Approved: April 28, 1995
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on March 13, 1995 in Room 313-S-of the Capitol.

All members were present except:
Representative Clyde Graeber - Excused
Representative Candy Ruff -Excused

Committee staff present: Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Nick Badgerow, Chairman of Civil Code Advisory Committee
Elwaine Pomeroy, Topeka Attorney
Kathy Taylor, Kansas Bankers Association
Jeff Sonnich, KS, NB & OK League of Savings Institutions
Scott Gates, Department of Administration
Senator Bob Vancrum
Jennifer Wents, Secretary of State's office
Dale Schedler, Attorney at Law
Stan Andeel, Foulston & Siefkin Attorney at Law

Others attending: See attached list

Hearings on **SB 140** - Amendments to rules of civil procedure, were opened.

Nick Badgerow, Chairman of Civil Code Advisory Committee, appeared before the committee in support of the bill. He told the committee that the Civil Code Advisory Committee of the Judicial Council recommended the bill which corresponds with federal rules. He provided the committee with a draft of the bill and an explanation of why each rule was changed. (Attachment 1)

Hearings on **SB 140** were closed.

Hearings on **SB 336** - Enacting the uniform limited liability company act, were opened.

Senator Vancrum appeared before the committee as the sponsor of the proposed bill. He told the committee that Kansas was one of the first states to adopt the limited liability act and that there has been a lot of defects in the act. The proposed bill would adopt the National Conference's Uniform Liability Act. (Attachment 2)

Jennifer Wents, Secretary of State's office, appeared as a proponent of the bill with the amendments that were put on in the Senate. (Attachment 3)

Dale Schedler, Attorney at Law, appeared before the committee as an opponent of the bill. He explained that the Uniform Limited Liability Company Act has not been approved and is still being revised and until the final revisions are done and the American Bar Association has approved them, it shouldn't be adopted. (Attachment 4) He provided the committee with testimony from Larry Ribstein, Professor at George Mason University School of Law, as to why the bill shouldn't be adopted. (Attachment 5)

Stan Andeel, Foulston & Siefkin Attorney at Law, appeared before the committee in opposition of the bill. He also stated that the Uniform Limited Liability Company Act should not be adopted because it hasn't been approved by the National Conference and the American Bar Association. (Attachment 6)

Representative Mays stated that he hadn't heard any criticism of the bill but that the opponents believe that it shouldn't be adopted because the Bar Association hasn't approved it. He asked why was it important to wait until it's been approved. Mr. Andeel responded that it's not necessary to have uniform laws but the states should wait until the language has been adopted. He didn't have any problems with the act as written, but the drafting has to be very specific in order to accomplish what is wanted to be accomplished. The main point is that the work on the Uniform Limited Liability Act is not done. Representative Mays commented that the decision that needs to be made is does Kansas really want to be uniform.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S-Statehouse, at 3:30 p.m. on March 13, 1995.

Hearings on **SB 336** were closed.

Hearings on **SB 139** - Effects of felony conviction on civil rights of convicted felon, were opened.

Elwaine Pomeroy,Topeka Attorney, appeared before the committee as a proponent of the bill. He stated that this bill strikes the 10 year exclusion of a convicted felon serving on a jury. This bill would address the inconsistences between the civil rights of convicted felons compatible with the Kansas Constitution. (Attachment 7)

Hearings on **SB 139** were closed.

Hearings on **SB 35** - Garnishment of funds held by a financial institution, were opened.

Kathy Taylor, Kansas Bankers Association, appeared before the committee as a proponent of the bill. She told the committee that this bill would resolve a procedural problem that occurs on a daily basis of how to process multiple garnishment orders on the same joint account. (Attachment 8)

Jeff Sonnich, KS, NB & OK League of Savings Institutions, appeared before the committee in support of the proposed bill. He stated the bill would clarify the procedure for withholding funds held in joint tenancy deposits accounts subject to order of garnishments. There have been cases where the non-defendant owner claims that their portion of the account was unfairly attached. (Attachment 9)

Elwaine Pomeroy, Kansas Collection Association, appeared before the committee as neither a proponent nor opponent of the bill. He suggested that rather than amend K.S.A. 60-726, which is a part of the Kansas Code of Civil Procedure it should be amended in K.S.A. 58-501. (Attachment 10)

Hearings on **SB 35** were closed.

Hearings on **SB 282** - Civil procedure and civil actions; garnishment; answers to garnishees, were opened.

Scott Gates, Department of Administration, appeared before the committee in support of the bill. He told the committee that this would limit non-wage garnishments to one and one half times the amount of the plaintiff's claim and would prevent creditors from tying up a debtor's entire bank account during the garnishment process for small debt. (Attachment 11)

Elwaine Pomeroy, Kansas Collectors Association, appeared before the committee as a proponent to the bill as amended by the Senate and would continue to support the bill as long as no other amendments are placed on it. (Attachment 12)

Hearings on **SB 282** were closed.

The next meeting is scheduled for March 14, 1995.

HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/13/95

NAME	REPRESENTING
Margie Broadlow	ACLU
Kathy Taylor	KS Bankers Assn.
Jeff Sonnek	KNOCSI
Matt Lynch	Judicial Council
Kathy Kearnell	Judicial Council
Jim Clark	KCDAA
Cindy Dubois	KBI Commission
Jon Newman	KS Governmental Consulting
Pat Higgins	D. of A.
Kathy Kirk	OJA
Peggy Jarman	PCAL
Mike Montero	Atty Gen Office
Jennifer Johnson	KTLA

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[As Amended by Senate Committee of the Whole]

As Amended by Senate Committee

Session of 1995

SENATE BILL No. 140

By Committee on Judiciary

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AN ACT concerning civil procedure; amending K.S.A. 60-102, 60-205, 60-206, 60-209, 60-211, 60-214, 60-215, 60-216, 60-223, 60-226, 60-228, 60-230, 60-231, 60-232, 60-233, 60-234, 60-235, 60-237, 60-238, 60-241, 60-243, 60-245, 60-245a, 60-250, 60-252, 60-256, ***60-262,*** 60-1608, ***60-2103,*** 60-3703 ~~and~~, ***61-1710,*** 61-1725 ***and 75-3079*** and repealing the existing sections; also repealing K.S.A. 60-2007.

[The comments below are the original comments of the advisory committee. Senate amendments are noted in bracketed additions to the comments.]

Civil Code Advisory Committee Comments

Senate Bill 140 contains amendments to the Rules of Civil Procedure recommended by the Civil Code Advisory Committee of the Judicial Council. The Civil Code Advisory Committee engaged in a two-year review of the Kansas Rules of Civil Procedure. This review principally involved a comparison of the Kansas provisions with the corresponding federal rules. Prior to this study, the most recent, comprehensive review of the rules of civil procedure was conducted by the Civil Code Committee prior to the 1986 legislative session. That study resulted in introduction, and passage of, 1986 SB 480 (L. 1986; ch. 215). Since the 1986 legislation, substantial amendments to the federal rules have gone into effect in December of 1991 and December of 1993.

Conformity with the federal rules provide certain benefits. It leads to uniformity of practice in the state and federal courts in Kansas. In addition, interpretation and analysis of the federal rules are available to assist in construing the corresponding Kansas provisions. However, where the advisory committee has viewed Kansas or some alternative procedure as preferable to that contained in the federal rule, the committee has not hesitated to depart from the federal rules in its recommendations.

Specifically, the committee does not at this time recommend adoption of the provisions in federal rule 26(a)(1) relating to initial disclosures of certain core information without specific written requests. These disclosure provisions were the subject of considerable opposition, including opposition by the House of Delegates of the American Bar Association and three justices of the United States Supreme Court. [See dissenting opinion of Justice Scalia, 146 F.R.D. 501 and Bell, Varner, and Gottschalk, Automatic Disclosure and Discovery - the Rush to Reform, 27 Ga. L. Rev. 1 (1992)].

Other departures from the federal rules are noted in the comments to specific sections of the bill.

The advisory committee and the Judicial Council viewed certain of the recommendations to be of sufficient interest to merit dissemination to the bench and bar prior to the introduction of any bill. Accordingly, the recommended amendments to K.S.A. 60-216 (pretrial procedure; case management conferences), 60-226 (disclosure of expert testimony) and 60-230 (depositions; limits in connection with case management conference) were published in the June/July issue of the Kansas Bar Journal and were made available to district judges at the October, 1994 Judicial Conference.

The members of the Civil Code Advisory Committee are: J. Nick Badgerow, Chairman, Overland Park; Susan S. Baker, Overland Park; Judge Barry Bennington, St. John; Judge Terry L. Bullock, Topeka; Professor Robert C. Casad, Lawrence; Judge Jerry G. Elliott, Topeka; Joseph W. Jeter, Hays; Phillip Mellor, Wichita; Justice David Prager (retired), Topeka; David M. Rapp, Wichita; Justice Fred N. Six, Topeka; Donald Vasos, Kansas City; and Jim D. Ward, Wichita.

Marvin E. Thompson of Russell, served as Chairman of the advisory committee for most of the study.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-102 is hereby amended to read as follows: 60-102. The provisions of this act shall be liberally construed *and administered* to secure the just, speedy and inexpensive determination of every action or proceeding.

Sec. 2. K.S.A. 60-205 is hereby amended to read as follows: 60-205. The method of service and filing of pleadings and other papers as provided in this section shall constitute sufficient service and filing in all civil actions and special proceedings but they shall be alternative to, and not in restriction of, different methods specifically provided by law.

(a) *When required.* Except as otherwise provided in this chapter, the following shall be served upon each of the parties: Every order required by its terms to be served; every pleading subsequent to the original petition, unless the court otherwise orders because of numerous defendants; every paper relating to *disclosure of expert testimony or* discovery required to be served upon a party, unless the court otherwise orders; every written motion other than one which may be heard *ex parte*; and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in article 3 of this chapter.

(b) *How made.* Whenever under this article service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered

The section is revised to add the words "and administered." The same amendment to federal rule 1 is intended ". . . to recognize the affirmative duty of the court to exercise the authority conferred by these rules to insure that civil litigation is resolved not only fairly, but also without undue cost or delay."

Subsections (a) and (d) are revised to accommodate the new provisions in K.S.A. 60-226(b)(6) relating to disclosure of expert testimony. Papers relating to disclosure of expert testimony are to be served and filed in the same manner as comparable papers relating to discovery.

by the court. Service upon the attorney or upon a party shall be made by: (1) Delivering a copy to the attorney or a party: (2) mailing it to the attorney or a party at the last known address; (3) if no address is known, by leaving it with the clerk of the court; or (4) sending or transmitting to such attorney a copy by telefacsimile communication. For the purposes of this subsection, "Delivery of a copy" means: Handing it to the attorney or to the party; leaving it at the attorney's or party's office with the clerk or other person in charge thereof or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the attorney's or party's office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Service by telefacsimile communication is complete upon receipt of a confirmation generated by the transmitting machine.

(c) *Numerous defendants.* In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that services of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* (1) Interrogatories, depositions other than those taken under K.S.A. 60-227 and amendments thereto, *disclosures of expert testimony under K.S.A. 60-226 and amendments thereto* and discovery requests or responses under K.S.A. 60-234 or 60-236, and amendments thereto, shall not be filed except on order of the court or until used in a trial or hearing, at which time the documents shall be filed.

(2) A party serving discovery requests or responses under K.S.A. 60-233, 60-234 or 60-236, and amendments thereto, *or disclosures of expert testimony under K.S.A. 60-226 and amendments thereto,* shall file with the court a certificate stating what document was served, when and upon whom.

(3) All other papers filed after the petition and required to be served upon a party, shall be filed with the court either before service or within a reasonable time thereafter.

(e) *Filing with the court defined.* The filing of pleadings and other papers with the court as required by this article shall be made by filing them with the clerk of the court~~, except that the~~. *In accordance with K.S.A. 60-271 and amendments thereto and supreme court rules, pleadings and other papers may be filed by telefacsimile communication. The*

Subsection (e) is revised to make reference to applicable statutes (K.S.A. 60-271) and Supreme Court rules (rule 119) relating to facsimile filing of papers with the court. K.S.A. 60-271 directs the clerks of the district and appellate courts to accept papers specified in K.S.A. 60-205 by telefacsimile communication in accordance with Supreme Court rule.

judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Sec. 3. K.S.A. 60-206 is hereby amended to read as follows: 60-206. The following provisions shall govern the computation and extension of time:

(a) *Computation; legal holiday defined.* In computing any period of time prescribed or allowed by this chapter, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, *or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible,* in which event the period runs until the end of the next day which is not ~~a Saturday, a Sunday or a legal holiday~~ *one of the foremen-tioned days*. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. "Legal holiday" includes any day designated as a holiday by the congress of the United States, or by the legislature of this state. When an act is to be performed within any prescribed time under any law of this state, or any rule or regulation lawfully promulgated thereunder, and the method for computing such time is not otherwise specifically provided, the method prescribed herein shall apply.

(b) *Enlargement.* When by this chapter or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the judge for cause shown may at any time in the judge's discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under subsection ~~(e)~~ ***(b)*** of K.S.A. 60-250, subsection (b) of K.S.A. 60-252, subsections (b), (e) and (f) of K.S.A. 60-259 and subsection (b) of K.S.A. 60-260, and amendments thereto, except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action pending before it.

Subsection (a) is revised to follow a 1985 amendment to the federal rule which recognized ". . . that weather conditions or other events may render the clerk's office inaccessible one or more days" and that "Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so."

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(d) *For motions—affidavits.* A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the judge. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in subsection (d) of K.S.A. 60-259, and amendments thereto, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at the time of hearing.

(e) *Additional time after service by mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party and the notice or paper is served upon such party by mail, three days shall be added to the prescribed period.

Sec. 4. K.S.A. 60-209 is hereby amended to read as follows: 60-209. (a) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of any party to sue or be sued in a representative capacity, the party raising the issue shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, mistake, conditions of the mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) *Conditions precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official document or act.* In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment.* In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) *Time and place.* For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.* When items of special damage are claimed, their nature shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the amended petition shall not state a dollar amount for damages sought to be recovered but shall state whether the amount of damages sought to be recovered is in excess of or not in excess of ~~$10,000~~ *$50,000*.

(h) *Pleading written instrument.* Whenever a claim, defense or counterclaim is founded upon a written instrument, the same may be pleaded by reasonably identifying the same and stating the substance thereof or it may be recited at length in the pleading, or a copy may be attached to the pleading as an exhibit.

(i) *Tender of money.* When a tender of money is made in any pleading, it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in the court at the trial, unless otherwise ordered by the court.

(j) *Libel and slander.* In an action for libel or slander, it shall not be necessary to state in the petition any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be not controverted in the answer, it shall not be necessary to prove it on the trial; in other cases it shall be necessary. The defendant may, in such defendant's answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances admissible in evidence to reduce the amount of damages; and whether the defendant proves the justification or not, the defendant may give in evidence any mitigating circumstances.

Sec. 5. K.S.A. 60-211 is hereby amended to read as follows: 60-211. *(a)* Every pleading, motion and other paper ~~provided for by this article~~ of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, and the attorney's address and telephone number shall be stated. A pleading, motion or other paper ~~provided for by this article~~ of a party who is not represented by an attorney shall be signed by the party and shall state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by an affidavit.

(b) The signature of a person constitutes a certificate by the person that the person has read the pleading~~;~~, *motion or other paper and* that to the best of the person's knowledge, information and belief formed after ~~reasonable~~ *an* inquiry ~~it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not imposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase~~

Subsection (g) is revised to make reference to the same dollar amount ($50,000) as K.S.A. 60-208(a). A figure of $10,000 was inserted in 60-208(a) and 60-209(g) in 1976. According to Kansas Code of Civil Procedure Annotated 2d (Gard), the 1976 amendment had the dual purpose of making unnecessary the amendment of a pleading to ask for a larger amount as justified by the proof and removing any psychological effect on the fact finder by the naming of the large figure of damages. At the time, $10,000 coincided with the amount in controversy requirement of federal court jurisdiction in diversity cases. The federal amount in controversy requirement was raised to $50,000 and 60-208(a) was amended in 1990 to reflect that change. However, no amendments were made to 60-209(g).

Subsections (b) and (d) are revised to conform to the language of certain of the 1993 amendments to rule 11.

Subsection (b)(2), relating to arguments for extensions, modifications or reversals of existing law or for creation of new law, uses the term "nonfrivilous." This is intended to establish an objective standard and ". . . to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments." As revised, subsection (b)(3) recognizes ". . . that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation." Similarly, revised subsection (b)(4) recognizes that, after an appropriate investigation, a party may not have information concerning the matter or may have a reasonable basis for doubting the credibility of the only relevant evidence. In such cases, a party should not be required, ". . . simply because it lacks contradictory evidence, to admit an allegation that it believes is not true."

Subsection (d) is new and follows the federal rule by making documents and conduct relating to discovery subject to the standards and sanctions under the discovery provisions. This is in line with the decision in New Dimensions Products, Inc. v. Flambeau Corp., 17 Kan.App. 2d 852 (1993).

~~in the cost of litigation~~ *reasonable under the circumstances:*

(1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) If a pleading, motion or other paper ~~provided for by this article~~ is not signed it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper ~~provided for by this article~~ is signed in violation of this section, the court, upon motion or upon its own initiative upon notice and after opportunity to be heard, shall impose upon the person who signed it or a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney fees. *A motion for sanctions under this section may be served and filed at any time during the pendency of the action but not later than 10 days after the entry of judgment.*

(d) Subsections (a) through (c) do not apply to disclosures and discovery requests, responses, objections and motions that are subject to the provisions of K.S.A. 60-226 through 60-237 and amendments thereto.

(e) The state of Kansas, or any agency thereof, and all political subdivisions of the state shall be subject to the provisions of this section in the same manner as any other party.

(f) If the court imposes monetary sanctions on an inmate in the custody of the secretary of corrections, the secretary is hereby authorized to disburse any money in the inmate's account to pay such sanctions.

Sec. 6. K.S.A. 60-214 is hereby amended to read as follows: 60-214. (a) *When defendant may bring in third party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and ~~complaint~~ *petition* to be served upon a person not a party to the action who is or may be liable to ~~him~~ *the third-party plaintiff* for all or part of the plaintiff's claim against ~~him~~ *the third-party plaintiff*. The third-party plaintiff need not obtain leave to make the service if ~~he~~

The revised section does not conform to certain of the 1993 amendments to federal rule 11. Under the federal rule, a motion for sanctions is not filed until 21 days after being served. If, during this period, the alleged violation is corrected the motion is not filed with the court. The advisory committee believes this "safe harbor" provision will promote reckless and harassing pleadings since any penalty can be avoided. The advisory committee also rejected the federal amendment that provides for monetary sanctions generally to be paid to the court. This provision was viewed as decreasing the incentive for affected parties to pursue violations of the rule. See dissenting opinion of Justice Scalia (146 F.R.D. 501).

Subsection (e) represents the relocation of a provision currently found in K.S.A. 60-2007. The advisory committee recommends the repeal of 60-2007 in that it overlaps with, and contains somewhat different standards from, 60-211. K.S.A. 60-2007 was adopted in 1982 and at that time there were no provisions in 60-211 for assessing costs for frivolous acts. Subsequent amendments to 60-211 appear to remove the need for 60-2007. Subsection (c) of 60-2007 indicates a motion under that section must be filed prior to the taxation of costs. The last sentence of revised subsection (c) of 60-211 is added to clarify when a motion for sanctions may be filed.

[Subsection (f) was added by Senate Committee and represents the incorporation of a 1994 amendment to K.S.A. 60-2007.]

The section is also revised to delete the phrase "provided for by this article." A number of motions in civil proceedings are provided for outside of article 2 of chapter 60. It is the opinion of the advisory committee that honest pleadings should be required in all types of proceedings. In this regard, the committee recommends an amendment to K.S.A. 61-1725 to make 60-211 applicable to limited civil actions. K.S.A. 61-1707 currently makes 60-211 applicable to pleadings in chapter 61 proceedings, but no existing provision makes 60-211 applicable to motions or other papers under chapter 61.

Finally, a reference to "motion or other paper" is added to the first sentence of revised subsection (b). The omission of this reference appears to have been inadvertent.

the third-party plaintiff files the third-party ~~complaint~~ *petition* not later than 10 days after ~~he~~ ~~serves~~ ~~his~~ *serving the* original answer. Otherwise ~~he~~ *the third-party plaintiff* must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party ~~complaint~~ *petition*, hereinafter called the third-party defendant, shall make ~~his~~ *any* defenses to the third-party plaintiff's claim as provided in K.S.A. 60-212 *and amendments thereto* and ~~his~~ *any* counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in K.S.A. 60-213 *and amendments thereto*. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert ~~his~~ *any* defenses as provided in K.S.A. 60-212 *and amendments thereto* and ~~his~~ *any* counterclaims and cross-claims as provided in K.S.A. 60-213 *and amendments thereto*. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to ~~him~~ *the third-party defendant* for all or part of the claim made in the action against the third-party defendant.

(b) *When plaintiff may bring in third party.* When a counterclaim is asserted against a plaintiff, ~~he~~ *the plaintiff* may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

(c) *Execution by third-party plaintiff — limitation.* Where a third-party defendant is liable to the plaintiff, or to anyone holding a similar position under subsections (a) and (b) ~~of this section~~, on the claim on which a third-party plaintiff has been sued, execution by ~~said~~ *the* third-party plaintiff on a judgment against said third-party defendant shall be permitted only to the extent that the third-party plaintiff has paid any judgment obtained against ~~him~~ *the third-party plaintiff* by the obligee.

Sec. 7. K.S.A. 60-215 is hereby amended to read as follows: 60-215. (a) *Amendments.* A party may amend ~~his~~ *the party's* pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, ~~he~~ *the party* may so amend it at any time within ~~twenty~~ ~~(20)~~ *20* days after it is served. Otherwise a party may amend ~~his~~ *the party's* pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given

The section is revised to substitute the Kansas term "petition" for the federal term "complaint" and to eliminate gender references.

when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ~~twenty~~ ~~(20)~~ *20* days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice ~~him~~ *the party* in maintaining ~~his~~ *the party's* action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.* ~~Whenever~~ *An amendment of a pleading relates back to the date of the original pleading when:*

(1) The claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading~~, the amendment relates back to the date of the original pleading. An~~; *or*

(2) the amendment ~~changing~~ *changes* the party *or the naming of the party* against whom a claim is asserted ~~relates back~~ if the foregoing provision *(1)* is satisfied and, within the period provided by law for commencing the action against ~~him~~ *the party including the period for service of process under K.S.A. 60-203 and amendments thereto*, the party to be brought in by amendment ~~(1)~~*: (A)* Has received such notice of the institution of the action that ~~he~~ *the party* would not be prejudiced in maintaining ~~his~~ *a* defense on the merits~~;~~; and ~~(2)~~ *(B)* knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against ~~him~~ *the party*.

(d) *Supplemental pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit ~~him~~ *the party* to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the judge deems it advisable that the adverse party plead to the supplemental pleading, ~~he~~ *the judge* shall so order, specifying the time therefor.

The revisions to subsection (c) parallel the form of the relevant 1991 amendments to the federal rule. Subsection (c)(2) follows the federal rule by providing for relation back of amendments that change "the naming of the party" against whom a claim is asserted. This codifies Kansas decisions recognizing that an amendment to correct a misnomer or misdescription of a defendant is "an amendment changing the party against whom a claim is asserted." Marr v. Geiger Ready-Mix Co., 209 Kan. 40 (1972); Anderson v. United Cab Co., 8 Kan.App. 2d 694 (1983). The addition in subsection (c)(2) of the phrase ". . . including the period for service of process under K.S.A. 60-203 . . ." is intended to codify the result in Anderson.

Sec. 8. K.S.A. 60-216 is hereby amended to read as follows: 60-216. (a) *Pretrial conferences; objectives.* In any ~~contested~~ action, ~~the court shall on the request of either party, or may in its discretion without such request, direct the attorneys for the parties to appear before it for other than an action described in subsection (c), the court shall conduct~~ ***on the request of either party, or may in its discretion without such request, direct the attorneys for the parties to appear before it for*** a conference ~~to consider:~~ *or conferences before trial to expedite processing and disposition of the litigation, minimize expense and conserve time. ~~Such conferences shall include, but are not limited to, case management conferences and a final pretrial conference.~~*

(b) *Case management conference. In any ~~contested~~ action, ~~other than an action described in subsection (c), the court shall~~* ***on the request of either party, or may in its discretion without such request,*** *conduct a case management conference with counsel and any unrepresented parties. The conference shall be scheduled by the court as soon as possible and shall be conducted within 45 days of the filing of an answer. However, in the discretion of the court, the time for the conference may be extended or reduced to meet the needs of the individual case.*

At any conference under this subsection consideration shall be given, and the court shall take appropriate action, with respect to:

(1) Identifying the issues and exploring the possibilities of stipulations and settlement;

(2) whether the action is suitable for alternative dispute resolution;

(3) exchanging information on the issues of the case, including key documents and witness identification;

(4) establishing a plan and schedule for discovery, including setting limitations on discovery, if any, designating the time and place of discovery, restricting discovery to certain designated witnesses or requiring statements be taken in writing or by use of electronic recording rather than by stenographic transcription;

(5) requiring completion of discovery within a definite number of days after the conference has been conducted;

(6) setting deadlines for filing motions, joining parties and amendments to the pleadings;

(7) setting the date or dates for conferences before trial, a final pretrial conference, and trial; and

(8) such other matters as are necessary for the proper management of the action.

Except as provided in subsection (a)(2)(B) of K.S.A. 60-230 and amendments thereto, no depositions, other than of the parties to the action, shall be taken until after the conference is held, except by agreement of the parties or order of the court. If the case management conference is not

K.S.A. 60-216 is revised to recognize there can be more than one pretrial conference in an action and to require an early case management conference and a final pretrial conference in any contested action that is not exempted from the requirement for such conferences.

The revisions are intended to encourage pretrial management and reflect the opinion of the advisory committee that intervention by a judge at an early stage will promote cases being disposed of by settlement or trial more efficiently and with less cost and delay. An early conference with judicial involvement should increase the possibility that cases are settled before resort to extensive discovery, that information can be obtained at the conference which will eliminate the need for some discovery and that consideration will be given to appropriate controls on the extent and timing of discovery. An early conference should result in scheduling dates for the completion of principal pretrial steps which should help narrow the focus of the case to areas that are truly relevant and material.

Since its adoption in 1963, the only amendment to K.S.A. 60-216 has been the addition of subsection (b) [subsection (g) under the proposed revisions] concerning sanctions for lack of cooperation in pretrial conference procedures. However, the proposed revisions to K.S.A. 60-216 are likely not as dramatic as they may appear since a number of the revisions reflect the incorporation of provisions currently contained in Supreme Court Rule 136 (discovery conference) and since the Time Standards adopted by the Supreme Court as part of the General Principles and Guidelines for the District Courts currently provide that, "All chapter 60 civil cases, except domestic relations cases, should ordinarily be set for an initial discovery conference not later than 60 days after the petition is filed. . . ." Kansas Supreme Court Rule 136 was adopted in 1976 and the Time Standards became effective on December 11, 1980.

As revised, subsection (a) recognizes there can be more than one pretrial conference. In its current form, K.S.A. 60-216 appears to be directed toward a single conference late in the pretrial process, as was the federal rule prior to its amendment in 1983.

Proposed subsection (b) addresses the time for the case management conference, the subjects for consideration at the conference and the relationship of the conference to depositions of nonparties. The time for the conference must be early enough to achieve the purposes of the conference, yet it must allow time for the parties to become sufficiently familiar with the case that participation in the conference is meaningful. The last sentence of the first paragraph gives the court flexibility to address the needs of individual cases. In regard to the subjects for

held within 45 days of the filing of an answer, the restrictions of this paragraph shall no longer apply.

If discovery cannot be completed within the period of time originally prescribed by the court, the party not able to complete discovery shall file a motion prior to the expiration of the original period for additional time to complete discovery. Such motion shall contain a discovery plan and shall set forth the reason why discovery cannot be completed within the original period. If additional time is allowed, the court shall grant only that amount of time reasonably necessary to complete discovery.

(c) Subjects for consideration at pretrial conferences. At any pretrial conference consideration may be given, and the court may take appropriate action, with respect to:

(1) The simplification of the issues;

(2) ~~The trial of issues of law~~ the determination of *issues of law* which may eliminate or affect the trial of issues of fact;

(3) the necessity or desirability of amendments to the pleadings;

(4) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(5) the limitation of the number of expert witnesses;

(6) the advisability of a preliminary reference of issues to a master; *and*

(7) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

In the discretion of the court, any pretrial conference may be held by a telephone conference call.

