Approved: April 28, 2010
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:35 a.m. on March 11, 2010, in Room 548-S of the Capitol.

All members were present.

Committee staff present:
Doug Taylor, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Lauren Douglass, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:
Professor Jim Concannon, Kansas Judicial Council
Randy Hearrell, Kansas Judicial Council
Jim Weisgerber, Attorney Tax Specialist, Kansas Department of Revenue
David Burger, Undersheriff, Johnson County Sheriff's Office
David Hutchings, Kansas Bureau of Investigation
Representative Joe Patton
Jessica Hosman, Topeka Rescue Mission
Connie Sanchez, Safe Visit Administrator, YMCA
Sharon Katz, Executive Director, SAFEHOME
Eileen Doran, Program Director, Center for Empowerment and Safety, YWCA

Others attending:
See attached list.

The Chairman informed the Committee of his intention to refer **Sub for HB 2238 - Amending the fairness in private construction contract act and the fairness in public construction contract regarding retainage** to the Kansas Judicial Council. There was no objection from the Committee.

3/11

The hearing on **HB 2656 - Amendments to the Kansas code of civil procedure was opened**. Jason Thompson, staff revisor, reviewed the bill.

Professor Jim Concannon appeared in support and provided the Committee with a review of the bill proposed by the Kansas Judicial Council Civil Code Advisory Committee. **HB 2656** is the result of over two years work by the Committee to bring Kansas more in compliance with the Federal Rules of Civil Procedure. Professor Concannon reviewed the substantive amendments including changes to K.S.A.60-206, adopting the federal method of time computation. The Professor requested an amendment regarding a change to K.S.A. 61-3304 and provided a proposed balloon to his testimony. (Attachment 1)

Written testimony in support of **HB 2656** was submitted by:
Kathy Olsen, Kansas Bankers Association (Attachment 2)
Tyson Langhofer, Mortgage Electronic Registration Systems, Inc. (Attachment 3)
Barkley Clark, Stinson Morrison Hecker, LLP (Attachment 4)

There being no further conferees, the hearing on **HB 2656** was closed.

The Chairman opened the hearing on **HB 2557 - Removing references to the inheritance tax and limiting the applicability of its provisions**. Doug Taylor, staff revisor, reviewed the bill.

Randy Hearrell spoke in support, stating the bill is technical in nature by removing reference to the inheritance tax which was repealed in 1998 from Kansas statutes. Mr. Hearrell noted the few remaining references to "inheritance tax" refer to the inheritance tax of other states. (Attachment 5)

Jim Wiesberger appeared in support, stating the proposed language by the Probate Law Advisory Committee has been discussed with the Department of Revenue and there are no objections to the bill. (Attachment 6)

Minutes of the Senate Judiciary Committee at 9:35 a.m. on March 11, 2010, in Room 548-S of the Capitol.

There being no further conferees, the hearing on **HB 2557** was closed.

The Chairman opened the hearing on **HB 2604 - Allowing the court to sentence a defendant to serve time in a work release program**. Jason Thompson, staff revisor, reviewed the bill.

Undersheriff David Burger appeared as a proponent, stating current law does not specifically authorize assignment to work release programs. **HB 2604** will clarify the further involvement of the court would not be needed to modify a sentence of an inmate remanded to the custody of the Sheriff. (Attachment 7)

There being no further conferees, the hearing on **HB 2604** was closed.

The Chairman opened the hearing on **HB 2605 - Clarifying the investigation fees for services rendered by the KBI and other regional forensic and scientific laboratories**. Jason Thompson, staff revisor, reviewed the bill.

David Hutchings spoke in favor, indicating the bill provides stronger language in which revenues may be brought more closely to those projected. It clarifies that when a forensic examination supported the investigation the court costs shall be ordered, regardless of whether the test supported the specific offense of conviction. The bill also adds computer forensic examinations that are presently preformed by KBI agents outside of its forensic laboratory. (Attachment 8)

Written testimony in support of **HB 2605** was submitted by:
Ed Klumpp, Kansas Assn. Of Chiefs of Police; Kansas Sheriffs Assn.; & Kansas Peace Officers (Attachment 9)

There being no further conferees, the hearing on **HB 2605** was closed.

The Chairman opened the hearing on **HB 2585 - Concerning marriage license fees and poverty**. Doug Taylor, staff revisor, reviewed the bill.

Representative Joe Patton appeared in support as the sponsor of the bill stating lowering the financial burden to marry for those with limited incomes will allow the opportunity to benefit from the positive outcomes of marriage. These in stronger families, improved mental and physical health, increased income and healthier and happier children. (Attachment 10)

Sharon Katz spoke in opposition, voicing her concern the impact HB 2585 will have on funding for SAFEHOME, a domestic violence program in Johnson and Miami Counties. SAFEHOME, partially funded by marriage license fees, supports life-saving services from victims of domestic violence and their children. Ms. Katz asked the Committee consider the financial impact enactment would have on this and other similar agencies. (Attachment 11)

The Chairman indicated the Committee was out of time and would continue the hearing at the next meeting.

The next meeting is scheduled for March 12, 2010.

The meeting was adjourned at 10:30 a.m..

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 11, 2010

NAME	REPRESENTING
Jean Miller	Capitol Strategies
David Hutchings	KBI
Laura Graham	KBI
Ed Klumpp	KACP/KPOA/KSA
Kelley Bellette	KDOR DC
M Batka	KDOR
Jamie Corkhill	SRS/CSE
MARilyn Rose Sanders	DOA/DFM
Joseph Molumby	KS BAR Assn
Lew Henry	Sandstone Grp LLC
JESSICA S. HOSMAN	TOPEKA RESCUE MISSION
Eileen Doran	YWCA Center for Safety & Empowerment
JOYCE GROVER	KCSDV
Sharon Katz	SAFEHOME, Johnson County
Bob Keller	JCSO
DAVID BARBER	JCSO

JUDICIAL COUNCIL TESTIMONY ON 2010 H.B. 2656

PROPOSED AMENDMENTS TO THE KANSAS CODE OF CIVIL PROCEDURE

Senate Judiciary
3-11-10
Attachment 1

CROSS REFERENCE TABLE
FOR
2010 H.B. 2656

Bill Section	K.S.A. Section	Caption
1	New	Depositions for use in foreign jurisdictions.
2 - 63	Various	These statutes in Chapters 8, 21, 22, 23, 26, 38, and 59 contain amendments, primarily to extend short time periods or deadlines, that are deemed necessary in light of the revised method of computing time pursuant to K.S.A. 60-206.
64	60-101	Title.
65	60-102	Construction.
66	60-103	Restricted mail defined,
67	60-104	Location of proceedings.
68	60-201	Rules of civil procedure; citation; scope.
69	60-202	One form of action.
70	60-203	Commencing an action.
71	60-204	Process, generally.
72	60-205	Serving and filing pleadings and other papers.
73	60-206	Computing and extending time; time for motion papers.
74	60-207	Pleadings allowed, form of motions and other papers.
75	60-208	General rules of pleadings.
76	60-209	Pleading special matters.
77	60-210	Form of pleadings.
78	60-211	Signing pleadings, motions, and other papers; representations to the court; sanctions.
79	60-212	Defenses and objections: when and how presented; motion for judgment on the pleadings; consolidating motions; waiving defenses; pretrial hearing.
80	60-213	Counterclaims and crossclaims.
81	60-214	Third-party practice.
82	60-215	Amended and supplemental pleadings.
83	60-216	Pretrial conferences; case management conference.
84	60-217	Parties; capacity.
85	60-218	Joinder of claims.

86	60-219	Required joinder of parties.
87	60-220	Permissive joinder of parties.
88	60-221	Misjoinder and nonjoinder of parties.
89	60-222	Interpleader.
90	60-223	Class actions.
91	60-223a	Derivative actions.
92	60-223b	Actions relating to unincorporated associations.
93	60-224	Intervention.
94	60-225	Substitution of parties.
95	60-226	General provisions governing discovery.
96	60-227	Depositions to perpetuate testimony.
97	60-228	Persons before whom depositions may be taken.
98	60-229	Stipulations about discovery procedure.
99	60-230	Depositions by oral examination.
100	60-231	Depositions by written questions.
101	60-232	Using depositions in court proceedings.
102	60-233	Interrogatories to parties.
103	60-234	Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.
104	60-235	Physical and mental examinations.
105	60-236	Requests for admission.
106	60-237	Failure to cooperate in discovery; sanctions.
107	60-238	Right to a jury trial; demand.
108	60-239	Trial by jury or by the court.
109	60-240	Scheduling cases for trial; continuances.
110	60-241	Dismissal of actions.
111	60-242	Multicounty and multidistrict litigation; consolidation; separate trials.
112	60-243	Taking testimony; evidence.
113	60-244	Proof of records.
114	60-245	Subpoenas.
115	60-245a	Subpoena of nonparty business records.
116	60-246	Objecting to a ruling or order.
117	60-247	Jurors.
118	60-248	Jury trial procedure.

119	60-249	Special verdict; general verdict and questions.
120	60-249a	Itemized verdict, personal injury actions; jury instructions.
121	60-250	Judgment as a matter of law in a jury trial; related motion for a new trial.
122	60-251	Instructions to the jury; objections; preserving a claim of error.
123	60-252	Findings and conclusions by the court; judgment on partial findings.
124	60-252a	Trial by the court; judgment; rulings, decisions, time limitation.
125	60-252b	Supreme court rules.
126	60-253	Trial by masters.
127	60-254	Judgment.
128	60-255	Default.
129	60-256	Summary judgment.
130	60-257	Declaratory judgment.
131	60-258	Entry of judgment.
132	60-258a	Comparative negligence.
133	60-259	New trial; altering or amending a judgment.
134	60-260	Relief from a judgment or order.
135	60-261	Harmless error.
136	60-262	Stay of proceedings to enforce a judgment.
137	60-263	Disability of judge.
138	60-264	Enforcing relief for or against a nonparty.
139	60-265	Applicability of article.
140	60-266	Jurisdiction and venue unaffected.
141	60-267	Rules by district courts.
142	60-268	Forms.
143	60-270	Retaining original records until case closed.
144	60-271	Acceptance of filings by electronic means.
145	60-301	Summons; issuance.
146	60-302	Summons; form.
147	60-303	Methods of service of process.
148	60-304	Service of process, on whom made.
149	60-305	Process agents for public utilities, except motor common and contract carriers.
150	60-305a	Process agents for motor common carriers.
151	60-306	Process service agent.

152	60-307	Service by publication.
153	60-308	Service outside state.
154	60-309	Relief from default judgment entered on service by publication.
155	60-310	Procedure when not all defendants are served.
156	60-311	Where process may be served.
157	60-312	Proof of service.
158	60-313	Amendment of return or proof of service.
159 - 223	Various	These statutes in Chapters 8, 21, 22, 23, 26, 38, and 59 contain amendments, primarily to extend short time periods or deadlines, that are deemed necessary in light of the revised method of computing time pursuant to K.S.A. 60-206.

Background

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 has completed a two-year review of the Kansas Code of Civil Procedure, comparing the Kansas provisions with the corresponding federal rules. Prior to this review, the most recent comprehensive review of the Kansas Code of Civil Procedure was in the mid-1990's. There have been significant amendments to the federal rules since that time, and the Committee's objective was to make a word-by-word comparison of the federal rules and the Kansas Code. Each difference was evaluated on its merits and the Committee determined whether the Kansas Code should be amended to conform with the federal rule. The Committee concluded that some amendments to the federal rules that had not yet been incorporated into the Kansas Code were inapplicable to practice in state courts or were inconsistent with established Kansas practice reflecting strong state policies. In most instances, however, the Committee concluded that amendments to the federal rules were compatible with Kansas practice and policies. The review was limited to Articles 1-3 of Chapter 60.

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

J. Nick Badgerow, Chairman, practicing attorney in Overland Park and member of the Kansas Judicial Council

Hon. Terry L. Bullock, Retired District Court Judge, Topeka

Prof. Robert C. Casad, Distinguished Professor of Law Emeritus at The University of Kansas School of Law, Lawrence

Prof. James M. Concannon, Distinguished Professor of Law at Washburn University School of Law

Hon. Jerry G. Elliott, Kansas Court of Appeals Judge, Topeka

Hon. Bruce T. Gatterman, Chief Judge in 24th Judicial District, Larned

John L. Hampton, practicing attorney in Lawrence

Joseph W. Jeter, practicing attorney in Hays and member of the Kansas Judicial Council

Hon. Marla L. Luckert, Kansas Supreme Court, Topeka

Hon. Kevin P. Moriarty, District Court Judge in 10th Judicial District, Olathe

Thomas A. Valentine, practicing attorney, Topeka

Donald W. Vasos, practicing attorney, Fairway

The Committee also acknowledges the contributions of David Rapp, who served on the Committee but is no longer a member.

General Comments to Proposed Amendments to the Kansas Code of Civil Procedure

Although some of the proposed amendments to the Kansas Code are substantive in nature, the bulk of the amendments proposed in this bill are related to the comprehensive Federal Style Project, effective December 1, 2007, which involved amendments to virtually every civil rule. The goal of the Federal Style Project was to clarify and simplify the rules so that they would be easier to use and understand, without making substantive changes. The Committee incorporated the federal style amendments in Kansas Code provisions modeled after the federal rules and, in order to achieve unity of style throughout the Code, also applied similar restyling guidelines to amend Kansas Code provisions that have no federal counterpart.

