Cong. Rec. H7818–H7819 (Sept. 8, 2008).

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

FN36. See *GFI, Inc. v. Franklin Corp.*, 265 F.3d 1268, 1273 (Fed.Cir.2001) (holding that when the plaintiff's patent attorney testified in an earlier trial about "his state of mind, knowledge of prior art, and communications with his client," he waived the attorney-client privilege with respect to "all communications pertaining to the subject matter of the communications"); *Info-Hold, Inc. v. TruSONIC, Inc.*, No. 1:06cv543, 2008 WL 2949399, at \*5 (S.D. Ohio July 30, 2008) (finding subject-matter waiver where the plaintiff's Fed.R.Civ.P. 30(b) witness testified in an unrelated patent-infringement lawsuit about letters from counsel).

## B. Analysis

Defendants argue that during the *Nonage* trial, **Sprint** selectively disclosed its internal legal communications and analysis to impress upon the jury the merits of its claims that Vonage was infringing **Sprint's** patents. Defendants assert that by revealing its attorneys' communications and analyses, **Sprint** waived privilege as to the subject matters it placed at issue: **Sprint's** investigation into whether Vonage infringed the Christie Patents (topic three) and **Sprint's** decision to contact and sue Vonage (topic four). Defendants argue that they need access to information on these subject matters so that they may challenge the narratives **Sprint** presented in *Nonage* and has indicated it will present in these cases. According to defendants, all information related to these subject matters must in fairness be considered together. The court will separately consider the disclosures **Sprint** made as to each of these subject matters.

### *Information about Sprint's Investigation of Nonage*

Defendants take issue with the following testimony and statements of **Sprint's** counsel related to **Sprint's** investigation of whether Vonage infringed the Christie Patents:

- In his opening statement, Mr. Webb stated that Mr. Ball began an investigation into Vonage and that the **Sprint** legal department "gathered all the material they could fin[d] about Vonage and evaluated [it]." Mr. Webb stated that **Sprint's** legal department "looked at those 80 patents in view of what Vonage was doing and they believed it infringed 43 patents" and an outside law firm "agreed."

- Mr. Ball testified that once he suspected Vonage of having voice over packet technology, he began an investigation into whether Vonage was using **Sprint's** purported technology. Mr. Ball testified that this investigation led him to conclude that Vonage was infringing "a number of **Sprint's** patents."

- Mr. Ball testified that **Sprint** hired two law firms to research Vonage's architecture. **Sprint's** legal team then "walked through" with the law firms "the Vonage architectures that we believed were being used and the specific claims and particular claims in looking at each element of those limitations of the claims based on what we believed that Vonage was doing."

\*6 Defendants argue that these disclosures "revealed substantive attorney communications and analysis." FN37 The court disagrees. Instead, the court finds that these disclosures revealed facts, general topics of attorney-client discussions, and legal conclusions.

FN37. ECF doc. 154 at 26.

First, **Sprint's** revelations that (1) **Sprint's** legal department investigated Vonage, (2) gathered information about Vonage's architecture, and (3) hired outside law firms to research and evaluate Vonage's architecture simply cannot be classified as anything other than facts. As stated above, "Underlying facts are not protected by the privilege." FN38 Similarly,

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

neither the acts or services performed by an attorney during the course of his representation, nor the scope of representation, are within the attorney-client privilege because they are not “communications.”<sup>FN39</sup>

FN38. *Williams*, 2006 WL 1867478, at \*10 (citing *Upjohn*, 449 U.S. at 396).

FN39. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 675 (D.Kan.2005).

Second, Mr. Ball's testimony that **Sprint's** legal team “walked though” with outside counsel Vonage's architecture and **Sprint's** claims reveals nothing more than the topic of **Sprint's** discussions with its attorneys. “Revealing the general topic of discussion between an attorney and client does not waive the privilege, unless the revelation also reveals the substance of a protected communication.”<sup>FN40</sup> Mr. Ball never testified to any specific communications that were exchanged nor any legal advice that **Sprint** might have been given. The revelation of the general discussion topic between **Sprint** and its attorneys will not be held to reveal protected communications.<sup>FN41</sup>

FN40. *New Jersey v. Sprint*, 258 F.R.D. at 426. See also *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir.1989) (holding that the attorney-client privilege is waived only when the substance of a privileged communication is voluntarily disclosed to a third party); *Williams*, 2006 WL 1867478, at \*10 (holding that for testimony to constitute a waiver of the attorney-client privilege, it must disclose the substance of privileged communications); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. at 675 (holding that the subject matter of meetings with an attorney is not protected by the attorney-client privilege).

FN41. See *Williams*, 2006 WL 1867478, at \*10 (holding that testimony about defendant's directive to counsel to “run the adverse impact at different levels” did not waive the attorney-client privilege); *New Jersey v. Sprint*, 258 F.R.D. at 427–28 (holding that testimony stating that legal counsel advised the defendant that it need not publicly disclose tax shelter issues did not waive the attorney-client privilege because it did not disclose the substance of the legal advice received).

Third, legal conclusions by Mr. Ball and **Sprint's** outside legal counsel that Vonage was infringing **Sprint's** patents cannot be deemed privileged. Defendants assert that testimony about these conclusions reveal the substance of communications between **Sprint** and its counsel: that Vonage infringed **Sprint's** patents. But the court agrees with **Sprint** that the “ultimate legal conclusions of a party are always implicated at a trial, because it is those conclusions that lead parties to file and pursue lawsuits.”<sup>FN42</sup> The court does not believe that this is the type of substantive communication that privilege protects. **Sprint** did not reveal its attorney's reasoning and analysis behind these conclusions (which might be protected by the attorney-client privilege or work-product doctrine).<sup>FN43</sup> Defendants have cited no case holding that disclosure of a legal conclusion at trial waives privilege as to specific communications about the legal conclusions.

FN42. ECF doc. 169 at 9.

FN43. See *New Jersey v. Sprint*, 258 F.R.D. at 427–28 (holding that testimony stating that legal counsel advised the defendant that it need not publicly disclose tax shelter issues did not waive the attorney-client privilege because it did not disclose the substance of the legal advice received).