(d) Final pretrial conference. In any action, ~~other than an action described in subsection (c),~~ the court shall ***on the request of either party, or may in its discretion without such request,*** *conduct a final pretrial conference in accordance with procedures established by rule of the supreme court.*

~~*(e) Actions exempt from mandatory conferences.*~~

~~*(1) Pretrial conferences are not mandatory in the following categories of actions:*~~

~~*(A) Domestic relations cases, including, but not limited to:*~~

~~*(i) Actions under article 16 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto;*~~

~~*(ii) actions for support;*~~

~~*(iii) parentage actions; and*~~

consideration, items (a)(1) and (5) and parts of items (a)(3) and (4) are currently contained in Supreme Court Rule 136. The remaining items are patterned after provisions contained in federal rule 16(b), former federal rule 26(f) and the case management procedures adopted by the Federal District Court for the Northern District of Ohio. The proposal directs that consideration be given, and appropriate action taken, with respect to the enumerated items. The advisory committee recognizes that in any given case, due to timing or the nature of the particular case, no action may be the appropriate response in regard to a particular item or items.

The third paragraph of subsection (b) prohibits depositions of nonparties until after the case management conference is held, unless otherwise agreed by the parties or permitted by court order or unless the nonparty deponent will be unavailable if not deposed before the conference. Currently, Supreme Court Rule 136 similarly restricts depositions of nonparties before the discovery conference if such a conference is requested in a damage action. Amended federal rule 26(d) restricts discovery prior to the meeting of the parties required under rule 26(f). The restrictions on depositions of nonparties are removed if a case management conference is not timely held. The code of civil procedure generally provides for the pursuit of discoverable information. This is restricted under the proposal due to the potential the case management conference will eliminate the need for some discovery. However, discovery should not be unduly delayed. In this context, the advisory committee noted the Time Standards establish a median time of 180 days for disposition of nondomestic civil cases.

The last paragraph of subsection (b) reflects a provision currently contained in Supreme Court Rule 136.

The introductory language of subsection (c) is revised to recognize there may be multiple pretrial conferences. The second paragraph of subsection (c) incorporates 1983 and 1993 amendments to the federal rule which are intended to promote meaningful participation and avoid conferences being merely "ceremonial and ritualistic."

Subsection (d) recognizes there should be a final pretrial conference focused on preparation for trial. It is more abbreviated than the federal provision, however, Supreme Court Rule 140 (pretrial conference procedure) addresses the omitted federal provisions. The advisory committee recommends amendment of rule 140 to clarify it establishes the procedure for the "final" pretrial conference.

~~(iv) protection from abuse proceedings;~~
~~(B) actions for judicial review or enforcement of administrative decisions;~~
~~(C) actions filed by pro se prisoners or directly related to the litigant's incarceration;~~
~~(D) forfeiture proceedings;~~
~~(E) proceedings under the code for care of children or the juvenile offenders code;~~
~~(F) proceedings under chapter 59 of the Kansas Statutes Annotated, and amendments thereto; and~~
~~(G) alcoholism or drug treatment proceedings.~~
~~(2) Upon request of either party or on the court's own motion, the court may, and when required under K.S.A. 60-1608, and amendments thereto, the court shall, conduct a pretrial conference or conferences in an action described in subsection (e)(1). At any conference under this subsection, consideration may be given, and the court may take appropriate action, with respect to any of the matters contained in subsections (b) and (c).~~

~~(f)~~ *(e) Pretrial orders. After any conference held under this section, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only by agreement of the parties, or by the court to prevent manifest injustice.*

~~The court in its discretion may, and shall upon the request of either party make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.~~

~~(b) (g)~~ *(f)* If a party or party's attorney fails to obey a pretrial order, if no appearance is made on behalf of a party at a pretrial conference, if a party or party's attorney is substantially unprepared to participate in the conference or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative and after opportunity to be heard, may make such orders with regard thereto as are just, and among others any of the orders provided in subsections (b)(2)(B), (C) and (D) of K.S.A. 60-237 and amendments thereto. In lieu of or in addition to any other sanction, the judge shall require the party or the party's attorney, or both, to pay the reasonable expenses incurred

Subsection (e) sets out the actions exempted from mandatory pretrial conferences. Such proceedings either do not generally require pretrial conferences or have their own specific pretrial provisions. In most such proceedings, subsection (e)(2) gives the court discretion to conduct a pretrial conference or conferences. In regard to actions under the divorce code, the advisory committee was reluctant to mandate conferences, in part due to the statutory cooling-off period in such actions. Subsection (e)(2) recognizes the ability of a party under K.S.A. 60-1608 to mandate a conference in a divorce action.

Due to the possibility of multiple conferences, subsection (f) recognizes there may be a need for more than one pretrial order in a case. The standard for modifying a "final" pretrial order, "to prevent manifest injustice," is retained but such a rigid standard should not apply to orders resulting from earlier conferences. Modification of a final pretrial order is also allowed by agreement of the parties.

[As recommended by the Judicial Council, a case management conference and final pretrial conference would have been required in every civil action except categories of exempted cases. Rather than mandate such conferences, the Senate committee adopted the position, in line with current K.S.A. 60-216 and Supreme Court Rule 136, that such conferences shall be held on request of a party or on the court's own motion.]

because of any noncompliance with this section, including attorney fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Sec. 9. K.S.A. 60-223 is hereby amended to read as follows: 60-223. (a) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class actions maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

(c) *Determination by order whether class action to be maintained; judgment; actions conducted partially as class actions.*

(1) As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a nonclass action, may order that it be

As revised, the section conforms more closely to the language of the federal rule. Although there are differences in format and language between 60-223 and the federal rule, "The procedures are not materially different and the objects to be achieved are the same." Kansas Code of Civil Procedure Annotated 2d (Gard) Section 60-223. The revisions are not prompted by recent amendments to the federal rule. (The federal rule has not been substantively amended since 1966 and 60-223 has not been amended since 1980.) However the substantial similarities between 60-223 and the federal rule has led to the use of federal case law in interpreting 60-223. Waltrip v. Sidwell Corp., 234 Kan. 1059 (1984).

maintained as a class action. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

~~(2) The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.~~

~~In any class action maintained under subdivision (b)(3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.~~

~~(3)~~ *(2) In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that: (A) The court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion, if the member desires, may enter an appearance through counsel.*

(3) The judgment in an action maintained as a class action under subsection (b)(1)) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues such as the issue of liability, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

(d) *Orders in conduct of actions.* In the conduct of actions to which this section applies, the court may~~, without limitation,~~ make appropriate orders: (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of

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any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with an order under K.S.A. 60-216 *and amendments thereto*, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or compromise.* ~~An action brought as a~~ *A* class action~~, whether or not ordered to be maintained as provided in paragraph (1) of subsection (e),~~ shall not be dismissed or compromised without the approval of the court, and ~~the court in its discretion may order that~~ notice of ~~a~~ *the* proposed dismissal or compromise *shall* be given to ~~the~~ *all members of the* class in such manner as the court ~~may direct~~ *directs*.

Sec. 10. K.S.A. 60-226 is hereby amended to read as follows: 60-226. (a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written ~~interrogation~~ *interrogatories*; production of documents or things or permission to enter upon land or other property *under K.S.A. 60-234, subsection (a)(1)(C) of K.S.A. 60-245 or 60-245a and amendments thereto*, for inspection and other purposes; physical and mental examinations; and requests for admission. ~~Unless the court orders otherwise under subsection (e), the frequency of use of these methods is not limited.~~

(b) *Scope of discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) *In general:* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Except as permitted under subsection ~~(b)(3)~~ *(b)(4)*, a party shall not require a deponent to produce, or submit for inspection, any writing prepared by, or under the supervision of, an attorney in preparation for trial.

(2) The frequency or extent of use of the discovery methods otherwise permitted under the rules of civil procedure shall be limited by the court only if it determines that: (A) The discovery sought is unreasonably cu-

Subsection (a) is revised in accordance with a 1993 amendment to the federal rule to make note of the availability under revised K.S.A. 60-245 for inspection from nonparties of documents and premises without the need for a deposition. Reference is also made to the Kansas provision for subpoena of business records (K.S.A. 60-245a).

The deletion of the last sentence of subsection (a) and the addition of subsection (b)(2) are in accordance with a 1983 amendment to the federal rule. The objective of the 1983 federal amendment was ". . . to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." The amendment contemplated ". . . greater judicial involvement in the discovery process" and acknowledged ". . . the reality that it cannot always operate on a self-regulating basis." Supreme Court Rule 136 (discovery conference) contains language indicating the court can restrict discovery to certain witnesses and determine and order appropriate discovery procedures. This language is retained and amplified in the revisions to K.S.A. 60-216(b) which provide for a case management conference. In conducting a conference under 60-216 the court should consider the factors in revised (b)(2) of this section. The revised subsection allows the court to raise the issue of needless discovery on its own motion in addition to the ability of a party to raise such issues by motion for protective order. The grounds mentioned for limiting discovery appear to be drawn from cases authorizing protective orders relating to discovery.

mulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subsection (c).

~~(2)~~ *(3) Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

~~(3)~~ *(4) Trial preparation: Materials.* Subject to the provisions of subsection ~~(b)(4)~~ *(b)(5)*, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b) (1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative ~~(~~,including such other party's attorney, consultant, surety, indemnitor, insuror or agent~~)~~, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that such party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impression, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of K.S.A. 60-237 and amendments thereto apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

~~(4)~~ *(5) Trial preparation: Experts.* ~~Discovery of facts known and opin-~~

~~ions held by experts, otherwise discoverable under the provisions of subsection (b)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

~~(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C), concerning fees and expenses as the court may deem appropriate.~~

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subsection (b)(6)(B), the deposition shall not be conducted until after the report is provided.

(B) A party ~~may~~, *through interrogatories or by deposition, may* discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in K.S.A. 60-235 and amendments thereto or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under ~~subsections (b)(4)(A)(ii) and (b)(4)(B)~~ *this subsection*; and (ii) with respect to discovery obtained under subsection ~~(b)(4)(A)(ii) the court may require, and with respect to discovery obtained under subsection (b)(4)(B)~~ *(b)(5)(B)* the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) Disclosure of expert testimony.

(A) A party shall disclose to other parties the identity of any person who may be used at trial to present expert testimony.

(B) Except as otherwise stipulated or directed by the court, this disclosure, with respect to a witness (i) whose sole connection with the case is that the witness is retained or specially employed to provide expert testimony in the case or (ii) whose duties as an employee of the party regularly involve giving expert testimony, shall ~~be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and~~

Subsection (b)(5) is revised in accordance with 1993 amendments to the federal rule and new subsection (b)(6) relating to disclosure of expert testimony. As noted in the comments to the similar federal amendment, "Experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard." Where a written report is required under new (b)(6), it is hoped that the length of the deposition will be reduced and accordingly, the deposition of an expert required to provide a report may be taken only after the report has been served.

New subsection (b)(6) imposes a duty to disclose information regarding expert testimony. Under paragraph (6)(B), certain experts must provide a detailed and complete written report. The comments to the federal amendments state, "The information disclosed under the former rule in answering interrogatories about the 'substance' of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness." Sanctions under revised K.S.A. 60-237(c)(1) provide incentive for full disclosure.

The comments to the federal rule indicate a written report is not required from an expert such as a "treating physician." Paragraph (6)(B) attempts to make explicit this exception for treating physicians and similar such experts by use of the phrase ". . . sole connection with the case. . . ."

[The Senate committee deleted the requirement of detailed, written reports from retained or specially employed experts. Instead, information about such experts must be disclosed in line with information that can currently be sought through interrogatories under existing subsection (b)(4)(A)(i).]

~~*reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years*~~ ***state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.***

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b)(6)(B), within 30 days after the disclosure made by the other party. The party shall supplement these disclosures when required under subsection (e)(1).

(D) Unless otherwise ordered by the court, all disclosures under this subsection shall be made in writing, signed and served. Such disclosures shall be filed with the court in accordance with subsection (d) of K.S.A. 60-205 and amendments thereto.

(c) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including one or more of the following:

(1) That the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

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(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court ~~may~~, on such terms and conditions as are just, *may* order that any party or person provide or permit discovery. The provisions of K.S.A. 60-237 and amendments thereto apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and timing of discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who has *made a disclosure under subsection (b)(6) or* responded to a request for discovery ~~with a response that was complete when made~~ is under ~~no~~ *a* duty to supplement *or correct* the party's *disclosure or* response to include information thereafter acquired~~, except as follows~~ *if ordered by the court or in the following circumstances*:

(1) A party is under a duty ~~seasonably~~ to supplement ~~the party's response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the party is expected to testify and the substance of the party's testimony~~ *at appropriate intervals its disclosures under subsection (b)(6) if the party learns that in some material respect the information disclosed 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. With respect to testimony of an expert from whom a report is required under subsection (b)(6)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed at least 30 days before trial, unless otherwise directed by the court.*

(2) A party is under a duty seasonably to amend a prior response *to an interrogatory, request for production or request for admission* if the party ~~obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment~~ *learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during*

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Subsection (e) is revised to conform to 1993 amendments to the federal rule. Subsection (e)(1) addresses disclosures concerning expert witnesses under new (b)(6). The revisions to (e)(2) clarify that ". . . the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under . . ." new (b)(6), ". . . changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure. . ." under subsection (e)(1).

the discovery process or in writing.

~~(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

(f) *Signing of disclosures, discovery requests, responses and objections. (1)* Every request for discovery or response or objection to discovery made by a party represented by an attorney shall be signed by at least one attorney of record in such attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response or objection and state such party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response or objection and that to the best of such attorney's or party's knowledge, information and belief formed after reasonable inquiry it is: ~~(1)~~ *(A)* Consistent with the rules of civil procedure and warranted by existing law or good faith argument for the extension, modification or reversal of existing law; ~~(2)~~ *(B)* not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and ~~(3)~~ *(C)* not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues at stake in the litigation. If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party or person making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(2) Every disclosure made under subsection (b)(6) shall be signed by at least one attorney of record in the attorney's individual name whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(3) If, *without substantial justification,* a certification is made in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification or the party on whose behalf the *disclosure,* request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of reasonable expenses incurred because of the violation, including reasonable attorney fees.

Sec. 11. K.S.A. 60-228 is hereby amended to read as follows: 60-228. (a) *Within the United States.* (1) Depositions may be taken in this state before any officer or person authorized to administer oaths by the laws of this state.

Subsection (f)(2) is required by new subsection (b)(6). The addition of the phrase "without substantial justification" in (f)(3) follows the 1993 federal amendment and is consistent with the terminology used in revised K.S.A. 60-237.

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(2) Without the state but within the United States, or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(3) Any court of record of this state, or any judge thereof, before whom an action or proceeding is pending, is authorized to grant a commission to take depositions within or without the state. The commission may be issued by the clerk to a person or persons therein named, under the seal of the court granting the same.

(b) *In foreign countries.* ~~In a foreign country,~~ Depositions may be taken *in a foreign country:*

(1) *Pursuant to any applicable treaty or convention;*

(2) pursuant to a letter of request, whether or not captioned a letter rogatory;

(3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law of the United States or the law of that place~~, or (2)~~;

(4) before a person appointed by commission~~, or (3) under letters rogatory~~. A person appointed by commission has power by virtue of ~~his or her~~ *the* appointment to administer oaths and take testimony. A commission or ~~letters rogatory~~ *letter of request* shall be issued on application and notice, and on terms and directions that are just and appropriate. It is not requisite to the issuance of ~~letters rogatory~~ *a commission or a letter of request* that the taking of the deposition ~~by commission or on notice~~ *in any other matter* is impracticable or inconvenient; and both a commission and ~~letters rogatory~~ *letter of request* may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. ~~Letters rogatory~~ *A letter of request* may be addressed "To the Appropriate Judicial Authority in (here name the country)." *When a letter of request or any other device is used pursuant to an applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention.* Evidence obtained ~~under letters rogatory~~ *in response to a letter of request* shall not be excluded on the ground that it is not in the form of questions and answers or is not a verbatim transcript of the testimony.

(c) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) *Depositions for use in foreign jurisdictions.* Whenever the deposition of any person is to be taken in this state pursuant to the laws of

Subsection (b) is revised to conform to 1993 amendments to the federal rule. The amendments to the federal rule were ". . . intended to make effective use of the Hague convention on the taking of evidence abroad in civil or commercial matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad."

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another state or of the United States or of another country for use in proceedings there, the district court in the county where the deponent resides or is employed or transacts his or her business in person may, upon *ex parte* petition, make an order directing issuance of subpoena as provided in K.S.A. 60-245, in aid of the taking of the deposition, and may make any order in accordance with ~~K.S.A. 60-230 (d)~~ *subsection (d) of K.S.A. 60-230, subsection (a) of K.S.A.* 60-237 ~~(a)~~ or *subsection (b)(1) of* K.S.A. 60-237 ~~(b) (1)~~ *and amendments thereto.*

Sec. 12. K.S.A. 60-230 is hereby amended to read as follows: 60-230. (a) *When depositions may be taken; when leave required.* ~~After commencement of the action, any~~ *(1) A* party may take the testimony of any person, including a party, by deposition upon oral examination. ~~Leave of court, granted with or without notice, shall be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and petition upon any defendant or service made under K.S.A. 60-301 et seq., and amendments thereto, except that leave is not required if (1) a defendant has served a notice of taking deposition or otherwise sought discovery or (2) special notice is given as provided in this section~~ *without leave of court except as provided in paragraph (2).* The attendance of witnesses may be compelled by subpoena as provided in K.S.A. 60-245 and amendments thereto. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in subsection (b)(2) of K.S.A. 60-226 and amendments thereto, if the person to be examined is confined in prison or if, without written stipulation of the parties:

(A) The person to be examined already has been deposed in the case;

(B) a party seeks to take a deposition of a nonparty before the time specified in subsection (b) of K.S.A. 60-216 and amendments thereto, unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave Kansas and be unavailable for examination in Kansas unless deposed before that time; or

*(C) the plaintiff seeks to take a deposition of a party, or a deposition of a nonparty in an action in which a case management conference ~~is not mandatory~~ **[has not been scheduled]*** under subsection ~~(c)~~ ***[(b)]*** *of K.S.A. 60-216 and amendments thereto, prior to the expiration of 30 days after service of the summons and petition upon any defendant or service made under K.S.A. 60-301 et seq., and amendments thereto, unless (i) a defendant has served a notice of taking deposition or otherwise sought discovery or (ii) the notice contains a certification, with supporting facts, that the person to be examined is expected to leave Kansas and be unavailable for examination in Kansas unless deposed before expiration of the*

As revised, subsection (a) follows the form of the 1993 amendments to the federal rule. Requirements relating to obtaining leave of court to take a deposition are gathered in subsection (a)(2). In determining whether to grant leave to take a deposition, the court's attention is directed to revised K.S.A. 60-226(b)(2) relating to limitations on needless discovery. Paragraph (a)(2)(B) recognizes that revised K.S.A. 60-216(b) restricts depositions of nonparties in cases where a case management conference is mandatory. Paragraph (a)(2)(C) represents the relocation of an existing provision requiring leave of court and is necessary to address depositions of nonparties in cases that are not subject to a mandatory case management conference and depositions of parties. Paragraphs (a)(2)(B) and (C) continue the exception to obtaining leave of court where the deponent will be unavailable for a later examination. The provision is modified to cover persons about to leave the <u>state</u> who will be unavailable for later examination in <u>Kansas</u>.

[The time for deposing nonparties is tied to the case management conference. The Senate committee amendment to K.S.A. 60-216, concerning when a case management conference is required, necessitated the Senate floor amendment to proposed subsection (a)(2)(C) of 60-230.]

30-day period.

(b) *Notice of examination; general requirements; ~~special notice;~~ non-stenographic recording; production of documents and things; deposition of organization.* (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. ~~The attendance of witnesses may be compelled by subpoena as provided in K.S.A. 60-245 and amendments thereto.~~ The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known. ~~If~~, *and, if* the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena *duces tecum* is to be served on the person to be examined, a designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

~~(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial or is about to leave the United States, or is bound on a voyage to sea and will be unavailable for examination unless the deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information and belief the statement and supporting facts are true. The sanctions provided by K.S.A. 60-211 and amendments thereto are applicable to the certification.~~

~~If a party shows that when the party was served with notice under this section the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.~~

~~(3) The judge may for cause shown enlarge or shorten the time for taking the deposition.~~

~~(4)~~ (2) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under subsection (c), any changes made by the witness, the signature identifying the deposition as the signature of the witness or the statement of the officer that is required by subsection (e) if the witness does not sign and the certification of the officer required

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The last sentence of current subsection (b)(2) is relocated in revised K.S.A. 60-232(a)(3). Current subsection (b)(3) is deleted as unnecessary in light of K.S.A. 60-226(c)(2).

Revised subsection (b)(3) follows a 1993 amendment to the federal rule and "contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically."

by subsection (f) shall be set forth in writing to accompany a deposition recorded by nonstenographic means.

(3) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under K.S.A. 60-228 and amendments thereto, and shall begin with a statement on the record by the officer that includes: (A) The officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters. ***Any deposition which is to be recorded stenographically may also be recorded on videotape, or a comparable medium, by any party by giving notice to the other parties prior to the deposition.***

~~(5)~~ *(4)* The notice to a party deponent may be accompanied by a request made in compliance with K.S.A. 60-234 and amendments thereto for the production of documents and tangible things at the taking of the deposition. The procedure of K.S.A. 60-234 and amendments thereto shall apply to the request.

~~(6)~~ *(5)* A party may in the notice *and in a subpoena* name as the deponent a public or private corporation or a partnership, association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The named organization shall designate one or more officers, directors, managing agents or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. *A subpoena shall advise a nonparty organization of its duty to make such a designation.* The designated persons shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

~~(7)~~ *(6)* The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone *or other remote electronic means*. For the purposes of this section and ~~K.S.A. 60-228(a), 60-237(a)(1), 60-237(b)(1) and 60-245(e),~~ *subsection (c) of K.S.A. 60-226, subsection (a) of K.S.A. 60-228, subsection (a)(1) of K.S.A. 60-237, subsection (b)(1) of K.S.A. 60-237 and subsection (a)(2) of K.S.A. 60-245* and amendments thereto, a deposition taken by telephone ~~shall be~~ *or other*

[The Senate committee amendment on p. 23, ll. 17-20, allows a party, upon notice, to also videotape a deposition which is to be recorded stenographically. See amendments to subsection (c) of K.S.A. 60-232 (Sec. 14).]

As revised, subsection (b)(5) incorporates 1971 amendments to the federal rule which clarify the procedure when a party seeks to examine a nonparty organization. A subpoena rather than a notice of examination is served on a nonparty. An unrepresented nonparty organization may not be aware it has a duty to designate persons to testify on its behalf.

Revised subsection (b)(6) follows a 1993 federal amendment and recognizes there are other remote electronic means, such as satellite television, for taking a deposition. As revised, the provision follows the federal rule and clarifies that a telephone deposition is taken where the deponent answers questions. In addition, a reference to K.S.A. 60-226(c) is added. K.S.A. 60-226(c) indicates the appropriate court for a motion for a protective order.

The last sentence of revised (b)(6) and current (b)(8) are deleted on the basis such matters are adequately addressed in revised subsection (b)(2) [current (b)(4)].

remote electronic means is taken in the district ~~agreed upon by the parties~~ and at the place where the deponent answers questions. ~~If a deposition is taken by telephone, a stenographic record of the deposition shall be made while the deposition is being taken.~~

~~(8) The parties may stipulate in writing or the court, upon motion and a finding that it is necessary, may order that a deposition be videotaped. If a deposition is videotaped, a stenographic record of the deposition shall be made while the deposition is being taken, at the place where the deponent answers questions.~~

(c) *Examination and cross-examination; record of examination; oath; objections.* Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of K.S.A. 60-243 and amendments thereto. The officer before whom the deposition is to be taken shall put the witness on oath *or affirmation* and shall personally, or by some one acting under the direction and in the presence of the officer, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection ~~(b)(4)~~ *(b)(2)*. If requested by one of the parties, the testimony shall be transcribed. The judge may order the cost of transcription paid by one or some of, or apportioned among, the parties. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party ~~and any other objection to~~ *or to any other aspect of* the proceedings shall be noted by the officer upon the *record of the* deposition. ~~Evidence objected to shall be~~; *but the examination shall proceed, with the testimony being* taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party shall transmit ~~them~~ *the questions* to the officer who shall propound ~~them~~ *such questions* to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the judge in the district where the action is pending or where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition as provided in *subsection (c) of* K.S.A. ~~60-226(c)~~ *60-226* and amendments thereto. If the order made terminates the examination, it shall be resumed only upon the order of the judge where the action is pending. Upon demand of the objecting party or deponent the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The pro-

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visions of *subsection (a) of* K.S.A. ~~60-237(a)~~ *60-237* and amendments thereto apply to the award of expenses incurred in relation to the motion.

(e) ~~*Submission to*~~ *Review by witness; changes; signing.* ~~When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless the examination and reading are waived by the witness and by the parties. The officer shall enter, on a form prescribed by rule of the supreme court, any changes which the witness desires to make in the form or substance of the deposition, together with a statement of the reasons given by the witness for making the changes. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill, cannot be found or refuses to sign. The officer before whom the deposition is taken shall submit the deposition by sending it by first-class mail or by hand delivering it, either to the witness or to the attorney for the witness if the witness is a party to the lawsuit.~~

~~If the deposition is not signed by the witness or not returned within the time limitation provided in this subsection, the officer shall sign it or a copy of it and state on the record the waiver, the illness or absence of the witness or the refusal to sign together with the reason given, if any, or the failure to return the deposition within 30 days after having been submitted. The deposition may be used as though signed, unless on a motion to suppress under K.S.A. 60-232(d)(4) and amendments thereto, the judge holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part~~ *Unless waived by the deponent and by the parties, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making such changes. The officer shall indicate in the certificate prescribed by subsection (f)(1) whether the deposition was reviewed and, if so, shall append any changes made by the deponent during the period allowed.*

(f) *Certification and delivery or filing by officer; notice of delivery or filing; copies; exhibits; retention of original.* (1) The officer shall certify ~~on the deposition~~ that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. *This certificate shall be in writing and accompany the record of the deposition.* Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope *or package* indorsed with the title of the action and marked "deposition of (here insert name of witness)" and shall promptly deliver ~~it~~ *the deposition* to the party taking the deposition, *who shall store the deposition under conditions that will protect the deposition against loss, destruction, tampering or deterioration.* If so ordered by the

Subsection (e) is revised to substantially conform to a 1993 amendment to the federal rule. The revised provision provides 30 days for review of a deposition unless waived by the deponent and the parties, while the federal rule provides for such review only if requested by the deponent or a party prior to completion of the deposition. The federal amendment was prompted by difficulties in obtaining signatures and return of depositions from deponents.

Subsection (f) is revised in conformity with federal amendments to require storage of depositions under appropriate conditions and to require the officer taking the deposition to retain stenographic notes and a copy of a nonstenographic recording so that any other party can obtain a copy of the deposition.

court, the officer shall promptly file the deposition with the court in which the action is pending or send it by first-class mail to the clerk for filing. The officer shall serve notice of the delivery or filing of the deposition on all parties. ~~Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.~~

Documents and things produced for inspection during the examination of the witness ~~shall~~, upon the request of a party, *shall* be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve as originals, if the person affords to all parties an opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefore, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

~~(2)~~ *(3)* Except when filed with the court, the original of a deposition shall be retained by the party to whom it is delivered and made available for appropriate use by any party.

(g) *Failure to attend or to serve subpoena; expenses.* (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and attorney in so attending, including reasonable attorney fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and because of such failure the witness does not attend, and if another party attends in person or by attorney because the party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay the reasonable expenses and attorney fees of the party and the party's attorney in attending the taking of the deposition.

(h) *Persons to be present.* Unless otherwise ordered by the judge or stipulated by counsel, no person shall be present while a deposition is being taken except the officer before whom it is being taken; the reporter, stenographer or person recording the deposition; the parties to the action,

their respective counsel and paralegals or legal assistants of such counsel; and the deponent.

Sec. 13. K.S.A. 60-231 is hereby amended to read as follows: 60-231. (a) *Serving questions; notice.* ~~After commencement of the action, any~~ *(1)* A party may take the testimony of any person, including a party, by deposition upon written questions *without leave of court except as provided in paragraph (2).* The attendance of witnesses may be compelled by the use of subpoena as provided in K.S.A. 60-245 and amendments thereto. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the judge prescribes.~~

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in subsection (b)(2) of K.S.A. 60-226 and amendments thereto, if the person to be examined is confined in prison or if, without the written stipulation of the parties:

(A) The person to be examined has already been deposed in the case; or

(B) a party seeks to take a deposition of a nonparty before the time specified in subsection (b) of K.S.A. 60-216 and amendments thereto.