Restyling Objectives

Some of the primary restyling objectives are summarized below. More detailed comments from the Federal Advisory Committee on the Federal Style Project as well as the other federal rules amendment packages can be found at: http://www.uscourts.gov/rules/.

The restyled Kansas Code minimizes the use of inherently ambiguous words. The most significant example of this is the ambiguity that exists with the words "shall" and "must." For example, the word "shall" can mean "must," "may," or something else, depending on context. The Federal Restyling Committee noted federal case law highlighting this confusion. This is true in Kansas as well. "Kansas courts have read 'shall' to mean 'may' where the context requires." *State v. Porting*, 29 Kan. App. 2d 869, 892 P.2d 915 (1995) (citing *Paul v. City of Manhattan*, 212 Kan. 381, 385, 511 P.2d 244 (1973)); *State v. Copes*, No. 99,403, opinion filed February 26, 2010. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled Kansas Code replaces "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each section. It is the opinion of the Committee and the Judicial Council that failing to incorporate this change to the federal rules would indicate legislative intent to retain the ambiguity inherent in the word "shall."

The restyled Kansas Code reduces the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "upon motion or on its own initiative" in K.S.A. 60-205(c) and variations in many other statutes to "on motion or on its own." Some variations of expression have been carried forward when the context made that appropriate. As an example, "stipulate," "agree," and "consent" appear throughout the Kansas Code, and "written" qualifies these words in some places but not others. The number of variations has been reduced, but at times the former words were carried forward. None of the changes, when made, alters the statute's meaning.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. "The court in its discretion may" becomes "the court may"; "unless the order expressly directs otherwise" becomes "unless the court orders otherwise." The absence of intensifiers in the restyled Kansas Code does not change the substantive meaning. For example, the absence of the word "reasonable" to describe the notice of a motion for an order to compel discovery in K.S.A. 60-237(a)(1) does not mean that "unreasonable" notice is permitted.

The restyled Kansas Code also removes words and concepts that are outdated or redundant. The reference to "at law or in equity" in K.S.A. 60-201(b) has become redundant with the merger of law and equity. Outdated words and concepts include the reference to "demurrers, pleas, and exceptions" in K.S.A. 60-207(c) and references to "averments" in K.S.A. 60-208, 60-209, 60-210, and 60-255.

The restyled Kansas Code removes a number of redundant cross-references. For example, K.S.A. 60-208(b) states that a general denial is subject to the obligations of K.S.A. 60-211, but all pleadings are subject to K.S.A. 60-211. Removing such cross-references does not defeat application of the formerly cross-referenced statute.

Substantive Amendments

Some substantive amendments conform Kansas law to recent substantive amendments to the federal rules. Other substantive amendments improve or clarify provisions that are unique to Kansas. The Committee's detailed comments regarding each section of the Kansas Code are included with this testimony. The following is a summary of the most significant substantive amendments.

- **Time Computation** - K.S.A. 60-206 has been amended to use the "days-are-days" approach to computing all time periods adopted by amended Federal Rule 6. There is no longer a different computation method for time periods of less than 11 days. Throughout the Kansas Code, virtually all time deadlines of less than 11 days have been extended to adjust for the effect of including intermediate weekends and holidays in calculating deadlines. To further simplify deadline computation, most periods of less than 30 days have been amended to multiples of 7 days when possible, which results in deadlines that will usually fall on weekdays because the final day falls on the same day of the week as the event that triggered the period. Thirty-day and longer periods were generally retained without change. Included in this bill are proposed amendments to statutory time periods and deadlines outside the Kansas Code of Civil Procedure that are affected by the application of amended K.S.A. 60-206.

- **"Inaccessibility" of clerk's office** - Amended K.S.A. 60-206 also provides that filing deadlines are extended if the clerk's office is "inaccessible." The proposed amendments, the federal Committee Notes, and the Judicial Council Civil Code Advisory Committee Comments do not attempt to define "inaccessibility," which can vary depending on whether a filing is electronic or paper, leaving the definition to supreme court or local rules and case law development.

- **Electronic filing and service** - Language in K.S.A. 60-203, 60-205, and 60-271 has been amended to substitute "electronic" for "telefacsimile" and to use broader language that will accommodate future expansion of electronic communication methods authorized by supreme court rule. No substantive change to current rules regarding telefacsimile filing and service is intended.

- **Certificates of service** - Conforming to a 2001 amendment to Federal Rule 5, K.S.A. 60-205(d) now requires that a certificate of service be filed with any paper after the petition that is required to be served. In addition, this amended subsection no longer requires that responses to interrogatories be filed routinely with the court.

- **Sanctions** - The Civil Code Advisory Committee has in the past rejected the 1993 amendments to Federal Rule 11, which created a "safe harbor" and provided for monetary sanctions to be paid to the court. However, the Committee did determine in this review that it would be appropriate to adopt one portion of the 1993 amendment. K.S.A. 60-211(c) used to provide that if the court determines that subsection (b) has been violated, the court "shall impose" an appropriate sanction. It now provides that the court "may" impose a sanction, recognizing that there can be some violations that don't merit sanctions.

- **Amendments to pleadings** - K.S.A. 60-215(a)(1) is amended and changes the time allowed to make one amendment as a matter of course. These changes track amendments to Federal Rule 15 that went into effect on December 1, 2009.

- **Disclaiming interpleader** - An amendment to K.S.A. 60-222(b) provides that disclaiming interpleader is no longer restricted to "personal" property and applies to any claim for money, whether or not an action on contract.

- **Class actions** - Significant amendments were made to K.S.A. 60-223 to conform to 2003 amendments to Federal Rule 23. The amendments include new provisions for appointing class counsel and awarding attorney's fees.

- **Limitations on frequency and extent of discovery** - Former K.S.A. 60-226 (b)(2) allowed the court to limit frequency or extent only if the court made one of three specific findings. Now, the court has no stated limit on its ability to limit frequency or extent and must do so if it makes one of the three findings.

- **Certification of good faith attempt** - K.S.A. 60-237(a) provides that a motion to compel discovery must include a certification that the movant has in good faith attempted to resolve the dispute prior to filing the motion. The certification must describe the steps taken to resolve the issues in dispute. For consistency, the additional requirement to describe the steps has now been added to revised K.S.A. 60-237(d)(1)(B). In addition, the certification requirement has been added to motions for protective orders under K.S.A. 60-226(c).

- **Depositions for use in foreign jurisdictions** - Former K.S.A. 60-228(d) dealt with depositions for use in foreign jurisdictions. This subsection has been deleted and is replaced by new section K.S.A. 60-228a, which is modeled on the Uniform Interstate Depositions and Discovery Act.

- **Notice of completion or filing of depositions** - New K.S.A. 60-231(c) requires that the party who noticed a deposition on written questions, or filed the deposition with the court, must notify all other parties when the deposition is completed or filed.

- **Motion for an order compelling disclosure or discovery** - A motion to compel discovery regarding a party's deposition must now be filed in the court where the action is pending. The amendment eliminates the prior option to file the motion where the deposition is to be taken. The Committee determined it was appropriate to adopt this 1993 amendment to Federal Rule 37.

- **Nonparty business records** - Business records produced by a nonparty pursuant to K.S.A. 60-245a are now to be delivered to the requesting party and not to the clerk of the court.

- **Affidavits and declarations** - K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit. Throughout the Kansas Code, references to a required affidavit now state "affidavit or declaration." Former K.S.A. 60-245a(c), dealing with subpoenas of nonparty business records, required the requesting party to provide the nonparty with an affidavit form to sign and return with the records. Revised 60-245a(b) now requires that the requesting party provide only a declaration form, although the nonparty retains the option of submitting an affidavit in response.

- **Jury polling** - K.S.A. 60-248(g) now contains a revised version of Federal Rule 48(c) regarding polling of a jury.

- **Alternate jurors** - K.S.A. 60-248(h) has been amended to allow alternate jurors to be selected at the same time the regular jury is being selected.

- **Motion for a new trial** -Federal Rule 50(c), (d), and (e) are adopted in new K.S.A. 60-250(c), (d), and (e). Subsection (b) already authorizes combining a motion for a new trial and a renewed motion for judgment as a matter of law. New subsections (c), (d), and (e) merely give guidance to the court on how to consider those joint motions.

- **Motion for a new trial or motion to amend or make additional findings** - The 10-day periods for filing these post-judgment motions pursuant to K.S.A. 60-250, 60-252, and 60-259 are expanded to 28 days. K.S.A. 60-206(b) prohibits expansion of the 28-day period. These changes track amendments to Federal Rules 6, 50, 52, and 59 that went into effect on December 1, 2009.

- **Disqualification of master** - A disqualification provision based on language in Federal Rule 53(a)(2) has been added to revised K.S.A. 60-253(a).

- **Summary judgment** - Tracking a recent amendment to Federal Rule 56, the timing provisions for summary judgment are substantially revised in new K.S.A. 60-256(c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. A presumptive deadline is set at 30 days after the close of all discovery. The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

- **Service methods for garnishments** - Additional methods of service for garnishments have been added in new K.S.A. 60-303(f). This new subsection was modeled after K.S.A. 61-3003(g) and was added so that process methods for garnishment actions would be the same under Chapter 60 and Chapter 61.

- **Specific jurisdiction under the long-arm statute** - Under K.S.A. 60-308(b)(2), Kansas courts are authorized to exercise general jurisdiction to the extent allowed by the U.S. and Kansas constitutions. Similar language was added in new subsection (b)(1)(L) to ensure that courts can also exercise specific jurisdiction to the extent of due process.

- **Sale for value following a default judgment entered on service by publication** - The time period in K.S.A. 60-309(b), after which a sale of property is not affected by a later-filed motion for relief, has been shortened from 6 months to 3 months.

Bill Amendments

The House amended Sec. 86 of the bill, adding a new subsection (e) to K.S.A. 60-219. This amendment addresses the Kansas Supreme Court's decision in *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 216 P.3d 168 (2009). A possible holding of that case was that in real estate actions to determine title or foreclose a security interest, a holder of record of an interest in the property was not a 60-219(a) person to be joined if feasible if the holder was a mere nominee of the beneficial owner of the interest whose name did not appear of record. The effect of new subsection (e) is to require joinder of the nominee even if the nominee is not within K.S.A. 60-219(a). The Judicial Council Civil Code Committee does not oppose this amendment.

The Civil Code Committee is proposing additional amendments, which are attached to this testimony. Under the bill, the time to file post-judgment motions under K.S.A. 60-252 and 60-259 has been expanded to 28 days. Pursuant to K.S.A. 61-2912(i) and 61-3304, these Chapter 60 post-judgment procedures are made applicable to Chapter 61 actions. This creates a problem because K.S.A. 60-2103a provides that the time to appeal a Chapter 61 judgment rendered by a district magistrate judge is only 14 days. The purpose of the proposed amendments to K.S.A. 61-2912 and 61-3304 is to shorten the time for filing post-judgment motions pursuant to K.S.A. 60-252 and 60-259 to 14 days when the judgment is rendered by a district magistrate judge.

Detailed Comments to Proposed Amendments
to the Kansas Code of Civil Procedure
2010 H.B. 2656

Section 1

COMMENT

This section is new and replaces former K.S.A. 60-228(d). The section follows the Uniform Interstate Depositions and Discovery Act. There is no counterpart in the federal rules.

The Uniform Law Commission Drafting Committee identified ten issues that a state law should address in adopting procedures for taking depositions for actions that are pending in other states. That committee discussed the approach to these issues in the Uniform Foreign Depositions Act (UFDA) and the Uniform Interstate and International Procedure Act (UIIPA).

a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the "courts" or "judicial proceedings" of the other state. Some states allow depositions for any "proceeding." The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term "party" without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any "interested party" to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the "testimony" of witnesses. The UIIPA expressly applies to "testimony or documents or other things." Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and provides that a subpoena may be issued to a witness "to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises..."

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial state and then serve the witness with a subpoena under the law of the trial state. If a motion to compel is necessary, it must be filed in the discovery state (the deponent's home court). Other states require that a notice of deposition be shown to a clerk or judge in the discovery state, after which a subpoena will automatically issue. Still other states require a letter rogatory requesting the trial state to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

1-12

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness "may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state." The UIIPA provides that methods of service includes service "in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction." State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the discovery state power to issue, refuse to issue, or quash a subpoena.

g. Where can the deponent be deposed?

Some states limit the place where a deposition can be taken to the discovery state, and some limit it to the deponent's home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the discovery state apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction's discovery procedure applies?

A significant issue is whether the trial state's or discovery state's discovery procedure controls, and on what issues. The general Restatement rule is that the forum state's (the discovery state's) procedure applies. The UIIPA, as well as many states, provides that the discovery state can use the procedure of either the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state's or discovery state's courts can issue protective orders. Both states have interests: the trial state's courts have an interest in protecting witnesses and litigants from improper practices, and the discovery state's courts have an obvious interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most states expressly or implicitly allow the discovery state's courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state should rule on all relevance issues. Other states indicate that relevance issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents

from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

Uniform Law Commission Drafting Committee Comments

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency.

The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states. The act is simple and efficient: it establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforceable subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

Comment to subsection (b).

This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

Comment to subsection (c).

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistence to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk's office in Florida. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena is being sought pursuant to Florida statute ___ (citing the appropriate statute or rule and quoting Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied

by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

Comment to subsection (e).

