SENATE BILL No. 434

AN ACT relating to civil procedure; concerning certain rules of procedure; amending K.S.A. 60-216, 60-226, 60-233, 60-234, 60-237 and 60-245 and repealing the existing sections.

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

Section 1. K.S.A. 60-216 is hereby amended to read as follows: 60-216. (a) *Pretrial conferences; objectives.* In any action, the court shall on the request of either party, or may in its discretion without such request, direct the attorneys for the parties to appear before it for a conference or conferences before trial to expedite processing and disposition of the litigation, minimize expense and conserve time.

(b) *Case management conference.* In any action, the court shall on the request of either party, or may in its discretion without such request, conduct a case management conference with counsel and any unrepresented parties. The conference shall be scheduled by the court as soon as possible and shall be conducted within 45 days of the filing of an answer. However, in the discretion of the court, the time for the conference may be extended or reduced to meet the needs of the individual case.

At any conference under this subsection consideration shall be given, and the court shall take appropriate action, with respect to:

(1) Identifying the issues and exploring the possibilities of stipulations and settlement;

(2) whether the action is suitable for alternative dispute resolution;

(3) exchanging information on the issues of the case, including key documents and witness identification;

(4) establishing a plan and schedule for discovery, including setting limitations on discovery, if any, designating the time and place of discovery, restricting discovery to certain designated witnesses or requiring statements be taken in writing or by use of electronic recording rather than by stenographic transcription;

(5) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(6) any issues relating to claims of privilege or of protection as trial-preparation material, including, if the parties agree on a procedure to assert such claims after production, whether to ask the court to include their agreement in an order;

~~(5)~~ *(7)* requiring completion of discovery within a definite number of days after the conference has been conducted;

~~(6)~~ *(8)* setting deadlines for filing motions, joining parties and amendments to the pleadings;

~~(7)~~ *(9)* setting the date or dates for conferences before trial, a final pretrial conference, and trial; and

~~(8)~~ *(10)* such other matters as are necessary for the proper management of the action.

If a case management conference is held, except as provided in subsection (a)(2)(B) of K.S.A. 60-230, and amendments thereto, no depositions, other than of the parties to the action, shall be taken until after the conference is held, except by agreement of the parties or order of the court. If the case management conference is not held within 45 days of the filing of an answer, the restrictions of this paragraph shall no longer apply.

If discovery cannot be completed within the period of time originally prescribed by the court, the party not able to complete discovery shall file a motion prior to the expiration of the original period for additional time to complete discovery. Such motion shall contain a discovery plan and shall set forth the reason why discovery cannot be completed within the original period. If additional time is allowed, the court shall grant only that amount of time reasonably necessary to complete discovery.

(c) *Subjects for consideration at pretrial conferences.* At any pretrial conference consideration may be given, and the court may take appropriate action, with respect to:

(1) The simplification of the issues;

(2) the determination of issues of law which may eliminate or affect the trial of issues of fact;

(3) the necessity or desirability of amendments to the pleadings;

(4) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(5) the limitation of the number of expert witnesses;

(6) the advisability of a preliminary reference of issues to a master; and

(7) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

In the discretion of the court, any pretrial conference may be held by a telephone conference call.

(d) *Final pretrial conference.* In any action, the court shall on the request of either party, or may in its discretion without such request, conduct a final pretrial conference in accordance with procedures established by rule of the supreme court.

(e) *Pretrial orders.* After any conference held under this section, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only by agreement of the parties, or by the court to prevent manifest injustice.

(f) If a party or party's attorney fails to obey a pretrial order, if no appearance is made on behalf of a party at a pretrial conference, if a party or party's attorney is substantially unprepared to participate in the conference or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative and after opportunity to be heard, may make such orders with regard thereto as are just, and among others any of the orders provided in subsections (b)(2)(B), (C) and (D) of K.S.A. 60-237, and amendments thereto. In lieu of or in addition to any other sanction, the judge shall require the party or the party's attorney, or both, to pay the reasonable expenses incurred because of any noncompliance with this section, including attorney fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Sec. 2. K.S.A. 60-226 is hereby amended to read as follows: 60-226. (a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under K.S.A. 60-234, subsection (a)(1)(C) of K.S.A. 60-245 or 60-245a and amendments thereto, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) *Scope of discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) *In general:* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Except as permitted under subsection (b)(4), a party shall not require a deponent to produce, or submit for inspection, any writing prepared by, or under the supervision of, an attorney in preparation for trial.

