Approved: 2/6/97
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Carmody at 3:30 p.m.. on January 28, 1997 in Room 313--S of the Capitol.

All members were present except: Representative Presta (excused)
Representative Shultz (excused)

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes
Jan Brasher, Committee Secretary

Conferees appearing before the committee: Mark Stafford, General Counsel, Kansas State Board of Healing Arts
Representative Ballou
Nick Badgerow, Kansas Judicial Council, Chair of the Civil Code Advisory Committee
Tom Gilman, Attorney
Steve Dickerson, V.P. Legislative Dept., KTLA

Others attending: See attached list

The Chair called the meeting to order at 3:35 p.m.

**Bill Introductions:**

Mr. Mark Stafford, General Counsel, Kansas State Board of Healing Arts presented a bill request to amend the Limited Liability Company Act, K.S.A. 17-7601, et seq. The conferee related that this proposed bill request would provide a provision to allow Limited Liability Companies (LLC) the licensed professionals. The conferee stated that this request will require certifying licensure to the Secretary of State. The conferee stated that this request would define a LLC as a health care provider under the Health Care Provider Insurance Availability Act. The conferee concluded that these changes would mirror the professional corporation code in those respective areas. (Attachment 1)

A motion was made by Representative Powell and seconded by Representative Dahl to introduce the Board of Healing Arts' proposed bill as a Committee bill. The motion carried.

Representative Mays requested the introduction of two bills. The first bill proposal amends the Brokerage Relations and Real Estate Transactions Act, (BRRETA) passed in 1995. The conferee stated that **SB 710** was amended in the 1996 session to allow for a task force to review BRRETA and suggest amendments. Representative Mays requested the introduction of a bill recommended by the task force that would amend the BRRETA.

A motion made by Representative Mays was seconded by Representative Dahl to introduce as a Committee bill. The motion carries.

Representative Mays stated that the second bill request concerns the civil liability for worthless checks. Representative Mays stated that some judges are not allowing attorneys to collect their fees for worthless checks. The conferee stated that the proposed bill would resolve that problem.

A motion by Representative Mays and second by Representative Pauls to introduce as a Committee bill. The motion carries.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

**HB 2007:** **Judiciary amendments to rules of civil procedure.**

The Chair recognized Mr. Nick Badgerow, Chair of the Civil Code, Judicial Council. Mr. Badgerow testified in favor of **HB 2007** and stated that he had testified on the 1995 session bill **SB 140** which passed both houses, but the Bill died sine die at the end of the 1995 session. The conferee stated that **HB 2007** contains approximately ninety-nine percent of the provisions in **SB 140**. The conferee explained the background of the bill. The conferee stated that this bill was the culmination of two years' work by a diverse committee of lawyers to keep up with changes in the Federal Rules of Civil Procedure (1993), without adopting the controversial and objectionable portions thereof. The conferee gave a summary of **HB 2007** and delineated the objectionable portions of the Federal Rules that were not included in **HB 2007**.

The conferee stated that during the 1995 hearings by the Senate the provision requiring expert witnesses to prepare their own reports was deleted. The conferee related that a few comments and concerns were expressed during the 1995 hearings on **SB 140** or resulting from the Bill's publication in the Kansas Bar Journal. The conferee stated that one concern expressed was about mandatory case conferences. The conferee stated that verbal objections were made to the requirement for mandatory disclosures. The mandatory disclosures are included in **HB 2007**.

The conferee described the provisions which are included in the Bill in a page by page report noting the changes to present civil procedure code rules. (Attachment 2)

Mr. Badgerow and the Committee members discussed issues concerning the changes produced by **HB 2007**. Some of the issues discussed were: obtaining depositions, the expansion of the expert witness criteria, the tests that judges apply concerning expert witness qualifications, the change concerning delays in filing due to inaccessibility of the court.

Mr. Tom Gilman, Attorney and member of the Kansas Bar Association testified addressing Section 24, K.S.A. 60-245a. Mr. Gilman requested an amendment that would require the party issuing the subpoena to give a reasonable notice of the issuance of the subpoena before it is issued and to disclose the documents sought before they are produced by the person/business upon whom the subpoena is to be served. The conferee stated that in many cases when a subpoena is issued the requested material goes to the issuer of the subpoena instead of the clerk of the court, thereby the adverse parties' attorney may not have timely access to the information. (Attachment 3)

Mr. Steve Dickerson, Legislative Chair for the Kansas Trial Lawyers Association (KTLA) testified in favor of **HB 2007** except for strongly objecting to the proposed evidence changes to K.S.A. 60-456 contained at Section 29, page 53, lines 17 to 20 of the Bill. The conferee stated that this amendment appears to graft the United States Supreme Court's opinion in Daubert v Merrill Dow Pharmaceuticals, Inc. onto the Kansas evidence code. The conferee stated that this amendment will impose an additional burden on a trial judges. The conferee stated that Daubert has very limited significance in construing or interpreting Kansas evidence law. The conferee related that the Daubert decision has been controversial and generated inconsistent case decisions in the federal courts. Mr. Dickerson stated that Daubert would replace the so-called Frye test which was a well working standard in Kansas. The conferee stated that the inclusion of this language would subvert the jury process by changing the disputes over what is scientifically valid from weighing the evidence to determining the evidence's admissibility. The conferee stated that there is a long history of interpreting and applying K.S.A. 60-456 and there have been few problems arising out of its interpretation and application.

Mr. Dickerson stated that the Daubert language was not reviewed or recommended by the Kansas Judicial Council. The conferee asked that the Daubert language be deleted from **HB 2007**. (Attachment 4)

Mr. Dickerson briefly discussed K.S.A. 60-209 regarding the provision in **HB 2007** in the amount that must be in controversy in order to remove a case from state to federal court on diversity jurisdiction.

The Committee members and the conferees discussed issues concerning using Daubert or Frye as pertaining to expert witness standards under the evidence code. Other issues discussed regarding the discovery process included answering of objectionable questions in interrogatories, and amending information previously given during an interrogatory.

The Chair stated that **HB 2007** would be further considered next week. The Chair adjourned the meeting at 5:15 p.m.

The next meeting is scheduled for January 29, 1997.

M

# HOUSE JUDICIARY COMMITTEE COMMITTEE GUEST LIST

DATE: 1-28-97

| NAME | REPRESENTING |
|---|---|
| Mark Stafford | Bd of Healing Arts |
| NICK BADGEROW | KANSAS JUDICIAL COUNCIL |
| Steve Dickerson | KTLA |
| Randy M. Hearrell | Judicial Council |
| KEITH R LANDIS | CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS |
| Paul Shelby | OJA |
| Heather Randall | Whitney Damron, PA |
| PHIL WAGES | SECRETARY OF STATE |
| Melissa Wangemann | " |
| Karen France | Ks Assoc of REALTORS |
| Jean Dunman | KREC |
| Linda Fund | D of A |
| Callie Hill Denton | Kath Peterson's Associates |
| Jolene Grabill | KTLA |
| | |
| | |
| | |
| | |
| | |

# KANSAS BOARD OF HEALING ARTS

**BILL GRAVES**
**Governor**

**LAWRENCE T. BUENING, JR.**
**Executive Director**

**235 S. Topeka Blvd.**
**Topeka, KS 66603-3068**
**(913) 296-7413**
**FAX # (913) 296-0852**

BEFORE THE HOUSE JUDICIARY COMMITTEE
Request by Mark W. Stafford, General Counsel

January 28, 1997

On behalf of the Kansas State Board of Healing Arts, thank you for the opportunity to appear before this committee today. The Board requests that the committee introduce a bill to amend the limited liability company act, K.S.A. 17-7601, *et seq.*

The rule has long been established that certain professions may be practiced only by licensed individuals, and not by general corporations. An exception to the rule has been carved out to allow these professionals to form professional corporations. Limited liability companies may be more advantageous business entities than corporations, so authority was given for these professionals to form LLC's.