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

Comment to subsection (f).

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state's rules governing lawyers appearing in its courts. This act does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rules of Professional Conduct 5.5 and Kansas statutes or rules governing the unauthorized practice of law.)

Section 64

COMMENT

The language of K.S.A. 60-101 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. The change in this section is intended to be stylistic only.

Section 65

COMMENT

The language of K.S.A. 60-102 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 66

COMMENT

The language of K.S.A. 60-103 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

There is no counterpart of this section in the federal rules, which do not use the term "restricted mail." The required endorsements in the section are no longer correct under current postal regulations. The section was revised to remove the endorsement language so that the section will remain accurate regardless of future postal regulation amendments, if any. Although the term "restricted mail" is only used in one place in Article 2, K.S.A. 60-227, it is used in other provisions in Chapter 60 and elsewhere in the Kansas Statutes Annotated.

Section 67

COMMENT

The language of K.S.A. 60-104 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

A reference to K.S.A. 20-347 was added to clarify that, with supreme court approval, court may be held in suitable facilities other than the county courthouses.

There is no counterpart of this section in the federal rules.

Section 68

COMMENT

The language of K.S.A. 60-201 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Since cases are no longer classified as being at law or in equity, there is no need to carry forward the phrases that initially accomplished the merger.

The former reference to proceedings in the supreme court has been deleted. Appellate procedure has changed significantly since the Code was enacted and is now governed by Supreme Court Rules.

The former reference to "suits of a civil nature" is changed to the more modern "civil actions and proceedings."

The reference to K.S.A. 60-265 is deleted because K.S.A. 60-265 is not an exception to this section.

Section 69

COMMENT

The language of K.S.A. 60-202 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

The Committee determined that the designation of parties, carried forward from G.S. 1949 60-201, is unnecessary.

Section 70

COMMENT

The language of K.S.A. 60-203 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

No substantive change to current rules regarding telefacsimile filing is intended by substituting the words "electronic means." The use of the broader term will accommodate future expansion of electronic filing methods pursuant to supreme court rule.

K.S.A. 60-203 differs substantially from Federal Rule 3.

Section 71

COMMENT

The language of K.S.A. 60-204 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-204 does not conform to Federal Rule 4, which contains the federal service provisions. Service provisions in the Kansas Code are found in Article 3.

Section 72

COMMENT

The language of K.S.A. 60-205 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

K.S.A. 60-205(a)(l)(E) omits the former reference to a designation of record on appeal. Pursuant to a Supreme Court Rule change in 1977, the appellant no longer is required to designate the content of the record. Supreme Court Rule 1.05 specifies that K.S.A. 60-205 applies to appeals, and no reference to the record on appeal is necessary in this section.

K.S.A. 60-205 was amended to conform more closely with Federal Rule 5, but there are still differences. Rule 5 has been amended to allow electronic service (2001) and electronic filing (2006). Many state court judicial districts do not yet have the technological capability to accept e-filings and the only electronic method currently authorized by supreme court rule is telefacsimile service and filing. New subsection (b)(2)(F) allows service by any electronic means authorized by supreme court rule or a local rule, and "telefacsimile" filing in subsection (d)(3) has been changed to "electronic" filing. These amendments are not intended to be substantive changes to current service and filing methods. Rather, replacing the narrow "telefacsimile" with the broader "electronic" is intended to accommodate future expansion of electronic communication methods authorized by supreme court rule.

Subsection (d) was amended to conform to a 2001 amendment to Rule 5(d) that added a requirement for certificates of service. The substance of former subsection (d)(2), which requires filing only a certificate when service of certain discovery requests or responses, or disclosures of expert testimony has occurred, is unique to Kansas and has been retained. Responses to interrogatories no longer must be filed with the court.

The first sentence of the former statute, stating that the methods of service and filing provided in the section are not exclusive methods, is unique to Kansas and has been retained as new subsection (e).

Section 73

COMMENT

The language of K.S.A. 60-206 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Subsection (a). Subsection (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subsection (a) governs the computation of any time period specified in chapter 60, in any local rule or court order, or in any statute or administrative rule or regulation that does not specify a method of computing time.

The time-computation provisions of subsection (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, the date for filing is "no later than November 2, 2009," subsection (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subsection (a) describes how that deadline is computed.

Subsection (a)(1). New subsection (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, *e.g.*, K.S.A. 60-260(c)(1). Subsection (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former subsection (a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former subsection (a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. See *Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subsection (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subsection (a)(5). Subsection (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subsection (a) formerly referred to the "act, event, or default" that triggers the deadline, new subsection (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, *e.g.*, K.S.A. 60-214(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subsection (a)(2). New subsection (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Kansas Code of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subsection (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subsection (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subsection (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, October 30, 2009, will run until 9:23 a.m. on Monday, November 2; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subsection (a)(3). The former subsection (a) did not contain a provision dealing with inaccessibility of the courthouse due to weather conditions or other reasons, which was added to Federal Rule 6(a) in 1985. This provision is now incorporated in new subsection (a)(3), although as in the revised Federal Rule 6, there is no reference to "weather." Inaccessibility can occur for reasons unrelated to weather. The statute does not attempt to define inaccessibility.

When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subsection (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subsection (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

Subsection (a)(4). New subsection (a)(4) defines the end of the last day of a period for purposes of subsection (a)(1). Subsection (a)(4) does not apply in computing periods stated in hours under subsection (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

Subsection (a)(5). New subsection (a)(5) defines the "next" day for purposes of subsections (a)(1)(C) and (a)(2)(C). The Kansas Code of Civil Procedure contains both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time after an event. See, *e.g.*, K.S.A. 60-259(b) (motion for new trial "must be filed no later than 28 days after the entry of judgment"). A backward-looking time period requires something to be done within a period of time before an event. See, *e.g.*, K.S.A. 60-226(e)(2) (parties must disclose any additions or changes to expert witness information "at least 30 days before trial, unless the court orders otherwise"). In determining what is the "next" day for purposes of subsections (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days after an event, and the thirtieth day falls on Saturday, September 5, 2009, then the filing is due on Tuesday, September 8, 2009 (Monday, September 7, is Labor Day). But if a filing is due 21 days before an event, and the twenty-first day falls on Saturday, September 5, then the filing is due on Friday, September 4. If the clerk's office is inaccessible on September 4, then subsection (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no later than Tuesday, September 8.

Subsection (a)(6). New subsection (a)(6) defines "legal holiday" for purposes of the Kansas Code of Civil Procedure, including the time-computation provisions of subsection (a). New subsection (a)(6) adds to the definition of "legal holiday" days that are declared a holiday by the President. The definition of "legal holiday" in subsection (a)(6) differs from that in Federal Rule(a)(6).

Subsection (c). The time set in the former statute at 5 days has been revised to 7 days conforming this section to Supreme Court Rule 131. The one-day time period was not changed. This varies from Federal Rule 6, in which the time for serving a motion and notice of hearing was changed from 5 days to 14 days prior to the hearing and the time for filing opposing affidavits was changed from one day to 7 days. The Committee determined that state practice has proceedings and motion dockets, such as in domestic matters, where the extended time frame in Federal Rule 6 should not be followed.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Section 74

COMMENT

The language of K.S.A. 60-207 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

New subsection (a) retains the variation from the federal rules that requires a designation on the petition to distinguish Chapter 60 cases from those filed under Chapter 61.

Former subsection (a) stated that "there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *." Former K.S.A. 60-212(a) provided more generally that "[a] party served with a pleading stating a cross-claim against such party shall serve an answer thereto * * *." New K.S.A. 60-207(a)(4) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, subsection (a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former subsection (b)(1) stated that the writing requirement is fulfilled if the motion is stated in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a K.S.A. 60-206(c)(1) notice.

Former subsection (c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency, the court will treat the paper as if properly captioned. The substance of new subsection (c) formerly appeared in subsection (a) and has no counterpart in the federal rules.

There is no counterpart of subsection (d) in the federal rules.

Section 75

COMMENT

The language of K.S.A. 60-208 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-208(a) differs from Federal Rule 8(a) in actions other than contract actions by prohibiting an allegation of a specific amount of damages when damages exceeding $75,000 are sought. The general statement that is required allows the defendant to know if the amount in controversy required for federal diversity jurisdiction has been met.

The former subsection (b) and (e) cross-references to K.S.A. 60-211 are deleted as redundant. K.S.A. 60-211 applies by its own terms. The force and application of K.S.A. 60-211 are not diminished by the deletion.

Former subsection (b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader believes to be true but not material.

Deletion of former subsection (e)(2)'s "whether based on legal or on equitable grounds" reflects the parallel deletions in K.S.A. 60-201 and elsewhere. Merger is now successfully accomplished.

Section 76

COMMENT

The language of K.S.A. 60-209 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

There are no counterparts in the federal rules of subsections (h), (i), and (j), or of the provision in subsection (g) dealing with exemplary or punitive damages. Federal Rule 9(h) deals with admiralty and maritime claims and is not appropriate for the Kansas Code.

Section 77

COMMENT

The language of K.S.A. 60-210 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

The is no counterpart of subsection (d) in the federal rules. A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Section 78

COMMENT

The language of K.S.A. 60-211 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

The addition of an e-mail address in subsection (a) was incorporated from the federal "Style-Substance" amendments. Providing an e-mail address is useful, but does not in and of itself signify consent to filing or service by e-mail. A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subsection (c) is significantly different from Federal Rule 11(c), which was amended in 1993 to add a "safe harbor" provision under which a motion for sanctions may not be filed until 21 days after being served, giving the alleged violator time to correct the violation. The Civil Code Advisory Committee has in the past advised against the adoption of the 1993 federal amendment and continues to believe that the "safe harbor" provision will promote reckless and harassing pleadings since any penalty can be avoided. The Committee also rejected the federal amendment that provides for monetary sanctions to be paid to the court, as this would decrease the incentive for affected parties to pursue violations. However, the Committee did determine it would be appropriate to adopt one portion of the 1993 amendment to Federal Rule 11. K.S.A. 60-211(c) used to provide that if the court determines that subsection (b) has been violated, the court "shall impose" an appropriate sanction. It now provides that the court "may" impose a sanction, recognizing that there can be some violations that don't merit sanctions.

The time set in the former statute at 10 has been revised to 14 days. See the Comment to K.S.A. 60-206.

Section 79

COMMENT

The language of K.S.A. 60-212 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Former subsection (a) referred to an order that postpones disposition of a motion "until the trial on the merits." Subsection (a)(2)(A) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Former subsection (d) is now restyled subsection (i).

The times set in the former statute at 10 or 20 days have been revised to 14 or 21 days. See the Comment to K.S.A. 60-206.

Section 80

COMMENT

The language of K.S.A. 60-213 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

The meaning of former subsection (b) is better expressed by deleting "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in subsection (a) means the claim is not a compulsory counterclaim.

Subsection (d) has no counterpart in Federal Rule 13. Subsection (f) is unique to Kansas and applies only in comparative fault cases.

Former subsection (f) has been deleted pursuant to an amendment contained in the "Time-Computation" project. Subsection 13(f) was largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by K.S.A. 60-215. K.S.A. 60-215(a) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in former subsection (f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in K.S.A. 60-215(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of subsection (f) could, however, create some uncertainty as to the availability of relation back of the amendment under K.S.A. 60-215(c). See 6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430 (1990). Deletion of subsection (f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

There is no counterpart in the federal rules of former subsection (k), which is now revised subsection (j), dealing with appealed and transferred actions. The time set in former subsection (k) at 20 days has been revised in new subsection (j) to 21 days. See the Comment to K.S.A. 60-206.

Section 81

COMMENT

The language of K.S.A. 60-214 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Former K.S.A. 60-214 twice refers to counterclaims under K.S.A. 60-213. In each case, the operation of K.S.A. 60-213(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, K.S.A. 60-213(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. K.S.A. 60-214(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

The change of "counterclaim" to "claim" in subsection (b) was incorporated from the federal "Style-Substance" amendments. A plaintiff should be on equal footing with the defendant in making third-party claims, whether the claim against the plaintiff is asserted as a counterclaim or as another form of claim. The limit imposed by the former reference to "counterclaim" is deleted.

The times set in the former statute at 10 days has been revised to 14 days. See the Comment to K.S.A. 60-206.

There is no counterpart in the Kansas Code of Federal Rule 14(c), which deals with admiralty and maritime claims.

Section 82

COMMENT

The language of K.S.A. 60-215 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Subsection (a) is amended to incorporate changes made to Rule 15 in the federal Time-Computation project. The times set in the former section at 20 days have been revised to 21 days. See the Comment to K.S.A. 60-206.

Also, subsection (a)(1) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former subsection (a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in K.S.A. 60-207. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former subsection (a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under K.S.A. 60-212(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former subsection (a) in response to a motion, so the amended section permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended subsection (a)(1) omits the provision that cuts off the right if the action is on the trial calendar. K.S.A. 60-240 no longer refers to a trial calendar, and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under subsection (a)(2), or at and after trial under subsection (b).

Abrogation of K.S.A. 60-213(f) establishes K.S.A. 60-215 as the sole section governing amendment of a pleading to add a counterclaim.

Former subsection (c)(2)(A) called for notice of the "institution" of the action. New subsection (c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

Section 83

COMMENT

The language of K.S.A. 60-216 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

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.