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating ~~(1)~~ *(A)* the name and address of the person who is to answer them, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs and ~~(2)~~ *(B)* the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership, association or governmental agency in accordance with the provisions of *subsection (b) of* K.S.A. 60-230 ~~(b)~~ and amendments thereto.

(4) Within ~~30~~ *14* days after the notice and written questions are served, a party may serve cross-questions upon all other parties. Within ~~10~~ *14* days after being served with cross-questions, a party may serve redirect questions upon all other parties. Within ~~10~~ *14* days after being served with redirect questions, a party may serve recross-questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Officer to take responses and prepare record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the depositions to the officer designated in the notice, who shall proceed promptly, in the manner provided by *subsections (c), (e) and (f) of* K.S.A. 60-230 ~~(c),~~ ~~(c)~~ ~~and~~ ~~(f)~~, and amendments thereto, to take the testimony of the witness in response to the questions and to prepare, certify and either deliver or file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

As revised, subsection (a) follows the form of the 1993 amendments to the federal rule. Requirements relating to obtaining leave of court to take a deposition upon written questions are gathered in subsection (a)(2). In determining whether to grant leave to take a deposition, the court's attention is directed to revised K.S.A. 60-226(b)(2) relating to limitations on needless discovery.

The changes in revised subsection (a)(4) somewhat reduce the total time for developing cross examination, redirect and recross questions.

Sec. 14. K.S.A. 60-232 is hereby amended to read as follows: 60-232. (a) *Use of deposition.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under K.S.A. 60-230 or 60-231, and amendments thereto, to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that:

(A) The witness is dead;

(B) the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state of Kansas, unless it appears that the absence of the witness was procured by the party offering the deposition;

(C) the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under subsection (a)(2)(B) or (a)(2)(C)(ii) of K.S.A. 60-230 and amendments thereto, shall not be used against a party who demonstrates that, when served with the notice, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require ~~him~~ *the party* to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties pursuant to K.S.A. 60-225 and amendments thereto does not affect the right to use depositions previously taken; and, when an action *has been brought* in any court of the United States or of any state ~~has been dismissed~~ and another action

The revision in subsection (a)(3) represents the relocation of the substance of a provision currently found in 60-230(b)(2). In many circumstances, leave of court is required for depositions early in the case. This requirement is removed if the deponent is expected to leave Kansas and not be available for a later deposition in the state. The relocated provision protects a party against use of such a deposition if the party was unable through diligence to obtain counsel in a timely manner.

In subsection (a)(4), the phrase "has been brought" is substituted for "has been dismissed." This revision follows a 1980 amendment to the federal rule. The comment to the 1980 federal amendment states, "The requirement that a prior action must have been dismissed before depositions taken for use in it can be used in a subsequent action was doubtless an oversight, and the courts have ignored it."

The substance of revised subsection (c) is new and follows 1993 amendments to the federal rule. The first sentence requires a party to provide the court and opposing parties with a transcript of deposition testimony offered in nonstenographic form. For some time, K.S.A. 60-230 has allowed nonstenographic recording of depositions on stipulation or court order. In addition, 60-230 has been revised to delete the requirement that a stenographic record be made of any deposition that is videotaped. The revisions require the party to provide a transcript of the entire deposition while the federal rules require that the court be provided with a transcript of those portions offered [rule 32(c)] and that a party be provided with a transcript of the "pertinent portions" [rule 26(a)(3)(B)]. The committee recommends provision of the entire transcript to avoid questions which may arise as to who is responsible for providing a transcript of other portions of the same deposition an opposing party may wish to use for cross-examination. The second sentence of revised subsection (c) promotes use in a jury trial of the form of recording which more readily lends itself to a determination of credibility of the deponent.

involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.* Subject to the provisions of ~~K.S.A. 60-228(b)~~ *subsection (b) of K.S.A. 60-228* and amendments thereto and subsection ~~(d)(3)~~ *(e)(3)*, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Form of presentation. Except as otherwise directed by the court, a party offering deposition testimony under this section may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court and opposing parties with a transcript of the entire deposition from which the portions offered were taken. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.*

(d) Effect of taking or using depositions. A party does not make a person the party's own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2). At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by the party or by any other party.

~~(d)~~ *(e) Effect of errors and irregularities in depositions.* (1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of deposition.* (A) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the

manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation or in the conduct of parties, and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under K.S.A. 60-231 and amendments thereto are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, delivered or otherwise dealt with by the officer under K.S.A. 60-230 or 60-231, and amendments thereto, are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Sec. 15. K.S.A. 60-233 is hereby amended to read as follows: 60-233. (a) *Availability; procedures for use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories ~~may~~, without leave of court, *may* be served upon the plaintiff after commencement of the action and upon any other party with or after service of process upon that party.

(b) Answers and objections. (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event *the objecting party shall state* the reasons for objection ~~shall be stated in lieu of an answer~~ *and shall answer to the extent the interrogatory is not objectionable.*

(2) The answers are to be signed by the person making ~~them~~ *the answers*, and the objections signed by the attorney making ~~them~~ *the objections.*

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of process upon that defendant. The court may allow a shorter or longer time.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

The revisions in subsections (b)(1) and (4) follow 1993 amendments to the federal rule. The revisions to (b)(1) ". . . emphasize the duty of the responding party to provide full answers to the extent not objectionable." Subsection (b)(4) ". . . is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived." K.S.A. 60-226(f) allows imposition of sanctions on a party or attorney making an unfounded objection to an interrogatory.

(5) The party submitting the interrogatories may move for an order under subsection (a) of K.S.A. 60-237 and amendments thereto with respect to any objection to or other failure to answer an interrogatory.

~~(b)~~ *(c) Scope; use at trial.* Interrogatories may relate to any matters which can be inquired into under subsection (b) of K.S.A. 60-226 and amendments thereto and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

~~(c)~~ *(d) Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Sec. 16. K.S.A. 60-234 is hereby amended to read as follows: 60-234. (a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into ~~reasonable~~ *reasonably* usable form), or to inspect and copy, test or sample any tangible things which constitute or contain matters within the scope of subsection (b) of K.S.A. 60-226 and amendments thereto and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of subsection (b) of K.S.A. 60-226 and amend-

ments thereto.

(b) *Procedure.* The request ~~may~~, without leave of court, *may* be served upon the plaintiff after commencement of the action and upon any other party with or after service of process upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of process upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified *and inspection permitted of the remaining parts*. The party submitting the request may move for an order under subsection (a) of K.S.A. 60-237 and amendments thereto with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request.

(c) *Persons not parties.* ~~This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land~~ *A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in K.S.A. 60-245 and 60-245a and amendments thereto.*

Sec. 17. K.S.A. 60-235 is hereby amended to read as follows: 60-235. (a) *Order for examination.* When the mental or physical condition ~~(~~, including the blood group~~)~~, of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a ~~physician~~ *suitably licensed or certified examiner* or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. The moving party shall advance the expenses which will necessarily be incurred by the party to be examined.

(b) *Report of ~~examining physician~~ examiner.* (1) If requested by the

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In subsection (b) the phrase "an inspection permitted of the remaining parts" is added. This is consistent with the amendments made to K.S.A. 60-233 and makes clear that ". . . if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions."

The revisions to subsection (c) follow a 1991 amendment to the federal rule and should remove the necessity for an independent action against nonparties. Protections for nonparties are provided in revisions to K.S.A. 60-245(c). In addition to K.S.A. 60-245, the revision makes reference to the Kansas provision on subpoena of business records (K.S.A. 60-245a).

The revisions follow a 1991 amendment to the federal rule and provide for examinations by "suitably licensed or certified examiners" rather than just physicians. Other professionals, such as dentists, occupational therapists or clinical psychologists, may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute. The comments to the federal amendment note that the examiner must be suitably licensed or certified. This authorizes the court to assess the credentials of the examiner ". . . to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination."

party against whom an order is made under subsection (a) or by the person examined, the party causing the examination to be made shall deliver to the party or person making the request a copy of a detailed written report of the ~~examining physician~~ *examiner*, setting out the ~~physician's~~ *examiner's* findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition.

(2) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an ~~examining physician~~ *examiner* or the taking of a deposition of the ~~physician~~ *examiner* in accordance with the provisions of any other rule.

(c) *Reports of other examinations.* Any party shall be entitled upon request to receive from a party a report of any examination, previously or thereafter made, of the condition in controversy, except that the party shall not be required to provide such a report if the examination is of a person not a party and the party is unable to obtain a report thereof. Reports required to be provided under this subsection shall contain the same information as specified for reports under subsection (b).

(d) *Order requiring delivery of report.* The court on motion may make an order against a party requiring delivery of a report under subsection (b) or (c) on such terms as are just. If ~~a physician~~ *an examiner* fails or refuses to make or deliver such a report, the court may exclude the ~~physician's~~ *examiner's* testimony if offered at the trial.

Sec. 18. K.S.A. 60-237 is hereby amended to read as follows: 60-237. (a) *Motion for order compelling disclosure or discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling *disclosure or* discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the judge in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the judge in the district where the deposition is being taken.

(2) *Motion. (A) If a party fails to make a disclosure required by subsection (b)(6) of K.S.A. 60-226 and amendments thereto, any other party may move to compel disclosure and for appropriate sanctions. The motion shall include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action and shall describe the steps taken by all counsel or unrepresented parties to resolve the issues in dispute.*

(B) If a deponent fails to answer a question propounded or submitted under K.S.A. 60-230 or 60-231 *and amendments thereto*, or a corporation

Subsections (a)(2)(A) and (B) are revised in accordance with 1993 amendments to the federal rule by including language that requires litigants to seek to resolve disputes concerning discovery or disclosure of expert testimony by informal means before filing a motion with the court. The new language also borrows from local federal district court rule 210(j) and requires that the motion describe the steps taken to resolve the issues in dispute.

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or other entity fails to make a designation under ~~K.S.A. 60-230 (b) or 60-231 (a)~~ *subsection (b) of K.S.A. 60-230 or subsection (a) of K.S.A. 60-231 and amendments thereto*, or a party fails to answer an interrogatory submitted under K.S.A. 60-233 *and amendments thereto*, or if a party, in response to a request for inspection submitted under K.S.A. 60-234 *and amendments thereto* fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. *The motion shall include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action and shall describe the steps taken by all counsel or unrepresented parties to resolve the issues in dispute.* When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before ~~he applies~~ *applying* for an order.

~~If the judge denies the motion in whole or in part, he may make such protective order as he would have been empowered to make on a motion made pursuant to K.S.A. 60-226 (c).~~

(3) *Evasive or incomplete disclosure, answer or response.* For purposes of this subdivision an evasive or incomplete *disclosure,* answer *or response* is to be treated as a failure to *disclose,* answer *or respond.*

(4) ~~*Award of expenses of motion.*~~ *Expenses and sanctions. (A) If the disclosure or requested discovery is provided after the motion is filed but before the court rules on the motion, the court, after affording an opportunity to be heard, may require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees. Expenses shall not be awarded under this subparagraph if the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response or objection was substantially justified, or that other circumstances make an award of expenses unjust.*

(B) If the motion is granted, the ~~judge~~ *court* shall, after *affording an* opportunity ~~for hearing~~ *to be heard,* require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in ~~obtaining the order~~ *making the motion,* including ~~attorney's~~ *attorney* fees, unless the ~~judge~~ *court* finds that the ~~opposition to the~~ motion *was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response or objection* was substantially

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The revisions to (a)(4) parallel 1993 amendments to the federal rule except that, unlike the federal rule, sanctions are not mandatory if the requested material is provided before the court rules on the motion. It was the opinion of the advisory committee that mandatory sanctions in such situations create a "mined harbor" and provide an incentive in some cases for a party to continue to resist compliance since sanctions will follow. Like the federal rule, sanctions are not available if the movant did not first make a good faith effort to obtain compliance without court action. Although sanctions are not available in such situations, the court is still free to address the motion to compel.

justified or that other circumstances make an award of expenses unjust.

(C) If the motion is denied, the ~~judge~~ *court may enter any protective order authorized under subsection (c) of K.S.A. 60-226 and amendments thereto, and* shall, after *affording an* opportunity ~~for hearing~~ *to be heard,* require the moving party or the attorney ~~advising~~ *filing* the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including ~~attorney's~~ *attorney* fees, unless the ~~judge~~ *court* finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(D) If the motion is granted in part and denied in part, the ~~judge~~ *court* may *enter any protective order authorized under subsection (c) of K.S.A. 60-226 and amendments thereto, and, may, after affording an opportunity to be heard,* apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.* (1) *Sanctions by judge in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the judge in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director or managing agent of a party or a person designated under ~~K.S.A. 60-230 (b) or 60-231 (a)~~ *subsection (b) of K.S.A. 60-230 or subsection (a) of K.S.A. 60-231 and amendments thereto* to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this section or under K.S.A. 60-235 *and amendments thereto*, the judge before whom the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting ~~him~~ *such disobedient party* from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under ~~K.S.A. 60-235 (a)~~ *subsection (a) of K.S.A. 60-235 and amendments thereto* requiring ~~him~~ *such party* to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subsection, unless the party failing to comply shows that ~~he~~ *such party* is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the judge shall require the party failing to obey the order or the attorney advising ~~him~~ *such party* or both to pay the reasonable expenses, including ~~attorney's~~ *attorney* fees, caused by the failure, unless the judge finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) ~~*Expenses on failure to admit.*~~ *Failure to disclose; false or misleading disclosure; refusal to admit. (1) A party that without substantial justification fails to disclose information required by subsection (b)(6) or (e)(1) of K.S.A. 60-226, and amendments thereto, shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B) and (C) of subsection (b)(2) and may include informing the jury of the failure to make the disclosure.*

(2) If a party fails to admit the genuineness of any documents or the truth of any matter, as requested under K.S.A. 60-236 *and amendments thereto*, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, ~~he~~ *such party* may apply to the judge for an order requiring the other party to pay ~~him~~ *such party* the reasonable expenses incurred in making such proof, including reasonable attorney's fees. The judge shall make the order unless ~~he~~ *the judge* finds that ~~(1)~~ *(A)* the request was held objectionable to *subsection (a) of* K.S.A. ~~60-236 (a)~~ 60-236, or ~~(2)~~ *(B)* the admission sought was of no substantial importance, or ~~(3)~~ *(C)* the party failing to admit had reasonable ground to believe that he might prevail on the matter, or ~~(4)~~ *(D)* there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under ~~K.S.A. 60-230 (b) or 60-231 (a)~~ *under subsection (b) of K.S.A. 60-230 or subsection (a) of K.S.A. 60-231 and amendments thereto* to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers

Subsection (c)(1) is new and reflects the provision for disclosure of expert testimony under K.S.A. 60-226(b)(6). However, for sanctions to ensue, the failure to disclose must be "without substantial justification" and must not be "harmless."

Consistent with the changes in subsection (a), subsection (d) is revised to require an attempt to resolve matters informally before filing a motion for sanctions.

or objections to interrogatories submitted under K.S.A. 60-233 *and amendments thereto*, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under K.S.A. 60-234 *and amendments thereto* after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subsection (b) (2) of this section. *Any motion specifying a failure under clause (2) or (3) of this subsection shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action.* In lieu of any order or in addition thereto, the judge shall require the party failing to act or the attorney advising ~~him~~ *such party* or both to pay the reasonable expenses, including ~~attorney's~~ *attorney* fees, caused by the failure, unless the judge finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has ~~applied~~ *a pending motion* for a protective order as provided by ~~K.S.A. 60-226 (c)~~ *subsection (c) of K.S.A. 60-226 and amendments thereto*.

Sec. 19. K.S.A. 60-238 is hereby amended to read as follows: 60-238. (a) *Right preserved.* The right of trial by jury as declared by section 5 of the bill of rights in the Kansas constitution, and as given by a statute of the state shall be preserved to the parties inviolate.

(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by: *(1)* Serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ~~ten (10)~~ *10* days after the service of the last pleading directed to such issue; *and (2) filing the demand as required by K.S.A. 60-205 and amendments thereto*. Such demand may be indorsed upon a pleading of the party.

(c) *Same; specification of issues.* In ~~his or her~~ *the* demand a party may specify the issues which ~~he or she~~ *the party* wishes so tried; otherwise ~~he or she~~ *the party* shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within ~~ten (10)~~ *10* days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) *Waiver.* The failure of a party to serve *and file* a demand as required by this ~~rule and to file it as required by K.S.A. 60-205~~ *section* constitutes a waiver by ~~him or her~~ *the party* of trial by jury but waiver of

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The revisions follow a 1993 amendment to the federal rule and are intended to eliminate any ambiguity between subsections (b) and (d) concerning the requirement to file a demand for jury trial.

a jury trial may be set aside by the judge in the interest of justice or when the waiver inadvertently results without serious negligence of the party. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Sec. 20. K.S.A. 60-241 is hereby amended to read as follows: 60-241. (a) *Voluntary dismissal; effect thereof.* (1) *By plaintiff; by stipulation.* Subject to the provisions of subsection (e) of K.S.A. 60-223 *and amendments thereto* and of any statute of the state, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Where the dismissal is by stipulation the clerk of the court shall enter an order of dismissal as a matter of course. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By order of court.* Except as provided in paragraph (1) of this subsection, an action shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as the judge deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice. ~~The judge may on the judge's own motion cause a case to be dismissed without prejudice for lack of prosecution, but only after directing the clerk to notify counsel of record not less than ten (10) days in advance of such intended dismissal, that an order of dismissal will be entered unless cause be shown for not doing so.~~

(b) *Involuntary dismissal; effect thereof. (1)* For failure of the plaintiff to prosecute or to comply with these sections or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. ~~After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the defendant's right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in subsec-~~

The revisions in (b)(1) follow a 1991 amendment to the federal rule and delete language concerning dismissal on the ground that a plaintiff's evidence is legally insufficient. Such matters should be treated as a motion for judgment on partial findings as provided in revised subsection (c) of K.S.A. 60-252.

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~~tion (a) of K.S.A. 60-252.~~ Unless the court in its order for dismissal otherwise specifies, a dismissal under this ~~subsection~~ *paragraph* and any dismissal not provided for in this section, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under K.S.A. 60-219 *and amendments thereto*, operates as an adjudication upon the merits.

(2) The judge may on the judge's own motion cause a case to be dismissed without prejudice for lack of prosecution, but only after directing the clerk to notify counsel of record not less than 10 days in advance of such intended dismissal, that an order of dismissal will be entered unless cause be shown for not doing so.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this section apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subsection (a) shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously dismissed action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Sec. 21. K.S.A. 60-243 is hereby amended to read as follows: 60-243. (a) *Form and admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by this article. All evidence shall be admitted which is admissible under specific statutes or article 4 of this chapter. The competency of a witness to testify shall be determined in like manner.

(b) *Scope of examination and cross-examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate ~~him~~ *such witness* by leading questions and contradict ~~him~~ *such witness* and impeach ~~him~~ *such witness* in all respects as if ~~he~~ *such witness* had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of ~~his~~ *such witness'* examination in chief.

(c) *Record of excluded evidence.* In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what ~~he~~ *the examing attorney* expects to prove by the answer of the witness. The offer shall

Language in (a)(2) relating to dismissal by the court for lack of prosecution is redesignated as (b)(2) since it is more in the nature of an involuntary dismissal.

be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) *Evidence on motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(e) *Interpreters. In accordance with K.S.A. 75-4351 through 75-4355d and amendments thereto,* the court may appoint an interpreter of its own selection and ~~may determine the reasonable compensation of such interpreter, and direct its payment out of such funds as may be provided by law~~ *fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or, subject to the limitations in K.S.A. 75-4352 and 75-4355b and amendments thereto, by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.*

Sec. 22. K.S.A. 60-245 is hereby amended to read as follows: 60-245. (a) ~~*For attendance of witnesses;*~~ *Form; issuance. (1)* Every subpoena ~~for attendance of a witness shall be issued by the clerk under the seal of the court or by a judge,~~ shall:

(A) State the name of the court ~~and~~ *from which it is issued;*

(B) state the title of the action, ~~and shall~~ *the name of the court in which it is pending and the file number of the action;*

(C) command each person to whom it is directed to attend and give testimony *or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises,* at a time and place specified in the subpoena*; and*

(D) set forth the text of subsections (c) and (d) of this section.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. Subpoena and production of records of a business which is not a party shall be in accordance with K.S.A. 60-245a and amendments thereto.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the district court in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the district court in which the action is pending or the officer before whom the deposition is to be taken or, if the deposition is to be taken outside the state, from

The revisions to subsection (e) concerning interpreters are intended to allow the court the discretion to tax as costs interpreters' fees to the extent permitted by the relevant statutes (K.S.A. 75-4351 through 4355d). The referenced statutes also contain requirements for appointment and compensation of interpreters.

The section is revised to adopt the form and much of the substance of 1991 amendments to the federal rule.

As revised, subsection (a)(1) authorizes the issuance of a subpoena to compel a nonparty to produce evidence independent of any deposition. However, K.S.A. 60-245a continues to govern the subpoena and production of records of a nonparty business. Adopted in 1986, K.S.A. 60-245a permits, unless otherwise required by a party to the action, a nonparty business to respond to a subpoena of its records by mailing copies along wth an appropriate affidavit of the records custodian. Compliance with the procedures in K.S.A. 60-245a (1) constitutes prima facie evidence that the records satisfy the "business entries" exception to the hearsay rule [K.S.A. 60-460(m)] and (2) insulates copies of such records from exclusion under the "best evidence rule" [K.S.A. 60-467(c)].

Subsection (a)(1)(D) requires that the subpoena include a statement of the rights and duties of witnesses.

Revised subsection (a)(2) sets out the appropriate issuing authority for a subpoena. The authority to issue a subpoena of the clerk of the district court where the deposition is to be taken is deleted.

n officer authorized by the law of the other state to issue the subpoena. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the district court in which the action is pending or, if the production or inspection is to be made outside the state, an officer authorized by the law of the other state to issue the subpoena.

(3) Every subpoena issued by the court shall be issued by the clerk under the seal of the court or by a judge. Upon request of a party, the clerk shall issue a blank subpoena. The blank subpoena shall bear the seal of the court, the title and file number of the action and the clerk's signature or a facsimile of the clerk's signature. The party to whom a blank subpoena is issued shall fill it in before service.

(b) ~~*For production of documentary evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated in the subpoena, but the court, upon motion made promptly and at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.~~

~~Subpoena and production of records of a business which is not a party shall be in accordance with K.S.A. 60-245a, and amendments thereto.~~

~~(c) *Blank subpoenas.* Upon request of a party, the clerk shall issue a blank subpoena for the attendance of a witness or the production of documentary evidence. The blank subpoena shall bear the seal of the court, the title and file number of the action and the clerk's signature or a facsimile of the clerk's signature. The party to whom a blank subpoena is issued shall fill it in before service.~~

~~(d)~~ *Service.* Service of a subpoena upon a person named therein *may be made anywhere within the state,* shall be made in accordance with K.S.A. 60-303, and amendments thereto, and shall, *if the person's attendance is commanded,* be accompanied by the fees for one day's attendance and the mileage allowed by law. *When sought independently of a deposition, prior notice of any commanded production of documents or inspection of premises before trial shall be served on each party in the manner prescribed by subsection (b) of K.S.A. 60-205 and amendments thereto.*

~~(e) *Subpoena or notice for taking depositions; place of examination.* (1) Proof of service of a notice to take a deposition as provided in subsection (b) of K.S.A. 60-230 and subsection (a) of K.S.A. 60-231, and amendments thereto, constitutes sufficient authorization for the issuance of subpoenas for the person named or described in the notice. In addition~~

Subsection (a)(3) represents the relocation of the substance of current provisions.

Revised subsection (b) retains current language on service and adds that a subpoena may be served anywhere within the state. If the deposition of a nonparty nonresident is required and service cannot be made in Kansas, a party will need to utilize the counterpart to K.S.A. 60-228(d) in the state of the nonresident. The last sentence of the subsection is new and is needed so that other parties have notice and are able ". . . to monitor the discovery and to pursue access to any information that may or should be produced." If production or inspection is sought in connection with a deposition, notice is provided for under K.S.A. 60-230 and 231.

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~~to those mentioned in subsection (a), a subpoena for taking depositions may be issued by the officer before whom the deposition is to be taken, by the clerk of the district court where the deposition is to be taken or, if the deposition is to be taken outside the state, by an officer authorized by the law of the other state to issue the subpoena. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things which constitute or contain matters within the scope of the examination permitted by subsection (b) of K.S.A. 60-226 and amendments thereto, but in that event the subpoena will be subject to the provisions of subsection (c) of K.S.A. 60-226 and amendments thereto and subsection (c). In lieu of the procedure outlined in K.S.A. 60-234 and amendments thereto, when a party gives notice of the taking of the deposition of another party, the notice of taking the deposition and the contents of the notice will be as compelling upon the party as a subpoena.~~

~~Within 10 days after the service of a subpoena or at or before the time specified in the subpoena for compliance, if the time is less than 10 days after service, a party or person to whom the subpoena is directed may serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. If objection has been made, the party serving the subpoena may move upon notice to the deponent for an order at any time before or during the taking of the deposition.~~

~~(2) A resident of this state shall not be required to attend an examination at a place which is not within 50 miles of the place of the resident's residence, the place of the resident's employment or the place of the resident's principal business. A nonresident shall not be required to attend an examination at a place which is more than 50 miles from the place where the nonresident is served with the subpoena. A party or employee of a party, whether a resident or nonresident of the state, may be required by order of the court to attend an examination at any place designated by the court.~~

(c) Protection of persons subject to subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, a reasonable attorney fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or in-

Revised subsection (c)(1) follows the federal rule but does not explicitly state that an appropriate sanction may include lost earnings. Paragraph (c)(2)(B) extends from 10 to 14 days the time for objecting to inspection or copying of designated materials or premises. This avoids calculation problems associated with time periods of less than 11 days under K.S.A. 60-206. The last sentence of the paragraph directs protection for nonparties.

spection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to subsection (d)(2), a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) Fails to allow reasonable time for compliance;

(ii) requires a resident of this state who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person or requires a nonresident who is not a party or an officer of a party to travel to a place more than 100 miles from the place where the nonresident was served with the subpoena, is employed or regularly transacts business, except that, subject to the provisions of subsection (c)(3)(B)(iii), such a nonparty may in order to attend trial be commanded to travel to the place of trial;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) Requires disclosure of a trade secret or other confidential research, development or commercial information; or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that

Subsection (c)(3)(A) identifies the circumstances in which a subpoena must be quashed or modified. The limits on mandatory travel are modified by substituting 100 miles for 50 miles and by measuring the allowable travel for a nonresident not only from where the nonresident was served but also from any place where the nonresident is employed or regularly transacts business. The paragraph also recognizes that a nonparty may be compelled to travel more than 100 miles to attend trial subject to the protections under revised paragraph (c)(3)(B)(iii).

Revised subsection (c)(3)(B) identifies circumstances in which a subpoena should be quashed "unless the party serving the subpoena shows a substantial need and the court can devise an appropriate accommodation to protect the interests of the witness." Paragraph (c)(3)(B)(i) corresponds to K.S.A. 60-226(c)(7). Paragraph (ii) provides protection for the intellectual property of nonparty witnesses.

the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

~~(3)~~ *(4)* A person confined in prison may be required to appear for examination by deposition only in the county where the person is imprisoned.

~~(f)~~ ~~*Subpoena for a hearing or trial.*~~ ~~Subpoenas for attendance at a hearing or trial shall be issued at the request of any party. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.~~

(d) Duties in responding to subpoena. (1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that such information is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

~~(g)~~ *(e) Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon the person may be considered a contempt of the court in which the action is pending or the court of the county in which the deposition is to be taken. Punishment for contempt shall be in accordance with K.S.A. 20-1204 and amendments thereto. *An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by subsection (c)(3)(A)(iii).*

Sec. 23. K.S.A. 60-245a is hereby amended to read as follows: 60-245a. (a) As used in this section:

(1) "Business" means any kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(2) "Business records" means writings made by personnel or staff of a business, or persons acting under their control, which are memoranda or records of acts, conditions or events made in the regular course of business at or about the time of the act, condition or event recorded.

(b) A subpoena duces tecum which commands the production of business records in an action in which the business is not a party shall inform the person to whom it is directed that the person may serve upon the attorney designated in the subpoena written objection to production of any or all of the business records designated in the subpoena within ~~10~~ *14* days after the service of the subpoena or at or before the time for compliance, if the time is less than ~~10~~ *14* days after service. If such ob-

Revised subsection (d)(1) imposes a duty on nonparties that is imposed on parties by K.S.A. 60-234. Subsection (d)(2) is intended "to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified."

Subsection (e) is revised in accordance with the federal rule by adding the last sentence which explicitly recognizes one instance of adequate cause for failure to obey a subpoena.