In amending the LLC statutes, there was no provision put into place to limit an LLC's professional practice to licensed professionals. Neither were there provisions for certifying licensure to the Secretary of State, as required for professional corporations. Finally, there were no provisions for defining an LLC as a health care provider under the health care provider insurance availability act, K.S.A. 40-3401, *et seq.* The Board requests that the LLC act be amended to mirror the professional corporation code in these respects. The Revisor of Statutes has prepared a draft of these amendments.

Once again, thank you for the opportunity to address this committee.

MEMBERS OF BOARD
HOWARD D. ELLIS, M.D., PRESIDENT
LEAWOOD
JOHN P. GRAVINO, D.O., VICE-PRESIDENT
LAWRENCE
DONALD B. BLETZ, M.D., OVERLAND PARK
C.J. CONRADY, JR., ANTHONY
JAMES D. EDWARDS, D.C., EMPORIA
EDWARD J. FITZGERALD, M.D., WICHITA
ROBERT L. FRAYSER, D.O., HOISINGTON
LANCE MALMSTROM, D.C., TOPEKA
LAUREL H. RICKARD, MEDICINE LODGE
CHRISTOPHER P. RODGERS, M.D., HUTCHINSON
HAROLD J. SAUDER, D.P.M., INDEPENDENCE
EMILY TAYLOR, LAWRENCE
ROGER D. WARREN, M.D., HANOVER
JOHN P. WHITE, D.O., PITTSBURG
RONALD J. ZOELLER, D.C., TOPEKA

House Judiciary
Attachment 1
1/28/97

Prepared Testimony of J. Nick Badgerow

for

Committee on the Judiciary
Kansas House of Representatives

on

House Bill 2007

January 27, 1997

**I. Introduction and Background.**

May it please the Committee: My name is J. Nick Badgerow, and I appear here today before you to testify regarding House Bill 2007, relating to changes in the Kansas Code of Civil Procedure. I am testifying as a member of, and on behalf of, the Kansas Judicial Council and as Chairman of the Civil Code Advisory Committee of that Council. Our Committee was the original drafter of the bill which has now taken the form of HB. 2007.

By way of background, I am a civil trial lawyer. My curriculum vitae is attached to this prepared testimony and is incorporated herein by reference. I have tried civil jury trials in the courts of the State of Kansas for the past 21 years. I am Board Certified in Civil Litigation by the National Board of Trial Advocates. I am rated "AV" in both Missouri and Kansas by the Martingale-Hobble Law Directory. I am listed in Who's Who in American Law, and am a recipient of the Outstanding Service Award of the Kansas Bar Association (1995). In addition to my position on the Judicial Council, I have the honor to serve as co-



House Judiciary
Attachment 2
1/28/97

chair of the Civil Justice Reform Act Committee for the United States District Court for the District of Kansas; Chairman of the Ethics and Grievance Committee of the Johnson County Bar Association; and President of the Kansas Inn of Court. I am a co-author of the K.B.A. *Employment Law Handbook*, and a co-author and co-editor of the K.B.A. *Kansas Ethics Handbook*.

The work of the Kansas Judicial Council is carried out by lawyers and judges from around the State, but the Council could not function without the hard and daily work of its dedicated staff, including our Executive Director, Randy Hearrell, and our research attorney, Matt Lynch. Mr. Lynch's contributions to the drafting of HB. 2007 in its original form cannot be over-emphasized, and is insufficiently appreciated. The Council recognizes and must express appreciation for the dedication and effort of Mr. Lynch, in this bill and many others.

The testimony presented today will focus on H. B. 2007, and particularly on the form of the bill as submitted by the Kansas Judicial Council in 1995 (and originally called S.B. 140). This bill was the culmination of two years' work by a diverse committee of lawyers from all areas of the State -- both geographical and legal -- and was directed to keeping up with changes in the Federal Rules of Civil Procedure (which came about in December, 1993), without adopting the controversial and objectionable portions thereof. For example, the main objection to the Federal Rules has been the provision for "mandatory disclosures." That provision (and many others) were excluded from the Judicial Council's bill. This testimony will outline the changes which are made by HB. 2007, and will highlight the

changes which are **not** proposed, in the hope of eliminating objections based on provisions that are not contained in the Bill.

## II. History.

**Judicial Council.** The Kansas Judicial Council was created by the Legislature in 1927. It is comprised of one Justice from the Kansas Supreme Court and one judge from the Kansas Court of Appeals; the Chairmen of the House and Senate Judiciary Committees; four district court judges; and four practicing trial lawyers from around the State.

The purpose and function of the Kansas Judicial Council is to work with the Courts, to evaluate caseloads, and to provide assistance in the administration of justice, in both the civil and criminal courts.

**Civil Code.** Civil courts are those which address suits between individuals, corporations or governmental agencies and which are not criminal in nature. The code of civil procedure is the body of rules which the litigants follow in filing, preparing and trying their cases in the civil courts.

For many years, the Kansas code of civil procedure has traditionally been patterned on the Federal Rules of Civil Procedure. This has provided a benefit to parties and practicing lawyers, because of the general uniformity of the rules in both court systems, and the availability of precedents and interpretations of the rules from the many federal courts around the Country.

**Federal Amendments.** Prior to the 1993 amendments, the Federal Rules were last amended in 1986. Most of those changes were incorporated into the Kansas Code of Civil Procedure. On December 1, 1993, the Federal Rules were substantially amended. Those amendments were met with vocal opposition and equally vocal support from the Courts and the practicing Bar as either the anathema or the savior of civil litigation as we know it. Of course, in practice they have proved to be neither.

The 1993 amendments allowed each federal district to "opt out" -- to choose not to accept the amendments. The District of Kansas has not chosen to opt out, and has applied most of the amendments since January 28, 1994 -- soon after their adoption in 1993.

**Civil Code Committee -- Kansas Judicial Council.** Faced with these changes, the Kansas Judicial Council's Civil Code Committee took up the Federal Rules amendments to determine how much, if any, should be incorporated into the Kansas Code. This Civil Code Committee was the best equipped and most objective group in the State for such a task. Chaired by the able and intelligent Marvin Thompson of Russell during most of its activities, the Committee is comprised of a wide and diverse panel of practicing lawyers representing both the plaintiff and defense bars, as well as Professor Robert Casad of the University of Kansas School of Law, a nationally recognized expert on civil procedure.

**Study.** The Civil Code Committee worked for over two years to come up with its proposed Bill, meeting some 28 times. At an average of eight people for each meeting, and working an average of six hours per meeting, this comprises 1,200 person-hours of labor by

the Committee -- in addition to the countless, almost full-time work of the Judicial Council staff, including particularly Matt Lynch, Research Attorney. The bill went through numerous drafts, and was finally submitted to the Judicial Council (upon unanimous vote of the Civil Code Committee) in early, 1994. The Judicial Council also accepted the Bill by unanimous vote in April, 1994. However, not content to rely on the diversity of the Civil Code Committee, nor yet of the Judicial Council itself, the Judicial Council submitted the Bill to the Kansas Bar Association, and the Bill was published in that Association's *Journal of the Kansas Bar Association* in May, 1994, with an invitation for comment. The Bill was also presented to the Kansas District Courts Judicial Conference in October, 1994.

The Bill was then submitted for introduction by the Kansas Senate in January, 1995.

Before the Senate Judiciary Committee, before which this speaker had the honor to present the Bill, only one public comment was received. That comment requested that the provision requiring expert witnesses to prepare their own reports be deleted. The Judicial Council did not oppose that change, and it was made.

Testimony was presented to the Kansas House Judiciary Committee in March, 1995, with no public comment or opposition from any person or organization.

Thereupon, the Bill passed both the House and the Senate. However, the Bill died *sine die* at the end of that legislature, and has now been resubmitted.

**Comments Received.** In response to the publication of the Bill in the *Kansas Bar Journal* and the submission of the Bill to the Judicial Conference, two letters were received, requesting delay in submission of the Bill until after the Federal District Court in Kansas

decided whether to opt out. In March, 1995, the Federal Court renewed its decision not to opt out. Several judges in Johnson County expressed concerns about mandatory case conferences. And some verbal objections were made to the requirement for mandatory disclosures. As will be seen in this discussion, the mandatory disclosures are included in the Bill.

There were no other public or private comments or objections received to the Bill by the Judicial Council.

