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February 3, 2015

Honorable John Barker, Chairperson
House Committee on Judiciary Statehouse
Room 149-S
Topeka, Kansas 66612

RE: Business Records Subpoena House Bill

Dear Honorable Barker:

My case dealt with a pending divorce action in the District Court of Johnson County, Kansas. Through discovery, wife's counsel obtained copies of husband's bank statements and canceled checks. In reviewing those documents, they found checks made payable to a woman who wife believed husband was having an affair with. Having the person's name, wife's attorney filed their Notice of Intent to Issue a Business Record Subpoena to the bank of the female in question. The Notice was only sent to husband's attorney in accordance with the provisions of K.S.A. 60-245(a). K.S.A. 60-245(a) states in relevant part as follows:

"Any party may request production of business records from a nonparty by causing to be issued a nonparty business records subpoena pursuant to this section. The subpoena must inform the person to whom it is directed that the person may serve on the party or attorney designated in the subpoena written objection to production of any or all of the business records designated in the subpoena within the earlier of the time specified for compliance or 14 days after the subpoena is served. If such an objection is made, the business records need not be produced unless ordered by the court on motion, with notice to the person to whom the subpoena was directed."

In response, I filed a Motion to Quash Issuance of the Business Records Subpoena. In response to my Motion to Quash, wife's attorney filed their responsive pleading. In wife's responsive pleading, wife took the position that they had complied with the provisions of 60-245(a). Specifically, wife's responsive pleading stated:

"Respondent seems to misunderstand the Notice of Intent to Issue Business Records Subpoena that was served upon his counsel on August 1, 2014. K.S.A. 60-245(a)(b)(1)(A) requires Notice of Intent to be sent to all parties not less than 14 days prior to the issuance of the subpoena. Petitioner complied by sending her Notice of Intent to Respondent's counsel. Petitioner has no obligation to notify any non-party of her intent to issue a subpoena prior to issuance, as the required notification to non-parties is to be included in a subpoena itself, pursuant to K.S.A. 60-245(a)(b).

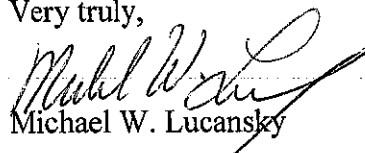
Petitioner never suggested that Respondent has a duty to inform any non-parties of the request contained within the proposed subpoena. Petitioner was simply complying with the notice provisions of the statute. Had Respondent not objected to the issuance of subpoena, the subpoena would have been issued after the 14 day period had lapsed and Metcalf Bank, the non-party to whom the subpoena was directed, would have been served with the attached subpoena, fully advising the bank of its right to object to the production of records."

Clearly, it was wife's position that they only had to provide notice of the intent to issue the business records subpoena for a non-party's banking records to Respondent's counsel. Further, it was wife's counsel's belief that the subpoena that would have ultimately been issued to Metcalf Bank would have allowed Metcalf Bank to file an objection to the requested documents. Metcalf Bank would have no reason to object to producing the banking records of one of their customers. As a result, the banking records of the female in question would have been produced, without her being notified and thereby, depriving her of her due process right to object to the production of her banking records in a case that did not involve her.

This matter was taken up before a judge of the District Court of Johnson County, Kansas, and after hearing statements of counsel, the court ordered the subpoena as issued to be quashed and ruled that wife's counsel would have to re-issue the Notice of Intent to Issue Business Records Subpoena with notification going to the female whose banking records were going to be subpoenaed. The trial judge felt that the statutory language was insufficient to protect the non-parties' due process rights.

It is clear that the statute needs to be amended to include appropriate language to protect a non-party from having their personal records subpoenaed and produced in a case that they are not even a party to. Literally, as written, anybody could have their personal banking records subpoenaed without their knowledge. As in our case, someone going through someone's banking records could start pulling out checks written to certain individuals and issuing business records subpoenas to those persons banks. I do not think the drafters of 60-245(a) intended this result. It is a result that can easily be rectified with the statutory language that is being proposed.

Very truly,


Michael W. Lucansky

MWL/rdp