Approved: 2-21-95
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:00 a.m. on February 8, 1995 in Room 514-S of the Capitol.

All members were present except:

Committee staff present: Michael Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Janice Brasher, Committee Secretary

Conferees appearing before the committee:

Nick Badgerow, Chair of Judicial Council Civil Code Committee
Jerry Palmer, Kansas Trial Lawyers Association

Others attending: See attached list

Chairman Emert call the meeting to order .

SB 140--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, 60-1608, 60-3703 and 61-1725 and repealing the existing sections; also repealing K.S.A. 60-2007

After a few words of support for **SB 140**, Randy Hearrell, of the Judicial Council introduced Nick Badgerow, Chair of Judicial Council Civil Code Committee.

Mr. Badgerow testified in support of **SB 140**, explaining the Civil Code Committee's purpose in drafting **SB 140**. Mr. Badgerow related the history of this bill, enumerated the main points of this bill, and addressed known objections to this bill.(Attachment 1) Mr. Badgerow stated that the goal was to keep Kansas Civil Procedure as close to the federal rules of civil procedure as has been the practice in Kansas, without adopting the controversial changes in federal rules that came about on December 1, 1993. The main objection to those federal rules was the mandatory voluntary disclosures, none of that section was adopted in this bill. Mr. Badgerow stated that the purpose of this bill was to update, clarify, solidify, and improve existing statutes. Mr. Badgerow related a brief history of this bill to advise the Committee that it comes with detailed effort from a lot of qualified people. Mr. Badgerow then addressed the main points of this bill and some of the reasons for the bill. Mr. Badgerow discussed the feedback received and answered objections that have been posed.

Mr. Badgerow summarized by stating that this bill would not contain mandatory voluntary disclosure, nor safe harbor sections found in the federal rules. Further, the report required from expert witnesses would help the plaintiff and weed out professional witnesses, it would make deposition easier to take by having an opinion. The mandated discovery conference would expedite the proceedings and focus on the issues. Amending K.S.A. 60-233 section (a) will emphasize the duty of the responding party to provide full answers to the extent not objectionable, thus making interrogatories easier to obtain. Mr. Badgerow feels that **SB 140** would ease general frustration with rules of procedure by streamlining procedures, thereby focusing on issues.

Questions and discussion followed regarding the expert witness report and the sections of the federal rules that were excluded from this bill.

Jerry Palmer, Attorney at Law, Palmer & Lowry addressed the Committee as a semi-opponent of **SB 140,** offering two amendments concerning the section on expert witness report and concerning the section on recording testimony (Attachment 2). Mr. Palmer stated that there was no real objection on the majority of the

changes proposed in this bill. However, Mr. Palmer expressed serious concerns in the section requiring an

expert witness report (page 16, line 25 through line 38). Mr. Palmer recommended that those lines be deleted and replaced with the following:

> *(ii) whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall include a statement as to 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.*

Mr. Palmer contended that as this bill is currently written, without the above suggested changes, the requirement for expert witness reporting would discourage many people from that capacity, the requirement would therefore, reduce the pool of expert witnesses, and encourage the "well traveled" expert witness. Mr. Palmer stated that the rules have been liberalized to permit any party to depose any expert which was not true under the predecessor rule.

Mr. Palmer addressed the amendments to K.S.A. 60-228, regarding the recording of depositions through audio and video mediums as well as stenographically. The following addition to line 1 of page 23 was offered by Mr. Palmer:

> *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..*

Mr. Palmer concluded by stating that basically, the Civil Code Committee has done a good job with drafting of **SB 140**, and they have taken out many of the objectional requirements of the federal rules. With the exception of the expert clause and recommended additions of alternate means of taking deposition, Mr. Palmer had no objections to this bill.

Questions and discussion concerning the expert witness requirements followed. Members of the Committee discussed briefly, a letter from the Chairman of the Johnson County Civil Bench and Bar Committee concerning objections to **SB 140**, (Attachment 3).

Chair Emert handed bill assignments to the Vice Chairs of bills to be heard in subcommittees, and announced that next Tuesday the Committee will not meet as a whole, but every subcommittee will meet with the assigned bills.

Bill Introduction

Senator Parkinson moved to introduce a bill concerning bad check penalty charges, second by Senator Reynolds. Motion Carried.

Senator Oleen moved to approve the minutes, second by Feleciano. Motion carried.

