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MEMORANDUM

TO: **Senate Judiciary Committee**
FROM: **Kansas Judicial Council – Professor James M. Concannon**
DATE: **January 24, 2017**
RE: **Judicial Council Testimony on 2017 SB 13 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. The latest amendments to the federal rules of civil procedure became effective December 1, 2015 and December 1, 2016. The Civil Code Advisory Committee reviewed the federal amendments and recommends amending K.S.A. 60-106, 60-216, 60-226, 60-230, 60-231, 60-237, and 60-255, and repealing K.S.A. 60-268. The Judicial Council approved the Committee's recommendations and requested introduction of SB 13.

The following pages contain the Civil Code Advisory Committee's comments to the amendments in each section of the bill. These comments were drawn from the federal comments with slight modifications to reflect differences between the federal rules and the Kansas code.

SB 13, Section 1 – Amending K.S.A. 60-102

K.S.A. 60-102 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.

SB 13, Section 2 – Amending K.S.A. 60-206

K.S.A. 60-206(d) is amended to remove service by telefacsimile communication and electronic means under K.S.A. 60-205(b)(2)(E) and (F) from the modes of service that allow 3 added days to act after being served. K.S.A. 60-205(b) is different from Federal Rule 5(b) in that the federal rule does not list service by telefacsimile and has a subsection for service by "other means consented to." The Committee believes that service by telefacsimile is a form of service by electronic means, and the reasons to disallow the extra 3 days for electronic service are equally applicable to service by fax.

When electronic forms of service were added to the statute, there were concerns that transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. These concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

Diminution of the concerns that prompted the decision to allow the 3 added days for fax and electronic transmission is not the only reason for discarding this indulgence. Many statutes have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

A potential ambiguity was created by 2010 amendments which substituted "after service" for the earlier references to acting after service "upon such party" if a paper or notice "is served upon such party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party that is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the statute, something that was never intended by the original statute or the amendment. Statutes setting a time to act after making service include K.S.A. 60-214(a)(1), 60-215(a)(1)(A), and 60-238(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

SB 13, Section 3 – Amending K.S.A. 60-216

K.S.A. 60-216 is slightly different from Federal Rule 16. The differences are mainly in terminology, as similar issues are handled in Kansas case management conferences that are covered under the federal rules in pretrial conferences.

Matters on which the court must take appropriate action at a case management conference are identified in K.S.A. 60-216(b)(1). Subsection (b)(1)(E) is amended to provide for consideration of preservation of electronically stored information, recognizing that a duty to preserve discoverable information may arise before an action is filed.

K.S.A. 60-216(b)(1)(F) is amended to include agreements incorporated in a court order under K.S.A. 60-426a controlling the effects of disclosure of information covered by attorney-client privilege.

SB 13, Section 4 – Amending K.S.A. 60-226

Information is discoverable under revised K.S.A. 60-226(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present subsection (b)(2)(A)(iii) because they are more accurately an integral part of determining the scope of discovery. This change is not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

A portion of present subsection (b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present provision adds: "including the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the statute with these examples. The discovery identified in these examples should still be permitted under the revised subsection when relevant and proportional to the needs of the case.

Federal Rule 26(b)(1) has been amended to delete the ability of the court, for good cause, to order discovery of "any matter relevant to the subject matter involved in the action." Currently, K.S.A. 60-226(b)(1) extends the scope of discovery to any matter relevant to the subject matter, without the need for a court order for good cause, as was the federal rule before its 2000 amendment, which Kansas has not yet adopted. That language is now deleted. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted and is replaced by a more direct statement. Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

K.S.A. 60-226(b)(2)(A)(3) is amended to reflect the transfer of the considerations that bear on proportionality to current subsection (b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by subsection (b)(1).

K.S.A. 60-226(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present statute, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the cost of responding.

K.S.A. 60-226(d) is amended to recognize that the parties may stipulate to case-specific sequences of discovery.

SB 13, Sections 5 and 6 – Amending K.S.A. 60-230 and 60-231

K.S.A. 60-230 and 60-231 are amended in parallel with K.S.A. 60-231 to reflect the recognition of proportionality in K.S.A. 60-226(b)(1).

SB 13, Section 7 – Amending K.S.A. 60-234

K.S.A. 60-234(b)(2)(B) is amended to require that objections to requests under the statute be stated with specificity. This provision adopts the language of K.S.A. 60-233(b)(4), eliminating any doubt that less specific objections might be suitable.

K.S.A. 60-234(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection.

K.S.A. 60-234(b)(2)(C) is amended to provide that an objection to a request under the statute must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objection.

SB 13, Section 8 – Amending K.S.A. 60-237

K.S.A. 60-237(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings subparagraph (iv) into line with paragraph (B), which provides a motion for an order compelling "production or inspection."

The language stricken in K.S.A. 60-237(e) was added in 2010 and has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of electronically stored information. In federal courts, variations in standards for imposing sanctions or curative measures on parties that fail to preserve electronically stored information have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

The new language in K.S.A. 60-237(e) authorizes and specifies measures a court may employ if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it.

A court may resort to measures under subsection (e)(1) only upon finding prejudice to another party from loss of the information. Once a finding of prejudice from loss of the information is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The severity of given measures must be calibrated in terms of their effect on the particular case. Much is entrusted to the court's discretion.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the

party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Courts should exercise caution in using the measures specified in subsection (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subsection (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subsection should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subsection (e)(1) would be sufficient to redress the loss.

SB 13, Section 9 – Amending K.S.A. 60-255

K.S.A. 60-255(b) is amended to make plain the interplay between K.S.A. 60-254(b), 60-255(b), and 60-260(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under K.S.A. 60-254(b). Until final judgment is entered, K.S.A. 60-254(b) allows revision of the default judgment at any time. The demanding standards set by K.S.A. 60-260(b) apply only in seeking relief from a final judgment.

SB 13, Repealing K.S.A. 60-268

K.S.A. 60-268 is deleted to conform with the deletion of Federal Rule 84. The federal comments note that the purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. They also noted that there are many excellent alternative sources for forms. The deletion of this statute is not intended to imply that the forms are deficient or that forms shouldn't be used. The amendment is consistent with the long-standing philosophy that the Kansas code should conform with the federal rules unless there is something unique to Kansas law or practice that warrants deviation from the rules.

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

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