(2) *Limitations. (A)* The frequency or extent of use of the discovery methods otherwise permitted under the rules of civil procedure shall be limited by the court only if it determines that: ~~(A)~~ *(i)* The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive; ~~(B)~~ *(ii)* the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or ~~(C)~~ *(iii)* the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the

importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subsection (c).

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

(3) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(4) *Trial preparation: Materials.* Subject to the provisions of subsection (b)(5), a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative,including such other party's attorney, consultant, surety, indemnitor, insuror or agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that such party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impression, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of K.S.A. 60-237, and amendments thereto, apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) *Trial preparation: Experts.* (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a disclosure from the expert is required under subsection (b)(6), the deposition shall not be conducted until after the disclosure is provided.

(B) A party, through interrogatories or by deposition, may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in K.S.A. 60-235, and amendments thereto, or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection; and (ii) with respect to discovery obtained under subsection (b)(5)(B) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) *Disclosure of expert testimony.*

(A) A party shall disclose to other parties the identity of any person who may be used at trial to present expert testimony.

(B) Except as otherwise stipulated or directed by the court, this disclosure, with respect to a witness (i) whose sole connection with the case is that the witness is retained or specially employed to provide expert testimony in the case or (ii) whose duties as an employee of the party regularly involve giving expert testimony, shall state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b)(6)(B), within 30 days after the disclosure made by the other party. The party shall supplement these disclosures when required under subsection (e)(1).

(D) Unless otherwise ordered by the court, all disclosures under this subsection shall be made in writing, signed and served. Such disclosures shall be filed with the court in accordance with subsection (d) of K.S.A. 60-205, and amendments thereto.

(7) Claims of Privilege or Protection of Trial-Preparation Materials. (A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including one or more of the following:

(1) That the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court, on such terms and conditions as are just, may order that any party or person provide or permit discovery. The provisions of K.S.A. 60-237,

and amendments thereto, apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and timing of discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who has made a disclosure under subsection (b)(6) or responded to a request for discovery is under a duty to supplement or correct the party's disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subsection (b)(6) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert under subsection (b)(6) the duty extends both to information contained in the disclosure and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed at least 30 days before trial, unless otherwise directed by the court.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) *Signing of disclosures, discovery requests, responses and objections.* (1) Every request for discovery or response or objection to discovery made by a party represented by an attorney shall be signed by at least one attorney of record in such attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response or objection and state such party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response or objection and that to the best of such attorney's or party's knowledge, information and belief formed after reasonable inquiry it is: (A) Consistent with the rules of civil procedure and warranted by existing law or good faith argument for the extension, modification or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues at stake in the litigation. If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party or person making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(2) Every disclosure made under subsection (b)(6) shall be signed by at least one attorney of record in the attorney's individual name whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(3) If, without substantial justification, a certification is made in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification or the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of reasonable expenses incurred because of the violation, including reasonable attorney fees.

Sec. 3. K.S.A. 60-233 is hereby amended to read as follows: 60-233. (a) *Availability; procedures for use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership, association

or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories, without leave of court, may be served upon the plaintiff after commencement of the action and upon any other party with or after service of process upon that party.

(b) *Answers and objections.* (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making the answers, and the objections signed by the attorney making the objections.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of process upon that defendant. The court may allow a shorter or longer time.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under subsection (a) of K.S.A. 60-237, and amendments thereto, with respect to any objection to or other failure to answer an interrogatory.

(c) *Scope; use at trial.* Interrogatories may relate to any matters which can be inquired into under subsection (b) of K.S.A. 60-226, and amendments thereto, and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records, *including electronically stored information,* of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Sec. 4. K.S.A. 60-234 is hereby amended to read as follows: 60-234. (a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the party's behalf, to inspect ~~and~~, copy, *test or sample* any designated documents *or electronically stored information* (including writings, drawings, graphs, charts, photographs, ~~phono-records~~ *sound recordings, images* and other *data or* data compilations *stored in any medium* from which information can be obtained, translated, if necessary, by the respondent ~~through detection devices~~ into reasonably usable form), or to inspect ~~and~~, copy, test or sample any *designated* tangible things which constitute or contain matters within the scope of subsection (b) of K.S.A. 60-226, and amendments thereto, and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of subsection (b) of K.S.A. 60-226, and amendments thereto.

