

SENATE BILL No. 74

By Committee on Judiciary

1-20

1 AN ACT concerning the code of civil procedure; relating to litigation
2 funding by third parties; providing for joint liability for costs and
3 sanctions; requiring certain discovery disclosures; payment of certain
4 costs for nonparty subpoenas in third-party funded action; amending
5 K.S.A. 2022 Supp. 60-226 and 60-245 and repealing the existing
6 sections.

7

8 *Be it enacted by the Legislature of the State of Kansas:*

9 New Section 1. (a) Any person, other than an attorney permitted to
10 charge a contingent fee representing a party, that has a right to receive
11 compensation that is contingent on and sourced from any proceeds of that
12 civil action, by settlement, judgment or otherwise, is jointly liable for costs
13 assessed pursuant to K.S.A. 60-2002, and amendments thereto, or any
14 monetary sanction imposed pursuant to K.S.A. 60-211(c), 60-226(f)(3) or
15 60-237(d)(3), and amendments thereto, on the party with whom such
16 person has such an agreement.

17 (b) This section shall be a part of and supplemental to the Kansas
18 code of civil procedure.

19 Sec. 2. K.S.A. 2022 Supp. 60-226 is hereby amended to read as
20 follows: 60-226. (a) *Discovery methods.* Parties may obtain discovery by
21 one or more of the following methods: Depositions on oral examination or
22 written questions; written interrogatories; production of documents or
23 things or permission to enter onto land or other property under K.S.A. 60-
24 234, ~~K.S.A.~~ 60-245(a)(1)(A)(iii) or ~~K.S.A.~~ 60-245a, and amendments
25 thereto; physical and mental examinations; and requests for admission.

26 (b) *Discovery scope and limits.*

27 (1) *Scope in general.* Unless otherwise limited by court order, the
28 scope of discovery is as follows: Parties may obtain discovery regarding
29 any nonprivileged matter that is relevant to any party's claim or defense
30 and proportional to the needs of the case, considering the importance of
31 the issues at stake in the action, the amount in controversy, the parties'
32 relative access to relevant information, the parties' resources, the
33 importance of the discovery in resolving the issues and whether the burden
34 or expense of the proposed discovery outweighs its likely benefit.
35 Information within this scope of discovery need not be admissible in
36 evidence to be discoverable.

1 (2) *Limitations on frequency and extent.* (A) On motion, or on its
2 own, the court may limit the frequency or extent of discovery methods
3 otherwise allowed by the rules of civil procedure and must do so if it
4 determines that:

5 (i) The discovery sought is unreasonably cumulative or duplicative,
6 or can be obtained from some other source that is more convenient, less
7 burdensome or less expensive;

8 (ii) the party seeking discovery has had ample opportunity to obtain
9 the information by discovery in the action; or

10 (iii) the proposed discovery is outside the scope permitted by
11 subsection (b)(1).

12 (B) A party need not provide discovery of electronically stored
13 information from sources that the party identifies as not reasonably
14 accessible because of undue burden or cost. On motion to compel
15 discovery or for a protective order, the party from whom discovery is
16 sought must show that the information is not reasonably accessible
17 because of undue burden or cost. If that showing is made, the court may
18 nonetheless order discovery from such sources if the requesting party
19 shows good cause, considering the limitations of subsection (b)(2)(A). The
20 court may specify conditions for the discovery.

21 (3) *Agreements.*

22 (A) *Insurance agreements.* A party may obtain discovery of the
23 existence and contents of any insurance agreement under which an
24 insurance business may be liable to satisfy part or all of a possible
25 judgment in the action or to indemnify or reimburse for payments made to
26 satisfy the judgment. Information concerning the insurance agreement is
27 not by reason of disclosure admissible in evidence at trial. For purposes of
28 this paragraph, an application for insurance is not a part of an insurance
29 agreement.