In subsection (c)(1), "or other means" was added. When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

Section 84

COMMENT

The language of K.S.A. 60-217 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

"A bailee" was added to the illustrative list of real parties in interest in subsection (a)(1). This amendment was made to Federal Rule 17 in 1966, primarily to preserve the admiralty practice whereby the owner or master of a vessel sues, as bailee, for damage to the cargo, the vessel, or both. However, as noted in the federal Advisory Committee Note, there is no reason to limit the provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored.

Subsection (b) has no counterpart in Federal Rule 17.

New subsection (d) conforms to the federal rule. This provision was added as Federal Rule 25(d)(2) in 1961, but had not been incorporated in the Kansas Code. It was moved from Rule 25 to Rule 17 because it deals with designation of a public officer, not substitution.

Section 85

COMMENT

The language of K.S.A. 60-218 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Modification of the obscure former reference to a claim "heretofore cognizable only after another claim has been prosecuted to a conclusion" avoids any uncertainty whether subsection (b)'s meaning is fixed by retrospective inquiry from some particular date.

Section 86

COMMENT

The language of K.S.A. 60-219 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

The language of K.S.A. 60-219 is now in conformity with Federal Rule 19 and no longer uses the term "contingently necessary" to describe persons to be joined if feasible.

Section 87

COMMENT

The language of K.S.A. 60-220 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 88

COMMENT

The language of K.S.A. 60-221 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 89

COMMENT

The language of K.S.A. 60-222 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Subsection (b) is no longer restricted to "personal" property and applies to any claim for money, whether or not an action on contract. There is no counterpart of subsection (b) in the Federal Rules.

Section 90

COMMENT

The language of K.S.A. 60-223 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Amended subsection (d)(2) carries forward the provisions of former subsection (d) that recognize two separate propositions. First, a K.S.A. 60-223(d) order may be combined with a pretrial order under K.S.A. 60-216. Second, the standard for amending the subsection (d) order continues to be the more open-ended standard for amending K.S.A. 60-223(d) orders, not the more exacting standard for amending K.S.A. 60-216 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended subsection (f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original provision.

The time set in the former statute at 10 days has been revised to 14 days. See the Comment to K.S.A. 60-206.

In addition, K.S.A. 60-223 was amended to conform to 2003 amendments to Federal Rule 23. Subsections (c) and (e) are significantly changed, and subsections (g) and (h) are new. More detailed comments, with which the Civil Code Advisory Committee concurs, can be found in the Advisory Committee Notes to the 2003 amendments.

Subsection (c). Subsection (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." There are many valid reasons that may justify deferring the initial certification decision.

The provision that a class certification "may be conditional" is deleted in new subsection (c)(1)(C). A court that is not satisfied that the requirements of K.S.A. 60-223 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits."

The notice provisions in subsection (c)(2) have been amended to call attention to the court's authority – already established in part by former subsection (d)(2) – to direct notice of certification to a subsection (b)(1) or (b)(2) class. The former subsection (c)(2) expressly required notice only in actions certified under subsection (b)(3). New subsection (c)(2)(B) requires that notice be provided in plain, easily understood language.

Subsection (e). Subsection (e) is amended to strengthen the process of reviewing proposed class-action settlements. Although settlement may be a desirable means of resolving a class-action, court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Revised subsection (e) resolves the ambiguity in the former reference to dismissal or compromise of "a class action." The new subsection requires court approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

New subsection (e)(1) carries forth the notice requirement of former subsection (e) only when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. New subsection (e)(2) mandates a hearing as part of the process of approving settlements, voluntary dismissal, or compromise that would bind members of a class. This subsection also states the standard for approving such a binding settlement – it must be fair, reasonable, and adequate – and requires that the court make findings supporting its conclusion.

New subsection (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under subsection (e). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

New subsection (e)(4) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under subsection (b)(3) after settlement terms are known.

New subsection (e)(5) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise and requires court approval for withdrawal of the objections.

Subsection (g). Subsection (g) is new. It was added to Federal Rule 23 in 2003. This subsection recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subsection also provides a method by which the court may make directions at the outset about the potential fee award to class counsel in the event the action is successful.

Subsection (h). Subsection (h) is new. It was added to Federal Rule 23 in 2003. This subsection provides a format for awards of attorney fees and nontaxable costs in connection with a class action. The subsection does not create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties.

Section 91

COMMENT

The language of K.S.A. 60-223a has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Subsection (c) has no counterpart in the federal rule.

Section 92

COMMENT

The language of K.S.A. 60-223b has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 93

COMMENT

The language of K.S.A. 60-224 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

K.S.A. 60-224 has been rearranged to be in closer conformity to Federal Rule 24. The Committee determined that a provision in Federal Rule 24(b)(2)(A) providing for permissive intervention by a government officer or agency should be incorporated into the Kansas Code.

The federal counterpart of former subsection (c)(2) was moved to new Federal Rule 5.1 in 2006. Federal Rule 5.1 implements a specific federal statute, 28 U.S.C. § 2043, and there is no need for a counterpart in the Kansas Code. Former subsection (c)(2) has been moved to new subsection (b)(2)(B) because it deals with permissive intervention, not notice and pleading.

Former subsection (c)(1) stated that the same procedure is followed when a state statute gives a right to intervene. This statement is deleted because it added nothing.

Section 94

COMMENT

The language of K.S.A. 60-225 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Previously, a motion for substitution with respect to a public officer was required. The Committee determined to conform with the federal rule and make the substitution automatic.

There is no counterpart of subsection (e) in the federal rules. The provision for a public officer was deleted from this subsection because substitution is now automatic under subsection (d).

Section 95

COMMENT

The language of K.S.A. 60-226 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

K.S.A. 60-226 is substantially similar to Federal Rule 26. The primary differences are that the Kansas Code does not mandate the initial disclosures found in Federal Rule 26(a)(1), and the discovery conference provisions in Federal Rule 26(f) are not incorporated into a counterpart subsection of K.S.A. 60-226. Federal Rule 26 and K.S.A. 60-226 are also organized a bit differently.

Former subsection (b) began with a general statement of the scope of discovery that appeared to function as a preface to each of the seven numbered paragraphs that followed. This preface has been shifted to the text of subsection (b)(1) because it does not accurately reflect the limits embodied in subsections (b)(2) through (b)(5), and because subsections (b)(6) and (b)(7) do not address the scope of discovery.

The reference to discovery of "books" in former subsection (b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery. The last sentence of former subsection (b)(1) was deleted as redundant.

Subsection (b)(2) has been amended to be more substantively similar to the federal rule. The previous section allowed the court to limit frequency or extent only if the court made one of the findings in (i), (ii), or (iii). Now, the court has no stated limit on its ability to limit frequency or extent and must do so if it makes one of the three findings.

The federal counterpart to subsection (b)(3) was moved to Federal Rule 26(a)(1)(A)(iv) in 1993, when the mandatory initial disclosure provisions were adopted.

Amended subsection (b)(4)(C) states that a party may obtain a copy of the party's own previous statement "on request." Former subsection (b)(4) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke K.S.A. 60-234 to obtain a copy of the party's own statement.

Subsection (b)(5)(A) was amended to delete the phrase "from the expert." The disclosure required under subsection (b)(6) is required from the party, not the expert.

Subsection (c) was amended to add a certification requirement as is found in Federal Rule 26(c)(1). The language is now consistent with the certification requirement set out in the sanctions rule, K.S.A. 60-237(a)(1) and 60-237(d)(1)(B).

Subsection (e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present provision.

Former subsection (e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended subsection (e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former subsection (f)(2) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended subsection (f)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former subsection (f)(1)(A) referred to a "good faith" argument to extend existing law. Amended subsection (f)(l)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with K.S.A. 60-211(b)(2). K.S.A. 60-211(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery, and this is now reflected in amended subsection (f)(1)(B)(i).

A requirement for adding the signer's e-mail address and telephone number was added to subsection (f)(1). As with the K.S.A. 60-211 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Section 96

COMMENT

The language of K.S.A. 60-227 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

A time limit has been added to subsection (a)(2) in conformity with Federal Rule 27(a)(2). The petition and notice of hearing must be served at least 21 days before the hearing date. The former subsection provided only that the "petitioner shall thereafter serve" the notice and petition.

K.S.A. 60-227 has always differed from Federal Rule 27. The Judicial Council Advisory Committee that drafted the original provision combined the prior Kansas Code provision, Federal Rule 27, and the Uniform Perpetuation of Testimony Act of the National Conference of Commissioners on Uniform State Laws. There is no counterpart of subsections (c), (e), or (f) in the federal rules.

Section 97

COMMENT

The language of K.S.A. 60-228 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

In subsection (a)(1), "may" has been changed to "must." The Committee determined it better to use the imperative as in the federal rule. The requirement can still be overruled by stipulation under K.S.A. 60-229.

Subsection (d), which had no counterpart in the federal rules, has been deleted. A new section dealing with depositions for use in foreign jurisdictions has been added as K.S.A. 60-228a.

Section 98

COMMENT

The language of K.S.A. 60-229 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 99

COMMENT

The language of K.S.A. 60-230 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

In new subsection (b)(6), which was formerly (b)(5), "other entity" is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the place to fit into current rule language such entities as limited liability companies, limited partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.

Although there are some differences, K.S.A. 60-230 is similar to Federal Rule 30. The provision in subsection (c) that the court may order the cost of transcription to be paid by one or some of, or apportioned among, the parties has no counterpart in the federal rule. It was suggested by the federal Advisory Committee in 1955, but was not adopted. The Kansas Judicial Council Advisory Committee deliberately chose to include the provision in the Kansas Code. There are no counterparts in the Kansas Code of Federal Rule 30(d)(1) and (2), which state a time limit for depositions and provide for imposing sanctions on any person who "impedes, delays, or frustrates the fair examination of the deponent." There is no counterpart in the federal rules of K.S.A. 60-230(h) regarding the persons who may attend a deposition.

Section 100

COMMENT

The language of K.S.A. 60-231 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

There is no Kansas counterpart to Federal Rule 31(a)(2)(A)(ii), limiting the number of depositions that can be taken. Subsection (a)(5) provides slightly longer times for developing redirect and recross questions than is provided in Rule 31.

In subsection (a)(4), "other entity" is added to the list of organizations that may be deposed by written questions. See the Comment to K.S.A. 60-230.

The Committee determined that Federal Rule 31(c) should be incorporated into the Kansas Code as new subsection (c). The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under K.S.A. 60-230(e)(1). A party filing a deposition must also notify all other parties of the filing.

Section 101

COMMENT

The language of K.S.A. 60-232 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Former subsection (a) applied "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding." The amended section describes the same events as "a hearing or trial."

Former subsection (a)(1) provided that depositions could be used for impeachment purposes. Because K.S.A. 60-460 allows deposition testimony to be used in many circumstances as substantive evidence, the former language was too narrow. New subsection (a)(2) allows the use of a deposition for impeachment "or for any other purpose allowed by the rules of evidence." New subsection (a)(8) makes clear that depositions taken in an earlier action can also be used "as allowed by the rules of evidence."

There is no counterpart in the Kansas code of Federal Rule 32(a)(5)(A), regarding depositions taken on short notice.

The federal counterpart to former subsection (d) was deleted in 1972. The Advisory Committee Note to that amendment states: "The concept of 'making a person one's own witness' appears to have had significance principally in two respects: impeachment and waiver of incompetency. Neither retains any vitality under the Rules of Evidence." Under the Kansas Rules of Evidence, impeaching one's own witness is allowed under K.S.A. 60-420, and there is no Dead Man's statute that might require consideration of waiver arising from calling incompetent party-witnesses. Former subsection (d) is deleted because it is unnecessary in light of the Kansas Rules of Evidence.

The time set in the former statute at 5 days has been revised to 7 days. See the Comment to K.S.A. 60-206.

Section 102

COMMENT

The language of K.S.A. 60-233 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-233 generally follows Federal Rule 33, but there are some minor differences. Federal Rule 33(a) states a limit for the number of interrogatories, but provides for leave to serve additional interrogatories to the extent consistent with Rule 26(b). Supreme Court Rule 135 governs these issues in Kansas. There is also a minor difference in the time to respond to interrogatories as Federal Rule 33 provides for 30 days, but the Kansas Code allows a defendant 45 days after being served with process.

In new subsection (b)(1)(B), "other entity" is added to the list of organizations that must respond to interrogatories. See the Comment to K.S.A. 60-230.

Former subsection(b)(5) was a redundant reminder of K.S.A. 60-237(a) procedure and is omitted as no longer useful.

Former subsection (c) stated that an interrogatory "is not necessarily objectionable merely because an answer * * * involves an opinion or contention * * *." "[I]s not necessarily" seemed to imply that the interrogatory might be objectionable merely for this reason. This implication has been ignored in practice. Opinion and contention interrogatories are used routinely. Amended subsection (a)(2) embodies the current meaning of K.S.A. 60-233 by omitting "necessarily."

Section 103

COMMENT

The language of K.S.A. 60-234 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-234 generally follows Federal Rule 34 with minor differences regarding the timing of service and time to respond. There is no counterpart in Federal Rule 34 to the reference to electronically stored information in subsection (c) regarding nonparties, but electronically stored information may be obtained by subpoena under Rule 45.

The redundant reminder of K.S.A. 60-237(a) procedure in the second paragraph of former subsection (b) is omitted as no longer useful.