**III. Summary of Bill.**

This Bill is best understood by starting with a discussion of what is **not** contained in the Bill.

The Bill does not contain the "Safe Harbor" provisions of Federal Rule 37, which allows a frivolous pleading to be filed and then to be withdrawn with impunity.

The Bill does not provide for the so-called "voluntary/mandatory" disclosures of Federal Rule 26(a).

The Bill does not provide for the so-called mandatory "Mined Harbor" in Rule 37, which requires sanctions if a frivolous discovery objection or response is withdrawn after receipt of a Motion to Compel.

And the Bill does not require an expert witness report to be written by the expert; the contain a list of all testimony given by the expert in the preceding four years; to list all publications in the past ten years; nor to identify the compensation being paid to the expert witness.

The provisions which are included in the Bill are summarized as follows:

60-102 (p. 1): adds "and administered" to purpose of Rules.

60-205 (p. 2): Technical change to refer to expert disclosure; allows facsimile filing.

60-206 (p. 3): allows delay in deadlines if weather makes court clerk's office "inaccessible."

[60-209 (p. 4): should be amended to increase amount pled to "$75,000," in accordance with recent changes in Federal Court jurisdictional requirements, effective January 19, 1997.]

60-211 (p. 5): Sanctions rule; requires reasonable inquiry. Applies to "motions and other papers; does not apply to discovery. Signature of pleading certifies that it is not frivolous; is warranted by the law and supported by facts.

60-215 (p.7): cleanup language.

60-216 (p. 8): Case management conference "shall" be held on request of either party or decision of judge. Can be by telephone. To discuss issues, discovery, deadlines. A mandatory pretrial conference also shall be held in every case if a party requests, and shall result in a pretrial order.

60-223 (p. 11): Class action notices; notice of motion to dismiss shall be given to members of the class, to avoid collusive settlements.

60-226 (p. 13): Expert disclosure: report listing subject matter, substance of opinions, grounds for opinions. Can be signed by attorney. Duty to supplement: if later learn that

previous answer is incomplete or incorrect, or to provide information acquired after initial answers.

60-230 (p. 20): avoid second deposition of same witnesses without leave of court. Allows tape recording of depositions. Provides for signing and correcting depositions.

60-231 (p. 25): depositions on written questions; same as 60-230.

60-233 (p. 29): interrogatories. Objections must state reasons. Must answer to the extent not objectionable. Extensions of time to answer only if motion for extension filed before expiration of the time to answer.

60-234 (p. 30): request for production of documents. Extensions of time to answer only if motion for extension filed before expiration of the time to answer.

60-235 (p. 31): mental and physical examination. Not limited to "physician."

60-236 (p. 32): requests for admissions. Extensions of time to answer only if motion for extension filed before expiration of the time to answer.

60-237 (p. 34): motions to compel. The court may sanction answering party if answer is provided and/or objections are withdrawn after filing of a motion to compel. If expert report not disclosed or if supplemental discovery not provided, court can refuse to allow such report or supplemental information into evidence and can award other sanctions.

60-241 (p. 38): dismissal. Removes reference to judgment as a matter of law, which is moved to 60-250.

60-243 (p. 39): interpreters paid as directed by court, can include order for party/parties to pay.

60-245 (p. 40): subpoenaes. Service anywhere in the State of Kansas; will grant protection on motion if responding party objects to traveling more than 100 miles from place of residence or work.

60-250 (p. 48): directed verdict. Changed to "motion for judgment as a matter of law." Renew motion after trial, instead of "motion for judgment notwithstanding the verdict."

60-252 (p. 49): judgment as a matter of law, provisions, findings.

60-256 (p. 50): technical change to make reference to judgment as a matter of law, instead of "directed verdict."

60-456 (p. 53)(evidence code): [not in Judicial Council bill]. Expert testimony. Can be admitted into evidence if based on "scientifically valid" reasoning or methodology, and is "likely to assist" trier of fact in understanding evidence or determining a fact in dispute.

60-1608 (p. 53)(divorce code): mandatory pretrial conference when either party requests or court decides.

60-2103 (p. 54)(appeals code): reference to judgment as a matter of law, instead of "directed verdict."

61-1725 (p. 57)(limited actions code): makes 60-211 (sanctions for frivolous pleadings) applicable to limited actions cases. Makes amendments of rules applicable to extent rules were previously applicable.

**IV. Case Management Conferences.**

K.S.A. 60-216 relates to discovery and case management conferences which district judges should hold with the civil litigants as often as necessary to narrow the issues and

prepare for trial. Most trial judges hold such conferences on a routine basis. However, some judges objected that the Bill made such conferences mandatory if a party requests it, and that some small cases might not justify at least one mandatory conference between the lawyers and the judge.

The purpose of such a conference is to get a handle on the case early in its life; to weed out the extraneous claims and issues; and to set deadlines to move the case. The rule provides for early discovery on some limited issues (such as the statute of limitations or personal jurisdiction), to save time and cost to the court and the parties; and for early summary judgment in those cases where it would be justified. All this will provide for increased efficiency and will increase the chances of an early settlement. In a small case or with distant counsel, a brief telephone conference will suffice.

The rule also provides for multiple pretrial conferences as needed, and requires a final pretrial conference if either party requests it or the Court decides that such a conference should be held. The conference should result in a final pretrial order.

**V. General Discovery.**

K.S.A. 60-226 is analogous to Federal Rule 26, and relates to the general scope of discovery. The amended Federal Rule 26 requires an early disclosure by each party, listing all witnesses with knowledge of "disputed facts pled with particularity in the pleadings;" all documents relating to "disputed facts pled with particularity in the pleadings;" a detailed computation of the damages sought by the claiming party; and the policy of any insurance which may provide coverage for the claims made in the case.

There are numerous objections to this so-called "voluntary-mandatory" disclosures. For a summary of those objections, see Badgerow, *Dealing with Change: A Practical Approach to Using the New Federal Rules*, 63 *Journal of the Kansas Bar Association* 26, April, 1994. In general, it is objected by some that these mandatory disclosures require one to guess what are the "disputed facts pled with particularity." It causes conflicts between the duty of loyalty to and vigorous advocacy for a client against the duty to comply with orders of a court. The rule imposes a duty to disclose, supplanting the right to wait to be asked the right question. And the rule imposes sanctions for failing to make the disclosures or failing to make them in an adequate manner -- as viewed in the light of subsequent discovery or disclosure.

The Federal Rule also imposes changes in expert witness reports. The former rule (and the present K.S.A. 60-226) require only a statement of the facts and opinions to which an expert witness is expected to testify, with a summary of the grounds for each opinion. The new Federal Rule requires, instead, that the expert (and not the party's lawyer) write the report; that the expert state the basis and reasons for all opinions and the data/information considered. The expert's report must list all exhibits; his/her qualifications; all publications by the expert in the past ten years; all testimony in the past four years; and the compensation being paid to the expert witness.

While that provision was initially included in the Judicial Council's bill, it was removed from S.B. 140 before a vote by the Judiciary Committee; and it has not been re-inserted.

One Federal Rule amendment which has been included in the Bill is that which relates to supplemental or correcting answers. The former rule made an answer sufficient for the remainder of the case if it was "correct when made," regardless of changes in circumstances or facts which may have occurred since the answer was made. The rule now requires amendment of a discovery response if the facts later change, to comport with the true facts at the time of the amendment.

**VI. Interrogatories.**

The Bill includes the Federal Rules' improvement in the handling of objections. Previously, any objection to an interrogatory (or written discovery question) allowed the responding party not to answer any part of the interrogatory. As amended, the Rule requires the responding party to answer any interrogatory "to the extent not objectionable." For example, if one objects to an open-ended interrogatory on the basis that it is unlimited in time and that it should be limited to a three-year period, then the responding party must proceed to provide information within that three-year period.

**VII. Motions to Compel and for Sanctions.**

Under the Bill, Motions to Compel Discovery and for Sanctions are governed by K.S.A. 60-237. As noted above, the amended Federal Rules provide a "Mined Harbor:" one who receives a motion to compel and is convinced to change a discovery response **must** be subjected to sanctions. This would not encourage improvement of discovery responses, but rather compel entrenchment in answers that might otherwise be corrected.