30 (B) *Third-party agreements.* *Except as otherwise stipulated or*
31 *ordered by the court, a party shall, without awaiting a discovery request,*
32 *provide to the other parties any agreement under which any person, other*
33 *than an attorney permitted to charge a contingent fee representing a party,*
34 *has a right to receive compensation that is contingent on and sourced from*
35 *any proceeds of the civil action, by settlement, judgment or otherwise.*

36 (4) *Trial preparation; materials.*

37 (A) *Documents and tangible things.* Ordinarily, a party may not
38 discover documents and tangible things that are prepared in anticipation of
39 litigation or for trial by or for another party or its representative, including
40 the other party's attorney, consultant, surety, indemnitor, insurer or agent.
41 But, subject to subsection (b)(5), those materials may be discovered if:

42 (i) They are otherwise discoverable under paragraph (1); and

43 (ii) the party shows that it has substantial need for the materials to

1 prepare its case and cannot, without undue hardship, obtain their
2 substantial equivalent by other means.

3 (B) *Protection against disclosure.* If the court orders discovery of
4 those materials, it must protect against disclosure of the mental
5 impressions, conclusions, opinions or legal theories of a party's attorney or
6 other representative concerning the litigation.

7 (C) *Previous statement.* Any party or other person may, on request
8 and without the required showing, obtain the person's own previous
9 statement about the action or its subject matter. If the request is refused,
10 the person may move for a court order, and K.S.A. 60-237, and
11 amendments thereto, applies to the award of expenses. A previous
12 statement is either:

13 (i) A written statement that the person has signed or otherwise
14 adopted or approved; or

15 (ii) a contemporaneous stenographic, mechanical, electrical or other
16 recording, or a transcription of it, that recites substantially verbatim the
17 person's oral statement.

18 (5) *Trial preparation; experts.*

19 (A) *Deposition of an expert who may testify.* A party may depose any
20 person who has been identified as an expert whose opinions may be
21 presented at trial. If a disclosure is required under subsection (b)(6), the
22 deposition may be conducted only after the disclosure is provided.

23 (B) *Trial-preparation protection for draft disclosures.* Subsections (b)
24 (4)(A) and (b)(4)(B) protect drafts of any disclosure required under
25 subsection (b)(6), and drafts of a disclosure by an expert witness provided
26 in lieu of the disclosure required by subsection (b)(6), regardless of the
27 form in which the draft is recorded.

28 (C) *Trial-preparation protection for communications between a
29 party's attorney and expert witnesses.* Subsections (b)(4)(A) and (b)(4)(B)
30 protect communications between the party's attorney and any witness
31 about whom disclosure is required under subsection (b)(6), regardless of
32 the form of the communications, except to the extent that the
33 communications:

34 (i) Relate to compensation for the expert's study or testimony;

35 (ii) identify facts or data that the party's attorney provided and that
36 the expert considered in forming the opinions to be expressed; or

37 (iii) identify assumptions that the party's attorney provided and that
38 the expert relied on in forming the opinions to be expressed.

39 (D) *Expert employed only for trial preparation.* Ordinarily, a party
40 may not, by interrogatories or deposition, discover facts known or
41 opinions held by an expert who has been retained or specially employed
42 by another party in anticipation of litigation or to prepare for trial and who
43 is not expected to be called as a witness at trial. But a party may do so

1 only:

2 (i) As provided in K.S.A. 60-235(b), and amendments thereto; or

3 (ii) on showing exceptional circumstances under which it is
4 impracticable for the party to obtain facts or opinions on the same subject
5 by other means.

6 (E) *Payment*. Unless manifest injustice would result, the court must
7 require that the party seeking discovery:

8 (i) Pay the expert a reasonable fee for time spent in responding to
9 discovery under subsection (b)(5)(A) or (b)(5)(D); and

10 (ii) for discovery under subsection (b)(5)(D), also pay the other party
11 a fair portion of the fees and expenses it reasonably incurred in obtaining
12 the expert's facts and opinions.

13 (6) *Disclosure of expert testimony*.

14 (A) *Required disclosures*. A party must disclose to other parties the
15 identity of any witness it may use at trial to present expert testimony. The
16 disclosure must state:

17 (i) The subject matter on which the expert is expected to testify; and

18 (ii) the substance of the facts and opinions to which the expert is
19 expected to testify.

20 (B) *Witness who is retained or specially employed*. Unless otherwise
21 stipulated or ordered by the court, if the witness is retained or specially
22 employed to provide expert testimony in the case, or is one whose duties
23 as the party's employee regularly involve giving expert testimony, the
24 disclosure under subsection (b)(6)(A) must also state a summary of the
25 grounds for each opinion.