Section 104

COMMENT

The language of K.S.A. 60-235 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Although organized differently, K.S.A. 60-235 is similar to Federal Rule 35. The two primary differences are that there is no counterpart in the federal rule of subsection (a)(2)(C)'s provision regarding expenses, and the Kansas Code has no counterpart of the waiver provision found in Rule 35(b)(4). The federal rule provides that by requesting or obtaining a copy of the report, or by deposing the examiner, "the party examined waives any privilege" the party may have. Kansas has declined to adopt this language to avoid the implication that the reports would be privileged without the waiver provision. The privilege ordinarily is already waived in Kansas under K.S.A. 60-427.

Section 105

COMMENT

The language of K.S.A. 60-236 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-236 generally follows Federal Rule 36 with minor differences regarding the timing of service and time to respond.

The final sentence of the first paragraph of former subsection (a) was omitted as a redundant cross-reference to the discovery moratorium provisions of K.S.A. 60-237(c).

Section 106

COMMENT

The language of K.S.A. 60-237 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

K.S.A. 60-237 generally follows Federal Rule 37, but differs in three respects. First, the language in subsection (a) borrows from local federal district court rule 37.2 and requires that the motion describe the steps taken to resolve the issues in dispute. Second, unlike Rule 37(a), sanctions are not mandatory under subsection (a) if the requested material is provided before the court rules on the motion. Finally, there is no counterpart in the Kansas Code of Federal Rule 37(f) regarding sanctions for failing to participate in framing a discovery plan.

The language of revised subsection (a)(2) has been amended to conform to the federal rule. A motion to compel discovery regarding a party's deposition must now be filed in the court where the action is pending. The amendment eliminates the prior option to file the motion where the deposition is to be taken. The Committee determined it was appropriate to adopt this 1993 amendment to Federal Rule 37.

Like Rule 37(a)(1), K.S.A. 60-237(a)(1) requires a certification that the movant has in good faith attempted to resolve the dispute prior to filing a motion for an order to compel discovery. Kansas intentionally added a unique requirement, borrowed from a local district rule, that the certification also describe the steps taken to resolve the issues in dispute. The additional requirement to describe the steps has been added to subsection (d)(1)(B) for consistency.

Section 107

COMMENT

The language of K.S.A. 60-238 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

There is no counterpart in the federal rule of the language in subsection (d) that allows the court to set aside waiver of a jury trial.

The time set in the former statute at 10 days has been revised to 14 days. See the Comment to K.S.A. 60-206.

Section 108

COMMENT

The language of K.S.A. 60-239 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 109

COMMENT

The language of K.S.A. 60-240 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Subsection (a) was amended to delete the specific directives regarding local rules. The best method for scheduling trials depends on local conditions. It is useful to ensure that each district adopts an explicit rule for scheduling trials. It is not useful to limit or dictate the provisions of local rules.

Subsections (b) and (c) are unique to Kansas. A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Section 110

COMMENT

The language of K.S.A. 60-241 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

When K.S.A. 60-223 was amended in 1969, K.S.A. 60-223a and 60-223b were separated from K.S.A. 60-223. K.S.A. 60-241(a)(1) was amended to correct the cross-reference to what had become K.S.A. 60-223(e), but K.S.A. 60-223a and 60-223b were inadvertently overlooked. K.S.A. 60-223a and 60-223b are now added to the list of exceptions in K.S.A. 60-241(a)(1)(A). This change does not affect established meaning. K.S.A. 60-223b explicitly incorporates K.S.A. 60-223(e), and thus was already absorbed directly into the exceptions in K.S.A. 60-241(a)(1). K.S.A. 60-223a requires court approval of a compromise or dismissal in language parallel to K.S.A. 60-223(e) and thus supersedes the apparent right to dismiss by notice of dismissal.

There is no counterpart of subsection (b)(2) in the federal rule.

The time set in the former statute at 10 days has been revised to 14 days. See the Comment to K.S.A. 60-206.

Section 111

COMMENT

The language of K.S.A. 60-242 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

There is no counterpart of subsection (c) in Federal Rule 42.

Section 112

COMMENT

The language of K.S.A. 60-243 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

The Committee determined that subsection (a) should be amended to more closely conform to the federal rule. Admissibility and competency to testify are governed by article 4, and the last two sentences of former subsection (a) are unnecessary.

There are no counterparts of subsections (b) and (c) in Federal Rule 43.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Section 113

COMMENT

The language of K.S.A. 60-244 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Federal Rule 44 sets out the method of proving official records which, in Kansas, is governed by the Kansas Rules of Evidence. K.S.A. 60-244 was inserted as a placeholder, and merely provides a reference to article 4 for the substance of proving records and other documents.

Section 114

COMMENT

The language of K.S.A. 60-245 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Although there are some differences between K.S.A. 60-245 and Federal Rule 45, such as the issuing authority for and service of subpoenas in subsection (a) and the differentiation between residents and nonresidents in subsection (c), the Kansas Code generally follows the federal rule. There are no counterparts in the Kansas Code of Federal Rule 45(b)(2), (3), and (4). Subsection (c)(4) has no counterpart in the federal rule.

The reference to discovery of "books" in former subsection (a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery. The last sentence of new subsection (a)(1)(C) was revised to be consistent with K.S.A. 60-245a(c), which makes clear that the use of a nonparty business records subpoena under the procedure in that section is optional and not mandatory.

The deletion in subsection (a)(3) of the reference to a facsimile of the clerk's signature is not a substantive change. K.S.A. 20-365 independently governs the clerks' use of facsimile signatures.

Former subsection (b) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Federal courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended subsection (b) because the Committee believes it is appropriate for Kansas to follow the general present federal practice.

Subsection (c) was added in 1997 to incorporate a 1991 amendment to the federal rule. The 1997 amendment did not include the federal language stating that an appropriate sanction can include lost wages. The Committee believes that the federal rules should be followed as closely as possible unless there is a clear reason to deviate. In this case, adding the "lost wages" language does not effect a substantive change. The subsection already allowed for "an appropriate sanction, which may include, but is not limited to, a reasonable attorney fee."

The language of former subsection (d)(2)(A) addressing the manner of asserting privilege is replaced by adopting the wording of K.S.A. 60-226(b)(7). The same meaning is better expressed in the same words. The method of asserting privilege under this section is now the same as the method of asserting privilege under K.S.A. 60-226(b)(7).

Section 115

COMMENT

The language of K.S.A. 60-245a has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

A substantive change has been made to revised subsection (b)(2) at the request of the Kansas Association of District Court Clerks & Administrators and the Office of Judicial Administration. Nonparty business records will now be delivered to the party or attorney requesting them and not to the court clerk.

K.S.A. 60-245a has also been amended regarding affidavits. Former subsection (c) required the requesting party to provide the nonparty with an affidavit form to sign and return with the records. This requirement was changed because K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit. The Committee determined that providing both an affidavit and a declaration to the nonparty would be overly cumbersome and could lead to confusion. Revised subsection (b) now requires that the requesting party provide only a declaration form, although the nonparty retains the option of submitting an affidavit in response.

When testimony of the custodian is desired, the procedure under K.S.A. 60-245 is to be followed and this section does not apply.

There is no counterpart of this section under the federal rules, but a similar procedure is possible under Rule 45(c)(2)(A) and Federal Rule of Evidence 902(11).

The time set in the former statute at 10 days has been revised to 14 days. See the Comment to K.S.A. 60-206.

Section 116

COMMENT

The language of K.S.A. 60-246 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 117

COMMENT

The language of K.S.A. 60-247 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Subsection (a) was added by the Supreme Court in 1976 and has no counterpart in the federal rules.

Federal Rule 47(b) requires that the court allow the number of peremptory challenges provided in 28 U.S.C. § 1870. Subsection (c) is similar to 28 U.S.C. § 1870, but adds the required finding of a "good faith controversy" before the court can allow additional peremptory challenges and permit them to be exercised separately or jointly. Kansas also added the last sentence of subsection (c)(2).

There is no counterpart in the Kansas Code of Federal Rule 47(c) regarding excusing a juror for good cause. Subsection (d) has no counterpart in the federal rule.

Section 118

COMMENT

The language of K.S.A. 60-248 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Subsection (a) originally followed Federal Rule 48, and the rest of the subsections are unique to Kansas. Kansas has not adopted the 1991 amendments to Federal Rule 48. The former rule was rendered obsolete at that time by the adoption in many federal districts of local rules establishing 6 as the standard size for a civil jury. In 2009, Rule 48 was divided into two sections – (a) Number of Jurors, and (b) Verdict. Also added in 2009 was new Federal Rule 48(c) regarding polling, which has been incorporated with some revisions into subsection (g).

Subsection (h) has been amended to allow alternate jurors to be selected at the same time the regular jury is being selected. A similar change to K.S.A. 22-3412(c), governing criminal jury trials, was enacted by the legislature during the 2009 session.

Section 119

COMMENT

The language of K.S.A. 60-249 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

K.S.A. 60-249 follows Federal Rule 49 except subsection (b) has been changed to require a written request. Language providing that the number and form of written questions are subject to the court's control has been deleted. No change to the court's discretion is intended. The language was unnecessary.

Section 120

COMMENT

The language of K.S.A. 60-249a has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-249a has been reorganized for clarity. Former subsections (b) and (c) apply in jury and nonjury actions. Because former subsection (a) applies only to jury actions, it was moved to the end of the statute as subsection (c). Former subsections (b) and (c) now appear first as (a) and (b).

There is no counterpart of this section in the federal rules.

Section 121

COMMENT

The language of K.S.A. 60-250 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

The Committee determined that Federal Rule 50(c), (d), and (e) should be adopted in K.S.A. 60-250. It appears they may have been inadvertently omitted when the Code was adopted in 1964. Subsection (b) already authorizes combining a motion for a new trial and a renewed motion for judgment as a matter of law. Subsections (c), (d), and (e) merely give guidance to the court on how to consider those joint motions.

Formerly, K.S.A. 60-250, 60-252, and 60-259 adopted 10-day periods for their respective post-judgment motions. K.S.A. 60-206(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. Rather than introduce the prospect of uncertainty in appeal time by amending K.S.A. 60-206(b) to permit additional time, the former 10-day periods are expanded to 28 days. K.S.A. 60-206(b) continues to prohibit expansion of the 28-day period.

Formerly, K.S.A. 60-250, 60-252, and 60-259 used inconsistent language regarding motions, including "service and filing," "made," and "served." Now all use "file" or "filed" to make uniform what must be done for a post-trial motion to delay the time for filing a notice of appeal.

Section 122

COMMENT

The language of K.S.A. 60-251 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

K.S.A. 60-251 has been amended to incorporate 2003 amendments to Federal Rule 51. Detailed comments can be found in the 2003 Federal Advisory Committee Notes. Some differences remain. The mandate that the court instruct the jury at the close of the evidence, before argument, is not found in the federal rule. New subsection (b)(4) is intended to reconfirm that the court may instruct the jury at any time, including after opening statements.

Also, the standard of error under Kansas law is "clearly erroneous," rather than the "plain error" standard in Federal Rule 51. There is a body of established Kansas case law defining the "clearly erroneous" standard, which is retained in revised K.S.A. 60-251.

Section 123

COMMENT

The language of K.S.A. 60-252 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Amended subsection (a)(4) includes provisions that appeared in former subsections (a) and (b). Subsection (a) provided that requests for findings are not necessary. It applied both in an action tried on the facts without a jury and also in granting or refusing an interlocutory injunction. Subsection (b), applicable to findings "made in actions tried by the court without a jury," provided that the question of the sufficiency of the evidence may "thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment." Former subsection (b) did not explicitly apply to decisions granting or refusing an interlocutory injunction. Amended subsection (a)(4) makes explicit the application of this part of former subsection (b) to interlocutory injunction decisions.

Amended subsection (a)(5) continues to omit the qualifier "whether based on oral or other evidence." When that language was added to the federal rule in 1985, Kansas chose not to adopt a conforming provision. Under Kansas law, the appellate courts have de novo review in cases submitted solely on documentary evidence and stipulated facts.

Former subsection (c) provided for judgment on partial findings, and referred to it as "judgment as a matter of law." Amended subsection (c) refers only to "judgment," to avoid any confusion with a K.S.A. 60-250 judgment as a matter of law in a jury case. The standards that govern judgment as a matter of law in a jury case have no bearing on a decision under subsection (c).

Formerly, K.S.A. 60-250, 60-252, and 60-259 adopted 10-day periods for their respective post-judgment motions. K.S.A. 60-206(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. Rather than introduce the prospect of uncertainty in appeal time by amending K.S.A. 60-206(b) to permit additional time, the former 10-day periods are expanded to 28 days. K.S.A. 60-206(b) continues to prohibit expansion of the 28-day period.

Formerly, K.S.A. 60-250, 60-252, and 60-259 used inconsistent language regarding motions, including "service and filing," "made," and "served." Now all use "file" or "filed" to make uniform what must be done for a post-trial motion to delay the time for filing a notice of appeal.

Section 124

COMMENT

The language of K.S.A. 60-252a has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

There is no counterpart of this section in the federal rules.

Section 125

COMMENT

The language of K.S.A. 60-252b has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

There is no counterpart of this section in the federal rules.

Section 126

COMMENT

The language of K.S.A. 60-253 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

When adopted, K.S.A. 60-253 followed Federal Rule 53 with minor variations. Federal Rule 53 has been amended several times, most substantially in 2003. Because masters are not used in state courts nearly as often as in federal court, the Committee determined it is not necessary to conform K.S.A. 60-253 to the federal rule.