Meeting adjourned 11:00 a. m.

The next meeting is scheduled for February 9, 1995.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-8-95

NAME	REPRESENTING
Nick Badgerow	Judicial Council
Jerry Palmer	KS Trial Lawyers Assn.

Session of 1995

SENATE BILL No. 140

By Committee on Judiciary

1-27

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, 60-1608, 60-3703 and 61-1725 and repealing the existing sections; also repealing K.S.A. 60-2007.

Civil Code Advisory Committee Comments

Senate Judiciary 2-8-95 Attachment 1

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.

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.

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."

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 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,

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 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.

A-1

A-1

(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* 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.

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.

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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 foremention 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.

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."

(b) *Enlargement.* When by this chapter or by a notice given thereder 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 (c) 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.

(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.

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).

(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 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

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

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.

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).

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.

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 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 (e), the court shall conduct* 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 (e), the court shall 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 held within 45 days of the filing of an answer, the restrictions of this paragraph shall no longer apply.

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

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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 (e), the court shall 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

(iv) protection from abuse proceedings;

(B) actions for judicial review or enforcement of administrative decisions;

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.

(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) 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)* 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 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.

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.

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 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.

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).

~~(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 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~~ -14-

~~subsection (c),~~ 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 (c), 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.

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.

(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 cumulative 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.

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~~(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

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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 opinions 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.~~ -16-

(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

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. . . ."

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).

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.

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 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.

(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;

(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*:

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(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.*

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(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 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

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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.

(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 com-

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."

mission 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 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~~

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>.

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~~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 under subsection (e) 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 30-day period.

(b) *Notice of examination; general requirements; ~~special notice;~~ nonstenographic 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~~

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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."

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)].

~~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 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

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concerning other pertinent matters.

~~(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(c),~~ *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 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 provisions 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,~~

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.

~~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 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 steno-

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.

graphically 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.

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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.

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(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), (e) 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

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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.

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of the United States or of any state ~~has been dismissed~~ and another action 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.*

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(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.

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(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 p.30 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*.

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.

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(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.

(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

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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 amendments 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

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).

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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 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).

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."

(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 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.

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.

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.

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.

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~~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 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 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 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.

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.

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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 subsection (a) of K.S.A. 60-252.~~ Unless the court in its order for dismissal oth-

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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.

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.

erwise 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 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.*

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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.

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 an 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 sub-~~

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.

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.

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.

poena 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 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

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.

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.

~~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 inspection 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 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

...e 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 objection 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.

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).

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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 e by serving such written objection upon _____ at _____

(Attorney) (Attorney's Address)

(within ~~10~~ *14* days after service of this subpoena) (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 if 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 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 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 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*

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.

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

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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.

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).

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

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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).

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th controverted. It shall thereupon make an order specifying the facts
at 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 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. 60-1608 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 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.

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.

Sec. 28. 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 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 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.

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. 29. 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;

~~(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.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.

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

Sec. 30. 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, 60-1608, 60-2007, 60-3703 and 61-1725 are hereby repealed.

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

PALMER & LOWRY

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By the
National Board of Trial Advocacy

February 9, 1995

FAXED THIS DATE: 296-6718

Senator Tim Emert,
Chairman
Senate Judiciary Committee
State Capitol
Room 148N
Topeka, KS 66612

Re: SB 140 – Rules of Civil Procedure

Dear Senator Emert:

Thank you for the opportunity to address the Committee on this bill. I have attached two amendments, pp. 16 and 23, which accomplish the following things:

(1) On p. 16, lines 29 through 38, the expert witness disclosures required in federal court which were embraced in the bill have been deleted. What has been substituted is substantially the requirements of current K.S.A. 60-226(b) with respect to the disclosure of information about experts. It removes the requirement that the document be prepared and signed by the expert. The rationale is that experts are hard to find, and to burden them with the degree of specificity in the proposed bill, will reduce the pool of experts. It also avoids the type of expert who would willing give this information for a dear fee; those experts who are referred to as "well traveled."