26 (C) *Time to disclose expert testimony*. A party must make these
27 disclosures at the times and in the sequence that the court orders. Absent a
28 stipulation or court order, the disclosures must be made:

29 (i) At least 90 days before the date set for trial or for the case to be
30 ready for trial; or

31 (ii) if the evidence is intended solely to contradict or rebut evidence
32 on the same subject matter identified by another party under subsection (b)
33 (6)(B), within 30 days after the other party's disclosure.

34 (D) *Supplementing the disclosure*. The parties must supplement these
35 disclosures when required under subsection (e).

36 (E) *Form of disclosures*. Unless otherwise ordered by the court, all
37 disclosures under this subsection must be:

38 (i) In writing, signed and served; and

39 (ii) filed with the court in accordance with K.S.A. 60-205(d), and
40 amendments thereto.

41 (7) *Claiming privilege or protecting trial preparation materials*.

42 (A) *Information withheld*. When a party withholds information
43 otherwise discoverable by claiming that the information is privileged or

1 subject to protection as trial preparation material, the party must:

2 (i) Expressly make the claim; and

3 (ii) describe the nature of the documents, communications or things
4 not produced or disclosed, and do so in a manner that, without revealing
5 information itself privileged or protected, will enable other parties to
6 assess the claim.

7 (B) *Information produced.* If information produced in discovery is
8 subject to a claim of privilege or of protection as trial preparation material,
9 the party making the claim may notify any party that received the
10 information of the claim and the basis for it. After being notified, a party
11 must promptly return, sequester or destroy the specified information and
12 any copies it has; must not use or disclose the information until the claim
13 is resolved; must take reasonable steps to retrieve the information if the
14 party disclosed it before being notified; and may promptly present the
15 information to the court under seal for a determination of the claim. The
16 producing party must preserve the information until the claim is resolved.

17 (c) *Protective orders.*

18 (1) *In general.* A party or any person from whom discovery is sought
19 may move for a protective order in the court where the action is pending,
20 as an alternative on matters relating to a deposition, in the district court
21 where the deposition will be taken. The motion must include a certification
22 that the movant has in good faith conferred or attempted to confer with
23 other affected parties in an effort to resolve the dispute without court
24 action and must describe the steps taken by all attorneys or unrepresented
25 parties to resolve the issues in dispute. The court may, for good cause,
26 issue an order to protect a party or person from annoyance,
27 embarrassment, oppression or undue burden or expense, including one or
28 more of the following:

29 (A) Forbidding the disclosure or discovery;

30 (B) specifying terms, including time and place or the allocation of
31 expenses, for the disclosure or discovery;

32 (C) prescribing a discovery method other than the one selected by the
33 party seeking discovery;

34 (D) forbidding inquiry into certain matters, or limiting the scope of
35 disclosure or discovery to certain matters;

36 (E) designating the persons who may be present while the discovery
37 is conducted;

38 (F) requiring that a deposition be sealed and opened only on court
39 order;

40 (G) requiring that a trade secret or other confidential research,
41 development or commercial information not be revealed or be revealed
42 only in a specified way; and

43 (H) requiring that the parties simultaneously file specified documents

1 or information in sealed envelopes, to be opened as the court orders.

2 (2) *Ordering discovery.* If a motion for a protective order is wholly or
3 partly denied the court may, on just terms, order that any party or person
4 provide or permit discovery.

5 (3) *Awarding expenses.* The provisions of K.S.A. 60-237, and
6 amendments thereto, apply to the award of expenses.

7 (d) *Sequence of discovery.* Unless the parties stipulate or the court
8 orders otherwise for the parties' and witnesses' convenience and in the
9 interests of justice:

10 (1) Methods of discovery may be used in any sequence; and

11 (2) discovery by one party does not require any other party to delay
12 its discovery.