The order of subsections (a) and (b) was reversed because it is more logical for the reference provision to appear first. The Committee determined that the disqualification provision in Federal Rule 53(a)(2) would be beneficial, and this was added to the end of revised subsection (a).

In subsection (c), "electronically stored information" has been added to the list of evidence of which the master can require production.

The time set in the former statute at 10 and 20 days have been revised to 14 and 21 days, respectively. See the Comment to K.S.A. 60-206.

Section 127

COMMENT

The language of K.S.A. 60-254 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Under the Kansas Code, "judgment" is defined differently than under the federal rules. Subsection (c) requires the giving of notice before taking a default judgment for money damages when the pleading specifies that the amount sought was in excess of $75,000. That requirement is not found in the federal rules. The notice must now be given by return receipt delivery rather than certified mail, allowing the same options as for service of process. The provision mandating proof of service is deleted as unnecessary. K.S.A. 60-205(d)(1) now requires a certificate of service be filed with any paper required to be served. There is no counterpart in the Kansas Code of Federal Rule 54(d).

The time set in the former statute at 10 days has been revised to 14 days. See the Comment to K.S.A. 60-206.

Section 128

COMMENT

The language of K.S.A. 60-255 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

K.S.A. 60-255 is substantially similar to Federal Rule 55, except that only the court can enter a default judgment. Subsection (a) now defines when a party is in default.

Amended K.S.A. 60-255 omits former subsection (c), which included two provisions. The first recognized that K.S.A. 60-255 applies to described claimants. The list was incomplete and unnecessary. Subsection (a) applies K.S.A. 60-255 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that K.S.A. 60-254(c) limits the relief available by default judgment.

The time set in the former statute at 3 days has been revised to 7 days. See the Comment to K.S.A. 60-206.

Section 129

COMMENT

The language of K.S.A. 60-256 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Former subsections (a) and (b) referred to summary judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. K.S.A. 60-256 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended subsections (a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Former subsections (c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. "Should" in amended subsection (c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under subsection (e)(2). Subsection (d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former subsection (d) used a variety of different phrases to express the K.S.A. 60-256(c) standard for summary judgment – that there is no genuine issue as to any material fact. Amended subsection (d) adopts terms directly parallel to K.S.A. 60-256(c).

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subsection (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature, both subsection (c)(1) and K.S.A. 60-206(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. A case management order entered under K.S.A. 60-216(b) may supersede the rule provisions, deferring summary-judgment motions until a stated time or establishing different deadlines.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

Section 130

COMMENT

The language of K.S.A. 60-257 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 131

COMMENT

The language of K.S.A. 60-258 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-258 is substantially different from Federal Rule 58.

Section 132

COMMENT

The language of K.S.A. 60-258a has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

There is no counterpart in the federal rules of K.S.A. 60-258a.

Section 133

COMMENT

The language of K.S.A. 60-259 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

There are substantial differences between K.S.A. 60-259 and Federal Rule 59.

Subsection (a) is amended to delete the phrase "when it appears that the rights of the party are substantially effected." That guidance for the court is already set out in the last sentence of K.S.A. 60-261.

The substance of former subsection (b)(2) was moved to revised subsection (e), which now conforms to Federal Rule 59(d).

Formerly, K.S.A. 60-250, 60-252, and 60-259 adopted 10-day periods for their respective post-judgment motions. K.S.A. 60-206(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. Rather than introduce the prospect of uncertainty in appeal time by amending K.S.A. 60-206(b) to permit additional time, the former 10-day periods are expanded to 28 days. K.S.A. 60-206(b) continues to prohibit expansion of the 28-day period.

Formerly, K.S.A. 60-250, 60-252, and 60-259 used inconsistent language regarding motions, including "service and filing," "made," and "served." Now all use "file" or "filed" to make uniform what must be done for a post-trial motion to delay the time for filing a notice of appeal.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Former subsection (d) set a 10-day period after being served with a motion for new trial to file opposing affidavits. It also provided that the period could be extended for up to 20 days for good cause or by stipulation. The apparent 20-day limit on extending the time to file opposing affidavits seemed to conflict with the K.S.A. 60-206(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former subsection (d) limit. K.S.A. 60-206(b) governs. The underlying 10-day period was extended to 14 days to reflect the change in the K.S.A. 60-206(a) method for computing periods of less than 11 days.

Section 134

COMMENT

The language of K.S.A. 60-260 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

The final sentence of former subsection (b) specified that the procedure for obtaining any relief from a judgment was by motion as prescribed in article 2 or by an independent action. That provision is deleted as unnecessary. Relief continues to be available only as provided in the Kansas Code or by independent action.

Section 135

COMMENT

The language of K.S.A. 60-261 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 136

COMMENT

The language of K.S.A. 60-262 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-262 is substantially similar to Federal Rule 62, except the Kansas Code has no counterparts of Federal Rule 62(f) or the last sentence of Federal Rule 62(c).

The final sentence of former subsection (a) referred to subsection (c). It is deleted as unnecessary. Subsection (c) governs of its own force.

The time set in the former statute at 10 days has been revised to 14 days. See the Comment to K.S.A. 60-206.

Section 137

COMMENT

The language of K.S.A. 60-263 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-263 originally followed the federal rule. Federal Rule 63 was substantially revised in 1991 and is now applicable to any situation in which a judge is unable to proceed with a hearing or trial.

Section 138

COMMENT

The language of K.S.A. 60-264 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-264 follows Federal Rule 71.

Section 139

COMMENT

The language of K.S.A. 60-265 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Other than the addition of language excluding limited actions, K.S.A. 60-265 has not been amended since its adoption in 1963. At that time, the Judicial Council Advisory Committee noted: "There are many provisions in the Kansas substantive law for special procedure. We cannot expect to reach them all in this code. The most practical solution will be to amend the provisions in the substantive law to conform to these rules." The amendment simplifies the statute, consistent with that approach, and makes clearer the relationship after unification of the district court between this code and other codes such as those governing probate, juvenile justice, and care of children proceedings. Language permitting the adoption of all or part of these procedural rules by any other court or body has been deleted as unnecessary.

The former reference to proceedings in the supreme court has been deleted. Appellate procedure has changed significantly since the Code was enacted and is now governed by Supreme Court Rules.

K.S.A. 60-265 has no counterpart in the federal rules.

Section 140

COMMENT

The language of K.S.A. 60-266 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-266 is similar to Federal Rule 82.

Section 141

COMMENT

The language of K.S.A. 60-267 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-267 is similar to Federal Rule 83.

Section 142

COMMENT

The language of K.S.A. 60-268 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-268 is similar to Federal Rule 84.

Section 143

COMMENT

The language of K.S.A. 60-270 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

K.S.A. 60-270 has no counterpart in the federal rules.

Section 144

COMMENT

The language of K.S.A. 60-271 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

No substantive change to current rules regarding telefacsimile filing is intended. The use of the broader terms "electronic means" and "document" will accommodate future expansion of electronic filing methods pursuant to supreme court rule. Subsection (c) is deleted as unnecessary.

K.S.A. 60-271 has no counterpart in the federal rules.

Section 145

COMMENT

The language of K.S.A. 60-301 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 146

COMMENT

The language of K.S.A. 60-302 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 147

COMMENT

The language of K.S.A. 60-303 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Although K.S.A. 60-303 states that it describes methods of service in the state, subsection (d)(3) refers to service outside the state, and K.S.A. 60-308 now refers back to K.S.A. 60-303 for service by return receipt delivery.

Subsection (f) was modeled after K.S.A. 61-3003(g) and was added so that process methods for garnishment actions would be the same under Chapter 60 and Chapter 61. Differences between subsection (f) and K.S.A. 61-3003(g) are intended to be stylistic only.

Section 148

COMMENT

The language of K.S.A. 60-304 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Section 149

COMMENT

The language of K.S.A. 60-305 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 150

COMMENT

The language of K.S.A. 60-305a has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 151

COMMENT

The language of K.S.A. 60-306 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

Subsections (a)(1), (2), and (3) were added at the request of the office of the secretary of state. References to recording appointments in the "register of service agents" have been deleted as outdated. Appointments must now be "filed" with the office of the secretary of state, which more accurately represents current practice.

Section 152

COMMENT

The language of K.S.A. 60-307 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit. Subsection (c) was amended to require that the affidavit or declaration supporting service by publication state the specific efforts made to ascertain names and/or addresses.

The phrase "or otherwise defend" was added to subsection (d)(2)(B) to conform with amended K.S.A. 60-255(a).

Section 153

COMMENT

The language of K.S.A. 60-308 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Under subsection (b)(2), Kansas courts are authorized to exercise general jurisdiction to the extent allowed by the U.S. and Kansas constitutions. Subsection (b)(1)(L) was added to ensure that courts can also exercise specific jurisdiction to the extent of due process.

Subsection (d) is deleted as unnecessary. The reference in subsection (a)(2) to K.S.A. 60-303(c), which sets out the details of service by return receipt delivery, is sufficient.

Section 154

COMMENT

The language of K.S.A. 60-309 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

The time period in subsection (b) has been shortened from 6 months to 3 months. The Committee determined there is no justification for having different rules for sales for value and judicial sales.

Section 155

COMMENT

The language of K.S.A. 60-310 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 156

COMMENT

The language of K.S.A. 60-311 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

Section 157

COMMENT

The language of K.S.A. 60-312 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code.

A formal affidavit is no longer required. K.S.A. 53-601 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

The time set in subsection (d) has been revised from 10 to 14 days. See the Comment to K.S.A. 60-206.

Section 158

COMMENT

The language of K.S.A. 60-313 has been amended as part of the general restyling of the Kansas Code to make it more easily understood and to make style and terminology consistent throughout the Code. These changes are intended to be stylistic only.

(f) K.S.A. 60-241, and amendments thereto, providing for dismissal of actions;

(g) K.S.A. 60-244, and amendments thereto, providing for proof of records;

~~(h)~~ K.S.A. 60-256, and amendments thereto, relating to summary judgment;

~~(i)~~ K.S.A. 60-259 ~~and 60-260~~, and amendments thereto, concerning new trial ~~and relief from judgment or order, respectively~~;

~~(j)~~ K.S.A. 60-261 and 60-263, and amendments thereto, relating respectively to harmless error and disability of a judge; and

~~(k)~~ K.S.A. 60-264, and amendments thereto, relating to process in behalf of and against persons not parties.

Sec. 200. K.S.A. 61-3002 is hereby amended to read as follows: 61-3002. (a) The summons shall be issued by the clerk and dated the day it is issued. The summons shall state the time when the law requires the defendant to appear or file an answer in response to the petition, and shall notify such defendant that in case of such defendant's failure to appear or file an answer, judgment by default will be rendered against such defendant for the relief demanded in the petition.

(b) The time stated in the summons requiring the defendant to appear in response to the petition shall be determined by the court. Such time shall be not less than ~~11~~ *14* nor more than 50 days after the date the summons is issued.

Sec. 201. K.S.A. 61-3006 is hereby amended to read as follows: 61-3006. (a) (1) Service of process may be made upon any party outside the state. If upon a person domiciled in this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of service of process within this state; otherwise it shall have the force and effect of service by publication.

(2) The service of process shall be made in the same manner as service within this state, by any officer authorized to make service of process in this state or in the state where the defendant is served. No order of a court is required. An affidavit, or any other competent proofs, of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

(3) The time stated in the summons requiring the defendant to appear in response to the petition shall be determined by the court. Such time shall be not less than ~~11~~ *14* nor more than 50 days after the date the summons is issued, except as provided in subsection (a)(3) of K.S.A. 60-308, and amendments thereto.

(b) The provisions of subsection (b) of K.S.A. 60-308, and amendments thereto, shall be used to determine whether a person has submitted

(h) K.S.A. 60-252, and amendments thereto, concerning findings and conclusions by the court, except that when the findings and conclusions are made by a district magistrate judge, the time to file a motion for amended or additional findings is 14 instead of 28 days;

(i)

(j)

, except that the time to file a motion for new trial or to alter or amend judgment when a judgment is rendered by a district magistrate judge is 14 instead of 28 days;

(k) K.S.A. 60-260, and amendments thereto, concerning relief from judgment or order;

(l)

(m)

Insert new section to read as follows:

61-3304. Modification of judgment. Except as modified by subsections (h) and (j) of K.S.A. 61-2912, and amendments thereto, ~~The~~ the provisions of K.S.A. 60-252, 60-259 and 60-260, and amendments thereto, shall apply to judgments entered under the code of civil procedure for limited actions where such provisions are not inconsistent with other provisions of the code.

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KBA
Kansas Bankers Association

March 11, 2010

To: Senate Judiciary Committee

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: HB 2656: Contingently Necessary Parties

Mr. Chairman and Members of the Committee:

Thank you for the opportunity today to present written testimony in support of **HB 2656**, Section 86, which amends K.S.A. 60-219, regarding contingently necessary parties.

This bill has been brought before you in response to a recent Kansas Supreme Court decision, Landmark National Bank v. Boyd A. Kelser, et al., 289 Kan. 528, 216 P.3d 158 (2009).

We understand that this case raised some issues with regard to who should be named a contingently necessary party in a mortgage foreclosure action. It has long been the rule and practice that any foreclosing entity wants to engage all parties who may claim an interest to the property for which they hold a mortgage. To not do so could mean that their foreclosure action could be set aside.