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

In addition to defendants' waiver arguments based on **Sprint's** alleged partial disclosure of protected information, defendants argue that **Sprint** implicitly waived the attorney-client privilege by placing privileged communications about its investigation into Vonage "at issue."<sup>FN44</sup> Under the implied waiver doctrine recognized by this court, a party waives the attorney-client privilege when the party places information protected by the privilege "in issue," and where allowing the privilege to protect against disclosure of the information would be "manifestly unfair to the opposing party."<sup>FN45</sup> Waiver will not be triggered unless a party indicates an intent to "assert the privilege in aid of" or "invoke the privilege in furtherance of" a claim or defense in the case.<sup>FN46</sup> Defendants argue that during the *Vonage* trial, **Sprint** placed at issue its attorney communications and analysis about possible infringement by Vonage.

FN44. ECF doc. 154 at 26.

FN45. *Williams v. Sprint/United Mgmt. Co.*, 464 F.Supp.2d 1100, 1104–05 (D.Kan.2006) (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975)); *New Jersey v. Sprint*, 258 F.R.D. at 430.

FN46. *Williams*, 464 F.Supp.2d at 1107 (quoting *Hearn*, 68 F. R.D. at 581).

\*7 The court finds this argument tenuous at this point in the instant litigation. First, defendants have not demonstrated that implicit waiver could have been found in *Vonage*, even if it had been asserted. Specifically, defendants have not demonstrated that **Sprint** relied on the advice or communications of its counsel to prove a claim or justify certain conduct on **Sprint's** part,<sup>FN47</sup> nor that if **Sprint** had so done, it was "manifestly unfair" to Vonage.<sup>FN48</sup> Second, defendants have not presented any support for their inferred argument that implicit waiver (in contrast to subject matter waiver based on explicit waiver) in one case can carry

over to a subsequent case.<sup>FN49</sup> Given the fairness consideration at issue in implicit waiver situations-i.e., manifest unfairness to the opposing party-the court is not persuaded that implicit waiver automatically carries over to subsequent cases. Finally, defendants have not demonstrated that **Sprint** plans to rely on the advice that counsel gave it with respect to possible infringement by *Vonage* to prove a claim in *this case*. The court will follow the approach taken in *Williams* and *New Jersey v. Sprint* by allowing defendants to revisit this issue should **Sprint** "affirmatively and voluntarily inject the reliance on counsel issue at trial or in subsequent briefing" in *this* action.<sup>FN50</sup>

FN47. See *New Jersey v. Sprint*, 258 F.R.D. at 430 ("Further, the testimony of the witness did not indicate that the defendant intended to use advice of counsel to justify any conduct on its part.")

FN48. See *Williams*, 464 F.Supp.2d at 1114 (quoting *Hearn*, 68 F.R.D. at 581).

FN49. Indeed, defendants only assert that "[i]ntentional disclosures of privileged or protected information generally results in a subject-matter waiver in subsequent litigation." ECF doc. 154 at 17 (emphasis added).

FN50. *Williams*, 464 F.Supp.2d at 1115 n. 16; *New Jersey v. Sprint*, 258 F.R.D. at 433.

The court concludes that the information **Sprint** disclosed during the *Vonage* trial about its investigation of Vonage (topic 3) did not reveal any privileged communication. Revealing non-privileged information, of course, does not waive protection accorded privileged information. Thus, to the extent **Sprint** asserts a privilege objection to producing information responsive to document Request No. 43, that objection is sustained.

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

*Information about Sprint's Decision to Contact and Sue Vonage*

Defendants take issue with the following testimony and statements of **Sprint's** counsel related to **Sprint's** decision to contact and sue Vonage:

- Mr. Webb stated in his opening statement that Mr. Ball talked to **Sprint** executives about his concern that Vonage infringed the Christie Patents to obtain authorization to contact Vonage.

- Mr. Ball testified that after he received the infringement analysis from the outside law firms, he “began the process of talking with various members of [ **Sprint's** ] senior management about the situation and discussing those issues with them and because, ... sending a letter to somebody else in the telecommunications industry in essence alleging ... that they are using your patents is considered a serious allegation within **Sprint** and so it required a number of levels for [ **Sprint** ] to even clear that path to even send out the first letter[,] so I started heading down that path and obtained approval.”

- **Sprint's** counsel introduced five letters sent from **Sprint** to Vonage alleging infringement, eliciting testimony from Mr. Ball regarding their contents, his authorization to send each letter, and his receipt of authorization to file the lawsuit.

\*8 • In his closing argument, Mr. Webb noted that **Sprint** had never filed a patent case before and stated, “It never would have filed this unless [it] believed it was a strong case [and the] right thing to do[.] [B]efore it filed it went through a detailed thorough investigat[ion] process twice with outside law firms and with internal people at **Sprint**[.] [T]hey wanted to make sure they got it [ ] right.”

Defendants argue that these disclosures revealed “communications between Mr. Ball and **Sprint** executives.” <sup>FN51</sup> According to defendants, Mr. Ball's

testimony “not only revealed that these meetings occurred, it also revealed the substance of these meetings-Mr. Ball's explanation of his understanding of Vonage's infringement based on his analysis of the information from outside law firms-and the culminating communications to Mr. Ball of authorization to (1) send a letter to Vonage alleging that it was using **Sprint's** Christie Patents, and (2) file a lawsuit against Vonage.” <sup>FN52</sup>

<sup>FN51</sup>. ECF doc. 154 at 27.