13 (e) *Supplementing disclosures and responses.*

14 (1) *In general.* A party who has made a disclosure under subsection
15 (b)(6), or who has responded to an interrogatory, request for production or
16 request for admission, must supplement or correct its disclosure or
17 response:

18 (A) In a timely manner if the party learns that in some material
19 respect the disclosure or response is incomplete or incorrect, and if the
20 additional or corrective information has not otherwise been made known
21 to the other parties during the discovery process or in writing; or

22 (B) as ordered by the court.

23 (2) *Expert witness.* For an expert to whom the disclosure requirement
24 in subsection (b)(6) applies, the party's duty to supplement extends both to
25 information included in the disclosure and to information given during the
26 expert's deposition. Any additions or changes to this information must be
27 disclosed at least 30 days before trial, unless the court orders otherwise.

28 (f) *Signing disclosures and discovery requests, responses and
29 objections.*

30 (1) *Signature required; effect of signature.* Every disclosure under
31 subsection (b)(6) and every discovery request, response or objection must
32 be signed by at least one attorney of record in the attorney's own name, or
33 by the party personally, if unrepresented, and must state the signor's
34 address, e-mail address and telephone number. By signing, an attorney or
35 party certifies that to the best of the person's knowledge, information and
36 belief formed after a reasonable inquiry:

37 (A) With respect to a disclosure, it is complete and correct as of the
38 time it is made;

39 (B) with respect to a discovery request, response or objection, it is:

40 (i) Consistent with the rules of civil procedure and warranted by
41 existing law or by a nonfrivolous argument for extending, modifying or
42 reversing existing law or for establishing new law;

43 (ii) not interposed for any improper purpose, such as to harass, cause

1 unnecessary delay or needlessly increase the cost of litigation; and

2 (iii) neither unreasonable nor unduly burdensome or expensive
3 considering the needs of the case, prior discovery in the case, the amount
4 in controversy and the importance of the issues at stake in the action.

5 (2) *Failure to sign.* Other parties have no duty to act on an unsigned
6 disclosure, request, response or objection until it is signed, and the court
7 must strike it unless a signature is promptly supplied after the omission is
8 called to the attorney's or party's attention.

9 (3) *Sanction for improper certification.* If a certification violates this
10 section without substantial justification, the court, on motion, or on its
11 own, must impose an appropriate sanction on the signer, the party on
12 whose behalf the signer was acting, or both. The sanction may include an
13 order to pay the reasonable expenses, including attorney's fees, caused by
14 the violation.

15 Sec. 3. K.S.A. 2022 Supp. 60-245 is hereby amended to read as
16 follows: 60-245. (a) *In general.*

17 (1) *Form and contents.*

18 (A) *Requirements; in general.* Every subpoena must:

19 (i) State the court from which it is issued;

20 (ii) state the title of the action, the court in which it is pending and the
21 file number of the action;

22 (iii) command each person to whom it is directed to do the following
23 at a specified time and place: Attend and testify; produce designated
24 documents, electronically stored information or tangible things in that
25 person's possession, custody or control; or permit the inspection of
26 premises; and

27 (iv) set out the text of subsections (c) and (d).

28 (B) *Command to attend a deposition; notice of the recording method.*

29 A subpoena commanding attendance at a deposition must state the method
30 for recording the testimony.

31 (C) *Combining or separating a command to produce or to permit
32 inspection; specifying the form for electronically stored information.* A
33 command to produce documents, electronically stored information or
34 tangible things or to permit the inspection of premises may be included in
35 a subpoena commanding attendance at a deposition, hearing or trial, or
36 may be set out in a separate subpoena. A subpoena may specify the form or
37 forms in which electronically stored information is to be produced.
38 Subpoena and production of records of a business that is not a party may
39 be in accordance with K.S.A. 60-245a, and amendments thereto.

40 (D) *Command to produce; included obligations.* A command in a
41 subpoena to produce documents, electronically stored information or
42 tangible things requires the responding party to permit inspection, copying,
43 testing or sampling of the materials.