As a practical matter, what happens is that general, vague and conclusory "Golden Rule" letters are sent to obtain further discovery responses. Such Golden Rule letters are required before a Motion to Compel can be filed. No authorities or specific support are contained in the Golden Rule letter, so the responding party is not encouraged to withdraw or change the offending discovery response. Then, the Motion to Compel is filed, setting forth specific grounds and citing legal authorities and precedent. But then it is too late for the responding party to correct its discovery response, since to do so will result in the imposition of sanctions under the Mined Harbor provision of Rule 37.

The Mined Harbor was not included in HB. 2007. However, the proposed amendment would allow sanctions to be awarded if the objection is withdrawn or the answer is provided after the filing of a motion to compel, unless the objection was made in good faith or was substantially justified.

**VIII. Other Sanctions.**

K.S.A. 60-211 provides for sanctions against a party who signs a pleading that asserts facts or claims which are without foundation, unless it can be shown that the assertions were non-frivolous. The rule is still a mandatory one, and requires that sanctions be assessed. The rule has been amended to make it clearly apply to pleadings and not to discovery, since discovery sanctions are governed by K.S.A. 60-237.

The Federal Rules amendments include a provision which allows the withdrawal of a frivolous pleading, within ten days after receipt of a proposed motion for sanctions under

the rule. If such a draft motion is received and the offending pleading is withdrawn, then no motion for sanctions can be filed and no sanctions can be awarded.

This so-called "Safe Harbor" allows one to file a frivolous, unsupported pleading with no threat of sanctions, so long as the offending pleading is withdrawn within ten days after receipt of a draft motion for sanctions. Thus, a pleading could be on file for weeks before it is withdrawn, and all the damage done by negative publicity would have been done.

HB. 2007 does not contain the Mined Harbor provision of the Federal Rules.

**IX. Evidence Code - The *Daubert* Case.**

The Bill does contain a provision which was not in the Judicial Council's proposal, at K.S.A. 60-456 (page 53 of the Bill). This provision alters the standards for admitting expert testimony, and would allow such testimony if it is based on "reasoning or methodology which is *scientifically valid* which can be properly applied to the facts in issue;" and which is "likely to assist the trier of fact to *understand the evidence* or to *determine a fact in issue.*" (Emphasis added.)

This provision has been criticized as allowing "junk science," since the single expert, standing alone, can say that his/her methods are "scientifically valid," without any showing of general acceptance in the scientific community, any scrutiny by peer review, or any application in any similar situations.

The standard long applied by the Kansas courts began with the case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and was recently stated by the Kansas Supreme Court

in *State v. Colbert*, 257 Kan. 896, 896 P. 2d 1089 (1995). There, the Court stated the long-standing rule as follows:

> [B]efore expert scientific opinion may be received into evidence, the basis of that opinion must be shown to be **generally accepted within the expert's particular scientific field.** If a new scientific technique's validity has not been generally accepted as reliable or is only regarded as an experimental technique, then expert testimony based upon its results should not be admitted into evidence.

257 Kan. 896, at 909 (emphasis added), *citing Smith v. Deppish*, 248 Kan. 217, 808 P. 2d 144 (1991).

This provision should not be adopted.

**X. Some Objections Answered.**

As noted above, a few objections were received to the original S.B. 140. Most were based on a misunderstanding of what is being proposed. Of the rest were addressed in the amendments made before a vote in either House.

**1. Mandatory Disclosures.** As noted above, these are not in the Bill.

**2. Safe Harbor.** Again, this provision was not included in the Bill.

**3. Mandatory Discovery Conferences.** Most courts hold such conferences in every case. The conferences help to get a case moving, and make the parties focus on the issues. Parties presumably will not request a conference in a case where it is not needed.

**4. No Notice.** As noted, the Bill was published in the *Journal of the Kansas Bar Association* some seven months before it was introduced in the Legislature, and disseminated to the Kansas Judicial Conference three months before it was introduced. Since then, two

more years have elapsed, allowing (1) sufficient time to determine if the Federal Rules work and are accepted by the practicing Bar, and (2) sufficient time for public comment, including hearings before this Committee, the Senate Judiciary Committee, and before a Joint Conference Committee.

**5. Too Quick.** The Judicial Council worked for two years, expending over 1,000 person-hours in this effort, and two more years of work have been done since then by the Legislature.

**6. Not Thought-Out.** This objection is the most base-less. In accordance with prior amendments, the Judicial Council could have blindly accepted, and submitted to the Legislature, all the changes contained in the December 1, 1993 amendments to the Federal Rules of Civil Procedure. That would have had some support, since practicing lawyers like uniformity of rules and interpretation. Instead, the Judicial Council agonized over every phrase, and only adopted those that could be uniformly accepted by the plaintiff and defense bars. None of the objectors has spent the time the Civil Code Committee spent in working out this Bill.

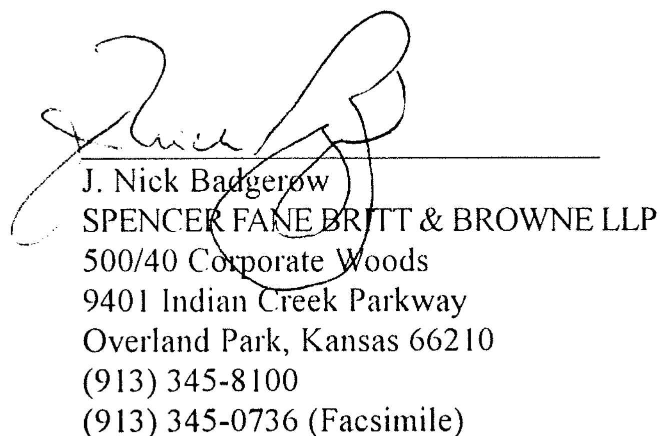
**XI. Conclusion.**

This Bill was unanimously approved by the Civil Code Committee of the Judicial Council, after two years of work -- a Committee representing the broadest cross-section of the bench, bar and academia.

The Bill was unanimously approved by the Judicial Council -- an organization representing a broad cross-section of practicing lawyers, trial judges, appellate judges, and legislators.

While there was much controversy about the Federal Rules, that controversy has been about the provisions which are not in this Bill.

We respect and appreciate the Legislature's interest and recognize that this is not an easy subject. The matter added since the submission of the original Judicial Council bill, relating to the Evidence Code, should be closely scrutinized, as there does not seem to be support from any segment of the Bench or Bar for such a change and it runs contrary to long-standing law. However, there is just not much opposition from the bench and bar to the bill presented by the Judicial Council -- and no opposition once it is understood what is, and is not, in the Bill.



J. Nick Badgerow
SPENCER FANE BRITT & BROWNE LLP
500/40 Corporate Woods
9401 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 345-8100
(913) 345-0736 (Facsimile)

**SPENCER FANE BRITT & BROWNE**
ATTORNEYS AND COUNSELORS AT LAW

Suite 500, 40 Corporate Woods
9401 Indian Creek Parkway,
Overland Park, KS 66225-5407
(913) 345-8100
FAX: (913) 345-0736

1400 Commerce Bank Building
1000 Walnut Street
Kansas City, MO 64106-2140
(816) 474-8100
FAX: (816) 474-3216

1133 Connecticut Ave., N.W., Suite 1000
Washington, D.C. 20036
(202) 775-2376
FAX: (202) 833-8491

**J. Nick Badgerow**
(913) 345-8100

## BIOGRAPHICAL SUMMARY

**Birthdate:** April 7, 1951

**Bar Admissions:**
Kansas, 1976
Missouri, 1986
U.S. Dist. Ct., Kansas
U.S. Dist. Ct., W.D. Mo.
U.S. Ct. App. Tenth Circuit, Eighth Circuit, Fourth Circuit, Federal Circuit
U.S. Claims Court
U.S. Supreme Court

**Legal Education:**
University of Missouri
Kansas City, Missouri
J.D., 1975
Law Review Staff

**Undergraduate Education:**
The Principia College
Elsah, Illinois
B.A. (honors), 1972
Business Administration and English Literature (including one semester at University of London, England)
Phi Alpha Eta Scholastic Honor Fraternity

9675.