<sup>FN52</sup>. *Id.*

Again, however, the court finds that defendants are over-stating the significance and extent of what **Sprint** actually disclosed regarding its internal communications about its decision to contact and sue Vonage. **Sprint** revealed nothing more than the subject matters of Mr. Ball's discussions with **Sprint** executives-specifically, Vonage's possible infringement of **Sprint's** patents and authorization to contact Vonage. Because **Sprint** did not disclose the substance of the communications, **Sprint** did not waive attorney-client protection over the communications.<sup>FN53</sup> While it could again be said that the subject matter of the communications necessarily reveals the legal conclusion reached by Mr. Ball and conveyed to his client (i.e., that Vonage infringed **Sprint** patents), defendants have presented no authority demonstrating that privilege is waived in this instance.<sup>FN54</sup> Nor could the introduction of **Sprint's** letters to Vonage have waived the attorney-client privilege, as the letters were never privileged.<sup>FN55</sup>

<sup>FN53</sup>. See, e.g., *New Jersey v. Sprint Corp.*, 258 F.R.D. at 426–28 (holding that testimony stating that company's board of directors discussed legal advice of counsel about two specific topics and then acted a certain way did not result in waiver of the attorney-client privilege because it did not reveal the

Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)  
(Cite as: 2014 WL 545544 (D.Kan.))

substance of the legal advice).

[FN54](#). Indeed, the caselaw is to the contrary.  
*See id.*

[FN55](#). *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. at 675 (holding that documents prepared by counsel submitted to a third party outside the attorney-client relationship “removes any cloak of privilege”).

The court concludes that the information **Sprint** disclosed during the *Vonage* trial about Mr. Ball's communications with **Sprint** executives regarding authorization to contact Vonage about alleged infringement and to sue Vonage for such alleged infringement (topic four) did not reveal any privileged communication. As noted above, revealing non-privileged information does not waive protection accorded privileged information. Thus, to the extent **Sprint** asserts a privilege objection to producing information responsive to document Request No. 45, that objection is sustained.

Finally, it bears mentioning that although both sides have set forth the standards for work-product protection and waiver, defendants have not made any specific arguments to show that **Sprint** made testimonial use of work-product materials during *Vonage* such that it waived work-product protection over documents and documents related to the same subject matter.<sup>[FN56](#)</sup> Thus, the court need not further address the issue of work-product waiver.

[FN56](#). Defendants simply make conclusory statements about work-product waiver in a footnote of their reply brief. ECF doc. 173 at 18 n. 8.

**\*9 IT IS THEREFORE ORDERED** that defendants' motion to compel is granted in part and denied in part, as set forth herein.

D.Kan.,2014.

Sprint Communications Co., L.P. v. Comcast Cable Communications, LLC  
Not Reported in F.Supp.2d, 2014 WL 545544 (D.Kan.)

END OF DOCUMENT

# PRIVILEGE LOG

## Draper v. CMCI, et al.

### PRIVILEGE LOG

#### DRAPER V. CMCI ET AL

**Abbreviation Guide and Elements of privileges asserted**

**RM: Risk Management Privilege pursuant to K.S.A. 65-4921, et seq.: Documents generated by or provided to a risk management officer or committee**

**PR: Peer Review Privilege pursuant to K.S.A. 65-4915, et seq.: Documents generated by or provided to a peer review officer or committee**

Date	Bates #	RFP #	Author/Source	Recipient(s)	Purpose	Description/Summary	Privilege Asserted	Privilege Elements
May 9, 2024	0081-83	17, 25 28, 29	XXXXX XXXX	RM File/log	Incident report	Incident report prepared by XXXXX XXXX, RN at 0524 on May 9, 2024	RM	Statement by person involved; provided to risk mgt officer
May 10, 2024	MACK00 04	18	XXXXXX XXXXXX	XXXXXX XXXXXX	Follow up on med error	Communication between ER Director and provider re med error	RM	Discussion between PR officer and person involved in incident
May 10, 2024	MOSS00 12-0016	18	XXXXXX XXXXXX	XXXXX XXXX	Follow up on med error	Communication between ER Director and nurse re med error	RM, PR	Discussion between PR officer and nurse involved in incident
June 20, 2024	0068	17, 25 28, 29	XXXXXXXX XXXX, XXX XXXXXXXX, MD	RM file/log	Summarize involvement of physician after incident	Recounts Dr. XXXXXXX's involvement at the request of XXXXXX XXXXXXX around 0700 May 8 2024	RM	Generated by risk mgt officer; part of risk management file
June 20, 2024	0068	17, 25 28	XXXXXXXX XXXX, XXXX XXXX, DO	RM file/log	Summarize involvement of physician on call for ER	Interview with XXXXX XXXXX, DO regarding conversations she had with XXXXXX XXXXXXX	RM	Statement by person involved in care; generated by risk mgt officer; part of RM file

**PRIVILEGE LOG**  
**Draper v. CMCI, et al.**

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# Code of Pretrial and Trial Conduct



AMERICAN COLLEGE  
OF TRIAL LAWYERS



## AMERICAN COLLEGE OF TRIAL LAWYERS

Please accept this copy of the Code of Pretrial and Trial Conduct published by the American College of Trial Lawyers. The development of this Code by the Fellows of the College and its distribution to persons and institutions engaged in all aspects of the administration of justice represents an important part of the execution of the College's mandate to improve and elevate standards of trial practice, the administration of justice and the ethics of the profession.

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice.

The College is confident that utilization of this Code in the course of legal proceedings in the courts and as teaching aid at the Bar and in the nation's law schools will represent a positive contribution to improving and elevating standards of trial practice, the administration of justice and the ethics of the profession.

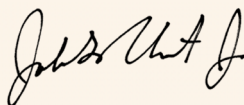
## Message from the Chief Justice of the United States

For more than fifty years, the American College of Trial Lawyers has promoted professionalism in the conduct of trial litigation. Its authoritative Code of Trial Conduct, first published in 1956, has served as an enduring landmark in the development of professional standards for advocates.

The College continues those efforts through the publication of its revised and enlarged Code of Pretrial and Trial Conduct. This comprehensive resource sets out aspirational principles to guide litigators in all aspects of their work as advocates of client interests. The Code looks beyond the minimum ethical requirements that every lawyer must follow and instead identifies those practices that elevate the profession and contribute to fairness in the administration of justice.

As Justice Frankfurter noted, “An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.” I encourage lawyers who engage in trial work to observe and advance the principles that the College has set forth in this volume.

I commend the American College of Trial Lawyers for its leadership in defining and refining the standards of professionalism that are vital to our system of justice.