To the end that this bill resolves the confusion regarding an action concerning title or a security interest in real property, whether a person, such as Mortgage Electronic Registration Systems, Inc., (MERS), who is subject to service of process and is a nominee of record on behalf of a beneficial owner of the real property, should be named in a foreclosure action as a contingently necessary party, we support the bill and respectfully request that the Committee act favorably.

Thank you for your time and attention today.

610 S.W. Corporate View 66615 | P.O. Box 4407, Topeka, KS 66604-0407 | 785-232-3444 | Fax 785-232-
kbaoffice@ksbankers.com | www.ksbankers.com

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Testimony in Support of Kansas HB 2656
Senate Judiciary Committee
Testimony on Behalf of Mortgage Electronic Registration Systems, Inc.
Tyson C. Langhofer, Esq.,
Partner, Stinson Morrison Hecker LLP
Thursday, March 11, 2010

Mr. Chairman, members of the committee, my name is Tyson Langhofer and I am pleased to appear before you in support of HB 2656. I am appearing today on behalf of Mortgage Electronic Registration Systems, Inc. ("MERS"). MERS was created to improve the efficiency of mortgage lending by reducing errors, costs, and delays associated with frequent and multiple assignments of the mortgage lien interest when servicing rights or beneficial ownership interests are sold. MERS Members contract with MERS to hold legal title to the mortgage lien by being the mortgagee of record as "nominee" for all MERS Members who may acquire the beneficial interest in the loan, as such interests and rights are frequently transferred throughout the life of such loans. MERS Members agree to appoint MERS to act as their common agent or nominee, and as the mortgagee of record in that capacity, on all mortgage loans they register on the MERS® System. The MERS® System is a database owned and operated by MERSCORP, Inc. that tracks the changes in servicing rights and beneficial ownership interests in registered mortgage loans. As the mortgagee of record, MERS keeps the chain of title clear and ascertainable, without the worry of unrecorded, incorrect, or intervening assignments. All mortgage loans registered on the MERS® System are recorded in the appropriate recording office.

My testimony will specifically address the amendment of HB 2656 to include subsection (e) to K.S.A. 60-219. K.S.A. § 60-219 is designated as the contingently necessary party statute. One of the purposes of this statute is to define the class of persons that is required to be named as a party to any civil action that involves an interest in property, which would include a foreclosure action. The proposed amendment is necessary due to a recent Kansas Supreme Court decision, Landmark National Bank v. Boyd A. Kesler, et al., 289 Kan. 528, 216 P.3d 158 (2009), which has created some potential confusion as to whom is to be included in the class of contingently necessary parties.

The rule which has always been followed in Kansas provides an orderly method for adjudication of competing claims to the real estate and prioritization of competing claims. The procedure is activated by joining all known competing interests in and claims to the real estate as parties to the action. To facilitate this process, the Legislature enacted the recording statutes which allow all persons claiming an interest in real property to record their claimed interest. The purpose of the recording statutes is to provide notice to the general public of the various claimed interests in real property. Hayner v. Eberhardt, 37 Kan. 308, 15 P. 168, 171 (1887). This methodology provides a person with the certainty that clear title can be obtained to a parcel of property if all parties which have properly recorded their claimed interests pursuant to the recording statutes are notified of any actions that may affect the real estate.

Historically, the various persons involved in the preparation and filing of foreclosure actions (e.g., attorneys, lenders and title companies) have always understood that all parties claiming an

interest in real property, even those claiming an interest on behalf of another party, are considered contingently necessary parties under K.S.A. § 60-219. In Landmark, however, the Court declined to rule on whether a named mortgagee that held title to the mortgage as nominee for the noteholder is a contingently necessary party under K.S.A. § 60-219. This has created some concern that this decision might be used to call into question whether a person holding a validly recorded interest on behalf of another is a contingently necessary party to an action involving such property. There are many scenarios in which a person might claim an interest on behalf of another, including, as executor, administrator, guardian, conservator, trustee, receiver, nominee, or any party with whom or in whose name a contract has been made for the benefit of another. If these parties are not considered to be contingently necessary parties, then they would not receive notice of a lawsuit which could affect their claimed interest in the property. Under this scenario, they would not be aware of the action and would be unable to carry out their duties to protect their claimed interest. Thus, this amendment is necessary to ensure that any person claiming an interest in property on behalf of another person is considered a contingently necessary party to any action involving such property.

Kansas law imposes certain duties upon mortgagees which include the duty to file a satisfaction of mortgage once the mortgage has been paid in full. K.S.A. § 58-2309a. If the satisfaction is not filed within 20 days from receipt of full payment, then the mortgagee is subject to a fine and civil damages. Since Kansas law imposes duties upon mortgagees which carry the potential for fines and civil damages, it is imperative that Kansas law also recognizes the concomitant rights associated with being a mortgagee. One of the most important rights is the right to notice of a lawsuit which could potentially affect the mortgagee's rights in the mortgage itself. Therefore, all legal titleholders to a mortgage in Kansas must be guaranteed the right to receive notice of any civil action affecting such interest. If they are not guaranteed such right, they could potentially be bound by a judgment that requires the release of the mortgage, but to which they were not a party . If the mortgagee is not aware of such judgment and does not release within the requisite period, the mortgagee could be subject to the imposition of fines and civil damages. This would be entirely inequitable and would not be in line with the due process rights afforded by the United States and Kansas Constitutions.

The amendment to this statute will also clarify K.S.A. § 60-219 to bring it in line with other statutes that also deal with this issue. For example, the real party in interest statute, K.S.A. § 60-217, provides that a person holding an interest on behalf of another "may sue in the party's own name without joining the party for whose benefit the action is brought." This amendment will clarify that not only does a person holding on behalf of another have the right to bring an action in their own name, but guarantees that such a person will be named as a party in any action involving such claimed interest.

I will close with a quote from the Kansas Court of Appeals in Citizens Bank & Trust v. Brothers Constr. & Mfg., Inc., 18 Kan. App. 2d 704, 711, 859 P.2d 394 (1993) which aptly summarizes the law in Kansas on this issue:

> Our holding in this case does nothing more than reiterate that the law in Kansas is as it has been for 97 years. We do not place an unimaginable burden on commercial lending institutions. Our decision requires only that a bank join as

> parties to a foreclosure action all parties which it knows or should know are making some claim to the property in question. . . . If a Bank seeks to foreclose a mortgage, joinder of other parties claiming an interest in the real estate is good law practice and not an overwhelming burden. We think it not outrageous to require that a party be joined before a foreclosure action can be held to foreclose his or her rights to real estate. . . . We believe that such procedure will support the principles of due process and justice on which our legal system was founded.

I urge the Kansas Legislature to enact HB 2656 which will ensure that all parties will be joined before a foreclosure action can be held to foreclose his or her rights to property in Kansas.

Thank you for your time and I'm happy to stand for questions at the appropriate time.

STINSON
MORRISON
HECKER LLP

Barkley Clark
(816) 691-2433
bclark@stinson.com
www.stinson.com

1201 Walnut Street, Suite 2900
Kansas City, MO 64106-2150

Tel (816) 842-8600
Fax (816) 412-1070

March 10, 2010

Senator Thomas C. Owens
Chairman, Kansas Senate Judiciary Committee
Kansas State Capital Building
10th and Jackson
Topeka, KS 66612

Re: Support for House Bill 2656

Dear Chairman Owens:

I am pleased to write this letter in support of that portion of House Bill 2656 which would amend K.S.A. 60-219 by adding a new subsection (e). This amendment would eliminate the confusion that has been created by a recent Kansas Supreme Court decision, Landmark National Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (Kan. 2009).

For many years, particularly during the time I taught Commercial Law at the KU Law School, I worked with the Kansas legislature on matters involving commercial law and consumer protection. Although I have not appeared before this Committee for several years, I appreciate the opportunity to provide some analysis in support of H.B. 2656, which you are considering today. Although my law firm (Stinson Morrison Hecker, LLP) represented MERS in the case to which this bill is responding, I was not involved in the case and am writing this letter more in my capacity as a teacher, writer and long-time student of commercial law principles. In that vein, I have attached a newsletter article I co-authored that discusses the recent Kansas case, as well as another MERS decision from the Minnesota Supreme Court. This article provides more detailed analysis of the issues involved in the Kansas Supreme Court decision.

MERS is a wholly owned subsidiary of MERSCORP, Inc., which owns the MERS System, a database that tracks the changes in ownership and servicing rights, from initial loan closing through to final loan payoff. MERS holds legal title to mortgage liens as the mortgagee and common agent for the various note-owners. In the Landmark Bank case, decided August 28, 2009, the Kansas Supreme Court held that MERS was not an indispensible party to a Kansas mortgage foreclosure action brought by the first mortgagee. As a result, MERS, as the mortgagee on the second mortgage, lost the opportunity to claim the surplus for the benefit of the notcholder that was left after the foreclosure of the

first mortgage. A default judgment in favor of the first mortgagee wiped out the second mortgage, and the property was sold to a third party.

Under the MERS system, if MERS had received notice of the foreclosure action, it would have immediately notified the current registered servicer of the second mortgage loan, which would then have been in a position to protect its right to any surplus. MERS should have received notice because its name appeared on the recorded second mortgage as "mortgagee" in a nominee capacity for the second mortgage lender and its assigns. MERS' address, which showed up on the title report and could have been used for service purposes, also appeared on the face of the recorded mortgage. But MERS never received the notice that would have allowed it to protect its interest as the second mortgagee and ultimately the interest of the holder of the second mortgage loan.

The Kansas Supreme Court concluded that the trial court did not abuse its discretion in holding that MERS did not qualify as an indispensible party because it functioned "solely as nominee" for the second mortgage lender and its assignees. The court felt that this status was more akin to a "straw man" than a party with a substantive economic stake in the underlying security interest. In my opinion, the court missed the key point that, though MERS does not **itself** have any economic interest in the loan that is secured by the mortgage, its commercial function in the secured lending world is to serve as the mortgagee of record and thus be in a position to notify the servicer or holder of the note of litigation such as the Kansas foreclosure. In serving this vital function, MERS is clearly protecting the economic interest of **third parties** such as the holder of the note which was secured by the second mortgage in the Kansas case. Tracking the ownership of loans secured by mortgages is a huge and important responsibility; in Kansas alone, MERS is designated as mortgagee on over 376,000 recorded mortgages.

The MERS business model relies on well-recognized principles of commercial law, such as (1) the use of a nominee in designating one (or multiple) secured parties on a UCC financing statement, (2) the "indirect holding system" that uses a central depository to track ownership and security interests in various types of securities under Article 8 of the UCC, and (3) the UCC rule that, if a secured party assigns a perfected security interest in collateral, no refiling is required for the assignment transaction.

In my opinion, H.B. 2656 is carefully tailored to respond to the confusion created by the Landmark Bank decision. The amendment to K.S.A. 60-219 would simply make it clear that joinder of a party is necessary if that party, as "nominee", represents another party in a contract that has been made for the benefit of that other party. This amendment reflects the fact that both Kansas common law and the UCC allow a person to appoint a third party to act on their behalf to protect that person's security interest. The Landmark Bank case creates some confusion as to whether

such a third-party nominee is a contingently necessary party to a lawsuit involving a security interest. The confusion caused by the case is not a good thing for secured parties who do business in Kansas, or wish to do so. H.B. 2656 clears up this confusion.

I sincerely hope that this letter, and the recent article that accompanies it, are helpful for the Committee. Please let me know if I can provide any other assistance.

Sincerely,

STINSON MORRISON HECKER LLP

Barkley Clark

Barkley Clark

BC:brl

Attachments

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council - Randy M. Hearrell**

DATE: **March 11, 2010**

RE: **HB 2557 Relating to Removal of the Reference to "Inheritance Tax" from the Kansas Statutes**

Effective July 1, 1998, the Legislature repealed the Kansas Inheritance Tax and in 2001 the Legislature amended K.S.A. 79-15,119 to "sunset" the inheritance tax act. The amended language is found in Chapter 63, Section 1 of the 2001 Session Laws. It reads:

> "The provisions of K.S.A. 2001 Supp. 79-15,100 through 79-15,199, and amendments thereto, shall be applicable to the estates of all decedents dying after June 30, 1998. The provisions of article 15 of chapter 79 of the Kansas Statute Annotated in effect immediately before the effective date of the Kansas estate tax act shall be applicable to the estates of all decedents dying before July 1, 1998, for which an inheritance tax return is not filed with the director before July 1, 2008, no liability which may have been imposed if the return was so filed by such accrue to either the estate or the distributees of the estate."

The Probate Law Advisory Committee has removed reference to the inheritance tax from the probate forms in recent years. Although the inheritance tax was repealed as to decedents dying on or after July 1, 1998, and "sunset" on July 1, 2008, reference to the tax still appears in the statutes. The proposed legislation removes reference to inheritance tax in the Kansas statutes when the

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reference is to the Kansas inheritance tax. It should be noted that a few references to inheritance tax will remain in the statues. The references that remain refer to the inheritance tax of other states.

On page 26, in line 43, and on page 31, in line 35, the reference to "inheritance tax" is stricken and reference to "estate tax" is inserted. These two changes insert the reference to the correct tax.

In addition, "sunset" language for the pick-up tax (repealed January 1, 2007) is included in new section 1 of the bill and "sunset" language for the estate tax (repealed January 1, 2010) is included in new section 2 of the bill.

Amendments

The amendments made by the House Judiciary are technical amendments and are supported by the Judicial Council.