**Post Graduate Employment:**

**1976 - 1985**

McAnany, Van Cleave & Phillips
Kansas City, Kansas
Associate, 1976 - 1979
Partner, 1979 - 1985

**1986 - present**

Spencer Fane Britt & Browne
Partner

**Representative Experience:** See Attached Listing.

**Professional Activities:**

Member:

American Bar Association (Litigation Section and Association of Professional Responsibility Lawyers)

Kansas Bar Association (Continuing Legal Education Committee)

Missouri Bar Association

Kansas Association of Defense Counsel

Johnson County (Kansas) Bar Association (Ethics and Grievance Committee - **Chairman,** 1995 - )

Wyandotte County (Kansas) Bar Association

Kansas City Metropolitan Bar Association (past Chair, Civil Rights Committee)

Kansas Inn of Court (Secretary, 1993 - 1995); (Counsellor, 1995 - 1996); (President, 1996 - 1997)

Author:

Casenote, 43 U.M.K.C. L. Rev. 211 (1974).
**"Dealing With Change: the New Federal Rules of Civil Procedure,"** 63 Kansas Bar Journal 26 (1994).

Co-Author, Kansas Employment Law Handbook (K.B.A. 1991; 1995 Supp.).

Co-Author, Kansas Lawyer Ethics (to be published, K.B.A. 1995).

Speaker: Over 100 seminars, meetings, and programs on litigation, construction and engineering, civil rights and employment, and professional ethics.

Honors:

Outstanding Service Award, Kansas Bar Association (1995).

Appointed by Kansas Supreme Court to Kansas Judicial Council (1994 - ).

Board Certified in Civil Litigation by the American Board of Trial Advocates (1994).

Appointed by Kansas Federal Court and trained as Federal Mediator under Federal Judicial Reform Act Plan (1992).

Appointed by Kansas Federal Court as **Chairman**, Civil Justice Reform Act Committee (1995 - 1996).

**Chairman**, Kansas Supreme Court Civil Code Advisory Committee (1995 - ).

Appointed by Kansas Supreme Court to Professional Malpractice Screening Panel (1995 - ).

Mission Valley Hunt Club, Conniver Award for Public Service (1995).

Who's Who in American Law (1990).

## STATE COURT CASES

Liberty Mutual Insurance Company v. American Family Mutual Insurance Company, 2 Kan. App. 2d 293, 578 P. 2d 284 (1978)(co-insurance vs. primary insurance).

Fields v. Stauffer Publications, Inc., 2 Kan. App. 2d 323, 578 P. 2d 1138 (1978)(libel; sanctions for failure to make discovery).

Miller v. William A. Smith Constructing Company, 226 Kan. 172, 603 P. 2d 602 (1979)(statute of limitations; purchase order as written contract).

Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P. 2d 479 (1980)(workers compensation).

Razo v. Erman Corporation, 4 Kan. App. 2d 473, 608 P. 2d 1025 (1980), aff'd. 228 Kan. 491, 618 P. 2d 1161 (1980)(workers compensation).

Yocum v. Phillips Petroleum Company, 228 Kan. 216, 612 P. 2d 649 (1980)(workers compensation; question certified from federal court).

Gumbhir v. State Board of Pharmacy, 228 Kan. 579, 618 P. 2d 837 (1980)(holding Kansas pharmacy registration act unconstitutional).

Gumbhir v. State Board of Pharmacy, 231 Kan. 507, 646 P. 2d 1078 (1982), cert. den. 459 U.S. 1103, 103 S. Ct. 724, 74 L. Ed. 2d 950 (1983)(attorneys' fees in civil rights case).

City of Hutchinson v. Winchester Foods, Inc., (unpublished) 798 P. 2d 972 (Kan. App. 1988)(personal guarantee).

Berglund v. J. C. Nichols Company, (unpublished) 770 P. 2d 497 (Kan. App. 1989)(breach of real estate commission contract).

Huffman v. Procter & Gamble Manufacturing Company, (unpublished) 784 P. 2d 390 (Kan. App. 1989)(workers compensation).

KCK Auto Finance, Inc. v. Womack, (unpublished) 814 P. 2d 42 (Kan. App. 1991)(garnishment).

Edgington v. City of Overland Park, Kansas, 15 Kan. App. 2d 721, 815 P. 2d 1116 (1991)(constitutionality of ordinance; placement of nominee in vacant council seat).

Tuley v. Kansas City Power & Light Co., -- Kan. --, -- P.2d -- (1992)(affirming application of assumption of risk defense after adoption of comparative negligence).

## FEDERAL COURT CASES

Soper v. Kansas City Southern Railway Company, 77 F.R.D. 665 (D. Kan. 1977)(FELA claim under Safety Appliance Act).

Pearce v. U.S.A., 450 F. Supp. 613 (D. Kan. 1978)(medical malpractice case; pendent party jurisdiction).

Ammon v. Kaplow, 468 F. Supp. 1304 (D. Kan. 1979)(veterinarian malpractice; long-arm jurisdiction over non-resident defendant).

United States of America v. Hulings, 484 F. Supp. 562 (D. Kan. 1979)(violation of administrative regulations).

Flood v. W.R.E.I.T., 497 F. Supp. 320 (D. Kan. 1980) and 503 F. Supp. 320 (D. Kan. 1980) (landlord liability for criminal acts of third persons).

Cain v. Archdiocese of Kansas City, 508 F. Supp. 1021 (D. Kan. 1981), aff'd. -- F. 2d -- (10th Cir. 1982)(disabled employee; liability under Rehabilitation Act).

Coates v. Metropolitan Life Insurance Company, 515 F. Supp. 647 (D. Kan. 1981)(liability on life insurance policy after suicide of insured).

Elliott v. Employers Reinsurance Company, 532 F. Supp. 690 (D. Kan. 1982)(sex discrimination and hostile working environment sexual harassment).

Sipple v. Sears, Roebuck & Co., 553 F. Supp. 908 (D. Kan. 1982)(slip/fall in public store; summary judgment for landowner).

Brown v. Reardon, 611 F. Supp. 302 (D. Kan. 1983), aff'd. 770 F. 2d 896 (10th Cir. 1985)(termination of public employees; failure to contribute to political campaigns).

United States of America v. City of Kansas City, Kansas, 761 F. 2d 605 (10th Cir. 1985)(environmental consent decree; failure to comply).

K-B Trucking Company v. Riss International Corporation, 763 F. 2d 1148 (10th Cir. 1985)(termination of contract cartage company; alleged fraud).

Blue Cross & Blue Shield of Kansas City v. Bell, 596 F. Supp. 1053 (D. Kan. 1984)(alleged unconstitutionality of administrative regulations).

North River Insurance Company v. Huff, 628 F. Supp. 1139 (D. Kan. 1985)(insurance coverage for director of failed savings and loan).

Kistler v. Life Care Centers of America, 620 F. Supp. 1268 (D. Kan. 1985)(wrongful termination from employment against public policy).

U S Sprint Corporation v. Buscher, 89 B. R. 154 (D. Kan. 1988)(suit against hacker stealing and selling long distance code numbers).

Smith v. Midwest Grain Company, F. 2d (10th Cir. 1989) (alleged racial discrimination; termination from employment).

Hanlon Chemical Company v. Fireman's Fund Insurance Company, 715 F. Supp. 326 (D. Kan. 1989)(wrongful refusal of insurance company to provide defense in product liability case).

U S Telecom, Inc. v. Hubert, 678 F. Supp. 1500 (D. Kan. 1987)(declaratory judgment action; ERISA and benefits claim).

U S Sprint Corporation v. Boran, 716 F. Supp. 505 (D. Kan. 1988)(long-arm jurisdiction and venue; computer fraud of long-distance carrier).

U S Sprint Corporation v. Kaczmarek, 121 F.R.D. 414 (D. Kan. 1987)(long-arm jurisdiction and venue; computer fraud of long-distance carrier).

