Approved by the Judicial Council
December 2, 2016

MEMORANDUM

TO: **Kansas Judicial Council**

FROM: **Nancy J. Strouse**

DATE: **December 2, 2016**

RE: **Civil Code Advisory Committee Recommendations Regarding Amendments to Federal Rules 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 Civil Code Advisory Committee recently reviewed a number of federal amendments that were effective December 1, 2015 and one amendment that is scheduled to take effect on December 1, 2016. The Committee has drafted proposed statutory amendments, which are attached to this memorandum. Among the recommended statutory amendments is a recommendation to delete K.S.A. 60-268, which is similar to Federal Rule 84 and formerly contained an appendix of forms. The forms were removed from K.S.A. 60-268 in 2005, and the statute was amended to indicate that the forms were to be provided by the Judicial Council. The Committee recommends deleting K.S.A. 60-268 to conform with the deletion of Federal Rule 84 and its appendix of forms, but it does not recommend that the Council completely remove the forms from its website. Rather, the Committee recommends stripping the forms of Notes on Use and Comments, which are out of date and were written by the Legal Forms Advisory Committee about 10 years ago when the Judicial Council was contemplating publishing a book of forms. While the level of detail contained in the Notes and Comments was appropriate for a legal publication, it is not particularly helpful to the average seeker of a basic form.

The Committee recommends that the Judicial Council request introduction of a bill in the 2017 legislative session to amend the Kansas code of civil procedure based on the attached proposal. The Committee notes that the Comments included in the attached proposal were largely drawn from the federal comments with slight modifications to reflect differences between the federal rules and the Kansas code.

60-102. Construction. The provisions of this act shall be liberally construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding.

COMMENT

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.

60-206. Time, computation and extension; accessibility of court; definitions.

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(d) *Additional time after certain kinds of service.* When a party may or must act within a specified time after ~~service~~ being served and service is made under ~~subsections~~ K.S.A. 60-205(b)(2)(C) (mail)~~;~~ or (D) (leaving with the clerk)~~, (E) or (F) of K.S.A. 60-205~~, and amendments thereto, three days are added after the period would otherwise expire under subsection (a).

COMMENT

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.

60-216. Pretrial conferences; case management conference.

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(b) *Case management conference.* In any action, the court must on the request of any party, or may without a request, conduct a case management conference with attorneys and any unrepresented parties. The court must schedule the conference as soon as possible. The conference must be conducted within 45 days after the filing of an answer, unless the court extends the time to meet the needs of the case.

(1) At a case management conference the court must consider and take appropriate action on the following matters:

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

(F) determining 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~~ any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under K.S.A. 60-426a and amendments thereto;

(G) requiring completion of discovery within a definite number of days after the conference has been conducted;

(H) setting deadlines for filing motions, joining parties and amendments to the pleadings;

(I) setting the date or dates for conferences before trial, a final pretrial conference, and trial; and

(J) such other matters as are necessary for the proper management of the action.

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COMMENT

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.

60-226. General provisions governing discovery.

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(b) *Discovery scope and limits.*

(1) *Scope in general*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to ~~the subject matter involved in the action, whether it relates to~~ any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~, 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. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.~~

(2) *Limitations on frequency and extent*.

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

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(iii) ~~the burden or expense of~~ the proposed discovery is outside the scope permitted by subsection (b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the proposed discovery in resolving the issues~~.

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(c) *Protective orders*.

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

(A) Forbidding the disclosure or discovery;

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

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(d) *Sequence of discovery*. Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

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

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

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COMMENT

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.

60-230. Depositions by oral examination; requirements; examination; copies; attendance.

(a) *When a deposition may be taken.*

(1) *Without leave*. A party may, by oral questions, depose any person including a party, without leave of court except as provided in subsection (a)(2). The deponent's attendance may be compelled by subpoena under K.S.A. 60-245, and amendments thereto.

(2) *With leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with subsections (b)(1) and (2) of K.S.A. 60-226, and amendments thereto:

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COMMENT

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

60-231. Depositions by written questions.

(a) *When a deposition may be taken.*

(1) *Without leave*. A party may, by written questions, depose any person, including a party, without leave of court except as provided in subsection (a)(2). The deponent's attendance may be compelled by subpoena under K.S.A. 60-245, and amendments thereto.

(2) *With leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with subsections (b)(1) and (2) of K.S.A. 60-226, and amendments thereto:

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COMMENT

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

60-234. Production of documents, electronically stored information, tangible things and entry onto land for inspection and other purposes.

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(b) *Procedure*. The request may be served on the plaintiff after commencement of the action and on any other party with or after service of process on that party.

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(2) *Responses and objections*.

(A) *Time to respond*. The party to whom the request is directed must respond in writing within 30 days after being served, except that a defendant may serve a response within 45 days after being served with process. A shorter or longer time may be stipulated to under K.S.A. 60-229, and amendments thereto, or be ordered by the court.

(B) *Responding to each item*. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

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COMMENT

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.

60-237. Compelling discovery; failure to comply; sanctions.

(a) *Motion for an order compelling disclosure or discovery.*

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(3) *Specific motions.*

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(B) *To compel a discovery response.* A party seeking discovery may move for an order compelling an answer, designation, production or inspection. This motion may be made if:

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(iv) a party fails to produce documents or fails to respond that inspection will be permitted, or fails to permit inspection, as requested under K.S.A. 60-234, and amendments thereto.

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(e) *Failure to ~~provide~~ preserve electronically stored information*. ~~Absent exceptional circumstances, a court may not impose sanctions under this article 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.~~ If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable for the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

COMMENT

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.

60-255. Default.

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(b) *Setting aside a default judgment*. The court may set aside a <u>final</u> default judgment under subsection (b) of K.S.A. 60-260 and K.S.A. 60-309, and amendments thereto.

COMMENT

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.

~~**60-268. Forms.** Forms provided by the judicial council suffice under this article and illustrate the simplicity and brevity that this article contemplates.~~

COMMENT

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.