1 (2) *Issued from which court.* A subpoena must issue as follows:

2 (A) For attendance at a hearing or trial, from the court where the
3 hearing or trial is to be held;

4 (B) for attendance at a deposition, from the court ~~in which~~ *where* the
5 action is pending or from the officer before whom the deposition is to be
6 taken, or, if the deposition is to be taken outside this state, from an officer
7 authorized by the law of the other state to issue the subpoena; and

8 (C) for production or inspection, if separate from a subpoena
9 commanding a person's attendance, from the court ~~in which~~ *where* the
10 action is pending, or, if the production, inspection, copying, testing or
11 sampling is to be made outside this state, from an officer authorized by the
12 law of the other state to issue the subpoena.

13 (3) *Issued by whom.* Every subpoena issued by the court must be
14 issued by the clerk under the seal of the court or by a judge. The clerk
15 must issue a subpoena, signed but otherwise in blank, to a party who
16 requests it. The blank subpoena must bear the seal of the court and the
17 clerk's signature. The party to whom a blank subpoena is issued must fill it
18 in before service.

19 (b) *Service.* Service of a subpoena may be made anywhere within this
20 state, must be made in accordance with K.S.A. 60-303, and amendments
21 thereto, and must, if the subpoena requires a person's attendance, be
22 accompanied by the fees for one day's attendance and the mileage allowed
23 by law. If, independently of a deposition, the subpoena commands the
24 production of documents, electronically stored information or tangible
25 things or the inspection of premises before trial, then before it is served, a
26 notice must be served on each party in accordance with ~~subsection (b) of~~
27 K.S.A. 60-205(b), and amendments thereto.

28 (c) *Protecting a person subject to a subpoena.*

29 (1) *Avoiding undue burden or expense; sanctions.* A party or attorney
30 responsible for issuing and serving a subpoena must take reasonable steps
31 to avoid imposing undue burden or expense on a person subject to the
32 subpoena. The issuing court must enforce this duty and impose an
33 appropriate sanction, which may include lost earnings and reasonable
34 attorney's fees, on a party or attorney who fails to comply.

35 (2) *Command to produce materials or permit inspection.*

36 (A) *Appearance not required.* A person commanded to produce
37 designated documents, electronically stored information or tangible things,
38 or to permit the inspection of premises, need not appear in person at the
39 place of production or inspection unless also commanded to appear for a
40 deposition, hearing or trial.

41 (B) *Objections.* A person commanded to produce designated materials
42 or to permit inspection may serve on the party or attorney designated in the
43 subpoena a written objection to inspecting, copying, testing or sampling

1 any or all of the designated materials or to inspecting the premises, or to
2 producing electronically stored information in the form or forms
3 requested. The objection must be served before the earlier of the time
4 specified for compliance or 14 days after the subpoena is served. If an
5 objection is made, the following rules apply:

6 (i) At any time, on notice to the commanded person, the serving party
7 may move the issuing court for an order compelling production or
8 inspection; and

9 (ii) these acts may be required only as directed in the order, and the
10 order must protect a person who is neither a party nor a party's officer
11 from significant expense resulting from compliance.

12 (3) *Quashing or modifying a subpoena.*

13 (A) *When required.* On timely motion, the issuing court must quash
14 or modify a subpoena that:

15 (i) Fails to allow a reasonable time to comply;

16 (ii) requires a resident of this state who is neither a party nor a party's
17 officer to travel more than 100 miles from where that person resides, is
18 employed or regularly transacts business in person or requires a
19 nonresident who is neither a party nor a party's officer to travel more than
20 100 miles from where the nonresident was served with the subpoena, is
21 employed or regularly transacts business in person, except that, subject to
22 paragraph (3)(B)(iii), the person may be commanded to travel to the place
23 of trial;

24 (iii) requires disclosure of privileged or other protected matter, if no
25 exception or waiver applies; or

26 (iv) subjects a person to undue burden.

27 (B) *When permitted.* To protect a person subject to or affected by a
28 subpoena, the issuing court may, on motion, quash or modify the subpoena
29 if it requires:

30 (i) Disclosing a trade secret or other confidential research
31 development or commercial information;

32 (ii) disclosing an unretained expert's opinion or information that does
33 not describe specific occurrences in dispute and results from the expert's
34 study that was not requested by a party; or

35 (iii) a person who is neither a party nor a party's officer to incur
36 substantial expense to travel more than 100 miles to attend trial.