Further, at the top of p. 16, line 1, the rules have been liberalized to permit any party to depose any expert which was not true under the predecessor rule which only gave an entitlement to interrogatory answers with depositions being taken on good cause shown. (I know that the practice was otherwise, but nevertheless, the rules did not provide the right to take the deposition.) This is a subject that also seemed to be of quite a bit of concern to Senators Parkinson and Rock who are experienced courtroom lawyers. It is a view shared by most lawyers who have had to practice under the federal system and it has led to some

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unjust results in having witnesses struck who were too busy to comply with the technicalities of the rule, but whose opinions could have been tendered and whose depositions could have been taken.

Suggestion on p. 23. Depositions by video tape or comparable medium. The proposed rules indicate and recognize that there are means of taking depositions other than by a stenographic machine. However, a common practice is to use the stenographer with a back-up video tape. It's technically pretty difficult to use a video tape unless you have a transcript that has been made. Mechanical equipment also can fail, so most lawyers probably will not rely exclusively on video or audio tape.

What the rule did not do, and what this amendment would do, is permit the universal taking of depositions by video tape upon notice to other parties. The equipment is of such a reasonable price and the medium so inexpensive, that virtually any deposition out of town that is worth taking or of any person who might even conceivably be unavailable for trial can have their deposition preserved in this way and the fact-finder will have a better view of the witness and the mannerisms of the witness from which to judge credibility.

Likewise, it keeps the courts from being burdened with routine motions to permit video tape where recalcitrant counsel are involved.

The reason for putting in "or a comparable medium," is to encompass the technology that is just emerging where the storage device may be some form of magnetic disk or optical disk, but the medium is still recording sound and picture. That language saves us having to go back and tinker with the rule in the future when these digital storage devices become the norm.

Thank you for the consideration of these two amendments. I think that they will do much to help alleviate concerns in the bar about these new rules.

I compliment the Judicial Council on straining out the worst elements of the new Federal Rules and congratulate them on not trying to impose bad rules in the circumstance where we already have good, effective rules.

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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.

concerning other pertinent matters.

~~(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(c),~~ *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 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

(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 discover, 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 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.~~

the disclosure shall include a statement as to 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.

(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

Yours truly,

JERRY R. PALMER

JRP/sd

cc: Nick Badgerow
Ron Smith
KTLA

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February 2, 1995

VIA FACSIMILE
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Senator Tim Emert
Chairman

Senator Dick Bond
Vice Chairman

Senator Mike Harris
Vice Chairman

Senator Mark Parkinson

Senator Richard R. Rock

Senator Jerry Moran

Senator Lana Oleen

Senator Marian K. Reynolds

Senator Robert Vancrum

Senator Marge Petty

Senator Bill Brady

Senator Paul Feleciano, Jr.

Senator Phil Martin

State Capitol
Topeka, Kansas 66612

Re: SB-140

Dear Chairman Emert, Vice Chairman Bond, Vice Chairman Harris and Members of the Senate Judiciary Committee:

This letter is written to you in my capacity as Chairman of the Johnson County Civil Bench and Bar Committee. The purpose of our Committee is to improve the quality of the practice of law for both judges and attorneys in our county. We therefore have a keen interest in any changes in the Code of Civil Procedure which

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establishes the basic framework of rules and procedures applicable to every case filed under Chapter 60 of the Civil Code.

We have 25 members on our Committee, representative of a cross-section of the many types of firms and practitioners in our county, including several judges. At our first meeting for this fiscal year, in the latter part of October, several of our judge-members brought the Committee a package of recommended amendments to K.S.A. §§ 60-216, 60-226, and 60-230, which had been proposed by the Civil Code Advisory Committee of the Judicial Council. My understanding is that these are the proposals which are now SB-140. Significantly, not one of the 15 members in attendance at that meeting had any prior knowledge or awareness of these proposals. It is possible there was some type of publication notice in one or more of the bar journals, but the fact is that not a single member of the judiciary or bar in attendance at that meeting, or at our next meeting just last week, had any awareness of the proposals, or any input into the process. Between our October and January meetings, several members of the Committee attempted to find out what had happened and sought an opportunity to be heard on the substantive changes proposed by the Judicial Council. Several members of the Committee got essentially the same response--that is, our interest was appreciated, but it was too late in the process to have input. (See enclosed copy of October 31, 1994, and December 12, 1994 letters.)

The purpose of this letter is to request your Committee to defer any action on the proposed amendments during this legislative session in order to give interested members of the Bar and Bench an additional opportunity to respond to the proposed amendments.

