

MEMORANDUM

TO: Kansas Judicial Council

FROM: Nancy J. Strouse

DATE: December 2, 2011

RE: Civil Code Advisory Committee Recommendations Regarding
December 1, 2010 Amendments to Federal Rules of Civil Procedure

Introduction

The Kansas Code of Civil Procedure, effective January 1, 1964, was originally proposed by a Judicial Council Advisory Committee. The Kansas Code was patterned after the Federal Rules of Civil Procedure, and the Advisory Committee noted at the time the many benefits of conformity with the Federal Rules. One of the benefits is uniformity of practice in the state and federal courts in Kansas. In addition, interpretation and analysis of the federal rules are available to assist in construing the corresponding Kansas provisions.

The Judicial Council Civil Code Advisory Committee regularly reviews amendments to the federal rules and makes recommendations concerning whether the amendment should be adopted in the Kansas Code. Most recently, the Committee completed a large study that resulted in HB 2656, which the Legislature passed in 2010.

Amendments to Federal Rules of Civil Procedure 8, 26, and 56 became effective December 1, 2010. The Civil Code Advisory Committee reviewed these federal amendments on October 28, 2011. The Committee recommends that the Judicial Council propose legislation to incorporate the amendment to Federal Rule 8 in K.S.A. 60-208. The Committee also recommends proposing legislation to incorporate in K.S.A. 60-226, to the extent applicable, the amendments to Federal Rule 26. The Kansas statute does not follow the federal rule in all respects. The Committee does not recommend adoption of the amendment to Federal Rule 56, which deals with summary judgment.

Federal Rule 8 — K.S.A. 60-208

Federal Rule 8(c)(1) was amended to delete “discharge in bankruptcy” from the list of affirmative defenses a party must state in responding to a pleading. The Federal Advisory Committee Note states that it is confusing to describe discharge as an affirmative defense because 1) a discharge would void a judgment on a discharged debt, and 2) the discharge operates as an injunction against filing or continuing an action on a discharged debt. For these reasons, a valid defense that the debt has been discharged in bankruptcy is not waived if not asserted in a responsive pleading and should not be called an affirmative defense.

After discussion, the Committee agreed to recommend that K.S.A. 60-208(c)(1)(E) be deleted, as shown below, to conform to the amended federal Rule.

60-208. General rules of pleadings.

(c) Affirmative defenses.

- (1) *In general.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:
 - (A) Accord and satisfaction;
 - (B) arbitration and award;
 - (C) assumption of risk;
 - (D) contributory negligence or comparative fault;
 - ~~(E) discharge in bankruptcy;~~
 - (~~F~~ E) duress;
 - (~~G~~ F) estoppel;
 - (~~H~~ G) failure of consideration;
 - (~~I~~ H) fraud, illegality;
 - (~~J~~ I) injury by fellow servant;
 - (~~K~~ J) laches;
 - (~~L~~ K) license;
 - (~~M~~ L) payment;
 - (~~N~~ M) release;
 - (~~O~~ N) res judicata;
 - (~~P~~ O) statute of frauds;
 - (~~Q~~ P) statute of limitations; and
 - (~~R~~ Q) waiver.
- (2) *Mistaken designation.* If a party mistakenly designates a defense as a counterclaim or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

Federal Rule 26 — K.S.A. 60-226

Kansas has chosen not to conform K.S.A. 60-226 to some prior amendments to Federal Rule 26. Unlike the federal rule, the Kansas statute does not require initial disclosures and does not require retained or specially employed expert witnesses to provide a signed report. The most recent changes to Federal Rule 26(a) are therefore not completely applicable to K.S.A. 60-226.

The December 1, 2010 amendments to Federal Rule 26(b)(4) are intended to provide work-product protection against discovery of drafts of expert reports or disclosures and, with some exceptions, communications between an attorney and an expert witness. The Civil Code Advisory Committee recommends that the federal amendments to Rule 26(b)(4) be incorporated in K.S.A. 60-226(b)(5). The Committee recommends adopting the protection of both draft disclosures and communications, although the protection of draft disclosures will apply differently under Kansas law since it is the attorney, and not the expert witness, who makes the disclosure required under K.S.A. 60-226(b)(6).

This amendment will help to eliminate the sparring and unnecessary litigation that can ensue when a party attempts to delve into the records and files of another party's expert witness to find out what the other party's attorney might have said to the witness. The recent amendment to Federal Rule 26(b)(4), which clarifies that communications between an attorney and an expert witness are protected, has been a definite improvement to the federal rules, and the Committee unanimously agrees that it would similarly benefit state practice. Under the federal rule, the protection extends only to communications between a party's attorney and a "retained or specially employed" expert witness who is required to submit a written report. The Committee recommends proposing a similar amendment to K.S.A. 60-226(b)(5), which will extend the protection to communications with any expert witness, whether or not the expert is "retained or specially employed." The protection applies to attorney-expert communications whether the communication is oral, written, electronic, or otherwise. There are three exceptions to the protection: communications regarding the expert's compensation; facts or data that the attorney provided to the expert and that were considered in forming the expert's opinion; and assumptions the attorney provided, and the expert relied on, in forming the opinion.