Hon. John G. Roberts, Jr.  
Chief Justice of the United States



**“I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto.”**

*- Sir Francis Bacon*

# Table of Contents

<b>Forward</b> .....	<b>1</b>
<b>Preamble</b> .....	<b>2</b>
<b>Code of Pretrial and Trial Conduct</b> .....	<b>3</b>
Qualities of a Trial Lawyer .....	3
Obligations to Clients .....	3
Obligations to Colleagues .....	4
Obligations to the Court .....	4
Obligations to the System of Justice .....	5
Motions and Pretrial Procedure .....	6
Discovery .....	9
Relationships with Witnesses and Litigants .....	10
Trial .....	12

Approved by the Board of Regents June 2009

## Forward

The Legal Ethics and Professionalism Committee of the American College of Trial Lawyers (the “College”) is charged with the following mandate:

To advance, improve, and promote ethical standards and professionalism in the trial bar in all its aspects in both the United States and Canada as well as to engage in such other activities as may be directed by the Board of Regents.

All jurisdictions have codes of conduct that prescribe minimum standards for disciplinary purposes. There is no need here to duplicate such standards. This ACTL Code represents an attempt by the College to set down aspirational, rather than minimal, guidelines for trial lawyers and judges. The problem in trial practice today is not that lawyers violate the ethical rules, although some lawyers do. Most lawyers know the rules and try to comply. The real problem is the gradual corrosion of the profession’s traditional aspirations, which are:

- Honor for values such as honesty, respect and courtesy toward litigants, opposing advocates and the court;
- A distaste for meanness, sharp practice, and unnecessarily aggressive behavior;
- Engagement in public service;
- A focus on the efficient, fair preparation and trial of cases; and
- A role as agent for counseling and for the resolution of disputes.

Despite what the profession says, the profession often acts as if these values are inconsistent with effective advocacy in an adversary system of justice. The College is uniquely positioned to lead the way in changing these attitudes because it strives to offer Fellowship only to those lawyers who embody the skill and values to which they and the profession should aspire. The College cannot lead by focusing on the lowest floor of acceptable behavior.

The College sees the new code as one that can be endorsed by courts, that can be profitably used in training programs by law schools and bar organizations, and that describes the values that the Fellows of the American College of Trial Lawyers endorse and practice daily.

The new Code of Pretrial and Trial Conduct is a product that the College believes can be endorsed by courts and the profession as articulating the level of conduct to which all members of our profession should aspire. If trial lawyers practice these principles the profession will begin a process of change that benefits lawyers, litigants, and our system of justice.

## Preamble

Admission to the Bar is a high honor, and those lawyers who devote their lives to presenting cases in the courts are truly privileged. Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society necessary to democracy. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American College of Trial Lawyers believes that, as officers of the court, trial lawyers must conduct themselves in a manner that reflects the dignity, fairness, and seriousness of purpose of the system of justice they serve. They must be role models of skill, honesty, respect, courtesy, and fairness consistent with their obligations to the client and the court.

Trial lawyers have a duty to conduct themselves so as to preserve the right to a fair trial, one of the most basic of all constitutional guarantees, while courageously, vigorously and diligently representing their clients and applying the relevant legal principles to the facts as found. Without courtesy, fairness, candor, and order in the pretrial process and in the courtroom, reason cannot prevail and constitutional rights to justice, liberty, freedom and equality under law will be jeopardized. The dignity, decorum and courtesy that have traditionally characterized the courts are not empty formalities. They are essential to an atmosphere in which justice can be done.

No client, corporate or individual, however powerful, nor any cause, civil, criminal or political, however important, is entitled to receive, nor should any lawyer render, any service or advice encouraging or inviting disrespect of the law or of the judicial office. No lawyer may sanction or invite corruption of any person exercising a public office or private trust. No lawyer may condone in any way deception or betrayal of the court, fellow members of the Bar, or the public. A lawyer advances the honor of the profession and the best interests of the client when a lawyer embodies and encourages an honest and proper respect for the law, its institutions and officers. Above all, a lawyer finds the highest honor in a deserved reputation as an officer for justice, faithful to private trust and to public duty, and as an honest person.

This Code of Pretrial and Trial Conduct (“the Code”) is not intended to supplant any local rules, procedural rules, or rules of professional conduct. This Code aims to provide aspirational guidance for trial lawyers. It sets forth a standard above the ethical minimum – a standard of conduct worthy of the privileges and responsibilities conferred on those who have sworn to serve our system of justice.

This Code is intended to provide guidance for a lawyer’s professional conduct except insofar as the applicable law, code or rules of professional conduct in a particular jurisdiction require otherwise. It is an aspirational guide for trial lawyers and should not give rise to a cause of action or sanction, create a presumption that a legal duty has been breached or form the basis for disciplinary proceedings not created under the applicable law, court rules or rules of professional conduct.

# Code of Pretrial and Trial Conduct

## Qualities of a Trial Lawyer

Trial lawyers are officers of the court. They are entrusted with a central role in the administration of justice in our society. Lawyers who engage in trial work have a special responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation.

### Honesty, Competence and Diligence

- a. A lawyer must in all professional conduct be honest, candid and fair.
- b. A lawyer must possess and apply the legal knowledge, skill, thoroughness and preparation necessary for excellent representation.
- c. A lawyer must diligently, punctually and efficiently discharge the duties required by the representation in a manner consistent with the legitimate interests of the client.

### Obligations to Clients

A lawyer must provide a client undivided allegiance, good counsel and candor; the utmost application of the lawyer's learning, skill and industry; and the employment of all appropriate means within the law to protect and enforce legitimate interests of a client. A lawyer may never be influenced directly or indirectly by any consideration of self-interest. A lawyer has an obligation to undertake unpopular causes if necessary to ensure justice. A lawyer must maintain an appropriate professional distance in advising his or her client, in order to provide the greatest wisdom.

