

MEMORANDUM

**TO: Kansas Judicial Council**  
**FROM: Nancy J. Strouse**  
**DATE: June 4, 2010**  
**RE: Federal Rule of Evidence 502**

At its June 2009 meeting, the Judicial Council requested that the Civil Code Advisory Committee review and make recommendation regarding Federal Rule of Evidence 502, which was enacted on September 19, 2008. This new evidentiary rule governs whether disclosure of information protected by attorney-client or work-product privilege results in waiver of the privilege.

The Civil Code Advisory Committee briefly discussed the issue several times, but was unable to take it up officially until its January 2010 meeting, after the civil code revision project was completed. The Committee reviewed the federal Advisory Committee Notes and several articles discussing the issue.

After thorough discussion, the Committee unanimously agreed to adapt FRE 502 for use in Kansas and recommend the proposed statute to the Judicial Council. That proposal is attached to this memorandum. For consistency, the Committee also recommends that K.S.A. 60-426 be amended to change “lawyer-client privilege” to “attorney-client privilege” and that three instances of “lawyer” appearing in K.S.A. 60-3003 be changed to “attorney.” The word “lawyer” is infrequently used today, and K.S.A. 60-3003 is the only statute in Chapter 60 that uses the word. As a point of interest, “lawyer” appears in just 16 statutes in the entire K.S.A.’s, while “attorney” appears more than 1,600 times.

The substance of the proposed statute is summarized below in comments taken from the federal Advisory Committee Notes and adapted for Kansas. The proposed statute provides the following protections against waiver of privilege or work product:

- ***Limitations on Scope of Waiver.*** Subsection (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder’s intentional and misleading use of privileged or protected communications or information.
- ***Protections Against Inadvertent Disclosure.*** Subsection (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made in a Kansas court proceeding or to a Kansas officer or agency, does not operate as a waiver in any other proceeding if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

- ***Effect on Disclosures Made in Non-Kansas Proceedings.*** Subdivision (c) provides that if there is a disclosure of privileged or protected communications or information in a non-Kansas proceeding, then admissibility in a subsequent Kansas proceeding is determined by the law that is most protective against waiver.

- ***Orders Protecting Privileged Communications Binding on Non-Parties.*** Subsection (d) provides that if a Kansas court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any other proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

- ***Agreements Protecting Privileged Communications Binding on Parties.*** Subsection (e) provides that parties in a Kansas proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

## Proposed New Statute Based on FRE 502

### Attorney-client privilege and work product; limitations on waiver.

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

**(a) *Disclosure made in a Kansas court proceeding or to a Kansas office or agency; scope of a waiver.*** When the disclosure is made in a Kansas court proceeding or to a Kansas office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

**(b) *Inadvertent disclosure.*** When made in a Kansas court proceeding or to a Kansas office or agency, the disclosure does not operate as a waiver in any proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following K.S.A. 60-226(b)(7)(B), and amendments thereto.

**(c) *Disclosure made in a non-Kansas proceeding.*** When the disclosure is made in a non-Kansas proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Kansas proceeding if the disclosure:

- (1) would not be a waiver under this section if it had been made in a Kansas proceeding; or
- (2) is not a waiver under the law of the jurisdiction where the disclosure occurred.

**(d) *Controlling effect of a court order.*** A Kansas court may order that the privilege or protection

1 is not waived by disclosure connected with the litigation pending before the court, in which event  
2 the disclosure is also not a waiver in any other proceeding.

3 (e) *Controlling effect of a party agreement.* An agreement on the effect of disclosure in a Kansas  
4 proceeding is binding only on the parties to the agreement, unless it is incorporated into a court  
5 order.

6 (f) *Definitions.* In this section:

7 (1) "attorney-client privilege" means the protection that applicable law provides for  
8 confidential attorney-client communications; and

9 (2) "work-product protection" means the protection that applicable law provides for  
10 tangible material (or its intangible equivalent) prepared in anticipation of litigation or  
11 for trial.

12 **60-426. ~~Lawyer-client~~ Attorney-client privilege.** (a) *General rule.* Subject to K.S.A. 60-437, and  
13 except as otherwise provided by subsection (b) of this section communications found by the judge  
14 to have been between ~~lawyer~~ attorney and his or her client in the course of that relationship and in  
15 professional confidence, are privileged, and a client has a privilege (1) if he or she is the witness to  
16 refuse to disclose any such communication, and (2) to prevent his or her ~~lawyer~~ attorney from  
17 disclosing it, and (3) to prevent any other witness from disclosing such communication if it came  
18 to the knowledge of such witness (i) in the course of its transmittal between the client and the ~~lawyer~~  
19 attorney, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of a  
20 breach of the ~~lawyer-client~~ attorney-client relationship. The privilege may be claimed by the client  
21 in person or by his or her ~~lawyer~~ attorney, or if an incapacitated person, by either his or her guardian  
22 or conservator, or if deceased, by his or her personal representative.

23 (b) *Exceptions.* Such privileges shall not extend (1) to a communication if the judge finds that  
24 sufficient evidence, aside from the communication, has been introduced to warrant a finding that the  
25 legal service was sought or obtained in order to enable or aid the commission or planning of a crime  
26 or a tort, or (2) to a communication relevant to an issue between parties all of whom claim through  
27 the client, regardless of whether the respective claims are by testate or intestate succession or by

1 *inter vivos* transaction, or (3) to a communication relevant to an issue of breach of duty by the  
2 lawyer attorney to his or her client, or by the client to his or her lawyer attorney, or (4) to a  
3 communication relevant to an issue concerning an attested document of which the lawyer attorney  
4 is an attesting witness, or (5) to a communication relevant to a matter of common interest between  
5 two or more clients if made by any of them to a lawyer an attorney whom they have retained in  
6 common when offered in an action between any of such clients.

7 (c) *Definitions.* As used in this section (1) "client" means a person or corporation or other  
8 association that, directly or through an authorized representative, consults a lawyer or lawyer's an  
9 attorney or an attorney's representative for the purpose of retaining the lawyer attorney or securing  
10 legal service or advice from the lawyer attorney in his or her professional capacity; and includes an  
11 incapacitated person who, or whose guardian on behalf of the incapacitated person so consults the  
12 lawyer attorney or the lawyer's attorney's representative in behalf of the incapacitated person; (2)  
13 "communication" includes advice given by the lawyer attorney in the course of representing the  
14 client and includes disclosures of the client to a representative, associate or employee of the lawyer  
15 attorney incidental to the professional relationship; (3) "lawyer attorney" means a person authorized,  
16 or reasonably believed by the client to be authorized to practice law in any state or nation the law  
17 of which recognizes a privilege against disclosure of confidential communications between client  
18 and lawyer attorney.

19 **60-3003. Same; notice of filing.** (a) At the time of the filing of the foreign judgment, the judgment  
20 creditor or the judgment creditor's lawyer attorney shall make and file with the clerk of the district  
21 court an affidavit setting forth the name and last known post-office address of the judgment debtor,  
22 and the judgment creditor.

23 (b) Promptly upon the filing of the foreign judgment and the affidavit, the judgment creditor or the  
24 judgment creditor's lawyer attorney shall mail notice of the filing of the foreign judgment to the  
25 judgment debtor at the address given. The notice shall include the name and post-office address of  
26 the judgment creditor and the judgment creditor's lawyer attorney, if any, in this state. In addition,  
27 the judgment creditor may mail a notice of the filing of the judgment to the clerk of the district court  
28 and may file proof of mailing with the clerk of the district court.