Based upon the discussions in my Committee, there are a number of provisions in the proposed amendments which are benign and acceptable to everybody, but also many provisions which are onerous and may be ill-advised. It appears that the amendments as a whole are an attempt to incorporate many of the recent changes to the Federal Rules of Civil Procedure into Kansas practice. While many of these new procedures work quite well in complex civil cases in the federal courts, which require a minimum jurisdictional amount of $50,000, most of the cases filed under Chapter 60 in the state courts have much less complexity, and the minimum jurisdictional amount is only $10,000. The new rules are particularly burdensome and unnecessary in the smaller and simpler cases which predominate in the state courts. They require much more input from the court and counsel early in every case, and the general consensus of our Committee is that, in most cases, this is completely unnecessary

and wasteful. It is doubtful that the stated purpose of the proposed revisions, i.e., to expedite processing, minimize expense, and conserve time, will be served and, in fact, likely the processing time will be lengthened in many cases, expense will be increased, and time will be wasted.

Some obvious examples of this are the absolute requirements for case management conferences within 45 days "of the filing of an Answer," and Pretrial Conferences. Cases will be slowed down because no depositions can be taken, except by order of the court, prior to the case management conference. It will be hard to complete discovery in 90 or 120 days when it cannot be initiated for 45. The requirements related to expert witnesses seem logical on their face, but many attorneys who have faced these requirements in federal court actions have found them to be very expensive and difficult to comply with. Surely some input from attorneys who have been working with these provisions in federal court actions would be helpful before these changes are adopted. As one of the judge-members of our Committee has written: "The frequency and limitation provisions on discovery, the expert disclosures, the supplementation of responses, and the vagueness as to when depositions can be taken, create extremely fertile ground for time-consuming, delaying pretrial motions which potentially could defeat the stated purpose of the amendments, both in terms of time and expense."

The members of our Committee are wondering why we are attempting to make our state court procedures just like our federal court procedures. Many litigants now avoid federal court just because of these very rules changes. Even with the large number of cases filed in Johnson County, dockets are moving. Even complex cases are getting to trial in reasonable periods of time. Currently, if the parties are unable to resolve discovery disputes on their own, the procedures are already in place to have the matter resolved expeditiously in most cases.

We do not perceive that there is any crisis in the Kansas state courts which requires the extensive changes embodied in the proposed amendments. We believe it would be wise to circulate the proposed amendments broadly throughout the Kansas Bench and Bar to obtain the comments of the lawyers and judges who work under the rules before any action is taken. We have learned that these proposals were discussed briefly at the September meeting of the Kansas Bar Association Bench/Bar Committee, but that Committee did not feel it had sufficient time to review the amendments to make any comments at that time. Therefore, we respectfully request that

action on SB-140 be deferred, at least until the Fall, so that the Bench and Bar can provide thoughtful input into this important process.

Respectfully yours,

Victor A. Bergman

VAB:kmb
cc: Representative Michael R. O'Neal
State House
Topeka, Kansas 66612

KANSAS JUDICIAL COUNCIL
KANSAS JUDICIAL CENTER
301 West Tenth Street, Suite 262
Topeka, Kansas 66612-1507

TELEPHONE (913) 296-2498
FACSIMILE (913) 296-1035

December 12, 1994

Mr. Roger D. Stanton
7500 West 110th Street
Overland Park, KS 66210

Dear Mr. Stanton:

The Judicial Council is in receipt of your letter. The letter requests the Judicial Council to defer approval of the suggested changes to the Kansas code of civil procedure. Your request was based on a pending decision by the Kansas federal court as to the continued applicability of the 1993 amendment to the Federal Rules of Civil Procedure. That decision is expected in February, 1995.

The Judicial Council met on December 9, 1994 and considered the report of the Civil Code Advisory Committee, as well as your letter. The Council decided to approve and submit the proposed changes to the legislature at this time.

This decision was based on the legislative reality that if a bill is not submitted early in the session, it is unlikely that the bill could be considered in 1995. Further, it appears likely that the Kansas federal court will continue with the 1995 federal rules amendments when it meets in February.

If the reports received by the Council predicting the federal court's decision prove to have been incorrect, the legislative future of the Civil Code Committee proposal can easily be changed. However, if the predictions are right, the delay of even a month would essentially mean the delay of a year.