PROBATE LAW ADVISORY COMMITTEE

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KANSAS
DEPARTMENT OF REVENUE

Mark Parkinson, Governor
Joan Wagnon, Secretary

www.ksrevenue.org

TESTIMONY REGARDING
HOUSE BILL 2557
Before the Senate Committee on Judiciary
March 11, 2010

The Kansas inheritance tax was first enacted decades ago. It applied to the estates of decedents dying prior to July 1, 1998. Then the inheritance tax was repealed and replaced with an estate "pick-up" tax.

The "pick-up" tax was in effect for estates of decedents dying after June 30, 1998 and prior to January 1, 2007. Then the "pick-up" tax was repealed and replaced with a stand alone estate tax.

The stand alone estate tax was in effect for estates of decedents dying after December 31, 2006 and prior to January 1, 2010. Then the stand alone estate tax was repealed for estates of decedents dying after December 31, 2009.

No inheritance or estate tax is imposed on the estates of decedents dying after December 31, 2009.

In 2001 the Legislature amended K.S.A. 79-15,119 to "sunset" the inheritance tax. After amendment, the statute provided:

> **79-15,119. Same; application of act.** The provisions of K.S.A. 2001 Supp. 79-15,100 through 79-15,119, and amendments thereto, shall be applicable to the estates of all decedents dying after June 30, 1998. The provisions of article 15 of chapter 79 of the Kansas Statute Annotated in effect immediately before the effective date of the Kansas estate tax act shall be applicable to the estates of all decedents dying before July 1, 1998, for which an inheritance tax return was filed before July 1, 2008. In the event any such inheritance tax return is not filed with the director before July 1, 2008, no liability which may have been imposed if the return was so filed by such date shall accrue to either the estate or the distributees of the estate.
>
> **History:** L. 1998, ch. 130, § 18; L. 2001, ch. 63, § 1; July 1.

Like the inheritance tax, both the "pick-up" tax and the stand alone estate tax apply to an estate based on the date of death of the decedent. Because both the "pick-up" tax and the stand alone estate tax have now been repealed it is appropriate to "sunset" both of these tax acts, as was done with the inheritance tax.

OFFICE OF POLICY AND RESEARCH
DOCKING STATE OFFICE BUILDING, 915 SW HARRISON ST., TOPEKA, KS 66612-1588
Voice 785-296-3081 Fax 785-296-7928 http://www.ksrevenue.org/

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New Section 1 of HB2557 is a "sunset" provision for the "pick-up" tax. As was the case for the inheritance tax the "sunset" occurs ten (10) years after the repeal of the act.

The House Committee's amendment to New Section 1 is a technical amendment made because some of the statutes included in the "pick-up" tax act were inadvertently omitted from the original language. Subject to review and approval by the Revisor's Office, we believe the amended language is correct and appropriate.

Please note K.S.A. 79-15,126, which is the Kansas estate tax apportionment act, is specifically omitted from the references in New Section 1. This act is a separate act which should not be included in the "sunset" provision.

New Section 2 is a "sunset" provision for the stand alone estate tax. Again, the "sunset" occurs ten (10) years after the repeal of the act.

The House Committee's amendment to New Section 2 was made to fix a typographical error. On line 31 the correct date is January 1, 2020.

The balance of the Bill removes references to the inheritance tax from other statutes. These amendments were suggested by the Probate Law Advisory Committee of the Kansas Judicial Council. A representative of the Department of Revenue met with members of the Advisory Committee during discussions of these amendments, and the Department has no objection to the amendments. The Department believes the law in effect at the time of a decedent's death will continue to apply through the "sunset" of the "pick-up" and stand alone estate taxes, and that the amendments will be prospective.

FRANK P. DENNING
SHERIFF

TELEPHONE
913-791-5800

FAX
913-791-5806

DUTY HONOR SERVICE

125 N. CHERRY
OLATHE, KANSAS 66061
WWW.JOCOSHERIFF.ORG

DAVID A. BURGER
UNDERSHERIFF

KEVIN D. CAVANAUGH
UNDERSHERIFF

TESTIMONY OF JOHNSON COUNTY SHERIFF FRANK P. DENNING BEFORE THE KANSAS SENATE COMMITTEE ON THE JUDICIARY

March 11, 2010

Chairman Owens and Members of the Committee,

I want to thank you for the opportunity to address you today on a matter that will have the long term effect of bridging a gap in the statutes. With my testimony, I will attempt to provide you with some background and perspective, and join several distinguished conferees with more specific information on the practical benefit our state could realize should you approve the change in law that we suggest.

With shrinking budgets, rising populations and steady pressure on the number of available jail beds in counties across the State and the nation, support for programs designed to reduce recidivism and the demand for jail bed space has begun to guide the conversation of decision makers at all levels of government. When we joined that conversation in Johnson County with the Board of County Commissioners, the District Court, the Community Corrections Department and the broad based Criminal Justice Advisory Board, we discovered a barrier that would require legislative attention.

"Second Chance" is the most recognizable name used to describe the "re-entry" programs under development across the country. Their purpose is to evaluate convicted persons serving sentences in jails and prisons. At usually a predetermined point with a few months remaining in the sentence of an inmate, teams of forensic evaluators make fact based decisions and recommendations for the placement of that person into any of a number of available treatment or training programs. Those programs are designed to facilitate the inmate's "re-entry" into the family and the community as well as reduce the incidence of "re-entry" into the criminal justice system and incarceration.

A large part of many re-entry programs is the assignment of the confined person to employment in the community. At present, the sentencing statute does not specifically authorize assignment to work release programs and it is our opinion that without the requested change before you in Sec (1), *new* Paragraph (11), the further involvement of the court would be needed to modify a sentence of an inmate remanded to the custody of the Sheriff.

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Kansas Bureau of Investigation

Robert E. Blecha
Director

Steve Six
Attorney General

Testimony in Support of HB 2605
Before the Senate Judiciary Committee
David Hutchings, Special Agent in Charge
Kansas Bureau of Investigation
March 11, 2010

Chairman Owens and Members of the Committee,

I appear today on behalf of the Kansas Bureau of Investigation in support of immediate passage of HB 2605. This bill would amend KSA 2009 Supp. 28-176.

Present language states that those persons convicted or diverted, or adjudicated or diverted, of a misdemeanor or felony must pay a separate court cost of $400 for each convicted offense if forensic laboratory services were provided by the KBI.

In determining the amount of funds that should have been received by the KBI in 2009, a number of statistics must be reviewed and some assumptions made.

- The number of cases examined by the KBI Forensic Laboratory is approximately 13,000 annually. Of those examinations, approximately 80% are positive tests-ones that provide evidence that would support an arrest.
- According to reported statistics, approximately 75% of arrestees are convicted. (There are no statistics that are specific to cases where forensic examinations were conducted.)
- According to anecdotal information from prosecutors, approximately 30% of persons convicted are not required to pay court costs due to indigence. The assumption is that the other 70% would pay the court costs.

With these statistics and assumptions in mind, and neglecting those situations where more than one conviction applies to a case, revenue to the KBI Forensic Lab arguably should have been approximately $2,184,000. Revenue in 2009 pursuant to KSA 2009 Supp. 28-176 was $1,429,298. This was $754,702 less than what could arguably have been expected.

The KBI hopes that, by strengthening the language of the present law with HB 2605, revenues may be brought more closely to those projected. This bill provides stronger language to the courts requiring that the court costs be ordered and that any finding of indigence be placed on the record with a basis for the finding. It clarifies that, when a forensic examination supported the investigation, the court costs shall be ordered regardless of whether the test(s) supported the specific offense of conviction. And, it adds computer forensic examinations that are presentlv performed by KBI agents outside of its forensic laboratory.

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-0915

The KBI sincerely hopes that your efforts to pass this legislation will result in a more equitable receipt of revenue to the KBI Forensic Laboratory as intended by the legislature when this law was originally passed.

Thank you for your time and consideration. I would be happy to answer your questions.

Kansas Association of Chiefs of Police
PO Box 780603
Wichita, KS 67278
(316)733-7301

Kansas Sheriffs Association
PO Box 1853
Salina, KS 67402
(785)827-2222

Kansas Peace Officers Association
PO Box 2592
Wichita, KS 67201
(316)722-8433

Testimony to the Senate Judiciary Committee
In Support of HB2605 Collection of Lab Fees
March 11, 2010

Chairperson Owens and Committee Members,

The Kansas Association of Chiefs of Police, the Kansas Sheriff's Association, and the Kansas Peace Officers Association support HB2605. Local law enforcement must depend heavily on the KBI laboratories for forensic analysis. In many cases the progress of our criminal investigations is highly dependent on this analysis. Currently, local agencies are having significant wait times to receive this analysis. During this wait some suspects are still free to commit further crimes victimizing more Kansans. We simply must find ways to better address the fiscal support of the KBI laboratories.

At the legislative conference with our three associations held in early February the impact on local law enforcement caused by the current state fiscal crisis was heavily discussed. This led to the three associations including legislation improving the KBI ability to support local law enforcement as a priority issue for this legislative session. We simply must find ways to support the KBI laboratories so they can support our local crime fighting efforts.

This bill is just one attempt to improve this situation in the face of the fiscal challenges of the state general fund. While we recognize this bill will not result in the collection of all of the funds that should be received, clearly it has a strong likelihood charges will be imposed on the defendant by the court as intended in current law and also will result in an improved opportunity to collect more of those fees. There is no doubt this bill will result in some increased funds to support the KBI labs. Of course it is difficult, at best, to determine how much of an increase that will be.

This bill creates no additional cost to the state. It simply encourages the courts to assess the fees and to collect the fees whenever possible.

Supporting this bill is supporting public safety in Kansas and supporting local law enforcement. We encourage you to recommend this bill favorably to pass.

Ed Klumpp
Kansas Association of Chiefs of Police, Legislative Committee Chair
Kansas Sheriffs Association. Legislative Liaison
Kansas Peace Officers Association, Legislative Liaison
E-mail: eklumpp@cox.net
Phone: (785) 235-5619
Cell: (785) 640-1102

Senate Judiciary
3-11-10
Attachment 9

STATE OF KANSAS

JOE PATTON
REPRESENTATIVE, 54TH DISTRICT
534 S. KANSAS
SUITE #820
TOPEKA, KANSAS 66603
(785) 273-4330

STATE CAPITOL
TOPEKA, KANSAS 66612
(785) 296-7641
joe.patton@house.ks.gov

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: CORRECTIONS AND JUVENILE JUSTICE
MEMBER: JUDICIARY
ADMINISTRATIVE RULES AND REGULATIONS

Testimony in support of HB 2585
March 10, 2010

Chairman Owens and Committee members; thank you for the opportunity to appear before you in support of HB 2585.

I support HB 2585. The Kansas House of Representatives approved the measure with an 80-42 vote. The bill will waive the marriage fee for those who cannot afford it.

Currently the marriage fee is $69 which is split among various funds. With HB 2585, those that are unable to pay the fee will be able to file a poverty affidavit and have the fee waived much like Kansas courts currently do with docket fees.

One study found "even small changes in the cost of a marriage license can have significant effects." Kansas has seen a decline in the number of marriage licenses in recent years.

Evidence-based studies show us marriage improves the well-being of children, improves the mental and physical health for the married adults and **is a factor in family members earning more money.** The impact of marriage and family on our society is very positive.

Lowering the financial burden to marry for those with limited incomes in our state will allow them the opportunity to benefit from the positive outcomes of marriage – stronger families, improved mental and physical health, increased income and healthier and happier children.

Senate Judiciary Committee
HB 2585
March 11, 2010
Oppose

Chairman Owens and Members of the Committee:

My name is Sharon Katz. I have been the Executive Director of SAFEHOME, the domestic violence program in Johnson County Kansas for 18 years. SAFEHOME provides comprehensive services to victims of domestic violence and their children from Johnson and Miami counties. In 2009 SAFEHOME provided services to 6,405 survivors of domestic violence and partner abuse.

I am here today to express my concern about HB 2585, which provides a poverty exception for marriage license fees. I want to ask the Senate Judiciary Committee to consider the potential impact this bill could have on funding for SAFEHOME and for domestic violence and sexual assault agencies across Kansas.

SAFEHOME relies on state grants that are partially funded by marriage license fees, including the Protection From Abuse (PFA) fund, and Crime Victims Assistance Fund (CVAF). SAFEHOME's 2010 funding from these grants are $99,750 from PFA, and $22,800 from CVAF. Together this funding provides support for outreach advocacy, administration of client assistance funding, and critical administrative support for the agency.

This funding, which supports life-saving services for victims of domestic violence and their children, could potentially be decreased as a result of HB 2585. I have serious concerns about how SAFEHOME will continue to offer necessary services, such as shelter, 24-hour hotline, and other client support, if we continue to face further state funding reductions, on top of the reductions we've already experienced in State General Funds and the cuts in private foundation funding and corporate sponsorships for fundraisers.

At the same time in this economic downturn, we are experiencing increased needs from victims that are in significantly more lethal situations. They are waiting longer to call us, fearing the economy would make their financial survival impossible, especially if they have children. The problem is growing and the funding is declining. We must be there to provide safety. We truly are in the business of preventing domestic homicide.

I ask that you consider the financial impact of HP 2585 on domestic violence agencies as you consider this bill next week in the Judiciary Committee.

Submitted: Sharon I. Katz

Senate Judiciary
3-11-10
Attachment 11