This section continues to govern subpoena of records of a nonparty business. The time for objecting to such a subpoena is extended from 10 to 14 days to conform to revised K.S.A. 60-245(c)(2)(B).

jection is made, the business records need not be produced except pursuant to an order of the court upon motion with notice to the person to whom the subpoena was directed.

Unless the personal attendance of a custodian of the business records and the production of original business records are required under subsection (d), it is sufficient compliance with a subpoena of business records if a custodian of the business records delivers to the clerk of the court by mail or otherwise a true and correct copy of all the records described in the subpoena and mails a copy of the affidavit accompanying the records to the party or attorney requesting them within ~~10~~ *14* days after receipt of the subpoena.

The records described in the subpoena shall be accompanied by the affidavit of a custodian of the records, stating in substance each of the following: (1) The affiant is a duly authorized custodian of the records and has authority to certify records; (2) the copy is a true copy of all the records described in the subpoena; and (3) the records were prepared by the personnel or staff of the business, or persons acting under their control, in the regular course of the business at or about the time of the act, condition or event recorded.

If the business has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit and shall send only those records of which the affiant has custody. When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name and address of the witness and the date of the subpoena are clearly inscribed. If return of the copy is desired, the words "return requested" must be inscribed clearly on the sealed envelope or wrapper. The sealed envelope or wrapper shall be delivered to the clerk of the court.

The reasonable costs of copying the records may be demanded of the party causing the subpoena to be issued. If the costs are demanded, the records need not be produced until the costs of copying are advanced.

(c) The subpoena shall be accompanied by an affidavit to be used by the records custodian. The subpoena and affidavit shall be in substantially the following form:

Subpoena of Business Records

State of Kansas

County of _____

(1) You are commanded to produce the records listed below before

_____

(Officer at Deposition) (Judge of the District Court)

at _____
(Address)
in the City of _____, County of _____, on the _____ day of _____, 19____, at _____ o'clock ____m., and to testify on behalf of the _____ in an action now pending between _____, plaintiff, and _____, defendant. Failure to comply with this subpoena may be deemed a contempt of the court.

(2) Records to be produced: _____

_____

_____

(3) You may make written objection to the production of any or all of the records listed above by serving such written objection upon _____ at _____
(Attorney) (Attorney's Address)
(within ~~10~~ *14* days after service of this subpoena) (on or before _____, 19____). If such objection is made, the records need not be produced except upon order of the court.

(4) Instead of appearing at the time and place listed above, it is sufficient compliance with this subpoena if a custodian of the business records delivers to the clerk of the court by mail or otherwise a true and correct copy of all the records described above and mails a copy of the affidavit below to

_____ at _____
(Requesting Party or Attorney) (Address of Party or Attorney)

within ~~10~~ *14* days after receipt of this subpoena.

(5) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name and address of the witness and the date of this subpoena are clearly inscribed. If return of the copy is desired, the words "return requested" must be inscribed clearly on the sealed envelope or wrapper. The sealed envelope or wrapper shall be delivered to the clerk of the court.

(6) The records described in this subpoena shall be accompanied by the affidavit of a custodian of the records, a form for which is attached to this subpoena.

(7) If the business has none of the records described in this subpoena, or only part thereof, the affidavit shall so state, and the custodian shall send only those records of which the custodian has custody. When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

(8) The reasonable costs of copying the records may be demanded of the party causing this subpoena to be issued. If the costs are demanded, the records need not be produced until the costs of copying are advanced.

(9) The copy of the records will not be returned unless requested by the witness.

_____
Clerk of the District Court

[Seal of the District Court]

Dated _____, 19____

Affidavit of Custodian of Business Records

State of _____

County of _____

I, _____, being first duly sworn, on oath, depose and say that:

(1) I am a duly authorized custodian of the business records of _____ and have the authority to certify those records.

(2) The copy of the records attached to this affidavit is a true copy of the records described in the subpoena.

(3) The records were prepared by the personnel or staff of the business, or persons acting under their control, in the regular course of the business at or about the time of the act, condition or event recorded.

_____

Signature of Custodian

Subscribed and sworn to before the undersigned on _____

_____

Notary Public

My Appointment Expires:

_____

Certificate of Mailing

I hereby certify that on _____, 19____, I mailed a copy of the above affidavit to

_____ at _____

(Requesting Party or Attorney) (Address of Party or Attorney)

by depositing it with the United States Postal Service for delivery with postage prepaid.

_____

Signature of Custodian

Subscribed and sworn to before the undersigned on _____

_____

Notary Public

My Appointment Expires:

_____

(d) Any party may require the personal attendance of a custodian of business records and the production of original business records by causing a subpoena duces tecum to be issued which contains the following statements in lieu of paragraphs (4), (5), (6), (7) and (8) of the subpoena form described in subsection (c):

The personal attendance of a custodian of business records and the production of original records is required by this subpoena. The procedure for delivering copies of the records to the clerk of the court shall not be deemed sufficient compliance with this subpoena and should be disregarded. A custodian of the records must personally appear with the original records.

(e) Upon receipt of business records the clerk of the court shall so

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notify the party who caused the subpoena for the business records to be issued. If receipt of the records makes the taking of a deposition unnecessary, the party shall cancel the deposition and shall notify the other parties to the action in writing of the receipt of the records and the cancellation of the deposition.

After the copy of the record is filed, a party desiring to inspect or copy it shall give reasonable notice to every other party to the action. The notice shall state the time and place of inspection. Records which are not introduced in evidence or required as part of the record shall be destroyed or returned to the custodian of the records who submitted them if return has been requested.

Sec. 24. K.S.A. 60-250 is hereby amended to read as follows: 60-250. ~~(a) *When made; effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. When a motion for a directed verdict is sustained the judge shall cause the appropriate judgment to be entered.~~ *(a) Judgment as a matter of law. (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.*

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

~~(b) *Reservation of decision on motion.*~~ *(3)* Decisions on motions for ~~directed verdict~~ *judgment as a matter of law* by parties joined pursuant to subsection (c) of K.S.A. 60-258a and amendments thereto, shall be reserved by the court until all evidence has been presented by any party alleging the movant's fault.

~~(c) *Motion for judgment notwithstanding the verdict.*~~ *Renewal of motion for judgment after trial; alternative motion for new trial. (b)* Whenever a motion for a ~~directed verdict~~ *judgment as a matter of law* made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. ~~A party~~

The revisions generally follow 1991 amendments to the federal rule and also incorporate technical amendments made to the federal rule in 1993. The revised section and the federal rule substitute the term "judgment as a matter of law" for the old terminology of "direction of verdict." The old terminology was viewed as misleading in describing the relationship between judge and jury and as freighted with anachronisms. The term "judgment as a matter of law" is used in K.S.A. 60-256 and federal rule 56 and its use in revised 60-250 calls attention to the relationship between the two sections. The revision enables 60-250 ". . . to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding."

The second sentence of subsection (a)(2) ". . . does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof."

As revised, subsection (b) differs from the federal rule in that it retains the ability to renew a motion for judgment as a matter of law in cases where the jury was discharged for failing to return a verdict.

~~who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict, or, if a verdict was not returned, such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the motion for a directed verdict.~~ *Such a motion may be renewed by service and filing not later than 10 days after entry of judgment or the date the jury was discharged for failing to return a verdict.* A motion for a new trial *under K.S.A. 60-259 and amendments thereto* may be joined with ~~this~~ *a renewal of the* motion *for judgment as a matter of law*, or a new trial may be ~~prayed for~~ *requested* in the alternative. If a verdict was returned the court, *in disposing of the renewed motion,* may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as ~~if the requested verdict had been directed~~ *a matter of law*. If no verdict was returned, the court, *in disposing of the renewed motion,* may direct the entry of judgment as ~~if the requested verdict had been directed~~ *a matter of law* or may order a new trial.

Sec. 25. K.S.A. 60-252 is hereby amended to read as follows: 60-252. (a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury or upon entering summary judgment or involuntary dismissal, the judge shall find, and either orally or in writing state, the controlling facts *and the judge's conclusions of law thereon*. Judgment shall be entered pursuant to ~~section~~ *K.S.A.* 60-258 *and amendments thereto*. In granting or refusing interlocutory injunctions, except in divorce cases, the judge shall set forth the findings *and conclusions of law*. Requests for findings are not necessary. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the judge adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and ~~reasons for the decision~~ *conclusions of law* appear therein.

(b) *Amendment.* Upon motion of a party made not later than ~~ten (10)~~ *10* days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to ~~section~~ *K.S.A.* 60-259 *and amendments thereto*. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) Judgment on partial findings. If during a trial without a jury a

The revisions to subsection (a) follow the federal rule and require the judge to state conclusions of law in actions tried without a jury or with an advisory jury. Currently, Supreme Court Rules 141 (summary judgments) and 165 (reasons for decisions, matters submitted to judge without jury) require the judge to state the legal principles controlling the decision.

Subsection (c) is new and parallels a 1991 federal amendment and also incorporates technical amendments made to the federal rule in 1993. It parallels the revisions to K.S.A. 60-250 but is applicable to nonjury trials. It replaces language that is deleted under the revisions to K.S.A. 60-241(b).

party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subsection (a).

Sec. 26. K.S.A. 60-256 is hereby amended to read as follows: 60-256. (a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) *Motion and proceeding thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this section judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the actions as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show

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The phrase "answers to interrogatories" is added to subsection (e). The phrase appears in subsection (c) and must have been inadvertently omitted from subsection (e).

affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, *answers to interrogatories* or ~~by~~ further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

Sec. 27. K.S.A. 60-262 is hereby amended to read as follows: *60-262. (a) Automatic stay; exceptions — injunctions and receiverships.* ***Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of*** ~~ten~~ ~~(10)~~ ***10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subsection (c) of this section govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.***

(b) Stay on motion for new trial or for judgment. ***In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to K.S.A. 60-259*** *and amendments thereto,* ***or of a motion for relief from a judgment or order made pursuant to K.S.A. 60-260*** *and amendments thereto,* ***or***

of a motion for judgment ~~in accordance with a motion for a directed verdict~~ *as a matter of law* ***made pursuant to K.S.A. 60-250*** *and amendments thereto,* ***or of a motion for amendment to the findings or for additional findings made pursuant to*** *subsection (b) of* ***K.S.A.*** ~~60-252(b)~~ *60-252 and amendments thereto.*

(c) Injunction pending appeal. ***When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the judge in*** ~~said~~ *such* ***judge's discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.***

(d) Stay upon appeal. ***When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subsection (a) of this section. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.***

(e) Stay in favor of the state or agency thereof. ***When an appeal is taken by the state or an officer or agency thereof or by direction of any department of the state and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.***

(f) Power of appellate court not limited. ***The provisions in this section do not limit any power of the appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve*** *the status quo* ***or the effectiveness of the judgment subsequently to be entered.***

(g) Stay of judgment upon multiple claims. ***When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in*** *subsection (b) of* ***K.S.A.*** ~~60-254 (b)~~ *60-254 and amendments thereto,* ***the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.***

Sec. ~~27~~ *28.* K.S.A. 60-1608 is hereby amended to read as follows: 60-1608. (a) *Time.* An action for divorce shall not be heard until 60 days after the filing of the petition unless the judge enters an order declaring the existence of an emergency, stating the precise nature of the emergency, the substance of the evidence material to the emergency and the names of the witnesses who gave the evidence. In such an emergency case, unless waived by both parties, the action for divorce shall not be heard

[The amendments in ll. 1 and 2 of page 52 reflect the new terminology of "judgment as a matter of law" under revised K.S.A. 60-250.]

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until 10 days after the filing of the petition or 10 days after personal service upon the respondent of the petition and order declaring the existence of the emergency, whichever is later.

(b) *Pretrial ~~conference~~ conferences.* ~~Upon the request of either party, the court shall set a pretrial conference to explore the possibilities of settlement of the case and to expedite the trial.~~ The *court shall conduct a pretrial conference or conferences in accordance with K.S.A. 60-216 and amendments thereto, upon request of either party or on the court's own motion. Any* pretrial conference shall be set on a date other than the date of trial and the parties shall be present or available within the courthouse.

(c) *Marriage counseling.* After the filing of the answer or other responsive pleading by the respondent, the court, on its own motion or upon motion of either of the parties, may require both parties to the action to seek marriage counseling if marriage counseling services are available within the judicial district of venue of the action. Neither party shall be required to submit to marriage counseling provided by any religious organization of any particular denomination.

(d) *Cost of counseling.* The cost of any counseling authorized by this section may be assessed as costs in the case.

Sec. 29. K.S.A. 60-2103 is hereby amended to read as follows: 60-2103. (a) When and how taken. When an appeal is permitted by law from a district court to an appellate court, the time within which an appeal may be taken shall be 30 days from the entry of the judgment, as provided by K.S.A. 60-258, and amendments thereto, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subsection commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: Granting or denying a motion for judgment under subsection ~~(e)~~ (b) of K.S.A. 60-250, and amendments thereto; or granting or denying a motion under subsection (b) of K.S.A. 60-252, and amendments thereto, to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under K.S.A. 60-259, and amendments thereto, to alter or amend the judgment; or denying a motion for new trial under K.S.A. 60-259, and amendments thereto.

A party may appeal from a judgment by filing with the clerk of

Subsection (b) is revised to cross reference the pretrial provisions in revised K.S.A. 60-216. The ability of a party, or the court, to require a pretrial conference in an action under article 16 is retained. Any of the issues enumerated in revised K.S.A. 60-216 can be addressed at such a conference.

[This section was amended in line 35 to refer to the appropriate subsection of revised K.S.A. 60-250.]

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the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this chapter, or when no remedy is specified, for such action as the appellate court having jurisdiction over the appeal deems appropriate, which may include dismissal of the appeal. If the record on appeal has not been filed with the appellate court, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in the district court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) Notice of appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from, and shall name the appellate court to which the appeal is taken. The appealing party shall cause notice of the appeal to be served upon all other parties to the judgment as provided in K.S.A. 60-205, and amendments thereto, but such party's failure so to do does not affect the validity of the appeal.

(c) Security for costs. Security for the costs on appeal shall be given in such sum and manner as shall be prescribed by a general rule of the supreme court unless the appellate court shall make a different order applicable to a particular case.

(d) Supersedeas bond. Whenever an appellant entitled thereto desires a stay on appeal, such appellant may present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed after notice and hearing at such sum only as will secure the amount recovered for the use and de-

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tention of the property, the costs of the action, costs on appeal, interest, and damages for delay. When an order is made discharging, vacating, or modifying a provisional remedy, or modifying or dissolving an injunction, a party aggrieved thereby shall be entitled, upon application to the judge, to have the operation of such order suspended for a period of not to exceed 10 days on condition that, within such period of 10 days such party shall file a notice of appeal and obtain the approval of such supersedeas bond as is required under this section.

(e) Failure to file or insufficiency of bond. If a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(f) Judgment against surety. By entering into a supersedeas bond given pursuant to subsections (c) and (d) of this section, the surety submits such surety's self to the jurisdiction of the court and irrevocably appoints the clerk of the court as such surety's agent upon whom any papers affecting such surety's liability on the bond may be served. Such surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the judge prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if such surety's address is known.

(g) Docketing record on appeal. The record on appeal shall be filed and docketed with the appellate court at such time as the supreme court may prescribe by rule.

(h) Cross-appeal. When notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which such appellee complains, the appellee shall, within 20 days after the notice of appeal has been served upon such appellee and filed with the clerk of the trial court, give notice of such appellee's cross-appeal.

(i) Intermediate rulings. When an appeal or cross-appeal has been timely perfected, the fact that some ruling of which the appealing or cross-appealing party complains was made more than 30 days before filing of the notice of appeal shall not prevent a review of the ruling.

Sec. ~~28~~ *30*. K.S.A. 60-3703 is hereby amended to read as follows: 60-3703. No tort claim or reference to a tort claim for punitive damages shall be included in a petition or other pleading unless the court enters an

The section is revised to refer to the "final" pretrial conference in light of revised K.S.A. 60-216 which provides for the possibility of more than one pretrial conference in any action.

order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim pursuant to K.S.A. 60-209, and amendments thereto. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed on or before the date of the *final* pretrial conference held in the matter.

Sec. 31. K.S.A. 61-1710 is hereby amended to read as follows: 61-1710. Any party to an action pursuant to this chapter may take the testimony of any person, including a party, either within or without the state, by deposition upon oral examination or written questions but only for use as evidence in the action. Unless the court orders otherwise, the parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions. The taking of such depositions shall be governed by the provisions of K.S.A. 60-228, subsections (b) through (h), inclusive, of K.S.A. 60-230, K.S.A. 60-231 and subsection ~~(d)~~ *(e) of K.S.A. 60-232 and amendments thereto, except that any party desiring to take a deposition shall first file with the court, and serve on all other parties to the action, a motion that the taking of such deposition be allowed due to the existence of at least one* ~~(1)~~ *of the conditions prescribed in K.S.A. 61-1711 and amendments thereto for the use of depositions as evidence. Within five* ~~(5)~~ *days after any such motion has been made, any other party to the action may file an objection to such motion, and in such event, the court shall hold a hearing within five* ~~(5)~~ *days thereof to determine the issue. No deposition shall be taken unless and until the court shall have granted the motion requesting permission therefor.***

Sec. ~~29~~ 32. K.S.A. 61-1725 is hereby amended to read as follows: 61-1725. The following provisions of article 2 of chapter 60 of the Kansas Statutes Annotated are hereby adopted by reference and made a part of this act as if fully set forth herein, insofar as such provisions are not inconsistent or in conflict with the provisions of this act:

(a) *K.S.A. 60-211 and amendments thereto, relating to signing of pleadings, motions and other papers and liability for frivolous filings;*

(b) K.S.A. 60-215 *and amendments thereto*, relating to amended and supplemental pleadings, except that the time for filing amended pleadings and for responding thereto shall be ~~ten~~ ~~(10)~~ *10* instead of ~~twenty~~ ~~(20)~~ *20* days;

K.S.A. 61-1707 currently makes the provisions of 60-211 applicable to pleadings in chapter 61 proceedings, but no existing provision makes 60-211 applicable to motions or other papers under chapter 61.

[This section was amended to refer to the appropriate subsection of revised K.S.A. 60-232.]

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~~(b)~~ *(c)* K.S.A. 60-217 *and amendments thereto*, relating to capacity of parties;

~~(c)~~ *(d)* K.S.A. 60-218 *and amendments thereto*, providing for joinder of claims and remedies, K.S.A. 60-219 and 60-220 *and amendments thereto*, providing for joinder of parties, and K.S.A. 60-221 *and amendments thereto*, relating to misjoinder of parties and claims;

~~(d)~~ *(e)* K.S.A. 60-224 *and amendments thereto*, relating to intervention, and K.S.A. 60-225 *and amendments thereto*, providing for substitution of parties;

~~(e)~~ *(f)* K.S.A. 60-234 *and amendments thereto*, relating to production of documents and things for inspection;

~~(f)~~ *(g)* K.S.A. 60-241 *and amendments thereto*, providing for dismissal of actions;

~~(g)~~ *(h)* K.S.A. 60-244 *and amendments thereto*, providing for proof of records;

~~(h)~~ *(i)* K.S.A. 60-256 *and amendments thereto*, relating to summary judgment;

~~(i)~~ *(j)* K.S.A. 60-259 and 60-260 *and amendments thereto*, concerning new trial and relief from judgment or order, respectively;

~~(j)~~ *(k)* K.S.A. 60-261 and 60-263 *and amendments thereto*, relating respectively to harmless error and disability of a judge; and

~~(k)~~ *(l)* K.S.A. 60-264 *and amendments thereto*, relating to process in behalf of and against persons not parties.

Sec. 33. K.S.A. 75-3079 is hereby amended to read as follows: 75-3079. (a) If costs are assessed against the state or any agency of the state pursuant to K.S.A. ~~60-2007~~ 60-211 and amendments thereto, the head of the state agency which conducted the litigation shall report the assessment, its amount and the reason for it to the speaker and the minority leader of the Kansas house of representatives and to the president and the minority leader of the Kansas senate within 30 days after entry of the order assessing the costs against the state or state agency.

(b) Payment of costs assessed against the state or a state agency pursuant to K.S.A. ~~60-2007~~ 60-211 and amendments thereto shall be made from the operating budget of the state agency which conducted the litigation.

Sec. ~~30~~ *34*. K.S.A. 60-102, 60-205, 60-206, 60-209, 60-211, 60-214, 60-215, 60-216, 60-223, 60-226, 60-228, 60-230, 60-231, 60-232, 60-233, 60-234, 60-235, 60-237, 60-238, 60-241, 60-243, 60-245, 60-245a, 60-250, 60-252, 60-256, ***60-262,*** 60-1608, 60-2007, ***60-2103,*** 60-3703 ~~and~~, ***61-1710,*** 61-1725 ***and 75-3079*** are hereby repealed.

[The section was amended to recognize that K.S.A. 60-207 is repealed and incorporated into revised K.S.A. 60-211.]

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Sec. ~~31~~ 35. This act shall take effect and be in force from and after its publication in the statute book.

STATE OF KANSAS

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MEMBER: WAYS AND MEANS
JUDICIARY
MEMBER: COMMERCE, LABOR AND REGULATIONS
COMMITTEE, NATIONAL CONFERENCE ON STATE LEGISLATURES
MEMBER: ENVIRONMENTAL TASK FORCE, COUNCIL ON STATE GOVERNMENTS

TESTIMONY OF ROBERT VANCRUM TO THE HOUSE JUDICIARY COMMITTEE ON SENATE BILL 336

The Uniform Limited Liability Company Act:

I doubt many in the Legislature are aware that Kansas was one of the first states in the nation to authorize limited liability companies, in 1990. The limited liability company is a business organization that is taxed as a partnership, even though none of its members have unlimited liability. Since 1990, the internal revenue service has nearly always approved partnership tax treatment of these entities and now 47 states and the District of Columbia authorize such companies, with the remaining hold outs likely to approve them this year.

For this reason, the National Conference of Commissioners on Uniform State Laws and the American Bar Association started developing a Uniform Act in early 1992, which was approved by the National Conference in August of 1994.

Even setting aside the issue of uniformity, there are many reasons to update our act with the latest available improvements. Since our Act was one of the first adopted, it has a lot of defects by comparison with the ones enacted in the last five years around the country. This often happens when you are a pioneer in a new area of the law. Some of the features of Senate Bill 336 that are improvements over existing Kansas Limited Liability Companies laws are the following:

1. This act puts in statute the right of the company to allocate voting rights based on capital contributions rather than on the one vote

House Judiciary
3-13-95
Attachment 2

per capita rule. This probably was optional in the operating agreement, but is a trap for the unwary under the Kansas Act.

2. On death, withdrawal or dissolution of a member the majority in interest of remaining members can continue the company, to avoid what could be a catastrophic dissolution for tax purposes.

3. This Act would allow expressly the free transfer of the distributional interest in shares without a unanimous vote, of other members, though it would still require a unanimous vote to transfer the voting rights of a member. This is an important option for the estate planning purposes.

4. This act would also allow the admission of new members with less than a unanimous vote.

5. Provisions are added permitting the merger of the LLC not only with other Kansas LLC's, but also with partnerships, limited partnerships, corporations, and any of the above types of business entities organized under other state's laws. These are not currently options.

6. The act expressly authorizes creation of share interest that have different distributional rights (sort of a preferred share interest).

7. Provisions are inserted covering the right of access of members to records. (Not presently part of Kansas law).

8. Provisions are inserted governing who is the proper party plaintiff or defendant in suits brought by or against such an LLC.

9. Provisions are inserted to prohibit distributions if total assets are reduced to less than the total of liabilities.

10. The act clarifies that when reinstated after an administrative forfeiture reinstatement relates back to the date they were dissolved.

11. The act also would clarify that one member LLC's are permitted, and that it's possible to organize not for profit as well as for profit.

The Secretary of State has carefully reviewed the enclosed act and

has inserted those changes which it believes are necessary to conform our state laws to the uniform act. In addition to these changes, I've inserted one section which is not part of the uniform act attempting to correct a troublesome problem having to do with the annual report of limited liability companies. Although one of the advantages the LLC's have over Sub chapter S corporations is that you can have more than 35 members, this fact alone under existing Kansas law takes you out of the area where you can keep your financial information on the annual report confidential. Since many professional groups are utilizing the LLC act, the required public disclosure of this information seems inappropriate.

R[illegible] Thornburgh
S[illegible]cary of State

2nd Floor, State Capitol
300 S.W. 10th
Topeka, KS 66612-1594
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STATE OF KANSAS

House Judiciary Committee
March 13, 1995

Hearing on SB 336

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you to testify on SB 336, which enacts the uniform limited liability company act.

The Secretary of State offered numerous amendments to SB 336 which were adopted by the Senate. The amendments address filing and procedural issues which are either not addressed in the uniform act, or which are addressed in the uniform act but the Secretary recommends be amended in order to maintain consistency in business filings in the state of Kansas.

The amendments proposed by the Secretary of State appear in sections 5, 7, 12 -16, 19, 49, 53, 58, 59, 65 - 67, 76, and 77. They address areas involving names and name availability; registered agent/office requirements; annual reports and forfeiture; filing practices; execution of documents; FAX filing; fees; and clerical changes.

The amendments do not address substantive aspects of the bill. If the committee determines that enacting the uniform act is desirable for the state of Kansas, we ask for your favorable consideration of the amendments as passed by the Senate.

Thank you.

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To: Members of The House Judiciary Committee -
Chairman: Representative Mike O'Neal

From: Dale G. Schedler, Esq.

Date: March 13, 1995

Ladies and Gentlemen:

I am speaking today in opposition Senate Bill 336, enacting what is supposed to be Uniform Limited Liability Company Act, which is currently before this House Judiciary Committee chaired by representative Mike O'Neal.

Although the National Conference of Commissioners on Uniform State Laws voted in February to approve a Uniform Limited Liability Company Act, the styled version of the Act has not been completed and is still being revised. The final version of Uniform Act will be on the agenda for the meeting of the American Bar Association House Counsel Delegates in August of this year. As of this date, the National Commission is still in the process of making changes to the Bill and significant revisions have been made since the draft upon which the current Kansas Senate Bill is based. In fact, in the Journal of Limited Liability Companies published the second week of March, 1995, two of the advisors to the Uniform Commission, James W. Reynolds and Steven D. Frost, wrote:

> The authors are optimistic that most of the ULLCA's remaining drafting problems will be resolved by the drafting and style committees. Until the final language of the ULLCA has been prepared, however, and the interested ABA sections has had an opportunity for review and analysis, state legislature should proceed with caution in considering the enactment of the ULLCA.

The Kansas Senate Bill 336 was introduced on February 15th. Based on my discussions with Ron Smith, legislative counsel for the Kansas Bar Association, no Bar Committee has had an opportunity to review the Bill. I have also spoken with Alson Martin of Shook, Hardy & Bacon in Kansas City and Stanley Andeel with Foulston & Siefskin, in Wichita, both of whom were the drafters of the existing Kansas Limited Liability Company Act. I think all of us are in accord that the interest of the people in the State of Kansas and the Kansas Bar Association would be best served if a drafting committee were formed to review this legislation over the course of the Summer. In this manner, the Bill could be revised to reflect the final determinations of the National Commission on Uniform Laws as well as the

ABA comments. Moreover, the Bill could be reviewed to make sure it integrates with the existing Kansas procedural law.

In summary, no one disputes that the existing Kansas Limited Liability Company Act is not one of the "premier" LLC Acts in the nation. However, most people would also agree that "a shaken tree bears no fruit" - that amendments to existing legislation should be carefully considered, and infrequently made, to promote a sense of stability in our laws. Few people will rely on legislation that they know will be change in the near future. At this point, introducing and passing this legislation which we know will have to be amended in the following year, only hurts the people of the State of Kansas an undermines the credibility of the legislative system. I appreciate the honor to testify in front of your Committee.

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nments on ULLCA

Larry E. Ribstein, George Mason University School of Law

January 30, 1995

Note: The following comments are based on the January 20, 1995 version of the uniform limited liability company Act. They are part of a longer article, A Critique of the Uniform Limited Liability Act, to be published in the Stetson Law Review. Portions will also appear in Ribstein & Keatinge On Limited Liability companies (1995 Supplement).

101(14), 103: THE OPERATING AGREEMENT

Section 103 provides for the effect of the "operating agreement," which is defined in || 101(14).

1. What is an operating agreement?

ULLCA must address the basic policy question of what kinds of agreements should be deemed to waive the statutory provisions. The answer, arguably, is any agreement (or, perhaps, as discussed below, any written agreement) that is (1) agreed to by all of the members; and (2) that relates to the LLC. This is the definition provided for in the Prototype Act, || 102(k).

