

HOUSE BILL No. 2510

By Committee on Judiciary

Requested by Eric Stafford on behalf of the Kansas Chamber of Commerce

1-16

1 AN ACT concerning the code of civil procedure; relating to litigation
2 funding by third parties; authorizing discovery of an agreement thereof;
3 amending K.S.A. 2023 Supp. 60-226 and repealing the existing section.
4

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

6 Section 1. K.S.A. 2023 Supp. 60-226 is hereby amended to read as
7 follows: 60-226. (a) *Discovery methods.* Parties may obtain discovery by
8 one or more of the following methods: Depositions on oral examination or
9 written questions; written interrogatories; production of documents or
10 things or permission to enter onto land or other property under K.S.A. 60-
11 234, ~~K.S.A.~~ 60-245(a)(1)(A)(iii) or ~~K.S.A.~~ 60-245a, and amendments
12 thereto; physical and mental examinations; and requests for admission.

13 (b) *Discovery scope and limits.* (1) *Scope in general.* Unless
14 otherwise limited by court order, the scope of discovery is as follows:
15 Parties may obtain discovery regarding any nonprivileged matter that is
16 relevant to any party's claim or defense and proportional to the needs of
17 the case, considering the importance of the issues at stake in the action, the
18 amount in controversy, the parties' relative access to relevant information,
19 the parties' resources, the importance of the discovery in resolving the
20 issues and whether the burden or expense of the proposed discovery
21 outweighs its likely benefit. Information within this scope of discovery
22 need not be admissible in evidence to be discoverable.

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

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

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

32 (iii) the proposed discovery is outside the scope permitted by
33 subsection (b)(1).

34 (B) A party need not provide discovery of electronically stored
35 information from sources that the party identifies as not reasonably

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

8 (3) *Agreements. (A) Insurance agreements.* A party may obtain
9 discovery of the existence and contents of any insurance agreement under
10 which an insurance business may be liable to satisfy part or all of a
11 possible judgment in the action or to indemnify or reimburse for payments
12 made to satisfy the judgment. Information concerning the insurance
13 agreement is not by reason of disclosure admissible in evidence at trial.
14 For purposes of this paragraph, an application for insurance is not a part of
15 an insurance agreement.

16 (B) *Third-party agreements.* A party may obtain discovery of the
17 existence and content of any third-party agreement under which any
18 person, other than an attorney representing a party, has agreed to pay
19 expenses directly related to prosecuting the legal claim and has a
20 contractual right to receive compensation that is contingent on and
21 sourced from any proceeds. Information concerning the third-party
22 agreement is not, by reason of disclosure, admissible as evidence at trial.

23 (4) *Trial preparation; materials. (A) Documents and tangible things.*
24 Ordinarily, a party may not discover documents and tangible things that
25 are prepared in anticipation of litigation or for trial by or for another party
26 or its representative, including the other party's attorney, consultant, surety,
27 indemnitor, insurer or agent. But, subject to subsection (b)(5), those
28 materials may be discovered if:

- 29 (i) They are otherwise discoverable under paragraph (1); and
30 (ii) the party shows that it has substantial need for the materials to
31 prepare its case and cannot, without undue hardship, obtain their
32 substantial equivalent by other means.

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

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

- 43 (i) A written statement that the person has signed or otherwise

1 adopted or approved; or

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

5 (5) *Trial preparation; experts.* (A) *Deposition of an expert who may*
6 *testify.* A party may depose any person who has been identified as an
7 expert whose opinions may be presented at trial. If a disclosure is required
8 under subsection (b)(6), the deposition may be conducted only after the
9 disclosure is provided.

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

15 (C) *Trial-preparation protection for communications between a*
16 *party's attorney and expert witnesses.* Subsections (b)(4)(A) and (b)(4)(B)
17 protect communications between the party's attorney and any witness
18 about whom disclosure is required under subsection (b)(6), regardless of
19 the form of the communications, except to the extent that the
20 communications:

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

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

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

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

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

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

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

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

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

43 (6) *Disclosure of expert testimony.* (A) *Required disclosures.* A party

1 must disclose to other parties the identity of any witness it may use at trial
2 to present expert testimony. The disclosure must state:

- 3 (i) The subject matter on which the expert is expected to testify; and
- 4 (ii) the substance of the facts and opinions to which the expert is
5 expected to testify.

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

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

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

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

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

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

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

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

27 (7) *Claiming privilege or protecting trial preparation materials.* (A)
28 *Information withheld.* When a party withholds information otherwise
29 discoverable by claiming that the information is privileged or subject to
30 protection as trial preparation material, the party must:

31 (i) Expressly make the claim; and

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

36 (B) *Information produced.* If information produced in discovery is
37 subject to a claim of privilege or of protection as trial preparation material,
38 the party making the claim may notify any party that received the
39 information of the claim and the basis for it. After being notified, a party
40 must promptly return, sequester or destroy the specified information and
41 any copies it has; must not use or disclose the information until the claim
42 is resolved; must take reasonable steps to retrieve the information if the
43 party disclosed it before being notified; and may promptly present the

1 information to the court under seal for a determination of the claim. The
2 producing party must preserve the information until the claim is resolved.

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

14 (A) Forbidding the disclosure or discovery;

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

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

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

21 (E) designating the persons who may be present while the discovery
22 is conducted;

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

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

28 (H) requiring that the parties simultaneously file specified documents
29 or information in sealed envelopes, to be opened as the court orders.

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

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

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

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

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

41 (e) *Supplementing disclosures and responses.* (1) *In general.* A party
42 who has made a disclosure under subsection (b)(6), or who has responded
43 to an interrogatory, request for production or request for admission, must

1 supplement or correct its disclosure or response:

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

6 (B) as ordered by the court.

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

12 (f) *Signing disclosures and discovery requests, responses and*
13 *objections.* (1) *Signature required; effect of signature.* Every disclosure
14 under subsection (b)(6) and every discovery request, response or objection
15 must be signed by at least one attorney of record in the attorney's own
16 name, or by the party personally, if unrepresented, and must state the
17 signor's address, e-mail address and telephone number. By signing, an
18 attorney or party certifies that to the best of the person's knowledge,
19 information and belief formed after a reasonable inquiry:

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

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

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

26 (ii) not interposed for any improper purpose, such as to harass, cause
27 unnecessary delay or needlessly increase the cost of litigation; and

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

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

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

41 Sec. 2. K.S.A. 2023 Supp. 60-226 is hereby repealed.

42 Sec. 3. This act shall take effect and be in force from and after its
43 publication in the statute book.