Beam v. Concord Hospitality, Inc., 873 F. Supp. 491 (D. Kan. 1994)(partial summary judgment; alleged sexual harassment in employment).

Naab v. Inland Container Corporation, 877 F. Supp. 546 (D. Kan. 1994)(summary judgment for employer in case of breach of implied contract and defamation by former employer).

X3

**PROPOSED AMENDMENT TO K.S.A. 60-245a**
**RELATING TO BUSINESS RECORDS SUBPOENAS**

I. THE AMENDMENT IS NEEDED TO PROTECT PRIVILEGED DOCUMENTS OR OTHER DOCUMENTS NOT DISCOVERABLE.

A. The statute currently requires that the person/business upon whom the subpoena is served respond by placing the subpoenaed documents in a sealed envelope and returning them to the clerk's office. Then the parties to the action may make arrangements to obtain the documents from the clerk's office after giving notice. (See, K.S.A. 60 245a(b) and (e))

B. Unfortunately, the most common practice in responding to these subpoenas is that the person/business to whom the subpoena is issued responds directly to the party issuing the subpoena rather than to the clerk of the court as the statue now requires. As a result, the documents are sent directly to the party who issued the subpoena rather than the clerk. This practice is most common with people\businesses that have no attorney - that is, small businesses. Understandably, they simply want to respond to the subpoena as quickly, efficiently and cost effectively as possible.

C. The problem with such a response, however, is that documents which should not be produced at all, may be produced directly to an adverse party. The other party has no notice that the documents have been sought nor knowledge that they have been produced and are in their adversary's possession. This leads to the production of documents which are privileged or otherwise not discoverable. Example: priest-penitent privilege (K.S.A. 60-429); documents not discoverable because discovery is closed.

D. The proposed amendment solves the problem by requiring the party issuing the subpoena to give a reasonable amount of notice of the issuance of the subpoena before it is issued and to disclose the documents sought before they are produced by the person\business upon whom the subpoena is to be served.

II. THE AMENDMENT IS NEEDED TO CORRECT CONFUSION AMONG MEMBERS OF THE BAR AS TO WHETHER NOTICE OF THE ISSUANCE OF A SUBPOENA IS NECESSARY.

A. A genuine disagreement exists among the members of the bar as to whether K.S.A. 60-245a requires that notice of the issuance of a business records subpoena be given.

1. Notice should be given.

a. K.S.A. 60-245a(e) specifies that if the documents are produced to the clerk of the district court as contemplated by the statute, the party issuing the subpoena shall cancel "the deposition" and shall so notify the other parties to



House Judiciary
Attachment 3
1/28/97

the action. Other than in the suggested form set out in K.S.A. 60-245a(c), however, there is no other requirement in the statute that notice of a deposition be given in the first place. K.S.A. 60-230(b) (relating to depositions) requires that reasonable notice of the taking of a deposition be given. In practice, however, issuance of a notice to take deposition concurrently with the issuance a business records subpoena is very rare.

b. Disclosing in a pretrial order documents obtained by a business records subpoena may be too late. They may have been used in pretrial depositions, the information contained in the documents may have been disclosed to other witnesses or parties and tainted their testimony, and the threat to disclose the information contained in the documents may be used to coerce a settlement. Further, disclosure of such documents in a pretrial order is not required if the documents are to be used as rebuttal evidence.

2. Notice should not be given.

a. K.S.A. 60-245a does not specifically require that notice of the deposition be given, as does K.S.A. 60-245. Thus, the legislature must not have intended to require notice. Had it intended that notice be given, it could have drafted legislation which specifically requires that notice be given and that an adversary have an opportunity to object, as it did when it enacted K.S.A. 60-245.

b. Any documents obtained by a business records subpoena must be disclosed to adverse parties in the pretrial order.

**ATTACHMENTS**

A. K.S.A. 60-245a as presently enacted.

B. K.S.A. 60-245a as proposed to be amended.

C. K.S.A. 60-245.

CASE ANNOTATIONS

Prior law cases, see G.S. 1949, 60-2807, 60-2809 to 60-2812, 60-2814 and the 1961 Supp. thereto.

1. Cited in case concerning refusal to comply with discovery and consequences therefor. Williams v. Consolidated Investors, Inc., 205 K. 728, 735, 472 P.2d 248.

2. Subpoena not denied on grounds documents not pertinent to the proceedings; no showing of unreasonable or oppressive. Yellow Freight System, Inc., v. Kansas Commission on Civil Rights, 214 K. 120, 125, 519 P.2d 1092.

3. Inapplicable to service of summons issued by Kansas commission on civil rights under 44-1004. Kansas Commission on Civil Rights v. Carlton, 216 K. 735, 740, 533 P.2d 1335.

4. Procedures hereunder applicable to depositions in Governmental Ethics Commission proceedings; presence at time and place set for deposition constituted waiver of objection to fifty mile limitation. Governmental Ethics Commission v. Cahill, 225 K. 772, 780, 594 P.2d 1103.

5. Cited; service of process could have been amended; judgment reversed. State v. Jones, 226 K. 503, 507, 601 P.2d 1135.

6. Subpoenas previously left with doctor's office staff in derogation of statute did not preclude challenging service of process left with office secretary. Bray v. Bayles, 4 K.A.2d 596, 605, 609 P.2d 1146. Reversed in part on other grounds: 228 K. 481, 618 P.2d 807.

7. Subpoena power of commission cannot be unreasonable or oppressive; judgment affirmed in sex discrimination case. Cessna Aircraft Co. v. Kansas Comm'n on Civil Rights, 229 K. 15, 22, 24, 27, 622 P.2d 124.

8. Cited; deposition may be used in a disciplinary proceeding against attorney if complainant-witness is not subject to subpoena or is unable to attend hearing. State v. Scott, 230 K. 564, 567, 639 P.2d 1131 (1982).

9. Cited; where no showing subpoena unreasonable or oppressive, statute granting subpoena power (44-714) should be liberally construed. State ex rel. Wolgast v. Schurle, 11 K.A.2d 390, 394, 722 P.2d 585 (1986).

10. Cited; use of interrogatories and subpoena duces tecum by director of taxation (79-3233) after commencement of hearing examined. Kansas Dept. of Revenue v. Coca Cola Co., 240 K. 548, 550, 731 P.2d 273 (1987).

11. Time for party to respond to subpoena governed hereby; nonparty governed by 60-245a. Jones v. Bordman, 243 K. 444, 452, 759 P.2d 953 (1988).

12. Whether discretion abused by allowing depositions of third parties in a debt execution proceeding examined. City of Arkansas City v. Anderson, 19 K.A.2d 344, 345, 869 P.2d 244 (1994).

**60-245a. Subpoena of records of a business not a party.** (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 days after the service of the subpoena or at or before the time for compliance, if the time is less than 10 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 days after receipt of the subpoena.

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

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

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



3-3

EXHIBIT A

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

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

Subpoena of Business Records

State of Kansas
County of ____________

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

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

at ________________________________________
(Address)

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

(2) Records to be produced: ____________________
________________________________________
________________________________________
________________________________________

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

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

______________________ at ______________________
(Requesting Party or Attorney) (Address of Party or Attorney)
within 10 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 dis-



3-4

regarded. 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 has been requested.

**History:** L. 1985, ch. 196, § 1; July 1.

**Research and Practice Aids:**

Witnesses ⇐ 16.

C.J.S. Witnesses § 25.

CASE ANNOTATIONS

1. Nothing in statute requires a party to relinquish right to oppose subpoena of documents of nonparty. Jones v. Bordman, 243 K. 444, 451, 759 P.2d 953 (1988).

**60-246. Objections to rulings.** Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he or she desires the court to take or his or her objection to the action of the court and his or her grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

**History:** L. 1963, ch. 303, 60-246; Jan. 1, 1964.

**Cross References to Related Sections:**

Erroneous admission of evidence, objection required, see 60-404.

Erroneous exclusion of evidence, duty of proponent, see 60-405.

Form and admissibility of evidence, see 60-243(a).

Harmless error by court or parties, see 60-261.

Objections to instructions to jury, when waived, see 60-251(b).

