



KANSAS JUDICIAL COUNCIL

CHIEF JUSTICE LAWTON R. NUSS, CHAIR, SALINA
JUDGE STEPHEN D. HILL, PAOLA
JUDGE ROBERT J. FLEMING, PARSONS
JUDGE MARITZA SEGARRA, JUNCTION CITY
SEN. THOMAS C. (TIM) OWENS, OVERLAND PARK
REP. LANCE Y. KINZER, OLATHE
J. NICK BADGEROW, OVERLAND PARK
JOSEPH W. JETER, HAYS
STEPHEN E. ROBISON, WICHITA
SARAH B. SHATTUCK, ASHLAND

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

EXECUTIVE DIRECTOR
NANCY J. STROUSE
STAFF ATTORNEY
CHRISTY R. MOLZEN
ADMINISTRATIVE ASSISTANTS
JANELLE L. WILLIAMS
MARIAN L. CLINKENBEARD

MEMORANDUM

TO: House Judiciary Committee
FROM: Kansas Judicial Council – Prof. James M. Concannon
DATE: January 30, 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 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.

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.

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.

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 24th 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 10th Judicial District, Olathe

Thomas A. Valentine, practicing attorney, Topeka

Donald W. Vasos, practicing attorney, Fairway