An immediate problem with the ULLCA provisions on the operating agreement is that they make conflicting statements about the nature of the operating agreement. Section 101(14) defines the operating agreement as "concerning the relations among the members, managers, and the limited liability company. . . " However, 103 says more broadly that the operating agreement may "provide for the regulation of the affairs of the company, the conduct of its business, and governing the relations among the members, managers, and the limited liability company." These sections suggest that a provision concerning relations with third parties, such as member liability, may or may not be part of what ULLCA defines as an "operating agreement."

The ULLCA provisions on the operating agreement are also incomplete because they do not explicitly answer several questions which have arisen under state statutory definitions of the operating agreement, including whether the definition includes several agreements on specific points made at different times, or agreements made by fewer than all of the members.

2. Should The Act Be Waivable By Oral Operating Agreements?

ULLCA || 103 provides that the operating agreement "need not be in writing." In the informal type of firm for which LLC statutes should be drafted a requirement of a written operating agreement might often frustrate the members' legitimate expectations. But there is also much to be said for reducing potential litigation by providing that at least some important statutory defaults, including allocation of financial rights, voting requirements, and dissolution causes, can be varied only by written agreement. Note in this respect that an "oral operating agreement" could include something as ephemeral as a course of conduct.

Whatever the best default rule as to the enforceability of oral operating agreements, the parties to an LLC should be able to agree that the agreement cannot be amended except by a writing. This approach would avoid frustrating members' expectations in informal firms, while allowing more formal firms to minimize the potential uncertainty and litigation expense of oral operating agreements. ULLCA 103 apparently would permit waivers of the default provisions on operating agreements by not listing itself as a provision which cannot be waived.

3. Are The Limits On Contracting In 103 Justified?

Section 103 provides that the operating agreement rather than the act controls except for the matters listed in subsection (b), which include certain fiduciary duties. Mandatory rules are criticized generally above and in more detail below.

One type of mandatory rule in ULLCA 103(b) is worth discussing separately -- waivers relating to third parties. LLCs clearly ought to be able to make enforceable agreements with third parties, even if these agreements waive the default provisions of the Act. The relevant ULLCA provisions are not as straightforward as this proposition. ULLCA provides that an operating agreement cannot "restrict rights of third parties under this [Act], other than managers, members or their transferees." (|| 103(b)(7)). It is not clear what the Act means either by "restrict," or by "third parties." Any definition of rights is a restriction. Presumably, however, "restrict" means to take away rights that "third parties" would have under the act unmodified by the operating agreement. "Third parties" apparently means anyone who is not a manager, member or transferee. Does this mean that an operating agreement is not enforceable against anyone who is not a manager, member or transferee but who was otherwise a party to the agreement? If so, this is wrong.Perhaps this provision means only that an "operating agreement" cannot restrict third parties' rights, but that an agreement that is not an "operating agreement" may do so. Since the Act defines "operating agreement" to include only agreements "concerning the relations among the members, managers, and the limited liability company," (|| 101(14) maybe an agreement which concerns third parties may waive their rights. The Act could have made matters clearer in this respect by defining the operating agreement according to its parties -- i.e., as one "among" the members -- rather than solely according to its subject matter.

104 SUPPLEMENTAL PRINCIPLES

This provision says that, "[u]nless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]." The Comment says such principles "include, but are not limited to" those listed in UCC 1- 103, including fraud and agency, and 1-205 on course of dealing and usage of trade. But course of dealing and usage of trade are part of the contract rather than "supplemental principles." At the same time, "law" could be interpreted to include other statutory law, including partnership and corporate statutes. Thus, the "black letter" creates a potentially open-ended linkage with other law which may not be suitable for LLCs. It is not clear whether the Comment should be interpreted to close such linkages since it does not expressly preclude them and, if so, whether it would be effective to limit the "black letter."

105 NAME

This provision requires the LLC's name to include certain terms which indicate that it is an LLC, and, except in certain circumstances, to be "distinguishable upon the records of the Secretary of State" (or other equivalent agency).

This provision is unclear in several important respects. First, the "name" of the LLC is not defined. If "name" includes only what is set forth in the articles of organization, then it is not clear why the terms identifying the firm as an LLC are necessary. If the term includes what the firm calls itself in advertising, correspondence and other contexts, what is the firm's "name" under the statute when this varies in different uses?

Second, what is the penalty for violation of the section? If "name" includes advertising and other uses, and if a violation includes any use of a name different from that in the articles, is the penalty loss of LLC status, damages to anyone who deals with the LLC under the non-complying name, damages to a relying creditor, or none of the above?

201 LLC AS ENTITY

This section says that "[a] limited liability company is a legal entity distinct from its members." But whether

a firm is an "entity" depends on whether a court or legislature chooses to endow it with the legal characteristics of an entity, not on whether it is one in some Platonic sense. Thus, even a partnership, the archtypical non-"entity," often is treated like one in many contexts (see Bromberg & Ribstein, || 1.03. For an example of this confusion between causes and consequences it is necessary to look no further than the Comment to this section, which says:

A limited liability company is legally distinct from its members who are not normally liable for the debts, obligations, and liabilities of the company. See Section 303. Accordingly, members are not proper parties to suits against the company unless an object of the proceeding is to enforce members ⊨ rights against the company or to enforce their liability to the company.

In fact, ULLCA 303 provides that members may be liable to third parties for LLC debts when they so agree. It is not clear whether the Comment means that, because an LLC is an "entity," members are never proper parties to suits against the LLC, even when their agreed liability would contradict "entity" status. ULLCA might have usefully reduced the potential confusion created by the entity and aggregate concepts if it had simply provided that an LLC is an "entity" unless the context otherwise requires.

202 ORGANIZATION

This section provides that one or more persons may form an LLC by filing articles of organization. This raises two issues: (1) whether one-person LLCs should be permitted; and, (2) what are the consequences of failing to file articles.

1. Should one-member LLCs be permitted?

Partnerships must have two members (UPA || 6, RUPA || 101(4), 202)requirement has been carried over to many LLC statutes. This makes sense, since LLC statutes typically include many partnership-type rules, including concerning allocation of management rights, allocation of financial rights, transfer of interests, and the consequences of member dissociation. As in the partnership statute, these rules assume the existence of two or more members. Accordingly, one-member LLCs may raise problems in interpreting and applying the statute.

On the other hand, the Comment says the one-member rule gives flexibility. . . to enable sole proprietors to obtain the benefit of a liability shield." Indeed, it makes sense to give sole proprietorships the same access to LLCs that they have to the corporate form. Moreover, a rule requiring two members could cause problems for unwary firms if a member dies or if contractual or formality questions are raised about the status of purported members.

But this "flexibility" comes at a cost. One-member firms may not be characterized as partnerships for tax purposes (Rev. Proc. 95-10, || 4.01), and may have difficulty seeking the protection of the bankruptcy law. While there is a strong argument against drafting a statute so that it complies with the tax characterization factors, that argument is based on balancing non-tax transaction cost considerations in light of the fact that firms do not need to comply with all of the tax characterization factors to be taxed as partnerships. But, as discussed immediately above, transaction cost considerations weigh against one-member firms. Moreover, ULLCA's drafters are inconsistent regarding tax-compliant terms, since they adopt rules on continuity of the LLC solely for tax reasons.

In any event, even if ULLCA's rule permitting one-member LLCs is not clearly wrong, reasonable legislators could reach a contrary conclusion. Accordingly, there is no reason why this rule should be uniform, or why states should use it as a model.

2. Effect of Failing to file Articles

ULLCA 201(b) provides that "the existence of a limited liability company begins when the articles of organization are filed." But there is no reason why, before filing, the members and third parties should not be bound by any agreements they have made, including an express or implied agreement to be governed by the Act. This is the rule in limited partnerships. The Comment to this Section says that "[u]ntil the articles are filed, a firm is not organized under this Act and is not a "limited liability company" as defined in Section 101(8)." However, it also says that members may nevertheless agree to be bound by the act, and that third parties may express "a contractual intent to extend a limited liability shield to the members of the would-be limited liability company." Indeed, there is nothing in the ULLCA, as there is in several statutes, that imposes liability on members who assume or purport to be acting as an LLC without complying with formalities. Under this approach, the filing is important only if there is no contract among members or third parties that accomplishes the effect of the filing.

203 ARTICLES OF ORGANIZATION

This section provides for the contents and effect of the articles of organization. While most of the required contents of the articles are similar to requirements in most other LLC statutes, ULLCA includes several idiosyncratic provisions on term, manager-management, and the effect of the articles.

1. Provisions on Term And Manager-Management

ULLCA || 203 requires the articles to state "whether" the LLC is a "term company" and whether it is to be managed by managers, and provides that an LLC is at will unless the articles specify a term. The use of the term "whether," and the fact that the section states a default regarding term or at will, implies that there is no default management term. The Comment states that the defaults are member-management and at-will. This is probably how courts will interpret the provision, but the drafters might have been clearer.

A more serious problem in this respect is that the firm is at-will unless the articles state not only that the firm is for a specified term, but also the "period specified." The Comment says that "[m]ere specification of a particular undertaking of an uncertain business duration is not sufficient." This is far from clear from the 'black letter," particularly since partnership law, which is the origin of the term/non-term distinction, equates time period and undertaking durations. Nor is it clear why there should be a distinction between these two situations. The members may know the firm's mission without knowing how long it will take. Thus, the members may be caught by surprise concerning important effects of member dissociation because their articles do not contain precisely the right form of words. This is hardly the "flexibility" for "small entrepreneurs" the drafters promised in the Prefatory Note.

The antidote to this problem is that the articles' failure adequately to specify the term may be inconsequential. The operating agreement will control among the members under || 203(c). As discussed below, the articles control as to third parties only if they are inconsistent with the operating agreement and third parties detrimentally rely. If the operating agreement and articles both provide for a definite undertaking, the articles would not control because they would not be inconsistent with the operating agreement. The main question concerning the effect of the articles' specification of a "term" is whether third parties are deemed to have notice of the cessation of members' going concern authority on expiration of a term specified in the articles. If so, it would make sense to require the term to be stated in terms of a time period rather than an undertaking. This question is discussed further below concerning || 804. (If it were clear that third parties were bound in this respect, this might justify requiring the term to be stated as a definite period rather than as an undertaking.)

2. What Is The Effect Of The Articles?

ULLCA || 203(c) provides that, where the articles and operating agreement are inconsistent, the operating agreement controls as to "managers, members and their transferees"while the articles control as to other types of persons "who relied on the articles to their detriment."

These provisions are questionable from a policy standpoint. The provision on managers, members and transferees oddly seems to say that an oral operating agreement, or even course of conduct that is construed as an operating agreement, would control over formal, written filed articles. Most parties to LLCs probably would not expect this result. The provision on third parties is also dubious in several respects. First, ULLCA apparently would enforce articles on which third parties relied despite knowing of contrary provisions in a more recent written operating agreement -- that is, whether or not the reliance was reasonable. Since actual reliance controls, the third party can win on the basis of subjective evidence, which may be difficult to refute.

Second, ULLCA provides that the articles may not "vary the nonwaivable provisions of Section 103(b)." The latter section does not "have" any unwaivable provisions, but rather provides that the operating agreement may not waive or vary certain provisions of the act, or "restrict rights of third parties." It is not clear whether and to what extent this latter constraint applies to the articles. Ignoring for the moment the mismatched language, ULLCA may be saying that the articles cannot do what the operating agreement cannot do. If so, it raises the same questions about the meaning of "restrict" as does the provision on the effect of the operating agreement. If not, why restrict third parties' rights by articles they do not see, but not by written agreements they do see?

Finally, ULLCA provides that the articles have other effects, including liability for false statements discussed next, and binding the firm in real property transactions (|| 301). In sum, the complexity of this section could trap the informal firms for which the statute should be designed.

209 LIABILITY FOR FALSE STATEMENTS

This section provides that one who suffers loss in reliance on a false statement in a filed document can recover damages from one who signed the document knowing it was false. This provision is confusing because it is not clear when there can be a false statement in a filed document. Most statements in filed documents are necessarily "true" by reason of having been stated in the document. For example, the name of an LLC is probably what is set forth in the articles. If the firm transacts business under a different name, the misrepresentation, if any, is that name, and not the one in the articles. Also, as discussed immediately above, ULLCA provides that the articles control as to third parties where there is an inconsistency between the articles and the operating agreement. Again, the articles are true for such statements even if they are contradicted by other evidence.

Where the articles are not controlling -- as where the articles neither "restrict" third parties' rights nor are inconsistent with the operating agreement -- the special statutory liability for such falsity is excessive because LLCs and their members are in any event liable for fraud, including fraud in filed documents. The section may go beyond fraud in giving a remedy to third parties for immaterial misstatements on which they unreasonably relied. In other words, a third party could recover on proving a false statement which she believed and acted on -- a contention that may be impossible to disprove. But there is no apparent justification for relaxing the usual elements of a fraud cause of action for misstatements in a filed document. Also, this open-ended damage remedy could have the perverse effect of discouraging LLCs from using the articles to provide information about the firm to third parties.

A final problem with the liability for false statements is the way it relates to the effect of the articles in ULLCA || 203. In some cases, as where the articles are inconsistent with the operating agreement, || 203 makes the articles, in effect, controlling and, therefore, not false. In other situations the articles may be "false" and trigger an open- ended action for damages. There is no apparent reason why these similar actions have such different consequences.

301 AGENCY POWER

This section provides for the authority of members and managers in LLCs that are (subsection (b)) and are not (subsection (a)) managed by managers, as well for the authority to bind in real property transfers (subsection (c)).

1. When Is A Manager's Act Binding?

ULLCA 301(b) says that only managers, and not members, are agents of the LLC. Unfortunately, there is no precise guidance on who is a "manager." While this is generally a problem in LLC statutes ULLCA does not help solve the problem by defining a "manager" as simply one who is authorized under 301 (see || 101(9)). without explaining further when that authorization is deemed to take place.

Whoever "managers" are, their authority to bind the firm in extraordinary transactions is uncertain. ULLCA || 301 (b)(4) provides that a manager's act "which is not apparently for carrying on in the ordinary course the company business or business of the kind carried on by the company" is binding only if it was authorized under || 404(b)(2). Yet || 404(b)(2) says only that managers can act without member consent, "except as specified in subsection (c)." Section 404(c), in turn, provides for a member vote only on specific matters, and not on all acts that might be considered "not apparently . . . ordinary." These three subsections together leave it unclear whether the LLC is bound by a manager's act which is not listed in || 404(c) but is, nevertheless, not "apparently. . . ordinary" under || 301(b)(4).

It is also not clear whether the operating agreement can restrict a manager's authority to act without member consent. This would seem to be the case, since || 301(b)(4) cross-references the members' voting rights under || 404 which are, in turn, not among the non-waivable rights listed in ULLCA || 103(b). Yet this would contradict || 103(b)(7), which provides that the operating agreement cannot restrict third party rights.

2. When Does A Member Effectively Transfer Real Property?

ULLCA || 301(c) provides that a member may sign and deliver a real property conveyance which is conclusive against a bona fide purchaser without knowledge of the lack of authority, unless the articles restrict the member's authority. This raises several questions. First, if the articles do restrict the member's authority, this could restrict a relying third party's rights contrary to ULLCA || 203.

Second, it is not clear when a third party is deemed to have "knowledge" of the lack of authority. ULLCA unhelpfully defines "knowledge" as "actual knowledge." Does a third party have such "knowledge" if she knows of a restriction on authority in the operating agreement? Apparently not, in light of prohibitions on restricting third party rights under || 103(b)(7) and 203(c)(2). Does a third party have such knowledge when the member's act is not "apparently. . . ordinary" within the meaning of || 301(a), as where the member is transferring all of the LLC's property?

Apart from these questions, the rule on real property conveyances is questionable policy. ULLCA || 301(a) is explicitly subject to || 301(c), which implies that the ordinary rules of authority do not apply to real property transfers, most of which would be outside a member's usual authority. If this is the rule, it differs from the rule which applies to other business associations. As such, it would surprise any informal LLC -- the sort of firm for which the statute should be designed -- that did not receive competent legal advice about the terms of ULLCA.

303 LIABILITY OF MEMBERS

This section provides that LLC members and managers are not liable solely by reason of being or acting as such. This is similar to provisions in virtually all LLC statutes. However, the section includes other unusual and questionable rules regarding the effect of failure to observe formalities and of member consent to liability.

1. Significance Of Failure To Follow Formalities

ULLCA || 303(b) provides that "[t]he failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not

a ground for imposing personal liability on the members or managers for liabilities of the company." This provision poses more questions than it answers. What are "usual" formalities and requirements? Are they different from "unusual" formalities? If the LLC's failure to follow formalities is not "a ground" for imposing liability, does that nevertheless mean it can still be taken into account in piercing the veil? If the failure to comply with statutory requirements has no effect at all, what is the purpose of including such requirements in the statute? The simpler and more direct way to protect firms from veil-piercing liability based on failure to comply with formalities is to eliminate useless requirements from the statute and to specify the consequences of failing to comply with included requirements.

2. What Is The Effect Of The Filing Requirement For Personal Liability?

ULLCA || 303(c) provides that members may be liable "in their capacity as members for all or specified" LLC debts if the articles so provide with the members' consent. This provision is arguably useful to the extent that helps some members contract for liability without having to contract separately with each creditor, and to avoid the corporate tax characteristic of limited liability under Rev. Proc. 95-10. Such an LLC would be similar to a limited partnership, except that the guaranteeing members would not necessarily be managers and would not necessarily be liable for all of the firm's debts.

The main problem with || 303(c) is that it might inappropriately extend beyond this situation to impose constraints on member guarantees. An analogous New York provision (N.Y. Partnership Law, Ch. 34, || 609(b)) differs in explicitly providing that it does not apply to member guarantees. ULLCA does not include this qualification. Because ULLCA 303(c) applies to any liability of members "in their capacity as members" it could be interpreted as applying to members ⊨ guarantees of the LLC ⊨s liabilities. Significantly, this language is broader than that in subsection (a), which relieves members from liability "solely by reason of" being members.

To the extent that this subsection applies to member guarantees it is unnecessary and perverse. Authorizing guarantees is unnecessary because subsection (a) only removes members' liabilities that are imposed "solely by reason of" their acting as or being members -- that is, not including liability imposed by contract or otherwise. The provision is perverse if it conditions effectiveness of member guarantees on a certificate disclosure. If the function of the provision is to provide a statute of frauds, the act could simply require guarantees to be in writing. While guarantees may be relevant credit information, any such benefit from requiring disclosure is outweighed by the costs to unwary creditors, who may be out-maneuvered by members or more sophisticated creditors who know about ULLCA ⊨s idiosyncratic disclosure requirement.

402 LIABILITY FOR CONTRIBUTIONS

This section provides for members' liability for contribution obligations and for compromise of these obligations.

1. Enforceability of oral contribution obligations

This section permits enforcement of oral contribution obligations. The Comment explains: "Given the informality of some limited liability companies, a writing requirement may frustrate reasonable expectations of members based on a clear oral agreement." Yet the drafters also should have considered the litigation costs that might result from claims that members had orally agreed to make contributions. Although the appropriate balance between enforcing expectations and minimizing litigation may not be clear, the fact that the vast majority of the states require a writing is evidence of the appropriate rule. In any event, rejecting the clear majority rule is not the simplest path to the uniformity NCCUSL supposedly seeks.

2. Compromise of contribution obligations

ULLCA 402(b) provides that members can vote to compromise member contribution obligations, but that compromised contributions can be enforced by creditors who relied on the initial obligation. While many LLC acts also so provide, in this case they are wrong. To be sure, creditors may rely on contribution obligations, but it is more likely that they will rely either on general assets or profitability or obtain guarantees. Creditor reliance is particularly unlikely since ULLCA does not require contributions to be disclosed in the articles, requires no records of contributions to be kept (|| 408), and permits contributions to be made in any form, including by obligations to perform services which provide no security to creditors of insolvent LLCs. In the unusual case in which creditors do rely on a particular contribution obligation, they can contract for the protection this section would unnecessarily provide to all creditors. This rule costs LLCs financial flexibility with very little offsetting benefit to most creditors. Moreover, ULLCA apparently does not even let LLCs contract with its creditors to avoid the rule (see || 103(b)(7)).

This type of provision is borrowed from limited partnership statutes (e.g., RULPA || 502(b)) where it is a holdover from the early days of limited partnership in which limited liability was exceptional and mistrusted, and when it was surrounded by other provisions which bolstered creditor reliance on contributions by restricting their form and requiring certificate disclosure. There is no justification for continuing to include such provisions in LLC statutes.

404 MANAGEMENT

Subsections (a) and (b) provide, subject to subsection (c), for management by member-managed and manager-managed LLCs by majority vote of the members and managers, respectively. Subsection (c) provides that certain matters, including amendments to the operating agreement and articles, must be decided by unanimous vote of the members.

1. Is A Unanimity Rule For Certain Matters Appropriate?

The unanimity rule empowers each partner not only to protect herself from harmful transactions, but also to insist on a large share of the gain from beneficial transactions. Even if members do not behave opportunistically, the cost of obtaining unanimous consent rises rapidly with the number of members. Moreover, a unanimity rule may not be very important in protecting members from harm where, as in a partnership or LLC, a member who disagrees with the firm's policies can dissociate. Perhaps the costs of dissociating combined with the potential for harm to individual members from extraordinary new transactions justifies a veto power in partnerships, where the members are subject to personal liability. But the potentially serious problems caused by a unanimity rule may not be warranted where members have limited liability, as in an LLC.

The strongest argument for a unanimity rule in an LLC is that the default rule should be designed for the more intimate, informal firm in which partnership-like management rules have the greatest benefits for members and impose the lowest decisionmaking costs. But even if this argument is persuasive, the unanimity rule would not necessarily be appropriate in manager-managed firms. The members' decision to centralize management decisions indicates that the firm is not the sort of intimate firm in which the veto power is appropriate, and that the costs of obtaining unanimity may be high.

The most that could be said for the ULLCA approach is that, because reasonable minds could disagree on this issue, the ULLCA approach should not be uniform. Even if some matters should be decided unanimously, not everybody will agree about subsection (c)'s list of matters that must be approved unanimously. Matters such as compromise of contribution obligations, interim distributions and redemption of property subject to a charging order could be considered ordinary financing decisions best entrusted to the managers and a majority of members. To be sure, as discussed immediately below, members could vary the rules in their operating agreement. But default rules are important because of the costs of negotiating and drafting detailed agreements. Indeed, that is why business association statutes are necessary in the first place.

2. When Are These Rules Varied By Contrary Agreement

The rules prescribed by this section can be waived by an oral operating agreement under || 103. A strong argument can be made that a default rule of this importance should be waived only by written agreement. Although the statutory default rules should be designed for informal firms, it does not necessarily follow that rules regarding waiver of defaults also should accommodate informality. The drafters should consider the potential litigation costs of oral agreements about matters where disputes are sure to arise.

Even if oral agreements on this issue should be enforced, there are problems with applying the oral agreement rule in light of other ULLCA rules. If, for example, the members by their conduct or silence appear to sanction a subunanimous voting on all or some of the matters requiring unanimity, this is arguably an enforceable oral operating agreement which displaces the default rule. Yet || 404(d) provides that an action without a meeting requires "consents reflected in a record." which is defined in || 101(17) to exclude purely verbal action. One of the actions requiring unanimous vote under || 404(c) is "the amendment of the operating agreement under Section 103." Unfortunately, || 103 does not provide for amendment of the operating agreement. Section 101(14) does define "operating agreement" to include amendments, but || 404 does not cross-reference this definition. Thus, it is unclear whether the members' silence or conduct makes an oral operating agreement or amends an existing one. If the former, the action is probably effective under || 103; if the latter it is ineffective for lack of a "record" of "consents" under || 404(d). This confusion creates an unnecessary potential for litigation. Moreover, one wonders how the sort of informal LLC for which the Act is supposedly designed is supposed to understand how these rules operate, at least without the constant advice of counsel.

405 SHARING OF AND RIGHT TO PRE-DISSOLUTION DISTRIBUTIONS

This section provides that any distributions prior to dissolution shall be made equally, and that members have no right to receive or obligation to accept distributions in kind. This section raises issues about the appropriate default sharing ratio and about how the default provision can be waived.

1. Should Distributions Be Shared Per Capita Or Pro Rata?

There are good arguments both for and against a default rule allocating financial rights equally among the members rather than pro rata according to members' financial contributions as is the rule for corporate shareholders. The argument for the per capita approach is that informal firms may not have sufficient records from which members' current financial shares readily can be determined. As a result, such firms risk litigation concerning the validity of every distribution. On the other hand, a per capita rule is probably inconsistent with the parties' expectations in a limited liability firm, in which the members' contributions are mostly financial. Thus, while the ULLCA rule is not wrong, it is not so clearly right that it ought to be the uniform rule.

2. Should The Default Rule Be Waivable By Oral Agreement?

The distributions rule can be waived by oral operating agreement.This raises the same concerns and potential problems as waivers of management and voting rules under ULLCA || 404 -- i.e., the appropriate balance between accommodating the expectations of members of informal firms and avoiding excessive litigation costs. Thus, both Prototype || 601 and the Revised Uniform Limited Partnership Act || 504 require written waivers of this default.As with waivers of the management provision, ULLCA creates some confusion concerning waivers of the equal distribution rule. The Comment points out that the members must unanimously consent to interim distributions under ULLCA || 404(c), and therefore could block equal distributions where this inappropriately reflects members' contributions. While || 404 requires vote at a meeting or a "record," amendment by oral operating agreement may be more informal.

406-407 LIMITS ON AND LIABILITY FOR DISTRIBUTIONS

These sections provide, respectively for limitations on distributions and for liability for wrongful distributions. Such provisions give little more to creditors than they would get under fraudulent conveyance law. For this small benefit, these provisions impose a costly extra level of legality on LLCs. ULLCA || 406 requires firms to make determinations, on the basis of "reasonable" accounting practices that the distribution meets both "balance sheet" "equity insolvency" tests, with special rules for purchase or redemption of member interests. Such formalities ensure that even small, informal LLCs will need legal and accounting advice in arranging day-to-day finances. These provisions were not included in Prototype || 603 and comments. Moreover, the fact that they have not been included in most limited liability partnership statutes (an exception is Mn. St. 323.14(5)) suggests that state legislatures are now ready to accept limited liability without these restrictions.

408 INFORMATION RIGHT

This section provides for access to the LLC's books and for other member information rights. As discussed in the following subsections, ULLCA's open-ended language invites extensive litigation on disclosure, an issue that can be raised in connection with any dispute. Even worse, ULLCA does not give the parties adequate freedom to fashion their own agreements on this important issue.

1. Books and records

ULLCA || 408(a) provides for access to, but not the keeping of,records. This is consistent with both UPA || 19 and RUPA || 403. As noted by the Comment, such a rule arguably fits the most informal firms for which the act should be designed because such firms may be caught by surprise by a recordkeeping requirement. Moreover, where the statute requires the firm to keep books, it is not clear what the penalty for failing to keep required books is, or should be. However, because "default" LLCs may be centrally managed, the partnership analogy may not be appropriate for LLCs. In a manager-managed LLC, unlike the "standard form" partnership, members who do not directly participate in management normally would want a way to monitor managers' performance. Indeed, records are so basic to managers' disclosure duties that courts are likely to imply an agreement or statutory requirement of recordkeeping obligations by managers. Accordingly, the statute should delineate the default recordkeeping duty in order to minimize the cost of litigating the issue.

2. Where Do Members Have Access To Books And Records?

ULLCA || 408(a) gives members access to books and records "at reasonable locations specified in the operating agreement." This raises several issues. First, if the operating agreement does not provide for the location of the books and records, this section does not clearly limit where the records can be kept. As with the what books and records should be kept, the act should provide for a default rule.

Second, since operating agreements may be oral, members may not easily be able to determine where the records are supposed to be kept under the operating agreement. Indeed, simply putting the records in a particular place might constitute the operating agreement provision on location if no one objects. Once again, the potential litigation costs of oral agreements may outweigh the benefits even for informal firms.

Third, it is not clear when an operating agreement provision on location will be enforced. ULLCA 408(a) provides that the location must be "reasonable." While it is easy to see how managers who are free to decide could put the records in an inconvenient place, how can a place to which the members have agreed be "unreasonable?" This requirement is particularly confusing in light of other ULLCA provisions. Does "reasonable" differ from the obligation to discharge duties in "good faith" under ULLCA || 409(d), or from the rule that the operating agreement cannot "unreasonably" restrict access to records (|| 103(b)(1)? Can the agreement "reasonably" restrict access to an "unreasonable" place?