### Employment and Withdrawal

- a. It is the right of a lawyer to accept employment in any civil case unless such employment is or would likely result in a violation of the rules of professional responsibility, a rule of court or applicable law. It is the lawyer's right and duty to take all proper actions and steps to preserve and protect the legal merits of the client's position and claims, and the lawyer should not decline employment in a case on the basis of the unpopularity of the client's cause or position.
- b. The right of a person accused of a crime to be represented by competent counsel is essential to our system of justice. A lawyer should not decline such representation because of the lawyer's personal or the community's opinion of the guilt of the accused or heinousness of the crime. A lawyer must raise all defenses and arguments that should be asserted on the client's behalf.

## **Fidelity to the Client's Interests**

A lawyer must not permit considerations of personal or organizational advancement, financial gain, favor with other persons, or other improper considerations to influence the representation of the client.

## **Obligations to Colleagues**

A lawyer should be straightforward and courteous with colleagues. A lawyer should be cooperative with other counsel while zealously representing the client. A lawyer must be scrupulous in observing agreements with other lawyers.

## **Relations with Other Counsel**

- a. A lawyer must be courteous and honest when dealing with opposing counsel.
- b. A lawyer should not make disparaging personal remarks or display acrimony toward opposing counsel, and must avoid demeaning or humiliating words in written and oral communication with adversaries.
- c. When practicable and consistent with the client's legitimate interests and local custom, lawyers should agree to reasonable requests to waive procedural formalities.
- d. The lawyer, and not the client, has the discretion to determine the customary accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights.
- e. A lawyer must adhere strictly to all written or oral promises to and agreements with opposing counsel, and should adhere in good faith to all agreements implied by the circumstances or by appropriate local custom.
- f. Written communications with opposing counsel may record and confirm agreements and understandings, but must not be written to ascribe to any person a position that he or she has not taken or to create a record of events that have not occurred.

## **Obligations to the Court**

Judges and lawyers each have obligations to the court they serve. A lawyer must be respectful, diligent, candid and punctual in all dealings with the judiciary. A lawyer has a duty to promote the dignity and independence of the judiciary, and protect it against unjust and improper criticism and attack. A judge has a corresponding obligation to respect the dignity and independence of the lawyer, who is also an officer of the court.

## **Communication with the Court**

- a. A lawyer must always show courtesy to and respect for a presiding judge. While a lawyer may be cordial in communicating with a presiding judge in court or in chambers, the lawyer should never exhibit inappropriate familiarity. In social relations with members of the judiciary, a lawyer should take care to avoid any impropriety or appearance of impropriety. In making any communication about a judge, a lawyer should not express or imply that the lawyer has a special relationship or influence with the judge.
- b. A lawyer should never make any attempt to obtain an advantage through improper ex parte communication with a judge or the staff in the judge's chambers. A lawyer must make every effort to avoid such communication on any substantive matter and any matter that could reasonably be perceived as substantive, except as addressed in subpart (c) below. When a lawyer informally communicates with a court, the highest degree of professionalism is required.
- c. If ex parte communication with the court is permitted by applicable rules of ethics and procedure, a lawyer must diligently attempt to notify opposing parties, through their counsel if known, unless genuine circumstances exist that would likely prejudice the client's rights if notice were given. When giving such notice, the lawyer should advise the opponent of the basis for seeking immediate relief and should make reasonable efforts to accommodate the opponent's schedule so that the party affected may be represented.
- d. When possible, a lawyer's communications with the court related to a pending case should be in writing, and copies should be provided promptly to opposing counsel. When circumstances require oral communication with the court, a lawyer must notify opposing counsel of all such communications promptly.

## **Independence and Impartiality of Judicial Officers and Neutrals**

- a. Judges, arbitrators, mediators and other neutrals must maintain their independence and impartiality. They must not allow professional or personal relationships, employment prospects or other improper considerations to influence or appear to influence the discharge of their duties.
- b. A judge must promote the dignity and proper discharge of the duties of the lawyer, who is also an officer of the court entitled to respect and courtesy.

## **Obligations to the System of Justice**

A lawyer has an obligation to promote the resolution of cases with fairness, efficiency, courtesy, and justice. As an officer of the court and as an advocate in the court, a lawyer should strive to improve the system of justice and to maintain and to develop in others the highest standards of professional behavior.

## **Devotion to the System of Public Justice**

A lawyer must strive at all times to uphold the honor and dignity of the profession. Every lawyer should contribute to the improvement of the system of justice and support those measures that enhance the efficiency, fairness and quality of justice dispensed by the courts. A lawyer should never manifest, or act upon, bias or prejudice toward any person based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

## **Pro Bono Publico**

A lawyer should personally render public interest legal service and support organizations that provide legal services to persons of limited means by contributing time and resources.

## **Settlement and Alternative Dispute Resolution**

A lawyer must never be reluctant to take a meritorious case to trial if the dispute cannot otherwise be satisfactorily resolved. However, a lawyer must provide the client with alternatives to trial when to do so would be consistent with the client's best interests. A lawyer should educate clients early in the legal process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation.

## **Motions and Pretrial Procedure**

A lawyer has an obligation to cooperate with opposing counsel as a colleague in the preparation of the case for trial. Zealous representation of the client is not inconsistent with a collegial relationship with opposing counsel in service to the court. Motions and pretrial practice are often sources of friction among lawyers, which contributes to unnecessary cost and lack of collegiality in litigation. The absence of respect, cooperation, and collegiality displayed by one lawyer toward another too often breeds more of the same in a downward spiral. Lawyers have an obligation to avoid such conduct and to promote a respectful, collegial relationship with opposing counsel.

## **Scheduling and Granting Extensions for Pretrial Events**

- a. A lawyer should schedule pretrial events cooperatively with other counsel as soon as the event can reasonably be anticipated. Lawyers scheduling an event should respect the legitimate obligations of colleagues and avoid disputes about the timing, location and manner of conducting the event.
- b. A lawyer should seek to reschedule an event only if there is a legitimate reason for doing so and not for improper tactical reasons. A lawyer receiving a reasonable request to reschedule an event should make a sincere effort to accommodate the request unless the client's legitimate interests would be adversely affected.