(b) *Procedure.* The request, without leave of court, may be served upon the plaintiff after commencement of the action and upon any other party with or after service of process upon that party. The request shall

set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts. *The request may specify the form or forms in which electronically stored information is to be produced.*

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of process upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested unless the request is objected to, ~~in which event~~ *including an objection to the requested form or forms producing electronically stored information, stating* the reasons for objection ~~shall be stated~~. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. *If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms the party intends to use.* The party submitting the request may move for an order under subsection (a) of K.S.A. 60-237, and amendments thereto, with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

~~A~~ *Unless the parties otherwise agree, or the court otherwise orders:*

(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request~~.~~*;*

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one form.

(c) *Persons not parties.* A person not a party to the action may be compelled to produce documents, *electronically stored information* and things or to submit to an inspection as provided in K.S.A. 60-245 and 60-245a, and amendments thereto.

Sec. 5. K.S.A. 60-237 is hereby amended to read as follows: 60-237. (a) *Motion for order compelling disclosure or discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the judge in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the judge in the district where the deposition is being taken.

(2) *Motion.* (A) If a party fails to make a disclosure required by subsection (b)(6) of K.S.A. 60-226, and amendments thereto, any other party may move to compel disclosure and for appropriate sanctions. The motion shall include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action and shall describe the steps taken by all counsel or unrepresented parties to resolve the issues in dispute.

(B) If a deponent fails to answer a question propounded or submitted under K.S.A. 60-230 or 60-231, and amendments thereto, or a corporation or other entity fails to make a designation under subsection (b) of K.S.A. 60-230 or subsection (a) of K.S.A. 60-231, and amendments thereto, or a party fails to answer an interrogatory submitted under K.S.A. 60-233, and amendments thereto, or if a party, in response to a request for inspection submitted under K.S.A. 60-234, and amendments thereto, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort

to secure the information or material without court action and shall describe the steps taken by all counsel or unrepresented parties to resolve the issues in dispute. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) *Evasive or incomplete disclosure, answer or response.* For purposes of this subdivision an evasive or incomplete disclosure, answer or response is to be treated as a failure to disclose, answer or respond.

(4) *Expenses and sanctions.* (A) If the disclosure or requested discovery is provided after the motion is filed but before the court rules on the motion, the court, after affording an opportunity to be heard, may require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees. Expenses shall not be awarded under this subparagraph if the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is granted, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response or objection was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is denied, the court may enter any protective order authorized under subsection (c) of K.S.A. 60-226, and amendments thereto, and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(D) If the motion is granted in part and denied in part, the court may enter any protective order authorized under subsection (c) of K.S.A. 60-226, and amendments thereto, and, may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.* (1) *Sanctions by judge in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the judge in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director or managing agent of a party or a person designated under subsection (b) of K.S.A. 60-230 or subsection (a) of K.S.A. 60-231, and amendments thereto, to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this section or under K.S.A. 60-235, and amendments thereto, the judge before whom the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such disobedient party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an

order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under subsection (a) of K.S.A. 60-235, and amendments thereto, requiring such party to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subsection, unless the party failing to comply shows that such party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the judge shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the judge finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Failure to disclose; false or misleading disclosure; refusal to admit.* (1) A party that without substantial justification fails to disclose information required by subsection (b)(6) or (e)(1) of K.S.A. 60-226, and amendments thereto, shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B) and (C) of subsection (b)(2) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any documents or the truth of any matter, as requested under K.S.A. 60-236, and amendments thereto, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, such party may apply to the judge for an order requiring the other party to pay such party the reasonable expenses incurred in making such proof, including reasonable attorney's fees. The judge shall make the order unless the judge finds that (A) the request was held objectionable to subsection (a) of K.S.A. 60-236, *and amendments thereto,* or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under subsection (b) of K.S.A. 60-230 or subsection (a) of K.S.A. 60-231, and amendments thereto, to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under K.S.A. 60-233, and amendments thereto, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under K.S.A. 60-234, and amendments thereto, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subsection (b)(2) of this section. Any motion specifying a failure under clause (2) or (3) of this subsection shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the judge shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the judge finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by subsection (c) of K.S.A. 60-226, and amendments thereto.