**Research and Practice Aids:**

Federal Civil Procedure ⇐ 1976, 2017; Trial ⇐ 31, 81, 131, 277, 366, 405.

Hatcher's Digest, Trial §§ 33 to 42½.

C.J.S. Federal Civil Procedure §§ 932, 941; Trial §§ 54, 123, 196, 418, 419, 572, 652.

Barron & Holtzoff Fed. P. & P. §§ 1021, 1101, 1103.

Gard's Kansas C.C.P. 60-246.

Vernon's Kansas C.C.P.—Fowks, Harvey & Thomas, 60-246.

**Law Review and Bar Journal References:**

"Federal Habeas Corpus and the State Prisoner," Michael L. Maxwell, 8 W.L.J. 248, 258 (1969).

"Objections," Laurence Rose, 2 J.K.T.L.A. No. 3, 18, 19 (1978).

CASE ANNOTATIONS

1. No prejudicial error in admission of evidence; defendant failed to state specific ground of objection. State v. Parker, 213 K. 229, 232, 516 P.2d 153.

2. Under facts and circumstances, admission of evidence of prior criminal conviction not prejudicial error. State v. Moore, 218 K. 450, 455, 543 P.2d 923.

3. Relative appealing juvenile court decision under 38-834 bound by contemporaneous objection to evidence rule. In re Collins, 3 K.A.2d 585, 586, 598 P.2d 1075.

4. Admissibility of report on similar gas explosion permitted for limited purpose of showing notice regarding hazardous installation. Kearney v. Kansas Public Service Co., 233 K. 492, 497, 498, 665 P.2d 757 (1983).

5. Sufficiency of objection to statements in defense counsel's closing argument regarding defendant/doctor's responsibility and judgment examined. Sledd v. Reed, 246 K. 112, 785 P.2d 694 (1990).

6. Party made known to court the objection to action of court and grounds therefor. Robinson v. McBride Bldg. Co., 16 K.A.2d 120, 122, 123, 818 P.2d 1184 (1991).

**60-247. Jurors.** (a) In all civil trials, upon the request of a party, the court shall cause enough jurors to be called, examined, and passed for cause before any peremptory challenges are required, so that there will remain sufficient jurors, after the number of peremptory challenges allowed by law for the case on trial shall have been exhausted, to enable the court to cause twelve (12) or sufficient jurors to be sworn to try the case.

(b) *Voir dire examination of jurors.* Prospective jurors shall be examined under oath as to their qualifications to sit as jurors. The court shall permit the parties or their attorneys to conduct an examination of prospective jurors.

(c) *Challenges.* In civil cases, each party shall be entitled to three (3) peremptory challenges, except as provided in subsection (h) of section 60-248, as amended, pertaining to alternate jurors. Multiple defendants or multiple plaintiffs shall be considered as a single party for purpose of making challenges except that if the judge finds there is a good faith controversy existing between multiple plaintiffs or multiple defendants, the court in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory chal-



3-5

60-245a. Subpoena of records of a business not a party.

(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 days after the service of the subpoena or at or before the time for compliance, if the time is less than 10 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 days after receipt of the subpoena.

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

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

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

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

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

**Subpoena of Business Records**
**State of Kansas**
**County of ______________**

(1) You are commanded to produce the records listed below before ______________________ (Officer at Deposition) (Judge of the District Court) at ______________________ (Address) in the City of ________, County of ________, on the ____ day of ________, 19__ at ____ o'clock _m., and to testify on behalf of the __________ in an action now pending between __________, plaintiff, and __________, defendant. Failure to comply with this subpoena may be deemed a contempt of the court.

(2) Records to be produced:

____________________________________
____________________________________
____________________________________
____________________________________

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

(4) Instead of appearing at the time and place listed above, it is sufficient compliance with this subpoena if a custodian of the business records delivers to the clerk of the court by mail or otherwise a true and correct copy of all the records described above and mails a copy of the affidavit below to __________________ at ______________ (Requesting Party or Attorney) Address of Party or Attorney) within 10 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.



3-6

EXHIBIT
B

(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) Notice of the issuance of a subpoena pursuant to this section where the attendance of the custodian of the business records is not required shall be given to all parties to the action at least ten days prior to the issuance thereof. A copy of the proposed subpoena shall also be served upon all parties along with such notice. In the event any party objects to the production of the documents sought by such subpoena prior to its issuance, the subpoena shall not be issued until further order of the court in which the action is pending.*

*(f)* 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 has been requested.

13. Counsel terminated examination without making known substance of evidence sought to be established. Manley v. Rings, 222 K. 258, 262, 564 P.2d 482.

14. Exclusion of proffered expert testimony in medical malpractice action error. Chandler v. Neosho Memorial Hospital, 223 K. 1, 2, 574 P.2d 136.

15. Motion for new trial is much more than a normal proffer of evidence during the course of a trial under subsection (c). State v. Phelps, 226 K. 371, 380, 598 P.2d 180.

16. Error to exclude evidence of prior carelessness of defendant's employee when offered to show negligence in supervision. McGraw v. Sanders Co. Plumbing & Heating, Inc., 233 K. 766, 770, 667 P.2d 289 (1983).

17. Evidence sufficient to establish witness as turncoat witness and hostile; prior inconsistent statements admissible under 60-460(a). State v. Hobson, 234 K. 133, 145, 671 P.2d 1365 (1983).

18. Qualifications and use of and challenges to interpreters discussed in detail. State v. Pham, 234 K. 649, 660, 675 P.2d 848 (1984).

19. Determination on use of interpreters will be reversed on appeal only in most extreme circumstances. State v. Perrigo, 10 K.A.2d 651, 653, 708 P.2d 987 (1985).

20. When trial court rules expert testimony is inadmissible, it is error to refuse a proffer of that testimony into the record. State v. Hodges, 241 K. 183, 192, 734 P.2d 1161 (1987).

21. Admission of suppression hearing transcript when state's witness unavailable at trial harmless error. State v. Phifer, 241 K. 233, 235, 737 P.2d 1 (1987).

22. Hearing, evidence and findings necessary to support admissibility of hearsay statements under 60-460(dd) examined. In re M.O., 13 K.A.2d 381, 383, 770 P.2d 856 (1989).

**60-244. Proof of records.** Official records and other documents shall be evidenced in the manner provided in article 4 of this chapter.

**History:** L. 1963, ch. 303, 60-244; Jan. 1, 1964.

**Cross References to Related Sections:**

Authentication of copies of records, see 60-465, 60-466.
Documentary originals as the best evidence, see 60-467.
Content of official record, exception to hearsay evidence rule, see 60-460(o).

**Research and Practice Aids:**

Evidence ⇐ 333(1), 338, 366.
C.J.S. Evidence §§ 634 et seq., 649 et seq.
Gard's Kansas C.C.P. 60-244.
Vernon's Kansas C.C.P.—Fowks, Harvey & Thomas, 60-244.

CASE ANNOTATIONS

1. Cited; permissible intervention based on common question of law or fact and procedural requirement thereof examined. Jones v. Bordman, 243 K. 444, 448, 759 P.2d 953 (1988).

**60-245. Subpoenas.** (a) *For attendance of witnesses; form; issuance.* Every subpoena for attendance of a witness shall be issued by the clerk under the seal of the court or by a judge, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place specified in the subpoena.

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

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

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

(d) *Service.* Service of a subpoena upon a person named therein shall be made in accordance with K.S.A. 60-303, and amendments thereto, and shall be accompanied by the fees for one day's attendance and the mileage allowed by law.

(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 sub-



3-8

EXHIBIT C

section (b) of K.S.A. 60-226 and amendments thereto, but in that event the subpoena will be subject to the provisions of subsection (c) of K.S.A. 60-226 and amendments thereto and subsection (c). In lieu of the procedure outlined in K.S.A. 60-234 and amendments thereto, when a party gives notice of the taking of the deposition of another party, the notice of taking the deposition and the contents of the notice will be as compelling upon the party as a subpoena.

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

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

(3) 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.

(g) *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.