- c. Scheduling pretrial events and granting requests for extensions of time are properly within the discretion of the lawyer unless the client's interests would be adversely affected. A lawyer should counsel the client that cooperation among lawyers on scheduling is an important part of the pretrial process and expected by the court. A lawyer should not use the client's decision on scheduling as justification for the lawyer's position unless the client's legitimate interests are affected.

### **Service of Process, Pleadings and Proposed Orders**

- a. The timing, manner, and place of filing, electronic filing or serving papers should never be calculated to delay, embarrass or improperly disadvantage the party being served.
- b. Unless exigent circumstances require otherwise, papers filed in a court must be promptly served upon or made available to opposing parties or counsel.
- c. Papers should not be served in a manner deliberately designed to unfairly shorten an opponent's time for response or to take other unfair advantage of an opponent.
- d. Service must be made in a manner that affords an opposing party a fair and timely opportunity to respond, unless exigent circumstances legitimately require or applicable rules permit an ex parte application to the court or an abbreviated time for response.

### **Motion Practice and Other Written Submissions to the Court**

- a. Before filing pretrial motions, lawyers should work together to resolve issues and to identify matters not in dispute. When motions are necessary, lawyers should cooperate to facilitate the filing, service, and hearing of the motion. Orders submitted to the court must fairly and accurately reflect the requested or actual ruling of the court.
- b. In written submissions and oral presentations, a lawyer should neither engage in ridicule nor sarcasm. Neither should a lawyer ever disparage the integrity, intelligence, morals, ethics, or personal behavior of an opposing party or counsel unless such matters are directly relevant under controlling law.
- c. When documents or data are presented to the court, they must be furnished to opposing counsel in exactly the same format, including identical highlighting or other emphasis.

## Pretrial Conferences

- a. A lawyer should seek to reach agreement with opposing counsel to limit the issues to be addressed before and during trial.
- b. A lawyer should determine in advance of a pretrial conference the trial judge's custom and practices in conducting such conferences.
- c. A lawyer should satisfy all directives of the court set forth in the order setting a pretrial conference and should consult and comply with all local rules and with any specific requirements of the trial judge unless properly challenged when based upon a belief of unfair prejudice to the client.
- d. Before a pretrial conference, a lawyer should ascertain the willingness of the client (and the carrier if an insurer is involved) to participate in alternative dispute resolution.
- e. Unless unavoidable circumstances prevent it, a lawyer representing a party at a pretrial conference must be thoroughly familiar with each aspect of the case, including the pleadings, the evidence, and all potential procedural and evidentiary issues.
- f. A lawyer should alert the court as soon as practicable to scheduling conflicts of clients, experts, and witnesses.
- g. If stipulations are possible for uncontested matters, a lawyer should propose specific stipulations and work with opposing counsel to obtain an agreement in advance of the pretrial conference.
- h. In advance of a final pretrial conference, discovery should be completed, discovery responses should be supplemented, evidentiary depositions should be concluded, and settlement should be explored.
- i. Unless unavoidable circumstances prevent it, the final pretrial conference should be attended by a lawyer who will actually try the case, and, in any event, by a lawyer who is familiar with the case.
- j. At or before a final pretrial conference, a lawyer should alert the court to the need for any pretrial rulings, hearings on motions or other matters requiring action by the court in advance of trial.
- k. At the final pretrial conference, a lawyer should be prepared to advise the court of the status of settlement negotiations and the likelihood of settlement before trial.

## Discovery

A lawyer must conduct discovery as a focused, efficient, and principled procedure to gather and preserve evidence in the pursuit of justice. Discourtesy, obfuscation, and gamesmanship have no proper place in this process.

### Discovery Practice

- a. In discovery, as in all other professional matters, a lawyer's conduct must be honest, courteous, and fair.
  1. A lawyer should conduct discovery efficiently to elicit relevant facts and evidence and not for an improper purpose, such as to harass, intimidate, unduly burden another party or a witness or to introduce unnecessary delay. Overly broad document requests should be avoided by focusing on clear materiality and a sense of cost/benefit.
  2. A lawyer should respond to written discovery in a reasonable manner and should not interpret requests in a strained or unduly restrictive way in an effort to avoid responding or to conceal relevant, nonprivileged information.
  3. Objections to interrogatories, requests for production, and requests for admissions must be made in good faith and must be adequately explained and limited in a manner that fairly apprises the adversary of the material in dispute and the bona fide grounds on which it is being withheld.
  4. When a discovery dispute arises, opposing lawyers must attempt to resolve the dispute by working cooperatively together. Lawyers should refrain from filing motions to compel or for court intervention unless they have genuinely tried, but failed, to resolve the dispute through all reasonable avenues of compromise and resolution.
  5. Lawyers should claim a privilege only in appropriate circumstances. They must not assert a privilege in an effort to withhold or to suppress unprivileged information or to limit or delay a response.
  6. Requests for additional time to respond to discovery should be made as far in advance of the due date as reasonably possible and should not be used for tactical or strategic reasons.
  7. Unless there are compelling reasons to deny a request for additional time to respond to discovery, an opposing lawyer should grant the request without necessitating court intervention. Compelling reasons to deny such a request exist only if the client's legitimate interests would be materially prejudiced by the proposed delay.

- b. Depositions should be dignified, respectful proceedings for the discovery and preservation of evidence.
  1. A lawyer should limit depositions to those that are necessary to develop the claims or defenses in the pending case or to perpetuate relevant testimony.
  2. A lawyer should conduct a deposition with courtesy and decorum and must never verbally abuse or harass the witness, engage in extended or discourteous colloquies with opposing counsel or unnecessarily prolong the deposition.
  3. During a deposition, a lawyer must assert an objection only for a legitimate purpose. Objections must never be used to obstruct questioning, to communicate improperly with the witness, to intimidate, to harass the questioner or to disrupt the search for facts or evidence germane to the case.

## **Relationships with Witnesses and Litigants**

A lawyer must treat all persons involved in a case with candor, courtesy and respect for their role and rights in the legal process.