(e) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide

electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Sec. 6. K.S.A. 60-245 is hereby amended to read as follows: 60-245. (a) *Form; issuance.* (1) Every subpoena shall:

(A) State the name of the court from which it is issued;

(B) state the title of the action, the name of the court in which it is pending and the file number of the action;

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection ~~and~~, copying, *testing or sampling* of designated books, documents, *electronically stored information* or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place specified in the subpoena; and

(D) set forth the text of subsections (c) and (d) of this section.

A command to produce evidence or to permit inspection, *copying, testing or sampling* may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. *A subpoena may specify the form in which electronically stored information is to be produced.* Subpoena and production of records of a business which is not a party shall be in accordance with K.S.A. 60-245a, and amendments thereto.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the district court in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the district court in which the action is pending or the officer before whom the deposition is to be taken or, if the deposition is to be taken outside the state, from an officer authorized by the law of the other state to issue the subpoena. If separate from a subpoena commanding the attendance of a person, a subpoena for production ~~or~~, inspection, *copying, testing or sampling* shall issue from the district court in which the action is pending or, if the production ~~or~~, inspection, *copying, testing or sampling* is to be made outside the state, an officer authorized by the law of the other state to issue the subpoena.

(3) Every subpoena issued by the court shall be issued by the clerk under the seal of the court or by a judge. Upon request of a party, the clerk shall issue a blank subpoena. The blank subpoena shall bear the seal of the court, the title and file number of the action and the clerk's signature or a facsimile of the clerk's signature. The party to whom a blank subpoena is issued shall fill it in before service.

(b) *Service.* Service of a subpoena upon a person named therein may be made anywhere within the state, shall be made in accordance with K.S.A. 60-303, and amendments thereto, and shall, if the person's attendance is commanded, be accompanied by the fees for one day's attendance and the mileage allowed by law. When sought independently of a deposition, prior notice of any commanded production, *inspection, copying, testing or sampling* of documents or inspection of premises before trial shall be served on each party in the manner prescribed by subsection (b) of K.S.A. 60-205, and amendments thereto.

(c) *Protection of persons subject to subpoenas.*

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, a reasonable attorney fee.

(2) (A) A person commanded to produce and permit inspection ~~and~~, copying, *testing or sampling* of designated *electronically stored information*, books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to subsection (d)(2), a person commanded to produce and permit inspection ~~and~~, copying, *testing or sampling* may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to ~~inspection or copying of~~ *producing* any or all of the designated materials or *inspection* of the premises *or to producing electronically stored information in the*

form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect ~~and~~, copy, *test or sample* the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, *inspection, copying, testing or sampling*. Such an order to compel ~~production~~ shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection ~~and~~, copying, *testing or sampling* commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) Fails to allow reasonable time for compliance;

(ii) requires a resident of this state who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person or requires a nonresident who is not a party or an officer of a party to travel to a place more than 100 miles from the place where the nonresident was served with the subpoena, is employed or regularly transacts business, except that, subject to the provisions of subsection (c)(3)(B)(iii), such a nonparty may in order to attend trial be commanded to travel to the place of trial;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) Requires disclosure of a trade secret or other confidential research, development or commercial information; or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(4) A person confined in prison may be required to appear for examination by deposition only in the county where the person is imprisoned.

(d) *Duties in responding to subpoena.* (1) *(A)* A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonable usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(2)(A) of K.S.A. 60-226, and amendments thereto. The court may specify conditions for the discovery.

(2) *(A)* When information subject to a subpoena is withheld on a claim that such information is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communi-

cations or things not produced that is sufficient to enable the demanding party to contest the claim.

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

(e) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon the person may be considered a contempt of the court in which the action is pending or the court of the county in which the deposition is to be taken. Punishment for contempt shall be in accordance with K.S.A. 20-1204, and amendments thereto. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by subsection (c)(3)(A)(iii).

Sec. 7. K.S.A. 60-216, 60-226, 60-233, 60-234, 60-237 and 60-245 are hereby repealed.

Sec. 8. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

_____

_____
President of the Senate.

_____
Secretary of the Senate.

Passed the HOUSE _____

_____
Speaker of the House.

_____
Chief Clerk of the House.

APPROVED _____

_____
Governor.