**History:** L. 1963, ch. 303, 60-245; amended by Supreme Court order dated July 20, 1972; amended by Supreme Court order dated July 28, 1976; L. 1982, ch. 243, § 1; L. 1985, ch. 196, § 2; L. 1990, ch. 202, § 2; Jan. 1, 1991.

**Source or prior law:**

(a). G.S. 1868, ch. 80, §§ 324, 325; L. 1909, ch. 182, §§ 322, 323; R.S. 1923, 60-2806, 60-2807.

(b). G.S. 1868, ch. 80, § 325; L. 1909, ch. 182, § 323; R.S. 1923, 60-2807.

(c). G.S. 1868, ch. 80, §§ 324, 327 to 329; L. 1909, ch. 182, §§ 322, 325 to 327; R.S. 1923, 60-2806, 60-2809 to 60-2811.

(d). G.S. 1868, ch. 80, § 326; L. 1909, ch. 182, § 324; R. S. 1923, 60-2808.

(f). G.S. 1868, ch. 80, §§ 330 to 334; L. 1909, ch. 182, §§ 328 to 332; R. S. 1923, 60-2812 to 60-2816.

**Cross References to Related Sections:**

Order for production of documents, see 60-234.

Issuance and use of subpoenas in limited actions, see 61-1719.

Depositions pending action, scope of discovery, see 60-226(b).

**Research and Practice Aids:**

Federal Civil Procedure ⇐ 1223 et seq.; Witnesses ⇐ 7, 13, 16, 21.

C.J.S. Federal Civil Procedure § 517 et seq.; Witnesses §§ 19, 23, 25, 27.

Barron & Holtzoff Fed. P. & P. §§ 644, 674, 713 to 715, 792, 851, 1001 to 1008.

Gard's Kansas C.C.P. 60-245.

Vernon's Kansas C.C.P.—Fowks, Harvey & Thomas, 60-245.

Vernon's Kansas Forms, C.C.P.—Hatcher §§ 2.3216 et seq., 2.3221 et seq., 2.3231 et seq., 2.3236 et seq., 2.3238 et seq.

**Law Review and Bar Journal References:**

"Discovery and Production of Documents Under the New Code of Civil Procedure," Wayne Coulson, 33 J.B.A.K. 96, 99 (1964).

Paragraph (e); note on witness fees under federal rules of civil procedure, James L. Crabtree, 13 K.L.R. 304, 306 (1964).

"Interrogatories Restrained," Roger D. Stanton, 37 J.B.A.K. 7, 9 (1968).

Subsection (d)(3) may be useful in obtaining a deposition of a witness confined in prison, other than the 1507 applicant, Richard H. Seaton, 36 J.B.A.K. 99, 102 (1967).

"Evidence: The Admissibility of Computer Print-outs in Kansas," Thomas E. Lowman, 8 W.L.J. 330, 337 (1969).

"Objection to the Form of the Question: 'They Never Taught Me This' in Law School'," Stanley D. Davis, 12 J.K.T.L.A. No. 3, 18, 20 (1989).

"Service of Process by Certified Mail," Robert C. Casad, 59 J.K.B.A. No. 10, 25, 27 (1990).

4

# HOUSE COMMITTEE ON JUDICIARY
## January 28, 1997

My name is Steve Dickerson and I am legislative chair for the Kansas Trial Lawyers Association (KTLA) for the 1997 legislative session. KTLA always welcomes the opportunity to appear before this committee as it considers and works legislation affecting consumers' legal interests.

Except for one key objection KTLA generally endorses HB 2007. The bill is essentially the work product of the civil procedure subcommittee of the Kansas Judicial Council. The subcommittee contains a broad cross-section of the Kansas bar and has invested considerable time and energy in responsibly drafting this update of the Kansas Code of Civil Procedure (Code).

The Code governs and controls the filing and processing of all civil actions in our district courts. When the present Code was first enacted in 1963 it was largely patterned after the federal rules of civil procedure. The federal rules of civil procedure have continued to evolve including certain significant changes which were effective in 1993. HB 2007 represents a comprehensive effort to update the Code based upon some of the federal changes combined with a healthy element of Kansas common sense.

KTLA strongly objects to the proposed evidence changes to K.S.A. 60-456 contained at Section 29, page 53, lines 17 to 20 of HB 2007. This amendment appears to represent someone's effort to graft the United States Supreme Court's opinion in _Daubert v. Merrell Dow Pharmaceuticals, Inc._, 509 U.S. 579 (1993), onto the Kansas evidence code. The amendment is unsound and unwarranted, and should be deleted from HB 2007 for the following reasons:

1. The amendment will impose an additional burden on a trial judge to find that an expert witness' opinions are "based on reasoning or methodology which is scientifically valid which can properly be applied to the facts in issue." This language will complicate, not streamline the processing and trial of cases in our state district courts.

2. _Daubert_ specifically construed or interpreted Federal Rule of Evidence §702. Kansas does not use the federal rules of evidence. In fact, Kansas has its own evidence code codified at K.S.A. 60-401 et seq. The comparable Kansas provision, K.S.A. 60-456, is simply different than Federal Rule of Evidence §702. Accordingly, _Daubert_ has very limited significance in construing or interpreting Kansas evidence law.

3. The _Daubert_ decision intended to clarify the standard for evaluating scientific knowledge for purposes of admissibility. As it turns out, _Daubert_ has been controversial and generated inconsistent case decisions in the federal courts. There is simply no

House Judiciary
Attachment 4
1/28/97

compelling reason to subject Kansas cases and judges to this prevailing confusion over _Daubert_ and its implications.

4. _Daubert_ replaced the so-called _Frye_ test which requires that, before expert scientific opinion may be received in evidence, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. The Kansas Supreme Court has consistently and recently stated that K.S.A. 60-456 requires a _Frye_ analysis. The _Frye_ standard is working well in Kansas. Accordingly, if a new scientific technique's validity has not been generally accepted as reliable or is only regarded as an experimental technique, then expert testimony based on its results will not be admitted into evidence in Kansas cases.

5. The claimed logic of _Daubert_ is that experts should be permitted to testify based on well-reasoned science. Unfortunately, many opposed to the admission of scientific testimony often claim, relying on _Daubert_, that their experts must also agree with other side's science or the other side's expert opinions are not admissible. Such an approach subverts the jury process. What should be and is now necessary under prevailing Kansas law, is that litigants make a simple showing that the proffered opinions are based on legitimate scientific logic. Disputes over what is scientifically valid properly go to the weight of the testimony, not its admissibility.

Following the principle "if it ain't broke, don't fix it," there simply is not a basis, even anecdotally, that Kansas district courts are experiencing problems in sorting out experts that mislead jurors with junk science (which is the ordinary claim that is made in support of reform in this area). There is a long history of interpreting and applying K.S.A. 60-456. Kansas judges and lawyers are familiar with this well-established body of law and few real problems are arising out of the interpretation and application of K.S.A. 60-456.

The so-called _Daubert_ language was not reviewed or recommended by the Kansas Judicial Council. If a change to the Kansas evidence code of this magnitude is contemplated, it should first be referred to the Kansas Judicial Council for its consideration and evaluation.

K.S.A. 60-208 contains the general rules of pleadings. Subsection (a) deals specifically with claims for relief and provides, in part, that:

> Every pleading demanding relief for damages in money in excess of \$50,000, without demanding any specific amount of money, shall set forth only that the amount sought as damages is in excess of \$50,000, except in actions sounding in contract. Every pleading demanding relief for damages in money in an amount of \$50,000 or less shall specify the amount of such damages sought to be recovered. Relief in the alternative or of several different types may be demanded.

The foregoing "$50,000" references (as well as the $50,000 reference in K.S.A. 60-254[c]) have historically been keyed or tied to the amount that must be controversy in order to remove a case from state to federal court on "diversity" jurisdiction. For example, when the diversity limit was raised from $10,000 to $50,000 by Congress in 1989, K.S.A. §§ 60-208 and -254 were amended in 1990 to substitute $50,000 for $10,000. See L. 1990, ch. 203.

Again, the *Daubert* language should be deleted from HB 2007. Thank you for the opportunity to be heard on this important bill. I am happy to respond to your questions or requests for additional information.