3. What Information Does The LLC Have To Provide Without Demand

ULLCA || 408(b)(1) provides that the LLC must furnish "without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the member's rights and duties under the operating agreement or this [Act]." Once again, the Act has provided an openended standard rather than a clear default rule. Does the "reasonably required" standard mean all information that is "relevant" to the members' financial or management rights, only such "relevant" information that is also "material," or something else? There is no case law on this issue because the law generally does not impose open-ended disclosure duties for the sound reason that such a rule would invite litigation and protective overdisclosure by managers. For all of these reasons, it is curious that the ULLCA drafters did not follow the UPA and RUPA approach of requiring demand (UPA || 20, RUPA || 403(c)).

4. What Information Can Members Demand?

ULLCA || 408((b)(2) entitles members "on demand, [to] other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances." Once again, ULLCA adopts a vague standard. When is information "unreasonable"? Does "unreasonable" differ from "otherwise improper?" From the bad faith conduct proscribed by ULLCA || 409(d)? Also, if the information is "reasonable," how could the demand be "unreasonable?" Although a demand might be unreasonable if the member insists on having the information in the middle of the night, the section seems to refer to what may be demanded rather than when it must be provided. Moreover, any victory based solely on when a member demanded "reasonable" information is bound to be pyrrhic.

In addition to being inherently unclear, this provision also relates uncertainly to members' rights to information without demand. How can "reasonable" information not be "reasonably required" under || 408(b)(1)? When should members "demand" information instead of suing because it has not already been disclosed?

5. What Are A Member's Rights To Production Of The Operating Agreement?

ULLCA || 408(c) provides that "[a] member has the right upon signed record given to the limited liability company to obtain at the company's expense a copy of any operating agreement in record form." Although the section could be read to say that a member has the right to have an oral agreement reduced to writing, it probably means only that a member has a right to a copy of any operating agreement that is already a "record."

6. When Can Disclosure Duties Be Waived?

The above questions are made particularly serious by the fact that that the members have only a limited right to contract around ULLCA || 408. ULLCA || 103(b)(1) provides that the operating agreement may not "unreasonably restrict a member's or former member's right of access to books and records under Section 408." Not only is "unreasonably" inherently unclear but, as already noted, it is confusing in conjunction with the reasonableness requirement for location provided for in || 408 and the good faith requirement in || 409(d). More fundamentally, it is not clear why the parties cannot make any agreement they want on this issue, subject to usual good faith rules of construction. Surely some LLCs would want to escape the potential litigation that is inherent in ULLCA's open- ended "reasonableness" default rules on disclosure. But if they try to do so, they only get tangled further in the additional issue of whether their agreement was "unreasonable."

409 FIDUCIARY DUTIES

This section provides for rules similar to those in RUPA defining the fiduciary duties in an LLC as the duties of loyalty and due care. These rules apply to members of member-managed firms and to managers and managing members of manager-managed firms. In general, this section is an invitation to extensive litigation because of its vague standards and because it attempts the impossible -- the full specification of duties that inevitably vary from case to case. As discussed in subsection (1), this was equally a problem in RUPA. Subsections (2) and (3) show that the attempt to transplant these duties to ULLCA creates even more problems.

1. Adoption of RUPA rules

My criticisms elsewhere of the RUPA fiduciary duty rules (see The Revised Uniform Partnership Act, Not Ready for Prime Time, 49 Business Lawyer 45 (1993)) apply equally to same rules in ULLCA. Like RUPA, ULLCA || 409 (b) confusingly provides for separate duties of loyalty in addition to the general duty of which these are a part; Subsection (d) wrongly provides for the basic contract good faith rule in the fiduciary duty section; and subsection (e) casts doubt on the rest of the section by letting members act selfishly. Most importantly, like its RUPA counterpart, ULLCA || 103 severely limits firms' ability to contract around these highly questionable default rules.

One aspect of the RUPA rules adopted in ULLCA deserves special mention because of the way it interrelates with other ULLCA rules. ULLCA || 103(b)(2) provides that the operating agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable, and that the operating agreement may "specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty." There is, however, no provision elsewhere in ULLCA explicitly permitting member authorization of self- dealing transactions. The Comment to ULLCA || 103 says that "Section 103(b)(2)(ii) preserves the common law right of the members to authorize future or ratify past violations of the duty of loyalty provided there has been a full disclosure of all material facts." Yet this "common law right" is far from clear. The LLC is not a "common law" organization. By contrast, the UPA || 21 requires partners to account for only those benefits derived "without the consent" of the other partners. ULLCA || 409(b)(1) uses almost the same language as the UPA, but deletes the language about consent. This strongly implies that ULLCA requires authorization in the operating agreement rather than by member vote. Although the members may amend the operating agreement, this only raises the issues of whether amendment requires a "record" or may be done informally.

If the members cannot authorize a specific transaction that would otherwise constitute self-dealing, this would be a real hardship for the typical informal firms -- for which the act should be designed -- that do not include such detail in their operating agreements. Indeed, members of such firms may be surprised by the existence of the rule only after the issue is litigated. This is particularly a problem since it may be difficult to determine whether the conduct in fact would violate the duty of loyalty in the absence of consent. In the end, courts probably will resolve this issue by holding that member consent removes any fiduciary breach regardless of what the Act says. The Act should make this clear.

2. Erroneous linkage with RUPA

Even if the RUPA rules applied in ULLCA were fine for partnerships, they would not necessarily suit LLCs (see Ribstein, Linking Statutory Forms, forthcoming Journal of Law and Contemporary Problems). For example, the limited liability of LLC members suggests that the extra incentive of a duty of care may be appropriate to protect against improvident transactions. Although the RUPA duty of care as set forth in ULLCA || 409(c) may be appropriate for LLCs, the use of the same language in both statutes erroneously suggests that the courts should apply this duty the same way in both contexts. This may cause the creation of inappropriate precedents for both LLCs and partnerships.

3. What Are Members' Duties In A Manager-Managed Firm?

ULLCA || 409 provides for several rules that adapt the RUPA fiduciary duty rules to the special circumstances of manager-managed LLCs. ULLCA provides that a member in a manager-managed LLC has no duties "solely by reason of being a member." Assuming it is clear who is a "member" and who a "manager," there is a question whether the members as a group should be freed from fiduciary duties to the minority. Although ULLCA || 801(5)(v) apparently provides for judicial dissolution in this situation, members arguably should have some remedy short of dissolution.

More seriously, because the relationship between members and managers in LLCs is an evolving concept, it is even more difficult to make precise statements about fiduciary duties in LLCs than in the relatively simply partnership context. When is a person a "member" and when a "manager" for fiduciary duty purposes, particularly in informal LLCs where functions may be blurred? ULLCA || 101(9) defines "manager" unhelpfully as one who is "vested with authority under || 301." But || 301 simply vests with authority one who is a "manager." Moreover, ULLCA 409(h)(3) provides that even a non- managing member "who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company business is held to the standards of conduct in subsections (b) through (f) to the extent that the member exercises the managerial authority vested in a manager by this [Act]." But when is a "member" who is not a "manager" under || 301 nevertheless exercising the rights of a manager under 409? And when is she doing so "pursuant to the operating agreement" if the agreement is oral or does not explicitly forbid the action? Does the member's fiduciary duty turn on whether she is usurping authority? Finally, ULLCA || 409(h)(4) relieves a manager of liability "to the extent of the managerial authority delegated to the members by the operating agreement." Does this mean that managers are relieved of liability when they act as long as the operating agreement has delegated authority to the members?

410 REMEDIES

This section provides that a member may maintain an action to enforce the member's rights against the LLC or another member with or without an accounting. This section's main problems concern its interrelation with the members' management rights and the derivative remedy. ULLCA || 410 apparently allows individual member suits for breach of fiduciary duty to the LLC without either co-member consent or demand on managers. ULLCA Article 11 permits derivative suits only if members or managers with authority refuse to do so. Courts will have to determine when a member is suing derivatively under Article 11 and when under || 410. That may be impossible. Although the Comment to || 410 provides that under the section a "member pursues only that member ⊨s claim," in fact the black letter is broad enough to let a member sue individually on account of a derivative- type claim for breach of fiduciary duty to the LLC.

411 CONTINUATION OF TERM LLC

This section provides that if a term LLC is continued after expiration of its term, it does so as an at-will LLC, and that if an LLC ⊨s business is continued without winding up, it continues as an at-will LLC. This section raises several questions, discussed below, in how it interrelates with ULLCA 801, 802 and 809.

501-504 TRANSFEREES AND MEMBERS' CREDITORS

These sections provide for transfer of LLC interests in terms similar to those which apply to partnership interests. This application of partnership law generally makes sense from an organizational standpoint, and helps ensure that LLCs have the partnership tax characterization feature of restricted transferability. The sections are also generally similar to those in most LLC statutes. Indeed, the existing uniformity of these provisions is one reason why ULLCA is unnecessary.

ULLCA does include one significant idiosyncrasy. ULLCA || 502 provides that a member ceases to be such on transfer of all of her distributional interest. ULLCA || 601(4)(i) also provides that a member who transfers "substantially all" of her interest may be expelled. This appears to be a compromise between providing for expulsion or providing for automatic termination as a result of transfer. However, it is an unsatisfactory compromise, since it will inevitably trigger litigation over whether the member has transferred "substantially all" of the interest. In the closely held firm for which the statute should be drafted, members might be concerned about any dilution of the incentives of a co-manager, and so arguably should have at least a default expulsion power in this situation. On the other hand, giving such a power to the majority could invite opportunistic expulsions. In any event, the rule should be clear-cut.

601 DISSOCIATION EVENTS.

This section specifies the events that cause a member ⊨s dissociation. Since it is obviously intended to clarify the precise circumstances that constitute a member dissociation, it is curious that the section includes a catchall category: "a termination of a member's continued membership in a limited liability company for any other reason" (|| 601(11)). This seems intended to include the transfer of all of the member's interest, which otherwise would be a cause of dissociation under ULLCA || 502 but is not included in the list of dissociation events in ULLCA || 601. But does the catchall include other events? How should a court determine whether a member is dissociated if the event which supposedly caused the dissociation is not listed in one of the specific || 601 categories? The drafters should have identified transfer and any other dissociation events they had in mind.

602 POWER TO DISSOCIATE

This section provides that a member has a power to dissociate at any time, although the dissociation may be wrongful.

1. Should There Be A Default Power To Dissociate

The most important question concerning the member's power to dissociate is whether the statute should provide for this default right. Since the main consequence of the power to dissociate is the member's buyout right, this issue is discussed below with respect to the provision concerning that right, ULLCA || 603.

2. Should Dissociation Be Wrongful If Not In Breach Of Operating Agreement But Prior To Expiration Of A Term?

ULLCA || 602 provides that a member's dissociation is wrongful if it is in breach of the operating agreement or prior to expiration of the duration of a term LLC (defined in || 101(20) as one which is so designated in the articles. A wrongfully dissociating member is liable under || 602(c) for damages caused by the dissociation. The question is whether this default damage remedy is appropriate. Unlike in a partnership, on which this rule is based, the member's premature departure does not necessarily impose significant burdens on the other members - - it does not generally cause dissolution under || 801(3), does not generally require the firm to find other debt guarantees because the members have limited liability and, at least in a manager-managed LLC, does not generally require replacement of the member's services. Moreover, any risk that prematurely buying out the member will disrupt the firm's business is minimized by the fact that a term LLC can delay buyout until completion of its term under || 701(a)(2). Thus, there will probably be no real damage from the member's departure. Yet this section invites the firm and the court to search for damages.

3. Should dissociation by member bankruptcy be wrongful?

ULLCA || 602(b)(2)(iii) provides that dissociation is wrongful if "the member is dissociated by becoming a debtor in bankruptcy" Even if damages ought to be imposed on some wrongfully dissociating members, such damages should not be imposed on the creditors of a bankrupt member.

603 EFFECT OF DISSOCIATION

This section is partly a switching provision: On dissociation, the firm either dissolves under || 801, in which case Article 8 applies; or the firm continues and purchases the member's interest under Article 7. In a term LLC, the purchase occurs only on expiration of the stated duration. The section also specifies the effect of dissociation on members' management and fiduciary rights and obligations.

1. Should Members Have A Default Put?

One of the more controversial aspects of this section is that, at least in the absence of contrary agreement, a member has a right at any time to be cashed out of the firm. The obligation to buy out members could impose significant burdens on the sort of closely held firm for which the statute should be designed. Perhaps such a right is justifiable in a partnership, since it relieves partners of having to continue to expose their personal wealth to business risk in order to keep their financial interest in the firm. But LLC members do not have this problem. Accordingly, it is worth asking whether the statute should assume that LLC members would want to provide for a buyout right.

The strongest justification for the buyout right is that, even in an LLC, illiquid minority members may be subject to potential oppression by majority members. Such problems have given rise to special remedies in close corporations which have triggered much litigation and unsatisfactory judicial lawmaking. The basic problem with this remedy is that courts must guess that close corporation shareholders want to be treated like partners, while their decision to incorporate indicates that that is not the case. The same problems would arise under LLC statutes that do not provide for a default buyout right. If the statute provides for such a right by default, the majority would have to make the absence of a buyout right clear to the minority by specifying it in the operating agreement. This would eliminate judicial guesswork about whether or not the members agreed to the absence of a buyout.

2. Other Consequences of Dissociation

ULLCA || 603(b) necessitates separating out the sub-parts of the duty of loyalty, determining when duties relate to pre-dissociation matters and which post-dissociation matters relate to winding up. These difficulties are added to the difficulties, discussed above, of interpreting the || 409, the fiduciary duty provision. This is another respect in which ULLCA is a litigator's dream.

701 PURCHASE RIGHT

ULLCA || 701 provides rules for the purchase of a dissociating member's "distributional interest." Although, as discussed in connection with || 603, a default buyout right arguably makes sense for informal LLCs, this section's rules governing the buyout provide the sort of detailed formality that is appropriate for a more sophisticated firm. If the firm is operated informally there is a strong possibility that members and managers will miss the 30-day and 120-day deadlines specified in this section. These rules are appropriate only for a formal, heavily lawyered, corporate appraisal proceeding, not the informal firm for which the statute should be designed.

702 COURT ACTION TO FIX PRICE

This section provides rules for the court determination of the buyout price -- i.e., "fair value" -- provided for under || 701. Most importantly, || 702(a)(1) provides that the court should consider "among other relevant evidence the going concern value of the company, any agreement among some or all of the members fixing the price or specifying a formula for determining value of company interests for any purpose, the recommendations of any appraiser appointed by the court, and any legal constraints on the company's ability to purchase the interest."

1. Vagueness of "Fair Value" Standard

The Comment to || 702 emphasizes the openendedness of the "fair value" standard used for determining the buyout price:

Under this broad standard, a court is free to determine the fair value of a distributional interest on a fair market, liquidation, or any other method deemed appropriate under the circumstances. A fair market value standard is not used because it is too narrow, often inappropriate, and assumes a fact not contemplated by this section --

a willing buyer and a willing seller.

While any judicially determined buyout price is bound to involve some uncertainty, there is no reason to maximize the need for costly lawyering as ULLCA does. The fact that there is no actual willing buyer and willing seller is no reason why the court cannot be instructed to determine a hypothetical market price based on a willing buyer/willing seller standard. Indeed, RUPA || 701(a)(1) requires just such a determination. If there is some policy reason why this would not be appropriate, the statute should clarify deviations from the market standard. For example, the statute could explicitly eliminate any "minority discount" by providing that value should be determined on the basis of the member's pro rata share of the value of the firm, as is provided in RUPA. This would help deter oppression of minority holders, thereby eliminating the need for open-ended special remedies to deal with the problem. As phrased, the section creates unnecessary potential for litigation on many issues, as indicated in the following subsections.

2. What factors may the court consider

ULLCA || 702 provides that "the court shall . . . determine the fair value of the interest, considering among other relevant evidence . . . . " This sets no limit on the factors the court may consider, exacerbating the openendedness problem discussed immediately above. Also, "the court shall" language implies that the court must consider at least the factors set forth in the section. Does "considering" mean that the court must take all of these factors into account, or that the court can apply a zero weight to some factors? If the latter, under what circumstances may the court do so?

3. Relevance of agreement

The language concerning the relevance of the price or formula in an agreement is confusing. To the extent that it refers to the buyout price in an operating agreement, this would be inconsistent with ULLCA || 701(c), which provides that the operating agreement price controls, and with the fact that || || 701 and 702 are not among the non- waivable provisions listed in 103(b). In fact, the provision probably refers only to agreements other than the operating agreement. But then the agreement may be wholly irrelevant to the buyout price. That would be a problem particularly if, as discussed immediately above, the court must take the agreement into account.

4. Difference from Partnership Standard

ULLCA || 702 applies a different standard from RUPA, which itself differs from the UPA. Thus, cases under one act cannot be used under the others. There is no apparent reason why ULLCA departs in this respect from RUPA while questionably borrowing RUPA language in many other respects. This indicates that ULLCA's drafters lacked a coherent theory that would help determine when to link the LLC with other forms.

801 DISSOLUTION

This section specifies the events which result in a dissolution of the LLC. These include agreed events, judicial decree, and member dissociation, depending on whether the firm is "term" or "at will," as discussed below in subsection 1.

1. Dissolution At Will

Pursuant to ULLCA 801, a "term" LLC, defined in || 101(2) as one whose articles so provide, dissolves on a member's dissociation only if the dissociation is caused by bankruptcy or death (or the equivalent of a non-individual member). -t-will LLCs, which ULLCA || 101(2) defines as those which are not "term," dissolve on dissociation of a member in a member- managed LLC or of a manager in a manager-managed LLC.

Dissolution at will should not be the default rule for any type of LLC. Dissolution at will is highly questionable

even in general partnerships because of the disruption it causes and the leverage it gives each member to extract concessions from co-partners who want to continue the firm (see generally Larry E. Ribstein, A Statutory Approach to Partner Dissociation, 65 WASH. U. LAW QUARTERLY 357 (1987)). But at least in a general partnership the liquidation power is supported to some extent by the potential harm to minority members resulting from their continuing personal liability for partnership debts. An LLC member's buyout right under 701 adequately addresses minority members' need for exit. Indeed, ULLCA ‖ 404 unnecessarily provides minority members with additional protection in the form of a default veto power. Adding a default dissolution power to the minority's other rights radically tips the balance of power in their favor.

It is no answer that firms can vary dissolution at will in their operating agreement or include the appropriate articles provision to make their firms term partnerships. The act should provide rules for informal firms that may not have such agreements or provide for such formalities. For the reasons discussed immediately above, few informal firms will be likely to want the rules ULLCA provides. Yet they will be forced to incur the costs of drafting around the Act. Worse, they probably will not have a formal agreement or special articles provisions, or even if they do they may run into the unexpected consequences of specifying a term. Firms are least likely to agree on dissolution, which is a remote event from the perspective of drafting operating agreements or initial articles. As a result, members' expectations will be frustrated, or courts will try to sort out what the parties really wanted, as they now do in close corporation dissolution cases.

In the final analysis, ULLCA's position on dissolution at will reflects an unsatisfactory compromise of tax and transaction cost considerations.The statute undoubtedly provides for dissolution at will because this is an important partnership tax characteristic. However, perhaps because they recognized the hardships of dissolution at will, the drafters have provided for exceptions for "term" and manager-managed LLCs. These compromises have only created additional difficulties. The problems of "term" LLCs are discussed below. The exception for manager- managed LLCs was a last-minute addition in the January 20, 1995 draft in response to the IRS's December Revenue Procedure which provides that non-dissolution after member dissociation from a manager-managed firm does not amount to corporate-type continuity of life for purposes of obtaining a private ruling. This distinction makes no sense as a default rule apart from tax considerations. It is based on an inappropriate analogy to limited partnerships in which the significant difference between general and limited partners based on limited liability should matter regarding the existence of a power to liquidate the firm at will. In an LLC, by contrast, both managing and non-managing members have limited liability. The governance and liquidity benefits to members from dissolution at will increase when members are excluded from management, while the costs to the firm depend on the duration of the firm and not on the form of governance. Although the centralized-management exception from dissolution at will increases continuity, it is an inappropriate default rule because it may confuse members of informal LLCs. Without costly legal advice, such firms are likely to think that continuity depends solely on whether the firm is at will.

2. When Is There "Majority-In-Interest" Continuation

ULLCA 801(3)(i) provides that the LLC can avoid dissolution at will "if, within 90 days after the dissociation, a majority in interest of the remaining members agree to continue the business of the company." The Comment to this section explains the "majority-in-interest" rule as follows: Decision-making under this Act is normally by a majority in number of the members or managers for ordinary matters and unanimity for specified extraordinary matters. See Section 404(a) to (c). The majority in interest standard varies this rule and is used only in paragraph (3)(i). "Majority in interest" is not defined in this Act and is intended to satisfy federal law concerning the Federal tax classification of the company. In the absence of federal law clarification regarding the definition, the phrase is intended to refer to the members ⊨ economic interests in the company measured by the members ⊨ respective capital accounts, share of profits or distributions, or otherwise. Under this Act, distributions are shared on a per capita basis. See Comments to Section 405. Therefore, under the default rule, a majority in number would also be a majority in interest.

Thus, the Drafters have made clear that this, like a similar late addition to the Revised Uniform Partnership Act

|| 801, was intended to conform with tax rules. (See Treas. Reg. || 301.7701-2(b)(1) (providing that corporate-type continuity of life does not exist notwithstanding the fact that a dissolution of the limited partnership may be avoided, upon an event of withdrawal of a general partner, by at least a majority in interest of the remaining partners agreeing to continue the partnership); Rev. Proc. 94-46, 1994-28 I.R.B. (June 29, 1994) (providing a safe harbor definition of "majority in interest" as majority of profit interests and of capital interests); Rev. Proc. 95-10, || 5.01, 1995-3 I.R.B.(December 28, 1994) (specifying conditions under which LLC may obtain ruling that relates to its classification as a partnership for federal tax purposes). Although this consideration may cause many firms to include such provisions in their operating agreements, that does not justify putting the provision in the statute. The main problem, as the Drafters confess, is that this rule departs from the statute's usual per capita rule, and there is nothing in the statute that helps interpret majority-in-interest. Majority-in- interest may be a nightmare in the informal firm for which the statute is designed because of the difficulty of determining the members' "interests." The Drafters say that their rule means "per capita" in a default firm which has no agreement on distributions. But they also say that the standard could refer to capital accounts.

3. Who may apply for judicial dissolution?

ULLCA 801 provides for separate grounds for judicial dissolution upon application by a "member or a dissociated member" under subsection (5) or "transferee" under subsection (6). The member's very broad rights are discussed in the next subsection. A transferee of an interest in a term LLC can sue for dissolution only after expiration of the term. The Comment says that the successor has the same rights as a member. But a successor is not a member. ULLCA unfortunately does not include a provision which would clarify the status of a member's successor. Some statutes explicitly provide that the successor is an assignee. This should be the result under all statutes. Otherwise, members would be forced to share management rights with new parties, contrary to the default rule in all LLC statutes providing new members can be admitted only upon member consent (see ULLCA || || 404(c)(7), 503). Moreover, the estate or other successor cannot be viewed as merely a continuation of the member's interest, since ULLCA || 601 provides that a member's death causes dissociation, and || 603(b)(1) provides that an event of dissociation terminates a member's power to participate in management.

The problem of successor's rights seems to have arisen as a result of the last- minute change in ULLCA in response to the IRS' late-December rule that non- dissolution on dissociation of a member from a manager-managed LLC does not amount to corporate-type continuity of life for purposes of seeking a private ruling. In catching up to the tax law, the drafters suddenly created a potential glitch for successors. Prior to the change, in the absence of contrary agreement death caused dissolution and winding up. After the change, death does not always cause dissolution, which means that the estate of a member who dies during an unexpired term is not entitled to be paid until after expiration of the term under || 701(a)(2). Thus, the estate is trapped in the firm, at the mercy of the other members and seemingly without even a dissociated member's right to sue for judicial dissolution during this period. These consequences result from the spiraling complexity of trying to compromise the general transaction-cost need for continuity and the tax need for dissolution by providing limited exceptions for term and manager-managed LLCs. The drafters at least could have explicitly empowered the successor to sue for judicial dissolution. But this would have entailed an inconvenient change in the black letter of the law that was supposed to have been the last word on LLCs. So the last resort was to attempt to change the law through commentary.

4. When may a member apply for judicial dissolution?

ULLCA 801(5) provides for circumstances which justify a judicial decree of dissolution. Some of these circumstances are discussed below. Subsection 5(i) provides for dissolution when "the economic purpose of the company is likely to be unreasonably frustrated." The Comment to 801 explains that a "court has the discretion to dissolve a company under paragraph (5)(i) when the company has a very poor financial record that is not likely to improve. In this instance, dissolution is an alternative to placing the company in bankruptcy." But an internal remedy for the members is not an "alternative" to administering the firm's debts to third party in

bankruptcy, and bankruptcy has nothing to do with a solvent firm that is able to pay its debts but whose "purpose" is "frustrated." Although the Drafters think the section applies only to a company with "a very poor financial record," the black letter does not say this. Disappointed members surely will try to claim that the "economic purpose" of an otherwise viable firm has been or probably will be "frustrated." The other members may oppose dissolution by arguing that the firm may be "frustrated," but not "unreasonably" so. The analogous provision in the UPA for judicial dissolution if the "the business of the partnership can only be carried on at a loss" (|| 32(e)), which more clearly focuses on poor finances and which is at least minimally justified in a context in which partners are personally liable for these losses.

Subsection 5(ii) provides for dissolution when "another member has engaged in conduct relating to the company business that makes it not reasonably practicable to carry on the business in the company with that member." This ground is adequately addressed by providing for judicial expulsion of misbehaving members (see ULLCA || 601(5)).

Subsection 5(v) provides for dissolution when "the managers or members in control of the company have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent or unfairly prejudicial to the petitioning member." This ground simply brings into the LLC the whole unsatisfactory body of "oppression" law from close corporations.

It is important to keep in mind that under || 103(b)(6) these causes apply irrespective of contrary provisions in the operating agreement -- that is, even if the parties explicitly have agreed that the firm should continue for a certain time or until a certain event. Thus, the judicial decree section gives members open-ended grounds to thwart the agreement by litigating for dissolution.

Even if some grounds of judicial dissolution are justified to protect minority members, these grounds go much too far. They unnecessarily supplement the basic ground of dissolution under || 801(5)(iii) where "it is not otherwise reasonably practicable to carry on the company business in conformity with the articles of organization and operating agreement," which is the sole ground provided for in RULPA || 802, the members' power to dissociate and have their interest purchased by the firm under || 603 and 701, the power under || 404(c) to veto major decisions, and the members' and managers basic fiduciary duties under || 409. The Comment to this section says that the court should take into account members' other rights, but there is no assurance courts actually will, or must, do so under the broad language of the black letter.

5. When Does a "Term" LLC Dissolve?

ULLCA || 801(7) provides that an LLC dissolves after expiration of a specified term. Since this is not one of the non-waivable provisions listed in ULLCA 103, it follows that the operating agreement may provide that a term LLC does not dissolve on expiration of the term. Under such an agreement, the term specified in the articles would be, in effect, a minimum rather than a maximum. The question, then, is when an operating agreement will be deemed to avoid dissolution on expiration of the term. This triggers two of ULLCA's general flaws. First, it is not clear when the operating agreement will override the articles as to third parties. [The operating agreement seemingly would not bind a third party under ULLCA 103(b)(7) (operating agreement does not restrict rights of third parties); 203(c)(2) (articles rather than inconsistent operating agreement controls as to third parties who rely on articles to their deteriment). But this is not entirely clear because of the "notice of dissolution" rule regarding continuing member authority to bind after dissolution. See ULLCA 804].

Second, the terms of the operating agreement may not be clear because the act effectuates oral agreements. Thus, ULLCA 411 provides that if a term LLC is continued after expiration of the term, including by continuation of the LLC's business by members or managers (depending on whether the LLC is manager-managed), the LLC becomes one at will. The Comment to 411 says that a continuation after expiration of the term in effect amends the operating agreement to provide for continuation as an at-will LLC. Does this mean that a term LLC dissolves on expiration of its term unless it does not?

Assuming that the LLC dissolves on expiration of the term, ULLCA 802 introduces further confusion. Under this section, which is discussed further below, an LLC may be continued after dissolution but before winding up only by unanimous vote of all the members, including the member whose dissociation caused the dissolution. Thus, continuation of the business by an unspecified number of members of a member managed LLC or by managers of a manager-managed LLC may be enough to continue a term LLC under 411 but not necessarily under 802.

The confusion confronting a term LLC may be particularly hard on informal LLCs which provide for a term in order to have continuity, only to find that the term actually provides discontinuity unless the members can persuade a court that it really wanted something different from what the articles seem to say.

All of these problems would disappear if the ULLCA simply did not provide for term LLCs. The drafters obviously inserted the term as a compromise which ameliorates the effect of dissolution at will. From a policy standpoint, the LLC should not dissolve at will in any situation. If dissolution at will is deemed to be necessary to preserve partnership-like non-continuity for tax purposes, then the Act should eliminate the intolerable confusion discussed in this subsection and provide for a simple default rule of dissolution at will.