Is has historically been the approach of the Judicial Council to make the Kansas code of civil procedure correlate as closely as possible to the Federal Rules of Civil Procedure. While rejecting some of the new federal rules as overly intrusive, the proposed changes do bring the Kansas rules as close as practicable to the new federal rules.

We appreciate your interest and welcome your further input of the proposed new rules.

Very truly yours,

Randy M. Hearrell

RMH/jw

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October 31, 1994

Civil Code Advisory Committee
Kansas Judicial Council
Kansas Judicial Center
301 W. 10th Street
Suite 262
Topeka, Kansas 66612-1507

Re: Recommended Amendments to K.S.A. 60-216, 60-226, and 60-230

Dear Committee Members:

I write to you on behalf of the Johnson County Bar Association Civil Bench-Bar Committee. We have received a copy of the proposed amendments to K.S.A. 60-216, 60-226 and 60-230, prepared by your committee.

We would urge that the Judicial Council not submit these revisions for the 1995 session of the Kansas Legislature. There are primarily two reasons for this. First, as you may be aware, changes to the Federal Rules of Civil Procedure regarding discovery allow local districts to opt out of certain of the requirements. The Kansas federal judges decided to use all of the new rules for a one-year trial period. That trial period does not end until February 17, 1995. At that time, the federal judges will evaluate the experience that has occurred in Kansas to that time and decide whether to continue to use the new rules. While your amendments do not include all of the new rules, but are instead rather a bit of a hybrid, it seems to us that it would be sensible to wait until the federal judges have made a final decision, based upon the experience in the Kansas federal courts, regarding the discovery rules that will be applied there for the next several years. There certainly is some value at least to knowing what rules will be applicable in the federal courts in our state before engaging in a substantial revision to the parallel state court rules.

Second, because we do not perceive that there is any crisis in the Kansas courts that requires immediate response, we strongly believe that it would be wise to circulate these proposals broadly throughout the Kansas bench and bar to obtain the comments of lawyers and judges throughout the state on them. It is our understanding that

these proposals were discussed briefly at the September meeting of the Kansas Bar Association Bench-Bar Committee, but that the KBA committee did not feel that it had sufficient time to review these amendments to make any comments at that meeting. We would hope that, perhaps through notice in the Journal of the Kansas Bar Association, broad input from the bar regarding these amendments would be sought. There is always the danger in amendments that provide mandatory conferences and procedures that we will slow down court proceedings, rather than speed them up, and that we will unnecessarily increase the costs of litigation. We would like for there to be sufficient time for lawyers in the state to study your proposals to more carefully evaluate those issues.

Thank you for your consideration of these comments.

Roger D. Stanton, Chairman Subcommittee on Statutory Amendments for the Johnson County Bench Bar Committee

The Honorable Gerald T. Elliott
The Honorable Steven A. Leben
Mr. Robert G. Herndon
Mr. Thomas R. Buchanan
Mr. Steven D. Ruse

cc: Members, Kansas Judicial Council

9052 v1

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Thank you for taking time out of your busy day to discuss Special Olympics and the needs of out state's citizens with mental disabilities.

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With thanks in advance,
Program Representative

P. S. Please don't delay. For each person whose life has been touched by Special Olympics, many more are still waiting to be given the chance. Your speedy reply gives hope to us all this season.

Medallion Productions, a division of Heritage Publishing Company, a paid professional fundraiser, has been retained to conduct this campaign on behalf of Kansas Special Olympics, 5288 Foxridge, Mission, KS 66202-1567, 913-236-9771, to raise unrestricted funds to assist in ongoing year-round activities of the organization. Please note that some of the organization's public education program efforts are carried out in its solicitations, such as the recent telephone contact with you and this mail piece you are now reading. A copy of the latest financial statements may be obtained by writing to the ;nization's headquarters.

IMPORTANT INFORMATION

Medallion Productions* is conducting a public-awareness and fund-raising campaign for Kansas Special Olympics. During June 1, 1992 to May 31, 1993, Medallion Productions conducted annual fund-raising campaigns for Kansas Special Olympics. After all public awareness and fund-raising expenses were paid, Kansas Special Olympics retained thirty-five percent of all funds collected from these campaigns.

FY

* If you have any questions, please write Medallion Productions (Attn: Mrs. Poncy Aldridge), 2402 Wildwood Ave., Sherwood, AR 72116.

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Fax # 913-296-1153	Fax #	

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