37 (C) *Specifying conditions as an alternative.* In the circumstances
38 described in subsection (c)(3)(B), the court may, instead of quashing or
39 modifying a subpoena, order appearance or production under specified
40 conditions as the serving party:

41 (i) Shows a substantial need for the testimony or material that cannot
42 be otherwise met without undue hardship; and

43 (ii) ensures that the subpoenaed person will be reasonably

1 compensated.

2 (4) *Nonparty subpoenas in third-party funded action.* A party that has
3 entered into an agreement subject to K.S.A. 60-226(b)(3)(B), and
4 amendments thereto, shall reasonably compensate a person who is neither
5 a party nor a party's officer the cost of responding to a subpoena to
6 produce designated documents, electronically stored information or
7 tangible things, to permit the inspection of premises or to appear at a
8 deposition. Reasonable costs incurred include, but are not limited to:

9 (A) *Costs incurred in identifying, collecting, reviewing and producing*
10 *the designated materials;*

11 (B) *the measurable cost of disruption to the nonparty's normal*
12 *business operations;*

13 (C) *costs of travel to appear at a deposition; and*

14 (D) *fees charged by outside counsel directly related to compliance*
15 *with the subpoena.*

16 (5) *Person in prison.* A person confined in prison may be required to
17 appear for examination by deposition only in the county where the person
18 is imprisoned.

19 (d) *Duties in responding to a subpoena.*

20 (1) *Producing documents or electronically stored information.* These
21 procedures apply to producing documents or electronically stored
22 information:

23 (A) *Documents.* A person responding to a subpoena to produce
24 documents must produce them as they are kept in the ordinary course of
25 business or must organize and label them to correspond to the categories in
26 the demand.

27 (B) *Form for producing electronically stored information not*
28 *specified.* If a subpoena does not specify a form for producing
29 electronically stored information, a person responding to a subpoena must
30 produce it in a form or forms in which it is ordinarily maintained or in a
31 reasonably usable form or forms.

32 (C) *Electronically stored information produced in only one form.* The
33 person responding need not produce the same electronically stored
34 information in more than one form.

35 (D) *Inaccessible electronically stored information.* The person
36 responding need not provide discovery of electronically stored information
37 from sources that the person identifies as not reasonably accessible
38 because of undue burden or cost. On motion to compel discovery or for a
39 protective order, the person responding must show that the information is
40 not reasonably accessible because of undue burden or cost. If that showing
41 is made, the court may nonetheless order discovery from such sources if
42 the requesting party shows good cause, considering the limitations of
43 ~~subsection (b)(2)(A) of K.S.A. 60-226(b)(2)(A), and amendments thereto.~~

1 The court may specify conditions for the discovery.

2 (2) *Claiming privilege or protection.*

3 (A) *Information withheld.* A person withholding subpoenaed
4 information under a claim that it is privileged or subject to protection as
5 trial-preparation material must:

6 (i) Expressly make the claim; and

7 (ii) describe the nature of the withheld documents, communications
8 or things in a manner that, without revealing information itself privileged
9 or protected, will enable the parties to assess the claim.

10 (B) *Information produced.* If information produced in response to a
11 subpoena is subject to a claim of privilege or of protection as trial-
12 preparation material, the person making the claim may notify any party
13 that received the information of the claim and the basis for it. After being
14 notified, a party must promptly return, sequester or destroy the specified
15 information and any copies it has; must not use or disclose the information
16 until the claim is resolved; must take reasonable steps to retrieve the
17 information if the party disclosed it before being notified; and may
18 promptly present the information to the court under seal for a
19 determination of the claim. The person who produced the information
20 must preserve the information until the claim is resolved.

21 (e) *Contempt.* The issuing court may hold in contempt a person who,
22 having been served, fails without adequate excuse to obey the subpoena.
23 Punishment for contempt should be in accordance with K.S.A. 20-1204,
24 and amendments thereto. A nonparty's failure to obey must be excused if
25 the subpoena purports to require the nonparty to attend or produce at a
26 place outside the limits of subsection (c)(3)(A)(ii).

27 Sec. 4. K.S.A. 2022 Supp. 60-226 and 60-245 are hereby repealed.

28 Sec. 5. This act shall take effect and be in force from and after its
29 publication in the statute book.