802 CONTINUATION AFTER DISSOLUTION

This section permits the members unanimously to agree to continue the LLC before completing winding up. The section provides that even the dissociating member must consent to the continuation, and that the waiver of dissolution does not affect the rights of creditors who relied on the dissolution or a member ⊨s post-dissolution authority. In effect, then, dissolution alters the firm ⊨s internal and external contracts, and this alteration can be reversed only through adequate consent by members and notice to third parties. Since the section provides adequate safeguards for dissociating members and creditors affected by the dissolution, it does not raise serious policy issues. However, the usefulness of the section is seriously impaired by the notice and consent requirements: the validity of the continuation is threatened by any member who claims oral dissent from the continuation or any creditor who relied on the dissolution. Accordingly, the members who wish to continue might be better off forming a new business association rather than by using the odd procedure provided for in this section.

804: MEMBER'S OR MANAGER'S POWER AND LIABILITY AS AGENT AFTER DISSOLUTION

This section provides that an LLC is bound by acts after dissolution that are appropriate for winding up "or would have bound the company under Section 301 before dissolution, if the other party to the transaction did not have notice of the dissolution." The important question is when a third party will be deemed to have "notice of dissolution." ULLCA ‖ 102(b) provides that one has "notice" when she "(1) knows of it; (2) has received a notification of it; or (3) has reason to know it exists from all of the facts known to the person at the time in question." Among other possible questions that may arise, it is not clear whether a third party has "notice" of dissolution after the expiration of a term specified in the articles. Although this section is based on RUPA ‖ 804, RUPA ‖ 805 at least permits the filing of a notice of dissolution which clarifies the termination of pre-dissolution partner authority. It is not clear why ULLCA, which followed RUPA in so many other respects, did not include a similar provision.

805 ARTICLES OF TERMINATION

This section permits an LLC to file "articles of termination" and provides that upon filing "[t]he existence of a limited liability company is terminated." The problem with this section is that it does not provide for the effect of the filing or for consequences of failing to file. As to the consequences of filing, the Comment to this section goes beyond the black letter in saying that "[t]he termination of legal existence also terminates the company ⊨s liability shield" as well as the obligation to file annual reports. Even if the Comment controls, it is not clear what it means to terminate the "liability shield." Presumably the members retain limited liability for

pre-termination debts.

Although ULLCA 805 does not specify consequences of failing to file articles of termination, ULLCA 809 provides that the Secretary may move for administrative dissolution if the LLC fails to "file articles of termination under Section 805 following the expiration of the specified term designated in its articles of organization." It is not clear why only "term" LLCs, and not other dissolving firms, should have to file articles of termination. Moreover, as discussed above, this provision creates confusion in relation to other provisions that permit continuation of the firm. In the end, the distinction in 809 does not amount to much, since at will LLCs have a similar incentive to file articles of termination -- if they do not and cease operations they can be administratively dissolved for failing to file annual reports under || || 211 and 809.

902 CONVERSION

Article 9 provides for conversions and mergers of LLCs. To the extent that this article permits mergers with and conversions into entities other than LLCs, it creates potential conflicts with the statutes which provide for those entities. For example, ULLCA 902(a) provides that conversion must be approved by all of the partners, which term includes limited partners under 901(5), or by the vote required in the partnership agreement. Suppose in a limited partnership/LLC conversion that the limited partnership statute and agreement are silent on conversion, and that neither the statute (see RULPA || 302) nor the agreement require a vote by the limited partners. Is a conversion approved only by general partners valid? If the limited partnership agreement controls limited partner voting rights, why should not the default agreement provided by the statute, which gives no voting rights, also control?

903 EFFECT OF CONVERSION

This section provides that a converted LLC is the "same entity" as prior to the conversion. It then specifies effects of the conversion in subsection (b), including vesting of property, debts and rights in the LLC. It is not clear what "same entity" means other than the effects specified in subsection (b).

904 MERGER

This section provides for mergers of LLCs with LLCs and other business entities.

1. Purpose And Effect Of "Plan" Requirement

ULLCA 904(a) provides that the merger must be pursuant to a "plan," while 904(b) sets forth the requirements for the plan. This is a needless and confusing requirement. It is not clear what the effect is of a plan-less merger in an informal firm -- precisely the sort of firm for which the act in general and these provisions in particular are most necessary. Moreover, since the plan may be oral, it may be unclear whether there is a plan or what it says. Consequently, the requirement of a plan does little to reduce litigation over merger terms. Rather, it only adds something to litigate about -- that is, the existence of a statutory "plan." Finally, the members may agree under ULLCA 103 to dispense with the plan. Does actually dispensing with a plan constitute an oral operating agreement not to require a plan?

2. Application Of Other Statutes

As with the conversion provisions, the merger provisions create possible conflicts with other statutes. For example, 904(c)(3) requires the same vote by a limited partnership as is required for a conversion, and therefore creates the same potential conflict discussed above with the limited partnership voting requirements.

3. Voting rule for LLCs

ULLCA 904(c)(1) provides that LLCs must approve mergers unanimously or by the vote provided for in the operating agreement, "but not fewer than the members holding a majority of the ownership." The mandatory aspect of this rule raises at least three problems. First, "majority of the ownership" is not defined in the Act, which elsewhere uses per capita(|| 404) and "majority in interest" (|| 801) rules. Assuming "majority of the ownership" is based on financial interests, it will raise problems in informal firms that may lack adequate records for readily determining these interests. Moreover, a vote based on financial interests may unexpectedly trump a per capita voting rule provided for in the operating agreement if the majority of the members hold less than a majority of the financial interests.

Second, even if the mandatory rule is clear, it is unjustified. There is no reason why the members should not be able to make their own voting rules on this issue as they can under ULLCA for voting rules generally. Third, it is not even clear whether this purported rule is, in fact, mandatory. This section is not listed in || 103(b) among those which are unwaivable by the operating agreement. Moreover, as discussed below, the Act's merger provisions are nonexclusive, which implies that the agreement may provide for a merger by means of an alternative voting rule.

905 ARTICLES OF MERGER

This section provides for articles of merger, upon the filing of which the merger is effective under 904(e). It is not clear, however, what the effect is of failing to file the articles. There is no apparent reason why the merger should not be effective at least among the members according to the terms of a final merger plan. Moreover, the non- exclusivity provision, || 907, suggests that the agreement may be effective even as to third parties without filing.

906 EFFECT OF MERGER

This section provides that a merger terminates the "separate existence" of LLCs and other non-surviving parties to the merger. It then lists specific effects of the merger, including on property, rights and liabilities. As for conversions, it is not clear what the overall termination of "separate existence" means apart from the specific listed effects. It is also not clear whether termination of "separate existence" in this section means something different from saying that a firm which converts "is for all purposes the same entity" as before the conversion.

907 NONEXCLUSIVE

This section provides that "[t]his [article] does not preclude an entity from being converted or merged under other law." Under this provision, the act provides a "safe harbor" for mergers and conversions. Unfortunately, it is not clear whether "other law" means (1) the law of other states; (2) the law relating to other business entities; (3) the law of the parties' contracts; (4) common as opposed to statutory law; (5) all of the above; or (6) none of the above.

Assuming this section has the broadest meaning -- i.e., the fifth alternative -- it raises a question about the effect of the merger and conversion provisions. Why comply with the act if the merger is effective even without compliance? Conversely, a court may conclude that Article 9 does have some function, and therefore invalidate noncomplying mergers or conversions despite 907, even if the transactions might have been effective without Article 9.

1001-1009 Foreign limited liability companies

Article 10 provides for certificates of authority and application of formation- state law of foreign limited liability companies. ["Foreign limited liability company" is defined as "an unincorporated entity organized under laws, other than the laws of this State, which afford limited liability to its owners similar to the liability under section 303 and is not required to obtain a certificate of authority to transact business under any law of this State other

than this [Act]."] There are similar provisions in most other LLC statutes. Thus, while this Article does not present any policy problems, it also does provide any benefits in facilitating uniformity or providing a model law.

1101-1104 DERIVATIVE ACTIONS

Article 11 provides for derivative actions by LLC members in the right of the firm. These provisions, although similar to those in RULPA || 1001-1004, raise several questions in LLC statutes.

1. Relation with Member's Individual Action

Members' individual rights to sue are broadly defined under ULLCA 410. The separate derivative remedy may give rise to litigation over whether members are suing individually or derivatively.

2. Critique of Derivative Remedy

Apart from the potential confusion with the member's individual remedy, there is the important basic issue of whether LLC members should have a derivative remedy. The derivative remedy involves very substantial litigation costs which often exceed the benefit of the action to anyone other than lawyers. In light of these costs, litigation within the firm should be considered an extraordinary action which should be evaluated by managers and members generally rather than left to the discretion of a lone disgruntled member. A derivative remedy might make some sense in a public corporation since even seemingly disinterested managers may sympathize with defendants and requiring a shareholder to obtain authority from the other shareholders would be burdensome. Also, in a limited partnership it may make sense not to require members to seek authority from limited partners who are completely isolated from management power and information.

But, unlike these other types of firms, in the sort of small, informal LLC for which the act should be designed, a default derivative remedy is clearly a mistake. In an LLC, there is no concern about leaving members to the mercy of hostile board members since they can seek authority directly from the members. So as long as the suit cannot be blocked by interested members or managers, fiduciary duty suits on behalf of the firm should be authorized by the members, who are in the best position to make the critical cost-benefit analysis. In short, individual members should not be able to litigate on behalf of the firm if authorized members or managers have refused to sue or if, under ULLCA 1101, "an effort to cause [authorized] members or managers to commence the action is not likely to succeed."

Even if requiring authority for suits on behalf of the firm might alone leave some fiduciary breaches unremedied or undeterred, it is important to evaluate the need for the derivative remedy in the light of members' other means of self-protection. As discussed in subsection 1, LLC members are likely to be able to characterize their claims as direct rather than derivative. Moreover, unless otherwise agreed, disgruntled members have the power to dissociate at will and be paid a judicially-determined value of their interest in the firm under || || 603 and 701, rather than merely the minority-discounted share price that an exiting corporate shareholder can obtain. LLC also members have veto and removal powers under || 404 that corporate shareholders generally do not have.

Finally, even if individual members should be able to sue for injuries to the firm without seeking authority from other members or managers, it is not clear that they should have a derivative remedy. A derivative remedy puts the recovery back in the firm, and therefore back in control of managers who, by hypothesis, cannot be trusted with it. Members in closely held firms cannot "cash in" the award simply by selling their stock as can corporate shareholders. Additionally, courts can easily award direct recovery to the very LLC shareholders who were injured by the breach because, unlike public corporations, LLC membership does not rapidly change in highly liquid markets. Consistent with these principles, the ALI Principles of Corporate Governance, || 701(d) provides that in closely held corporations courts may treat derivative claims as direct actions in certain circumstances.

It is ironic that the LLC act should move toward a corporate-type derivative remedy just as close corporation law moves in the opposite direction.

For all of these reasons, the limited-partnership-type derivative remedy is unsuited for LLCs. A much better alternative is the Prototype Act || 1102 provision for suit on behalf of the firm by one or more members of any LLC, or by managers of a manager-managed LLC, if authorized by a majority of disinterested members or managers.

3. Waiver

ULLCA does not list the provisions relating to the derivative remedy as non- waivable under ULLCA || 103(b). This strongly implies that the members ought to be able to contract around the derivative remedy. [ULLCA raises a question whether waiver will be enforced by providing that the operating agreement may not "eliminate" the duty of loyalty or "unreasonably reduce" the duty of care. Id.103(b)(2), (3). It is not clear whether agreements eliminating remedies for fiduciary breach would come within these prohibitions.] This is the right result, since even if the statute should provide by default for a derivative remedy, members surely should be able to contract out of the remedy, particularly given the serious questions concerning its suitability for LLCs. However, making the derivative remedy a default rule is no answer for the closely held firms for which ULLCA should be designed. The derivative remedy, which assumes that members are isolated and powerless, is particularly poorly suited for such closely held firms. At the same time, such firms are unlikely to contract in detail regarding remedies.

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March 13, 1995

Via Telecopy (316) 267-6345

Mr. Stanley G. Andeel,
700 Fourth Financial Center
Wichita, Kansas 67202

Re: ULLCA

Dear Stan:

I was surprised when you and Alson Martin informed me that the Uniform Limited Liability Company Act ("ULLCA") is close to final enactment in Kansas. In my opinion, enactment of the ULLCA without further review by your drafting committee would be a serious mistake for several reasons.

First, although ULLCA was promulgated as a final act by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), it is still in the process of change, and a truly completed "styled" draft will not be available until April or May. Thus, you have the potential of making the same mistake that Wyoming and Montana made with the Revised Uniform Partnership Act, enacting a draft of a uniform act that took two more years to be truly finalized. Such premature enactments constitute both a disservice to the business community that must reconsider each new act and an embarrassment to the legislators who must correct the errors in a subsequent legislative session. For this and other reasons, the American Bar Association will not even consider approving the ULLCA until this Summer.

Second, after the ULLCA is completed, it will require extensive review by people such as yourself to ensure that the policy decisions and drafting are appropriate. Even the legislative director of NCCUSL has stated that the input of states will be helpful in evaluating the decisions and drafting of the act. Thus, Kansas, which has been a leader in this area and has greater experience with LLCs, could

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provide insights into the strengths and weaknesses of the ULLCA through a thorough review.

Finally, there are several issues which Jim Reynolds (the American Bar Association Business Law Section Adviser to the ULLCA project) and I find troubling. We are finalizing a report on the ULLCA which will be discussed next week at the ABA Business Law Section Meeting in San Antonio next week.

I think you will find many aspects of the ULLCA that represent advances in the law. I also think you will find some portions which are not as well-considered as they should be. I understand the amount of time and energy that you, Al Martin, Dale Schedler and others have expended on ensuring that limited liability company legislation is carefully drafted and workable. I urge you to request that legislators give you an opportunity to fully review the final ULLCA before it becomes law. Please feel free to call if I can be of further assistance.

Sincerely yours,

RRKeating/VC

Robert R. Keatinge

cc: Alson Martin
Dale Schedler

6-2

Judicial Council Testimony
on
1995 SB 139
House Judiciary Committee
March 13, 1995

SB 139 contains the recommendations of the Criminal Law Advisory Committee of the Judicial Council. SB 139 is intended to make the statutes addressing the civil rights of convicted felons clearly compatible with the second sentence of article 5, section 2 of the Kansas Constitution, to remove apparent inconsistencies among such statutes and to avoid misleading discharged felons as to their rights to use and possess firearms.

The second sentence of section 2, article 5 of the Kansas Constitution states:

> "No person convicted of a felony under the laws of any state or of the United States, unless pardoned or restored to his civil rights, shall be qualified to vote."

Upon review of the constitutional provision and the relevant statutes, the Criminal law Advisory Committee recommends that, upon conviction, a felon should lose the right to hold public office, the right to vote and the right to serve as a juror and that such rights should automatically be restored upon discharge from supervision or from custody by reason of the expiration of the term of imprisonment to which the felon was sentenced. Upon discharge, convicted felons should be informed that they are not relieved from complying with any state or federal law relating to use or possession of firearms by persons convicted of a felony.

Subsection (b) of K.S.A. 21-4603d (section 1 of SB 139, page 3) currently states that, "Dispositions which do not involve commitment to the custody of the secretary of corrections shall not entail the loss by the defendant of any civil rights." This is arguably inconsistent with the constitutional provision which requires a restoration of rights before a convicted felon is qualified to vote. It also appears to be inconsistent with K.S.A. 43-158 which states that persons with a felony conviction in the preceding 10 years shall be excused from jury service. K.S.A. 43-158 makes no distinction between felons who have been committed to the custody of the Secretary and those who have not. In addition, to the extent that the right to possess firearms is a civil right, K.S.A. 21-4204 contains prohibitions on possession of firearms by convicted felons even if not imprisoned. SB 139 amends 21-4603d so that subsection (b) will no longer apply for felony convictions occurring on or after July 1, 1995.

Section 2 of the bill amends K.S.A. 21-4611 on page 4, lines 8 through 15, to address felons who are not imprisoned.

Section 3 amends K.S.A. 21-4615 and removes the requirement of imprisonment before there is a loss of the enumerated rights. The constitutional provision that a convicted felon is not qualified to vote does not refer to imprisonment. To serve as a juror, a person must possess the qualifications of an elector (K.S.A. 43-156). A person would also have to be a qualified elector to hold a number of public offices.

Section 5 amends K.S.A. 22-3722 (page 10, lines 21 through 26). K.S.A. 22-3722 directs the Parole Board to provide an inmate with a certificate of discharge. The current certificate of discharge states, ". . . that all civil rights lost by operation of law upon commitment are hereby restored. These rights include, but are not limited to, the right to vote, the right to hold public office, and the right to serve on a jury. . . . " It would seem more appropriate for the certificate to refer to the specific rights lost under 21-4615, and the section is amended to reach this result. The section is also amended so that the certificate will inform the inmate that the inmate is not relieved from complying with any state or federal law relating to use or possession of firearms by persons convicted of a felony. First, this informs discharged inmates that they are still subject to prohibitions concerning firearms. Second, federal law looks to state law to determine whether a person is a convicted felon and thus subject to the prohibitions in the federal firearms law. 18 U.S.C. § 921(a)(20) states, "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." In other words, if a felon is still subject to firearms prohibitions under state law, the felon is considered a convicted felon for purposes of federal firearms prohibitions. Decisions in the Tenth Circuit and Kansas federal district court have held that the state firearms restriction does not have to be expressed in the actual certificate of discharge to be effective. However, other federal courts have viewed the subject differently.

Section 6 amends K.S.A. 43-158 concerning jury service. Currently, the section measures the prohibition on jury service from the date of conviction with no reference to imprisonment or discharge. As amended, the section will be consistent with the other statutes and the prohibition will extend until the felon is finally discharged.

The bill also contains a minor amendment to the expungement statute, K.S.A. 21-4619 (section 4, page 9, lines 1 and 2). In reviewing this area, the committee considered the relationship of the expungement statute. Apparently, certain agencies are destroying expunged records and they are not subsequently available for appropriate purposes. The amendment directs sealing and retention of such records.

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(Revised 01/95)

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

March 13, 1995

TO: House Committee on Judiciary

FROM: Kathleen A. Taylor, Kansas Bankers Association

RE: SB 35 - Garnishment of funds in financial institutions

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before the Committee on **SB 35**, dealing with the garnishment of funds in financial institutions. These proposed changes would amend several provisions of KSA 60-726 and would make one technical amendment to KSA 61-2013.

Last year, this legislature made several changes to the garnishment law in SB 530. One part of that large bill made some changes to the garnishment law as it relates to funds of the judgment debtor found in financial institutions.

Technical amendment. The need for the suggested technical amendment to KSA 61-2013 was discovered as practicing attorneys were applying these new changes found in KSA 60-726 to limited actions cases. It is believed that the omission of the reference to future amendments to this statute was inadvertent, thus our amendment.

Recouping compliance costs. Prior to the enactment of SB 530, when a financial institution received a garnishment order seeking to attach funds held there, the financial institution had no other way to recoup its costs in complying with the garnishment order, other than to contract with its customer for a fee to cover those costs.

As a result of SB 530, language was included to provide for a statutory administrative fee to be taken out of the defendant's account to defray the costs incurred by the garnishee (financial institution). It is our understanding that this administrative fee was inserted to guarantee that the costs of complying with a garnishment order will be recouped in those cases where the parties (financial institution and customer) have not already contracted for such a fee. **SB 35** inserts language to make that clarification in the statute in subsection (a) of KSA 60-726.

Identifying language. Many times, financial institutions will receive a garnishment order stating a common name. Especially for those larger, urban institutions with many Smiths and Jones's, and also in the case of smaller communities with large families and many Juniors and Seniors, this can be particularly confusing. Unfortunately, such confusion may result in inadvertent garnishment compliance errors.

The 1994 legislature recognized this in requiring further identification of the defendant when it amended the garnishment statute dealing with wage garnishments - KSA 60-717(a)(2) (see attached copy). We are requesting similar identifying information to be included in those garnishment orders to financial institutions. This amendment can be found in subsection (b) of 60-726.

Joint tenancy and multiple garnishments (new subsection (f)). Institutions are faced with a dilemma when they receive an order of garnishment on a joint tenancy account. The law regarding joint tenancy accounts states that each joint tenant has access to all the funds. The IRS requires the institution to freeze the entire joint account, even when only one owner has been levied against.

The solution presented in subsection (f) tells the institution what to do in that case...it is procedural in nature. If passed, the law would direct the institution to freeze the entire amount of the garnishment, report the amount frozen on the garnishment form and return that information to the court. It is at that later time that the court must decide what portion of the account may actually be the defendant's. According to the Kansas Supreme Court in the Walnut Valley v. Stovall case, the court would then presume that a proportionate share is the defendant's. That presumption would be reflected on the Order of Payment that is sent to the institution, and the institution would then carry out the order of the court by remitting that share of the account.

We have not tried to change the substantive law as it was set out by the Kansas Supreme Court. Rather, we are just trying to resolve a procedural problem that occurs on a daily basis. Resolving the problem in this way is consistent with banking law, with the IRS rules, and it still allows the court to apply the case law as it is stated for Kansas. In addition, it resolves the problem of how to process multiple garnishment orders on the same joint account.

It is our belief that the financial institution should not be the entity that is deciding how the funds are divided. An institution is merely a conduit, as keeper of the funds, for attaining the funds. It does not benefit whatsoever from the attachment of these funds.

What we have prescribed by this amendment is merely procedural, so that we do not attempt to reach the issue of ownership of the funds. Therefore, the final sentence of subsection (f) is added as protection to the financial institution for complying with another party's order of garnishment.

There will always be instances where the garnishment order reaches a joint account and the funds are truly not the defendant's, but are the other joint owner's. This possibility exists now. As the court in the Walnut Valley case states, the burden of proof that an account is held other than equally lies with the party asserting such claim. The court further states that persons wishing to avoid the effect of this rule may maintain their property separately. We have not changed the rule by our amendment.

Thank you again and I hope that you will act favorably on SB 35 as amended.

sas-
Nebraska-
Oklahoma
League of
Savings
Institutions

Jeffrey D. Sonnich, Vice-President

700 S. Kansas Ave., Suite 512
Topeka, Kansas 66603
(913) 232-8215

March 13, 1995

TO: House Committee on Judiciary
FROM: Jeffrey Sonnich, Vice President
RE: SB 35; Garnishment of Funds held by Financial Institutions

Mr. Chairman. Members of the Committee. The Kansas-Nebraska-Oklahoma League of Savings Institutions is pleased to have the opportunity to appear before the House Committee on Judiciary in support of S.B. 35 regarding the garnishment of funds held by financial institutions.

Subsection (f) of S.B. 35 would clarify what has become somewhat of a confusing procedure for withholding funds held in joint tenancy deposit accounts subject to orders of garnishment.

Most accounts held at savings institutions are designate as "joint tenancy with right of survivorship and not tenants in common". This type of account allows equal access to the parties designated on the account. Should one of the joint tenants die the financial institution is authorized to deal with the survivor, or survivors, as sole and absolute owner, or owners of the account.

However, two court cases in Kansas, Walnut Valley State Bank v Stovall, 233 Kan. 459 (1978) and Miller v Clayco State Bank, 10 Kan. App. 659 (1985), held that when a garnishment order attaches funds held in joint tenancy and where only one depositor is garnished, a pro rata portion of the funds should be withheld. Essentially this changes the account ownership from joint tenancy to tenant in common where orders of garnishment are applied.

Because of the ownership characteristics of joint tenancy accounts many financial institutions withhold the full amount stated in the garnishment order. The above stated cases would indicate that a potential liability exists for financial institutions where a non defendant owner claims that their portion of the account was unfairly attached.

Subsection (f) would remove this potential liability by stating that financial institutions who withhold the full amount sought by the garnishment order are not liable to the joint owners if the ownership of the funds are later proven not to be the defendant's.

According, the Kansas-Nebraska-Oklahoma League of Savings Institutions respectfully requests the House Committee on Judiciary report S.B. 35 favorably for passage.

Jeffrey D. Sonnich
Vice President

House Judiciary
3-13-95
Attachment 9

REMARKS CONCERNING SENATE BILL 35
HOUSE JUDICIARY COMMITTEE
MARCH 13, 1995

Thank you for giving me the opportunity to appear before your committee on bahalf of Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas, and Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work.

Our only concern with this bill is the language on lines 20 through 28 on page 2. We have no argument with attempting to make the entire balance of a joint account be subject to a garnishment issued against any of the joint owners of that account. Obviously, that would make the collection of debts easier, which would be beneficial to both groups I represent. However, we feel that the language on lines 20 through 28 would make a significant change in Kansas law, and that such a change should be made in the proper manner, by an amendment to a substantive statute, rather than as an amendment to K.S.A. 60-726, which is a part of the Kansas Code of Civil Procedure. We feel that such a change should be made instead by amending K.S.A. 58-501. For your reference, I have attached a copy of that statute.

You will note that K.S.A. 58-501 has remained unchanged since 1955. This statute was discussed in a significant Kansas Supreme Court decision in 1978, Walnut Valley State Bank v Stovall, 223 Kan. 459. For your reference, I have attached a copy of that decision.

Under the current law, financial institutions are obligated to disclose that a garnished account is held in joint tenancy if that is the case, and then sever the joint tenancy and disclose the amount of the portion presumed to be owned by the defendant who is garnished. Under the proposed change, it would appear that

a financial institution would no longer be obligated to make these disclosures but simply disclose the entire amount held in the account. The plaintiff may unknowingly assume liability to a third party who owns an interest in the account because the plaintiff will no longer be put on notice that the account is owned in joint tenancy.

The bill seeks to absolve financial institutions of any liability if the ownership of the funds is later proven not to be the defendant's, but there is no such immunity given to the plaintiff who garnished the account. If the proper amendment is made to K.S.A. 58-501, no one would need be concerned about immunity.

We would ask the committee to keep in mind that it is not just a husband and wife who place funds in a joint account; often such accounts are created involving a parent and one or more children. We feel that such a significant change in Kansas law should be approached very carefully and only made after all the consequences of such change have been fully considered. We would urge the committee to delete lines 20 through 28 on page 2 of the bill. If the committee wants to pursue the change proposed in those lines, we would suggest the matter be considered either by an interim committee or by referring the matter to the Kansas Judicial Council.

If the committee feels comfortable in making such changes this year, we would very strongly urge that the change be made as an amendment to K.S.A. 58-501, rather than being made in one statute which is a part of the Kansas Code of Civil Procedure. Substantive changes in law should be made by amendments to substantive laws, not by amendments to procedural laws.

Elwaine F. Pomeroy
For Kansas Collectors Association, Inc., and
Kansas Credit Attorneys Association

No. 48,306

WALNUT VALLEY STATE BANK, a Corporation, *Appellant*, v. MERLE J. STOVALL and EMMA M. STOVALL a/k/a EMMA M. MEDLIN, *Appellee*, and TOWANDA STATE BANK, *Garnishee, Defendant.*

(574 P.2d 1382)

SYLLABUS BY THE COURT

1. JOINT TENANCY—*Bank Account—Garnishment.* The garnishment of a joint tenancy bank account severs the joint tenancy and the parties become tenants in common.
2. SAME—*Rebuttable Presumption of Equal Ownership.* There is a rebuttable presumption of equal ownership between tenants of joint tenancy property.
3. SAME—*Bank Account—Burden of Proof to Show Unequal Ownership.* The burden of proof on a claim the account is owned other than equally between the cotenants lies with the party asserting such claim.

Review from the Court of Appeals (1 Kan. App. 2d 421, 566 P.2d 33, filed July 1, 1977). Opinion filed February 25, 1978. Affirmed in part and reversed in part with directions.

Morgan Metcalf, of Coutts, Coutts & Metcalf, of El Dorado, argued the cause and was on the brief for the appellant.

No appearance by the appellee.

The opinion of the court was delivered by

OWSLEY, J.: This is an appeal from an order dissolving a garnishment. The decision of the trial court was affirmed by the Kansas Court of Appeals. See, *Walnut Valley State Bank v. Stovall*, 1 Kan. App. 2d 421, 566 P.2d 33. This court granted review.

Plaintiff first contends the trial court should have dismissed the appeal from the county court to the district court. The basis of the motion to dismiss was the failure to pay the docket fee prior to the hearing of the appeal and failure to provide surety on the appeal bond. Plaintiff also claims prejudicial error in the admission of certain evidence. Each of these points was considered by the court of appeals. The court of appeals concluded they were not grounds for reversal. We adhere to its opinion on these points.