### **Communicating with Nonparty Fact Witnesses**

- a. A lawyer must carefully comply with all laws and rules of professional responsibility governing communications with persons and organizations with whom the lawyer does not have an attorney-client relationship. A lawyer must be especially circumspect in communications with nonparty fact witnesses who have a relationship to another party.
- b. In dealing with a nonparty who is a fact witness or a potential fact witness, a lawyer must:
  1. disclose the lawyer's interest or role in the pending matter and avoid misleading the witness about the lawyer's purpose or interest in the communication;
  2. be truthful about the material facts and the applicable law;
  3. if the nonparty has no counsel, correct any misunderstanding expressed by the nonparty;
  4. treat the nonparty courteously; and
  5. avoid unnecessarily embarrassing, inconveniencing or burdening the nonparty.
- c. If a lawyer is informed that a nonparty fact witness is represented by counsel in the pending matter, the lawyer must not communicate with the witness concerning the pending litigation without permission from that counsel.
- d. If communicating with a nonparty fact witness, the lawyer should be careful to avoid fostering any impression that the lawyer also represents that witness unless

the lawyer does, in fact, represent the witness in compliance with the applicable rules of professional responsibility.

- e. A lawyer should not obstruct another party's access to a nonparty fact witness or induce a nonparty fact witness to evade or ignore process.
- f. A lawyer should not issue a subpoena to a nonparty fact witness except to compel, for a proper purpose, the witness's appearance at a deposition, hearing, or trial or to obtain necessary documents in the witness's possession.

### **Access to Fact Witnesses and Evidence**

- a. Subject to the applicable law and ethical principles, and to constitutional requirements in criminal matters, a lawyer may properly interview any person who is not a retained expert, because a fact witness does not "belong" to any party. A lawyer should avoid any suggestion calculated to induce any witness to suppress evidence or to deviate from the truth. However, without counseling the witness to refrain from cooperating with opposing counsel, a lawyer may advise any witness that he or she does not have a legal duty to submit to an interview or to answer questions propounded by opposing counsel, unless required to do so by judicial or legal process.
- b. A lawyer may never suppress any evidence that the lawyer or the client has a legal obligation to reveal or to produce. In the absence of such an obligation, however, it is not a lawyer's duty to disclose any work product, evidence or the identity of any witness.
- c. A lawyer must not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness.
- d. Except as provided in subparagraphs (1) and (2) below, a lawyer should not pay, offer to pay or acquiesce in the payment of compensation to a fact witness and may never offer or give any witness anything of value contingent upon the content of the witnesses' testimony or the outcome of the case. To the extent permitted by the applicable rules of professional responsibility, a lawyer may advance, guarantee or acquiesce in the payment of:
  - 1. expenses reasonably incurred by a witness in attending or testifying; and
  - 2. reasonable compensation to a witness for the witness's loss of time in attending or testifying;
- e. A lawyer may solicit witnesses to a particular event or transaction but not to testify to a particular version of the facts.

## **Relations with Consultants and Expert Witnesses**

- a. In retaining an expert witness, a lawyer should respect the integrity, professional practices and procedures in the expert's field and must never ask or encourage the expert to compromise the integrity of those practices and procedures for purposes of the particular matter for which the expert has been retained.
- b. A retained expert should be fairly and promptly compensated for all work on behalf of the client. A lawyer must never make compensation contingent in any way upon the substance of the expert's opinions or written report or upon the outcome of the matter for which the expert has been retained.
- c. Other than as expressly permitted by governing law, a lawyer should not communicate with, or seek to communicate with, an expert witness concerning the pending litigation whom the lawyer knows to have been retained by another party, unless express permission is granted by counsel for the retaining party.

## **Trial**

A lawyer must conduct himself or herself in trial so as to promote respect for the court and preserve the right to a fair trial. A lawyer should avoid any conduct that would undermine the fairness and impartiality of the administration of justice, and seek to preserve the dignity, decorum, justness and courtesy of the trial process.

## **Relations with Jurors**

Lawyers and judges should be respectful of the privacy of jurors during voir dire and after a verdict. A lawyer should abstain from all acts, comments and attitudes calculated to inappropriately curry favor with any juror, such as fawning, flattery, solicitude for the juror's comfort or convenience or the like.

## **Courtroom Decorum**

- a. Proper decorum in the courtroom is not an empty formality. It is indispensable to the pursuit of justice at trial.
- b. In court, a lawyer should always display a courteous, dignified and respectful attitude toward the judge presiding and should promote respect for and confidence in the judicial office. The judge should be courteous and respectful to the lawyer, who is also an officer of the court.
- c. A lawyer should never engage in discourteous or acrimonious comments or exchanges with opposing counsel. Objections, requests and observations must be addressed to the court.

- d. A lawyer should advise the client and witnesses appearing in the courtroom of the kind of behavior expected and counsel them against engaging in any disrespectful, discourteous or disruptive behavior in the courtroom.

### **Trial Conduct**

- a. A lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses. The conduct of a lawyer before the court and with other lawyers should at all times be characterized by civility. A lawyer should present all proper arguments against rulings the lawyer deems erroneous or prejudicial and ensure that a complete and accurate case record is made. In doing so, the lawyer should not be deterred by any fear of judicial displeasure.
- b. In appearing in a professional capacity before a tribunal, a lawyer must not:
  - 1. improperly obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value; nor should a lawyer counsel, permit or assist another person to do any such act;
  - 2. falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; or
  - 3. allude to any matter that the lawyer does not reasonably believe is relevant or will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.
- c. A lawyer should not interrupt or interfere with an examination or argument by opposing counsel, except to present a proper objection to the court.
- d. When a court has made an evidentiary ruling, a lawyer should not improperly circumvent that ruling, although a lawyer may seek to make a record of the excluded evidence or a review of the ruling.
- e. A lawyer must not attempt to introduce evidence or to make any argument that the lawyer knows is improper. If a lawyer has doubt about the propriety or prejudicial effect of any disclosure to the jury, the lawyer should request a ruling out of the jury's hearing.
- f. A lawyer should never engage in acrimonious conversations or exchanges with opposing counsel in the presence of the judge or jury.
- g. Examination of jurors and of witnesses should be conducted from a suitable distance, except when handling evidence or circumstances otherwise require.

