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### MEMORANDUM

**TO:** Senate Judiciary Committee  
**FROM:** Kansas Judicial Council – Prof. James M. Concannon  
**DATE:** March 2, 2012  
**RE:** Judicial Council Testimony on 2012 HB 2473 Relating to Amendments to the Code of Civil Procedure

#### Introduction

The Kansas Code of Civil Procedure, effective January 1, 1964, was originally proposed by a Judicial Council Advisory Committee. The Kansas Code was patterned after the Federal Rules of Civil Procedure, and the Advisory Committee noted at the time the many benefits of conformity with the Federal Rules. One of the benefits is 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.

The Judicial Council Civil Code Advisory Committee regularly reviews amendments to the federal rules and makes recommendations concerning whether the amendments should be adopted in the Kansas Code. Most recently, the Committee completed a large study that resulted in HB 2656, which the Legislature passed in 2010.

The latest amendments to the Federal Rules of Civil Procedure became effective December 1, 2010. The Civil Code Advisory Committee has reviewed the federal amendments and recommends amendments to K.S.A. 60-208 and K.S.A. 60-226. The Judicial Council approved the Committee's recommendation and requested introduction of HB 2473.

A list of the members of the Judicial Council Civil Code Advisory Committee is attached to this testimony.

## **HB 2473, Section 1 – Amending K.S.A. 60-208**

The Civil Code Advisory Committee recommends amending K.S.A. 60-208 to conform to the recent amendment to Federal Rule 8(c)(1), which deleted “discharge in bankruptcy” from the list of affirmative defenses a party must state in responding to a pleading. The Federal Advisory Committee Note states that it is confusing to describe discharge as an affirmative defense because 1) a discharge would void a judgment on a discharged debt, and 2) the discharge operates as an injunction against filing or continuing an action on a discharged debt. For these reasons, a valid defense that the debt has been discharged in bankruptcy is not waived if not asserted in a responsive pleading and should not be called an affirmative defense.

## **HB 2473, Section 2 – Amending K.S.A. 60-226**

Kansas has chosen not to conform K.S.A. 60-226 to some prior amendments to Federal Rule 26. Unlike the federal rule, the Kansas statute does not require initial disclosures and does not require retained or specially employed expert witnesses to provide a signed report. Because K.S.A. 60-226 is not identical to the federal rule, the most recent federal amendments cannot be incorporated in a way that exactly conforms to the federal rule. However, the Civil Code Advisory Committee agrees with the policy behind the federal amendments and recommends incorporating the amendments in K.S.A. 60-226 to the extent possible.

### Work-Product Protection Against Discovery

New subsections K.S.A. 60-226(b)(5)(B) and (C) are intended to provide work-product protection against discovery of draft disclosures and, with some exceptions, communications between an attorney and an expert witness.

The protection applies to attorney-expert communications whether the communication is oral, written, electronic, or otherwise. There are three exceptions to the protection: communications regarding the expert’s compensation; facts or data that the attorney provided to the expert and that were considered in forming the expert’s opinion; and assumptions the attorney provided, and the expert relied on, in forming the opinion.

This amendment will help to eliminate the sparring and unnecessary litigation that can ensue when a party attempts to delve into the records and files of another party’s expert witness to find out what the other party’s attorney might have said to the witness.

### House Amendment

The House amended Section 2 of the bill to clarify one of the new subsections, K.S.A. 60-226(b)(5)(B). The amendment expands the protection for drafts of disclosures required under K.S.A. 60-226(b)(6) to include a draft of a report provided by an expert witness in lieu of the required disclosures. The Judicial Council agrees with the House amendment.

### Expanded Disclosure Requirements

Federal Rule 26(a)(2)(C) has been amended to require more detailed disclosures about expert witnesses who are not “retained or specially employed” and not required to provide a written report. The Civil Code Advisory Committee recommends amending K.S.A. 60-226(b)(6)(A) and (B) to conform to the Federal Rule on this point, requiring for all expert witnesses — whether or not retained or specially employed to provide expert testimony — disclosure of the subject matter on which the expert is expected to testify and the substance of the facts and opinions to which the expert is expected to testify. Under the current Kansas statute, the required disclosure regarding a nonretained expert is limited to disclosing the expert’s name. Disclosure of the grounds for each opinion would still be required only if the expert is retained or specially employed.

**The members of the Judicial Council Civil Code Advisory Committee are:**

**J. Nick Badgerow**, Chairman, practicing attorney in Overland Park; member of the Kansas Judicial Council

**James M. Armstrong**, practicing attorney in Wichita

**Hon. Terry L. Bullock**, retired District Court Judge, Topeka

**Prof. James M. Concannon**, Distinguished Professor of Law at Washburn University School of Law

**Hon. Bruce T. Gatterman**, Chief Judge in 24<sup>th</sup> Judicial District, Larned

**Allen G. Glendenning**, practicing attorney in Great Bend

**John L. Hampton**, practicing attorney in Lawrence

**Hon. Marla L. Luckert**, Kansas Supreme Court, Topeka

**Hon. Kevin P. Moriarty**, District Court Judge in 10<sup>th</sup> Judicial District, Olathe

**Thomas A. Valentine**, practicing attorney, Topeka

**Donald W. Vasos**, practicing attorney, Fairway