The remaining issue is one of first impression. It involves the right and the extent of the right of a judgment creditor to garnishee a joint tenancy bank account to satisfy a judgment against one of the joint tenants. The court of appeals found such an account may be garnished by the creditor to the extent of the debtor's equitable interest in the account.

The facts relative to this issue are as follows: Plaintiff obtained judgment against defendants Merle J. and Emma M. Stovall.

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Thereafter, the Stovalls were divorced and Emma married Archer B. Medlin. The Medlins established a joint checking account at the Towanda State Bank and each of them signed the bank signature card. Thereafter, and upon application of plaintiff, an order of garnishment was issued to the garnishee, which answered stating that Emma had a checking account with that bank in the amount of $411.52. Three days later, Emma moved to vacate the order of garnishment, which motion was overruled by the county court. Emma appealed to the district court, which heard the matter and entered judgment sustaining the motion to vacate and to set aside the order of garnishment, and assessed cost to plaintiff.

The trial judge issued his opinion letter to counsel, which contained his findings of fact as follows:

"I have read the citations which you gentlemen provided me and find that the garnishment of the bank account held by the Towanda State Bank in the joint account of Archer B. Medlin and Emma Maye Medlin should be set aside. From this ruling it is obvious that I do not reach the same conclusions as the author of the note in the Washburn Law Journal and frankly I was more impressed with the cases set forth at 11 A.L.R. 3, Page 1487 under the section heading of 'Where the Funds in the Act Belong to the Husband Alone.' I feel that this is the situation here and that the funds in said bank account are the property of Mr. Medlin and that the account was established as a joint account for the convenience of Mr. Medlin when he was on the road driving a truck. It is the Court's recollection that it has been at least 6 months since Emma Medlin has been employed and that any loan made by the Liberty Loan Corporation of Hutchinson, Kansas was made primarily to Archer Medlin in March of 1975 and was not in fact made to Emma Medlin."

Through statutory enactment the legislature has sought to limit the creation of joint tenancy agreements unless by clear and convincing evidence the parties to the agreement show the intent to create such an estate. (K.S.A. 58-501). A joint tenancy bank account gives any party on the account a complete power of disposal. Upon death the survivor or survivors take all, even against lawful heirs of the decedent. Financial advisers not versed in the intricacies of the law have convinced many unlearned persons that a joint tenancy agreement is the answer to estate planning. While a joint tenancy has many laudable uses, it is not a panacea. Many injustices have resulted through use of the device. Upon proper showing we have imposed constructive trusts on property in the hands of a surviving joint tenant in order to avoid unintended results. (*Winsor v. Powell,* 209 Kan. 292, 497

P.2d 292; *Agrelius v. Mohesky,* 208 Kan. 790, 494 P.2d 1095; *Grubb, Administrator v. Grubb,* 208 Kan. 484, 493 P.2d 189.)

We have considered the cases cited at 11 A.L.R.3d 1465 and recognize there is support for the position that none of the funds in a joint tenancy account can be garnished, as well as support for the position that all the funds can be garnished. Any argument in support of either of these positions may be eliminated by reference to K.S.A. 58-501(*c*):

". . . The provisions of this act shall apply to all estates in joint tenancy in either real or personal property heretofore or hereafter created and nothing herein contained shall prevent execution, levy and sale of the interest of a judgment debtor in such estates and such sale shall constitute a severance."

The statute specifically provides the right to levy on personal property to the extent of the "interest of a judgment debtor." We must construe the phrase "interest of a judgment debtor." The court of appeals has stated the phrase means the equitable interest in joint tenancy property. Its affirmance of the trial court's decision is based on the trial court's finding of fact that the judgment debtor had no equitable interest in the joint tenancy account. We do not believe the solution is that simple. We are concerned with the ownership of a joint tenancy bank account between two or more joint tenants and the burden of proof if such ownership is challenged. In *Miller v. Miller,* 222 Kan. 317, 564 P.2d 524, we considered the ownership of a joint tenancy property conveyed by a father to himself, his son, and his daughter-in-law. We said:

"The record establishes that each of the three parties—Jessie, Ima Kaye, and Richard—owned an undivided one-third interest in this tract at the time suit was commenced, and had owned such interests for almost ten years, since the recording of the deed in 1965. Jessie made a gift of one-third interest to his son and of a like interest to his daughter-in-law when the property was acquired. That Jessie paid the entire purchase price is immaterial." (p. 321.)

The statement in *Miller,* "[t]hat Jessie paid the entire purchase price is immaterial," is too broad. It would appear that when a party to a joint tenancy attempts to prove an intent to own joint tenancy property other than equally between the parties the issue of who provided the purchase price would be material. Support for this statement is found in *Schierenberg v. Hodges,* 221 Kan. 64, 558 P.2d 133, where we said:

"It is well established in this jurisdiction that, absent fraud, one spouse may make an *inter vivos* transfer of his or her own personal property to another person

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outright or to himself and another person in joint tenancy without contravening the statutory rights of a surviving spouse under K.S.A. 59-602. *Malone v. Sullivan*, 136 Kan. 193, 14 P.2d 647; *In re Estate of Fast*, 169 Kan. 238, 218 P.2d 184; *Eastman, Administrator v. Mendrick*, 218 Kan. 78, 542 P.2d 347. The plaintiff's deceased spouse may well have lawfully transferred the funds in question; the funds may have come from her earnings, or they may have been accumulated solely by the plaintiff. Such questions have not been litigated or determined. We conclude that the court should not have sustained the motion for summary judgment." (p. 66.)

Severance of the joint tenancy into a tenancy in common between a husband and wife gives rise to a rebuttable presumption of equal ownership; that is, the husband and wife each own one-half of the account. Such a presumption is created on the theory of donative intent. In *Norcross v. 1016 Fifth Avenue Co., Inc.*, 123 N.J. Eq. 94, 196 A. 446 (1938), the court explained the theory in this manner:

"There seems to be abundant legal support to the inference that the opening of an account, wherein each depositor agrees that all the moneys deposited are to belong to the parties as joint tenants, is *prima facie* evidence of donative intent. *New Jersey Title Guarantee and Trust Co. v. Archibald*, 91 N.J. Eq. 82. In the last cited case, the court of errors and appeals, in part, said:

" 'We think that where, as here, moneys belonging originally either wholly to the mother, or in part to her and in part to her daughter, are deposited by them in a bank in their joint names, and at the same time they both sign and deliver to the bank a writing stating that 'This account and all money to be credited to it belongs to us as joint tenants and will be the absolute property of the survivor of us; either and the survivor to draw,' and upon the death of the mother the undrawn moneys belong to the surviving daughter.

. . . . . .

" 'The contract entered into by the bank with the mother and her daughter exhibited a donative purpose from donor to donee (not one merely for use and convenience of the donor) and hence constituted a valid gift.' *Commonwealth Trust Co. v. Grobel*, 93 N.J. Eq. 78; *Commercial Trust Co. v. White*, 99 N.J. Eq. 119; affirmed, 100 N.J. Eq. 561; *Trenton Saving Fund Society v. Byrnes*, 110 N.J. Eq. 617; *Dover Trust Co. v. Brooks*, 111 N.J. Eq. 40; *McGee v. McGee*, 81 N.J. Eq. 190; *Rosecrans v. Rosecrans*, 99 N.J. Eq. 176; *Mendelsohn v. Mendelsohn*, 106 N.J. Eq. 537." (p. 98.)

A similar result has been reached in Michigan. In *Murphy v. Michigan Trust Co.*, 221 Mich. 243, 190 N.W. 698 (1922), the Supreme Court stated:

"We must hold the deposits constituted plaintiffs joint tenants. As joint tenants the ownership of Mr. Murphy is severable for the purpose of meeting the demands of creditors.

"In the absence of proof establishing their contributions toward the deposits

the presumption prevails that plaintiffs were equal contributors thereto and, therefore, equal owners. If the assignee did not want to accept such presumption the way was open to introduce testimony on the subject. We do not, however, have to rest the matter upon such presumption, as all the testimony in the case was to the effect that the principal contributor to the deposits was Mrs. Murphy. We can conceive of no reason why this joint claim for deposits made in the bank should not be allowed, and payment, if any, to Mr. Murphy withheld by order of the court until his contingent liability to contribute as a partner is determined. The joint claim should have been allowed and the right of Mrs. Murphy therein determined as one-half thereof. . . ." (p. 246.)

In accord, *Czajkowski v. Lount,* 333 Mich. 156, 52 N.W.2d 642 (1952); *Sussex v. Snyder,* 307 Mich. 30, 11 N.W.2d 314 (1943); *Darst v. Awe,* 235 Mich. 1, 209 N.W. 65 (1926).

In *United States v. Third Nat. Bank & Trust Co.,* 111 F. Supp. 152, 156 (M.D. Pa. 1953), the court stated:

". . . The attachment of the interest of a joint tenant operates as a severance of the joint ownership, makes them tenants in common and terminates the right of survivorship. Dover Trust Co. v. Brooks, Court of Chancery of N.J., 111 N.J. Eq. 40, 160 A. 890; In re Erie Trust Co., 19 Erie, Pa., 469."

See also, *American Oil Co., Ap., v. Falconer et al.,* 136 Pa. Super. 598, 605, 8 A.2d 418 (1939).

We believe this presumption of equal ownership should prevail in the absence of proof of ownership in some other proportion. Anyone attacking equal ownership should assume the burden of proof. If the debtor can demonstrate that he has an interest less than an equal share of the account the burden is upon him to come forward with such evidence. By the same token the debtor's cotenant may come forward and demonstrate an ownership greater than the interest created by operation of the presumption upon severance. If it is within the power of the creditor-garnisher to demonstrate the debtor has an ownership greater than that of the other cotenant, the garnisher is entitled to claim the greater share upon proper proof.

The trial court found the garnishment must be dissolved because the wife had no interest in the account. Yet the record indicates she wrote nearly all the checks on the account and made numerous deposits, including the proceeds of a $483.18 loan taken out and signed by her and her present husband. The finding of the trial court that Emma Stovall had no interest in the account seems to stem from the fact the garnisher could not prove exactly what her interest was in the account at the time of the

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garnishment, rather than from the fact she had absolutely no interest in the account. Without the presumption of equal ownership and applying the rule established by the court of appeals, the garnisher of a joint tenancy account can be defrauded by a debtor and the debtor's cotenants by the act of commingling deposits and withdrawals to the point that no one can determine the origin of the proceeds of the account at the time of garnishment.

We hold that a garnishment upon a joint tenancy bank account severs the joint tenancy, creating a tenancy in common. A rebuttable presumption of equal ownership between the cotenants remains intact. The burden of proof on a claim the account is owned other than equally between the cotenants lies with the party asserting such claim. If married persons wish to avoid the effect of this rule they may maintain their property separate from that of their spouses and receive the protection of K.S.A. 1977 Supp. 23-201, *et seq.*

We reverse the decision of the court of appeals on the issue of garnishment of joint tenancy accounts and remand the case to the trial court with directions to grant a new trial in accord with rules of law established herein.

Affirmed in part and reversed in part with directions.

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58-407, 58-408.

History: L. 1938, ch. 46, §§ 3, 4; Repealed, L. 1979, ch. 173, § 31; July 1.

Article 5.—REAL OR PERSONAL PROPERTY GRANTED OR DEVISED (The Property Act of 1939)

Cross References to Related Sections:

Disposition of property in perpetuity for burial purposes, see 12-1419a.

Termination of life estates and estates in joint tenancy, see 59-2286.

Law Review and Bar Journal References:

Remainder interests and related problems prior to 1939, Eugene H. Nirdlinger, 4 J.B.A.K. 117, passim (1935).

Aspects of the law of future interests, William R. Scott, 20 J.B.A.K. 174 (1951).

Recent construction of act, William R. Scott, 24 J.B.A.K. 175, 176, 177 (1955).

58-501. Tenancy in common unless joint tenancy intended, when; exception; joint tenancy provisions. Real or personal property granted or devised to two or more persons including a grant or devise to a husband and wife shall create in them a tenancy in common with respect to such property unless the language used in such grant or devise makes it clear that a joint tenancy was intended to be created: *Except,* That a grant or devise to executors or trustees, as such, shall create in them a joint tenancy unless the grant or devise expressly declares otherwise. Where joint tenancy is intended as above provided it may be created by:

(a) Transfer to persons as joint tenants from an owner or a joint owner to himself or herself and one or more persons as joint tenants;

(b) from tenants in common to themselves as joint tenants; or

(c) by coparceners in voluntary partition to themselves as joint tenant.

Where a deed, transfer or conveyance grants an estate in joint tenancy in the granting clause thereof and such deed, transfer, or conveyance has a hebendum clause inconsistent therewith, the granting clause shall control. When a joint tenant dies, a certified copy of letters testamentary or of administration, or where the estate is not probated or administered a certificate establishing such death issued by the proper federal, state or local official authorized to issue such certificate, or an affidavit of death from some responsible person who knows the facts, shall constitute prima facie evidence of such death and in cases where real property is involved such certificate or affidavit shall be recorded in the office of the register of deeds in the county where the land is situated. The provisions of this act shall apply to all estates in joint tenancy in either real or personal property heretofore or hereafter created and nothing herein contained shall prevent execution, levy and sale of the interest of a judgment debtor in such estates and such sale shall constitute a severance.

History: L. 1939, ch. 181, § 1; L. 1955, ch. 271, § 1; June 30.

Judicial Council, 1939: This is G.S. 1935, 22-132, rewritten for clarification and so as to apply to both real and personal property, in harmony with the opinions of our supreme court construing the section. Simons v. McLain, 51 K. 153, 32 P. 919; Boyer v. Sims, 61 K. 593, 60 P. 309; Stewart v. Thomas, 64 K. 511, 68 P. 70; Holmes v. Holmes, 70 K. 892, 79 P. 163; Best v. Tatum, 78 K. 215, 96 P. 140; Withers v. Barnes, 95 K. 798, 149 P. 691; Malone v. Sullivan, 136 K. 193, 14 P.2d 647; Cress v. Hamnett, 144 K. 128, 58 P.2d 61.

Research and Practice Aids:

Bartlett's Probate Practice § 455.

Tenancy in Common ⇐ 3.

Hatcher's Digest, Cotenancy § 1; Joint Tenancy § 2; Wills § 131.

C.J.S. Tenancy in Common §§ 7 to 10.

Conveyance by grantor to himself and another as joint tenants, Kansas Probate Law and Practice § 458.

Designating grantees, Kansas Practice Methods § 247.

Designating mortgagee, Kansas Practice Methods § 316.

Devises of realty, Kansas Practice Methods § 580.

History of legislation, Kansas Probate Law and Practice § 456, et seq.

Law Review and Bar Journal References:

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Procedure for termination discussed, J. G. Somers, 1952 J.C.B. 78.

Disadvantages of jointly owned property, James D. Dye, 21 J.B.A.K. 351 (1953).

Foolproof survivorship deed? William R. Scott, 22 J.B.A.K. 128, 130 (1953).

Case of Malone v. Sullivan, 136 K. 193, 14 P.2d 647, mentioned in note on survivorship interests in a joint safe deposit, 3 K.L.R. 368, 370 (1955).

1955-56 survey of real property and future interests, Ferd E. Evans, Jr., 5 K.L.R. 300, 311, 312 (1956).

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Amendment of 1955 quoted and discussed, James D. Dye, 25 J.B.A.K. 334, 335 (1957).

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Quoted in comment on language, 1 W.L.J. 498 (1961).

Joint tenancies in bank accounts, 11 K.L.R. 277, 278, 279 (1962).

"Attachment or Garnishment of Jointly Held Bank Accounts," Clarence Koch, 7 W.L.J. 51, 57 (1967).

"Joint Tenancy; Effects Explored," Marvin E. Thompson, 37 J.B.A.K. 83, 84, 85 (1968).

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58-407, 58-408.

History: L. 1938, ch. 46, §§ 3, 4; Repealed, L. 1979, ch. 173, § 31; July 1.

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Research and Practice Aids:

Bartlett's Probate Practice § 455.

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Devises of realty, Kansas Practice Methods § 580.

History of legislation, Kansas Probate Law and Practice § 456, et seq.

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"Joint Tenancy; Effects Explored," Marvin E. Thompson, 37 J.B.A.K. 83, 84, 85 (1968).

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TESTIMONY OF SCOTT M. GATES
STAFF ATTORNEY, DEPARTMENT OF ADMINISTRATION
REGARDING S.A. 282
BEFORE THE HOUSE JUDICIARY COMMITTEE

I am appearing before the Committee today on behalf of the Secretary of Administration in support of S.A. 282. This bill was introduced at the request of the Department of Administration. The Division of Accounts and Reports is given the responsibility to answer garnishments served on the State. In addition, the Department's legal section provides debt collection services to the University of Kansas Medical Center, the Kansas Corporation Commission, and debts that are written off by other State agencies.

Clarifying Last Year's Amendments To The Garnishment Process

Last year's amendments to the garnishment process limited wage garnishments to the amount of the plaintiff's claim against the defendant, but they did not address non-wage garnishments. This bill would limit non-wage garnishments to one and one-half times the amount of the plaintiff's claim. This prevents a creditor from tying up a debtor's entire bank account during the garnishment process for a small debt. Several district courts in this State currently use this limitation even though it is not required by statute. These amendments would allow the non-wage garnishment to remain an effective tool for collection without harassing the debtor.

Facsimile Signatures

Sections 4 and 5 on page 11 of this bill allow public officers to sign answers of garnishees by using facsimile signatures. The Director of Accounts and Reports currently signs approximately 2,200 answers of garnishee each year. This is not an efficient use of time. Using a facsimile signature would in no way diminish the Director's responsibility to verify the information contained in the answer of garnishee. Making this procedure more efficient would free public officers to perform more essential duties.

Income Withholding Orders

A subcommittee of the Senate Judiciary Committee with only two members present deleted section one of the bill which would have clarified the relationship between income withholding orders for support of another person and regular garnishments by ordinary creditors. We ask this Committee to reinsert this section. See attachment.

The language we are proposing be stricken in the attachment was an apparent attempt to circumvent the restrictions on garnishments imposed by the Consumer Credit Protection Act. 15 U.S.C. 1673.

The CCPA, limits the amount a creditor can garnish to 25% of an individual's disposable earnings, subject to a minimum amount that the individual must be allowed to retain. The act increases this limitation to 50%, 55%, or 60% for garnishments pursuant to an order for the support

of another person. This higher limitation is based on a policy decision that forcing and individual to pay an obligation for the support of another in more important than insuring that an individual retain at least 75% of his/her disposable earnings. This decision recognizes that when and individual fails to pay support the intended recipient must turn to the government for assistance.

The federal regulations implementing the CCPA note that if 25% or more of an individual's disposable earnings are withheld pursuant to a "garnishment for support," the CPA prohibits withholding any additional amount for a garnishment by an ordinary creditor. 29 C.P.R. § 870.11(b)(2)(iv). This regulation recognizes the public policy decision that withholding more than 25% of an individual's earnings is only justified if the **entire** debt is for support. The proposed stricken language attempts to circumvent this policy decision by allowing an ordinary debt and a support debt to jointly exceed the 25% limitation.

In addition to the policy reasons in favor of striking this language, the stricken language is in conflict with federal law which controls this subject. The CPA defines a garnishment as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. § 1672(2). Federal courts have determined that income withholding orders meet this definition. *See, Hodgson v. Christopher*, 365 F. Supp. 583, 586-87 (DC N.D. 1973) (noting that the definition of the term garnishment is not restrictive and refers to **any** procedure by which earnings are withheld). Excluding an income withholding order from the definition of a wage garnishment in K.S.A. 60-2310(a)(3) does not affect the fact that an income withholding order meets the definition of a wage garnishment for support under the CPA limitations on garnishments

The District Court for Reno County, KS. has concluded that an income withholding order is a "garnishment for support" under the definition in the CPA, notwithstanding the language that I recommend striking from K.S.A. 1994 Supp. 23-4108(f). *J.C. Penney Co. Inc., v George Garcia and the Kansas Department of Administration*, Case No. 94 L 144 (January 18, 1995). A copy of this opinion is attached to my testimony for the committee's convenience.

The language which we propose striking from K.S.A. 1994 Supp. 23-4108(f) fosters litigation by confusing an issue which is actually controlled by federal law. This language also places garnishees, who have no interest in the withheld funds, in an awkward position by forcing them to defend a lawsuit from the creditor if they comply with federal law and refuse to withhold any amount when an income withholding order exceeds 25% of the defendant's disposable income or a lawsuit by the defendant if they rely upon the language stricken from K.S.A. 1994 Supp. 23-4108(f) and withhold a total of up to 60%.

We encourage this Committee to reinsert the attached section because it (1) represents good public policy, (2)recognizes that federal law is controlling, and (3) reduces the burden of unnecessary litigation.

Thank you for the opportunity to appear before the Committee on behalf of S.A. 282. I would be happy to answer any of your questions.

Session of 1995

SENATE BILL No. 282

By Committee on Ways and Means

2-10

AN ACT concerning civil procedure and civil actions; relating to garnishment and answers of garnishees; amending K.S.A. 60-717, 61-2005, 61-2006, 75-4001 and 75-4002 and K.S.A. 1994 Supp. 23-4,108 and repealing the existing sections; also amending Form No. 7 and No. 7a in the appendix of forms following K.S.A. 61-2605 and repealing the existing forms.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1994 Supp. 23-4,108 is hereby amended to read as follows: 23-4,108. (a) It shall be the affirmative duty of any payor to respond within 10 days to written requests for information presented by the public office concerning: (1) The full name of the obligor; (2) the current address of the obligor; (3) the obligor's social security number; (4) the obligor's work location; (5) the number of the obligor's claimed dependents; (6) the obligor's gross income; (7) the obligor's net income; (8) an itemized statement of deductions from the obligor's income; (9) the obligor's pay schedule; (10) the obligor's health insurance coverage; and (11) whether or not income owed the obligor is being withheld pursuant to this act. This is an exclusive list of the information that the payor is required to provide under this section.

(b) It shall be the duty of any payor who has been served an income withholding order for payment of an order for cash support to deduct and pay over income as provided in this section. The payor shall begin the required deductions no later than the next payment of income due the obligor after 14 days following service of the order on the payor.

(c) Within 10 days of the time the obligor is normally paid, the payor shall pay the amount withheld as directed by the income withholding agency pursuant to K.S.A. 23-4,109 and amendments thereto, otherwise to the clerk of court or court trustee as directed by the income withholding order. The payor shall identify each payment with the name of the obligor, the county and case number of the income withholding order, and the date the income was withheld from the obligor. A payor subject to more than one income withholding order from a single county may combine the amounts withheld into a single payment, but only if the amount attributable to each income withholding order is clearly identified. Premiums required for a child's coverage under a health benefit plan shall be remitted as provided in the health benefit plan and shall not be combined with any other support payment required by the income withholding order.

(d) The payor shall continue to withhold income as required by the income withholding order until further order of the court.

(e) From income due the obligor, the payor may withhold and retain to defray the payor's costs a cost recovery fee of $5 for each pay period for which income is withheld or $10 for each month for which income is withheld, whichever is less. Such cost recovery fee shall be in addition to the amount withheld as support.

(f) The entire sum withheld by the payor, including the cost recovery fee and premiums due from the obligor which are incurred solely because of a medical withholding order, shall not exceed the limits provided for under section 303(b) of the consumer credit protection act (15 U.S.C. 1673(b)). If amounts of earnings required to be withheld exceed the maximum amount of earnings which may be withheld according to the consumer credit protection act, priority shall be given to payment of current and past due support, and the payor shall promptly notify the holder of the limited power of attorney of any nonpayment of premium for a health benefit plan on the child's behalf. ~~An income withholding order issued pursuant to this act shall not be considered a wage garnishment as defined in subsection (b) of K.S.A. 60-2310 and amendments thereto.~~ If amounts of earnings required to be withheld in accordance with this act are less than the maximum amount of earnings which could be withheld according to the consumer credit protection act, the payor shall honor garnishments filed by other creditors to the extent that the total amount taken from earnings does not exceed consumer credit protection act limitations.

(g) The payor shall promptly notify the clerk of the district court or the court trustee of the termination of the obligor's employment or other source of income, or the layoff of the obligor from employment, and provide the obligor's last known address and the name and address of the individual's current employer, if known.

(h) Payment as required by an income withholding order issued under this act shall be a complete defense by the payor against any claims of the obligor or the obligor's creditors as to the sums paid.

(i) If any payor violates the provisions of this act, the court shall enter a judgment against the payor for the total amount which should have been withheld and paid over and may enter judgment against the payor to the extent of the total arrearage owed.

(j) Any payor who intentionally discharges, refuses to employ or takes disciplinary action against an obligor solely because of an income withholding order issued under this act shall be subject to a civil penalty not exceeding $500 and such other equitable relief as the court considers proper.

REMARKS CONCERNING SENATE BILL 282
AS AMENDED BY SENATE COMMITTEE
HOUSE JUDICIARY COMMITTEE
MARCH 13, 1995

I am Elwaine F. Pomeroy, appearing on behalf of Kansas Collectors Association, Inc., and Kansas Credit Attorneys Association.

We have no objections to the bill in its present form.

We would strenuously object to any proposals to return the bill to its original form.

We objected to section 1 of the original version of the bill because of changes proposed in the original bill which are not apparent by reading the amended bill. Originally, the original section 1 struck the sentence that begins on page 2, line 22 of the amended version "An income withholding order issued pursuant to this act shall not be considered a wage garnishment as defined in subsection (b) of K.S.A. 60-2310 and amendments thereto." This issue is presently being litigated, and there is a pending case in Shawnee County District Court, where the issue has been presented to Judge Parrish. That sentence was deliberately added by the 1994 legislature, and the policy decision made last year should not be overturned this year.

In the original version of the bill, we were also concerned about the original amendments which appear on page 4 of the amended version, lines 16 and 17; on page 5, lines 4 through 8; on page 8, lines 24 through 27; and on page 10, lines 23 and 24. In the original version of the bill, the garnishee was told that if the garnishee does not receive an order of the court to dispose of the earnings withheld from the defendant within 60 days from the filing of the garnishee's answer, the garnishee may return the withheld funds to the defendant. We were concerned that in some instances, there might be collusion between the garnishee

and the employee, and we were also concerned about placing the burden for any delay in the court process entirely upon the person obtaining the garnishment.

There are some very valid reasons why an order of the court to dispose of the earnings withheld could not be delivered to the garnishee within 60 days from the filing of the garnishee's answer. One instance might be the situation where the employee has filed for bankruptcy after the garnishment is issued. The bankruptcy proceeding results in orders which prohibit a creditor from enforcing any judgments. The proceeding in the state courts are stayed by the filing of the bankruptcy action, and until the bankruptcy action is completed or further bankruptcy orders are issued, no order to the garnishee to pay in the funds can be issued.

For a variety of reasons, there are delays in court proceedings. It would be unfair to place upon the plaintiff in a lawsuit seeking to collect a debt the burden of all possible court delays. Because of the large volume of cases in some judicial districts, particularly the metropolitan areas, there might be delays of several weeks before the attorney for the creditor receives a copy of the answer that has been filed by the garnishee.

After the attorney for the creditor is notified that the garnishee has filed an answer, there is a mandatory waiting period of 10 business days before the attorney for the creditor can request an order to the garnishee to pay in the funds. Ten business days can in some instances be equivalent to approximately 15 calendar days, because Saturdays, Sundays and holidays are excluded. After the attorney for the creditor has received a copy of the answer filed by the garnishee, the attorney for the creditor prepares an order, and mails it to the court; that order must then be processed, sent to a judge for signing, and then processed by the clerk's office,

and then mailed to the garnishee.

By the time this process is completed, three or four weeks have passed in ordinary circumstances in the best of situations. Depending upon the workload of the clerk's office and the workload of the judge, there could be additional delays.

The order for garnishment is a very effective tool for collection of amounts due creditors. The attorneys for those creditors obviously want to react as quickly as possible when they receive notification that a garnishee has filed an answer. It is to the best interests of the attorney and the client to get the order from the court to the garnishee to pay in the funds in to the court as soon as possible.

We were concerned that if the employer were told that automatically, after the passage of 60 days, if nothing is received from the court, that the employer could disregard the order which the employer had received from the court to withhold the funds, that employers might tend to treat the garnishment orders with less respect than what court orders deserve. We therefore strongly argued against the amendments that would have provided for the automatic cancellation of garnishment orders after the passage of 60 days. We felt that 60 days was not long enough to take into account the situations that could cause some delays in obtaining an order from the court to pay the funds in to the court. We also felt very strongly that once a court issues a garnishment order, that that order should not be permitted to be disregarded simply by the passage of time; if the funds were to be released to the employee, there should be a further order of the court allowing for such release.

As amended by the Senate Committee, we have no objections to SB 282. Our objections were to the original version of the bill.

Elwaine F. Pomeroy
For Kansas Collectors Association, Inc. and
Kansas Credit Attorneys Association

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