- h. Unless local custom dictates otherwise, a lawyer should rise when addressing or being addressed by the judge, except when making brief objections or incidental comments. A lawyer should be attired in a proper and dignified manner in the courtroom.
- i. A lawyer should not in argument assert as a fact any matter that is not supported by evidence.
- j. A lawyer must never knowingly misquote or mischaracterize the contents of documentary evidence, the testimony of a witness, the statements or argument of opposing counsel, or the language of a judicial decision.
- k. A lawyer should not propose a stipulation in the jury's presence unless the lawyer knows or has reason to believe the opposing lawyer will accept it.
- l. A lawyer who receives information clearly establishing that the client has, during the representation, perpetrated a fraud on the court should immediately take the actions required by the appropriate procedural and ethical rules.

### **Public Statements about Pending Litigation**

A case should be tried in the courtroom and not in the media. A lawyer should follow all rules and orders of the court concerning publicity. In the absence of a specific rule or order, a lawyer should not make any extrajudicial statement that may prejudice an adjudicative proceeding.



**AMERICAN COLLEGE  
OF TRIAL LAWYERS**

[www.actl.com](http://www.actl.com)

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URL: <http://www.bcwrightlaw.com>

**PERSONAL:**

Born in Paola, Kansas, November 4, 1960  
Married, one child

**EDUCATION:**

University of Kansas (B.S. 1983; J.D., 1986). Delta Sigma Rho-Tau Kappa Alpha.  
National Merit Scholar; Summerfield Scholar.

**LICENSURE:**

Admitted to bar, 1987, Kansas  
U.S. District Court, District of Kansas  
U.S. Court of Appeals, Tenth Circuit  
United States Supreme Court, 2025

**PROFESSIONAL EXPERIENCE:**

**2001 - Present**  
**Wright Law Office, Chtd.**

Mediation—civil cases

Civil trial and litigation practice

Insurance Defense: Medical Malpractice Defense—hundreds of cases defended for physicians, hospitals, chiropractors, clinics, nurse practitioners, physician assistants, nurses, and nursing homes.

Representative Referral Sources:

- Kansas Medical Mutual Insurance Company
- The Medical Protective Company
- Health Care Stabilization Fund

Representative clients:

- Rush County Memorial Hospital
- Stevens County Hospital
- Citizens Medical Center

Plaintiff's Legal Malpractice

Plaintiff's Personal Injury:

- Automobile Accidents
- Slip and Fall
- Wrongful Death
- Product Liability

Professional Licensing defense

**1987 – 2001**

**Turner & Boisseau, Chtd.**

Civil trial practice—primarily insurance defense, including product liability, medical malpractice, trucking, general insurance defense.

**1986 – 1987**

**Kansas Legislature**

Legislative Assistant to the House Minority Leader

**MEMBERSHIPS:**

Ellis County, Southwest Kansas, Kansas, and American Bar Associations  
Fellow, American College of Trial Lawyers (2007)

**PUBLISHED CASES**

*Reeves v. Equipment Service Industries*, 245 Kan. 165 (1989)  
*Southwest National Bank v. Simpson and Son*, 14 Kan.App.2d 763 (1990)  
*Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 876 P.2d 609 (1994)  
*Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994)  
*Grant v. Chappell*, 22 Kan. App. 2d 398, 916 P.2d 723 (1996)  
*Hughs v. Valley State Bank*, 26 Kan. App. 2d 631, 1994 P.2d 1079 (1999)  
*In Re Estate of Wells*, 26 Kan. App. 2d 282, 983 P.2d 279 (1999)  
*Rodreick v. Wikoff*, 29 Kan.App.2d 726, 31 P.3d 307 (2001)  
*Daniels v. Knudsen*, 138 P.3d 417 (2006)  
*Fieser v. Kansas State Board of Healing Arts*, 281 Kan. 268, 130 P.3d 555 (2006)  
*Atwell v. Imseis*, 37 Kan. App.2d 435, 154 P.3d 511 (2007)

*Dreiling v. Davis*, 38 Kan. App.2d 997, 176 P.3d 197 (2008)  
*Shaw v. Southwest Kansas Groundwater Management District 3*, 42 Kan. App.2d 994,  
219 P.3d 857 (2009)  
*Estate of Mills v. Mangosing*, 44 Kan. App.2d 399, 238 P.3d 293 (2010)  
*Dumler v. Conway*, 49 Kan. App.2d 567, 312 P.3d 385 (2013)  
*Spillman v. Stanton*, 335 P.3d 710 (2015)  
*Koel v. Citizens Med. Ctr., Inc.*, 128 F.4<sup>th</sup> 1329 (2025) (cert. denied)

**PRESENTATIONS:**

November 9, 2005 “Supervision of Physician Assistants and Nurse Practitioners,” CME;  
Great  
Bend, Kansas, Central Kansas Medical Center

May 2007 “Roadside and In-Flight Emergencies,” CME; Dodge City, Kansas, Ford  
County Medical Society

May 2009 “Discovery of Expert Impeachment Information,” CLE; Overland Park, Kansas;  
Health Care Stabilization Fund Annual Seminar

March 2, 2010 “Use and Abuse of Written Discovery,” CLE; Wichita, Kansas; Kansas  
Association of Legal Assistants

May 9, 2014 “Effective Cross-Examination of Expert Witnesses,” CLE; Wichita, Kansas;  
Wichita Bar Association

October 30, 2015 “Cross-Examining the Expert Witness,” CLE; Wichita, Kansas;  
American College of Trial Lawyers/Wichita Bar Association

December 5, 2015 “Topics and Trends in Settlement Mediation Conferences,” CLE;  
Kansas City, Missouri; Kansas Association of Defense Counsel

April 2021, “Effective Cross-Examination of Expert Witnesses,” CLE; Hays, Kansas; Ellis  
County Bar Association

April 9, 2026, “Alternative Dispute Resolution Panel,” CLE; Wichita, Kansas; Kansas Bar  
Association

April 23, 2026, “Civil Written Discovery: Balancing Obligations and Duties,” CLE; Hays,  
Kansas; Ellis County Bar Association