The Committee recommends the following amendments to K.S.A. 60-226(b)(5):

60-226. General provisions governing discovery.

(b) *Discovery scope and limits.*

(5) *Trial preparation; experts.*

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

(B) *Trial-preparation protection for draft disclosures.* Subsections (b)(4)(A) and (B) protect drafts of any disclosure required under subsection (b)(6), regardless of the form in which the draft is recorded.

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

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

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

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

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

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

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

- (E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:
- (i) Pay the expert a reasonable fee for time spent in responding to discovery under subsection (b)(5)(A) or (b)(5)(B D); and
 - (ii) for discovery under subsection (b)(5)(B D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

The Committee also considered one aspect of the amendment to Federal Rule 26(a), for which the Kansas statute does not have a corresponding section. Federal Rule 26(a)(2)(C) has been amended to require more detailed disclosures about expert witnesses who are not “retained or specially employed” and not required to provide a written report. The Committee recommends that the Kansas Code conform to the Federal Rule on this point, requiring for all expert witnesses — whether or not retained or specially employed to provide expert testimony — disclosure of the subject matter on which the expert is expected to testify and the substance of the facts and opinions to which the expert is expected to testify. Under the current Kansas statute, the required disclosure regarding a nonretained expert is limited to disclosing the expert’s name. Disclosure of the grounds for each opinion would still be required only if the expert is retained or specially employed.

The Committee recommends that the Kansas Code be amended to incorporate the concept of expanded disclosure requirements by proposing the following changes to K.S.A. 60-226(b)(6)(A) and (B):

60-226. General provisions governing discovery.

- (b) *Discovery scope and limits.*

- (6) *Disclosure of expert testimony.*

- (A) *In general Required disclosures.* A party must disclose to other parties the identity of any witness it may use at trial to present expert testimony. The disclosure must state:
- (i) The subject matter on which the expert is expected to testify; and
 - (ii) the substance of the facts and opinions to which the expert is expected to testify.
- (B) *Required disclosures Witness who is retained or specially employed.* Unless otherwise stipulated or ordered by the court, if the witness is retained or specially employed to provide expert testimony in the case, or is one whose duties as the party's employee regularly involve giving expert testimony, the disclosure under paragraph (A) must also state:
- (i) ~~The subject matter on which the expert is expected to testify;~~
 - (ii) ~~the substance of the facts and opinions to which the expert is expected to testify;~~
and
 - (iii) a summary of the grounds for each opinion.

Federal Rule 56 — K.S.A. 60-256

Federal Rule 56 — which deals with summary judgment — has been substantially rewritten, providing for the first time the kind of procedural guidance that has been governed by local rule in the federal courts. The procedural guidelines for summary judgment motions and responses in state courts are located in Kansas Supreme Court Rule 141.

One of the changes in Federal Rule 56 was to change “should” back to “shall” to express the direction to grant summary judgment. The Federal Advisory Committee has commented that “should” is not strong enough, and “must” is too strong. Some of the case law provides that “shall” is discretionary, and the Federal Advisory Committee ultimately decided to change “should” back to “shall.”

The Committee gave thoughtful consideration to the federal amendments to Rule 56, but agreed not to recommend any corresponding changes to K.S.A. 60-256. Since the 1964 introduction of the Kansas Code — which closely follows the federal rules in most respects — the Committee has applied a uniform principle when considering any federal rule amendments. The Kansas Code will be amended to maintain uniformity with the federal rules unless there is a reason, based on the unique nature of Kansas state practice, for departing from the federal rule. In this case, the Federal Rules Advisory Committee was attempting to create some uniformity in the procedural aspects of summary judgment practice, because the many federal district courts had different local rules governing the procedure. That issue is not present in Kansas practice, as summary judgment procedure in all state district courts is already uniform under the guidelines of Supreme Court Rule 141. Further, the Committee agreed that the Supreme Court rule works well and provides more detailed procedures than are contained in Federal Rule 56.

Although the Committee does not recommend proposing revision of K.S.A. 60-256, it was agreed that a few of the new procedural provisions in Federal Rule 56 would also improve summary judgment practice in Kansas. A separate Judicial Council committee is currently reviewing and restyling the Supreme Court Rules, and the Committee agreed to pass on to the Supreme Court Rules Advisory Committee the following recommendations for amendments to Supreme Court Rule 141 (please note that the redlined amendments shown in the first two bullets below have been made to the Supreme Court Rules Advisory Committee’s proposed restyled draft of the rule, not the rule that is currently in effect):

- Amend the final sentence of subsection (c)(2) to state “in which case the uncontroverted factual contentions stated in the moving party’s memorandum or brief are deemed admitted for purposes of the motion.”
- Add a sentence to the end of subsection (d) that states: “When denying a motion, the court must state the reasons for the denial.”
- Incorporate Federal Rule 56(c)(2) and (3) into Rule 141. Those provisions are as follows:
 - (2) **Objection That a Fact Is Not Supported by Admissible Evidence.** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.
 - (3) **Materials Not Cited.** The court need consider only the cited materials, but it may consider other materials in the record.