

SENATE BILL No. 447

By Committee on Judiciary

2-14

1 AN ACT concerning the code of civil procedure; relating to litigation
2 funding by third parties; joint liability for costs and sanctions; required
3 discovery disclosures; nonparty subpoenas in third-party funded action;
4 amending K.S.A. 2019 Supp. 60-226 and 60-245 and repealing the
5 existing sections.
6

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

8 New Section 1. (a) Any person, other than an attorney permitted to
9 charge a contingent fee representing a party, that has a right to receive
10 compensation that is contingent on and sourced from any proceeds of that
11 civil action, by settlement, judgment or otherwise, is jointly liable for costs
12 assessed pursuant to K.S.A. 60-2002, and amendments thereto, or any
13 monetary sanction imposed pursuant to K.S.A. 60-211(c), 60-226(f)(3) or
14 60-237(d)(3), and amendments thereto, on the party with whom such
15 person has such an agreement.

16 (b) This section shall be a part of and supplemental to the Kansas
17 code of civil procedure.

18 Sec. 2. K.S.A. 2019 Supp. 60-226 is hereby amended to read as
19 follows: 60-226. (a) *Discovery methods.* Parties may obtain discovery by
20 one or more of the following methods: Depositions on oral examination or
21 written questions; written interrogatories; production of documents or
22 things or permission to enter onto land or other property under K.S.A. 60-
23 234, ~~K.S.A.~~ 60-245(a)(1)(A)(iii) or ~~K.S.A.~~ 60-245a, and amendments
24 thereto; physical and mental examinations; and requests for admission.

25 (b) *Discovery scope and limits.*

26 (1) *Scope in general.* Unless otherwise limited by court order, the
27 scope of discovery is as follows: Parties may obtain discovery regarding
28 any nonprivileged matter that is relevant to any party's claim or defense
29 and proportional to the needs of the case, considering the importance of
30 the issues at stake in the action, the amount in controversy, the parties'
31 relative access to relevant information, the parties' resources, the
32 importance of the discovery in resolving the issues and whether the burden
33 or expense of the proposed discovery outweighs its likely benefit.
34 Information within this scope of discovery need not be admissible in
35 evidence to be discoverable.

36 (2) *Limitations on frequency and extent.* (A) On motion, or on its

1 own, the court may limit the frequency or extent of discovery methods
2 otherwise allowed by the rules of civil procedure and must do so if it
3 determines that:

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

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

9 (iii) the proposed discovery is outside the scope permitted by
10 subsection (b)(1).

11 (B) A party need not provide discovery of electronically stored
12 information from sources that the party identifies as not reasonably
13 accessible because of undue burden or cost. On motion to compel
14 discovery or for a protective order, the party from whom discovery is
15 sought must show that the information is not reasonably accessible
16 because of undue burden or cost. If that showing is made, the court may
17 nonetheless order discovery from such sources if the requesting party
18 shows good cause, considering the limitations of subsection (b)(2)(A). The
19 court may specify conditions for the discovery.

20 (3) *Agreements.*

21 (A) *Insurance agreements.* A party may obtain discovery of the
22 existence and contents of any insurance agreement under which an
23 insurance business may be liable to satisfy part or all of a possible
24 judgment in the action or to indemnify or reimburse for payments made to
25 satisfy the judgment. Information concerning the insurance agreement is
26 not by reason of disclosure admissible in evidence at trial. For purposes of
27 this paragraph, an application for insurance is not a part of an insurance
28 agreement.

29 (B) *Third-party agreements.* *Except as otherwise stipulated or*
30 *ordered by the court, a party shall, without awaiting a discovery request,*
31 *provide to the other parties any agreement under which any person, other*
32 *than an attorney permitted to charge a contingent fee representing a party,*
33 *has a right to receive compensation that is contingent on and sourced from*
34 *any proceeds of the civil action, by settlement, judgment or otherwise.*

35 (4) *Trial preparation; materials.*

36 (A) *Documents and tangible things.* Ordinarily, a party may not
37 discover documents and tangible things that are prepared in anticipation of
38 litigation or for trial by or for another party or its representative, including
39 the other party's attorney, consultant, surety, indemnitor, insurer or agent.
40 But, subject to subsection (b)(5), those materials may be discovered if:

41 (i) They are otherwise discoverable under paragraph (1); and

42 (ii) the party shows that it has substantial need for the materials to
43 prepare its case and cannot, without undue hardship, obtain their

1 substantial equivalent by other means.

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

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

12 (i) A written statement that the person has signed or otherwise
13 adopted or approved; or

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

17 (5) *Trial preparation; experts.*

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

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

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

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

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

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

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

1 (i) As provided in K.S.A. 60-235(b), and amendments thereto; or
2 (ii) on showing exceptional circumstances under which it is
3 impracticable for the party to obtain facts or opinions on the same subject
4 by other means.

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

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

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

12 (6) *Disclosure of expert testimony.*

13 (A) *Required disclosures.* A party must disclose to other parties the
14 identity of any witness it may use at trial to present expert testimony. The
15 disclosure must state:

16 (i) The subject matter on which the expert is expected to testify; and

17 (ii) the substance of the facts and opinions to which the expert is
18 expected to testify.

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

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

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

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

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

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

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

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

40 (7) *Claiming privilege or protecting trial preparation materials.*

41 (A) *Information withheld.* When a party withholds information
42 otherwise discoverable by claiming that the information is privileged or
43 subject to protection as trial preparation material, the party must:

- 1 (i) Expressly make the claim; and
- 2 (ii) describe the nature of the documents, communications or things
- 3 not produced or disclosed, and do so in a manner that, without revealing
- 4 information itself privileged or protected, will enable other parties to
- 5 assess the claim.

6 (B) *Information produced.* If information produced in discovery is
7 subject to a claim of privilege or of protection as trial preparation material,
8 the party making the claim may notify any party that received the
9 information of the claim and the basis for it. After being notified, a party
10 must promptly return, sequester or destroy the specified information and
11 any copies it has; must not use or disclose the information until the claim
12 is resolved; must take reasonable steps to retrieve the information if the
13 party disclosed it before being notified; and may promptly present the
14 information to the court under seal for a determination of the claim. The
15 producing party must preserve the information until the claim is resolved.

16 (c) *Protective orders.*

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

28 (A) Forbidding the disclosure or discovery;

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

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

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

35 (E) designating the persons who may be present while the discovery
36 is conducted;

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

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

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

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

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

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

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

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

12 (e) *Supplementing disclosures and responses.*

13 (1) *In general.* A party who has made a disclosure under subsection
14 (b)(6), or who has responded to an interrogatory, request for production or
15 request for admission, must supplement or correct its disclosure or
16 response:

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

21 (B) as ordered by the court.

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

27 (f) *Signing disclosures and discovery requests, responses and*
28 *objections.*

29 (1) *Signature required; effect of signature.* Every disclosure under
30 subsection (b)(6) and every discovery request, response or objection must
31 be signed by at least one attorney of record in the attorney's own name, or
32 by the party personally, if unrepresented, and must state the signor's
33 address, e-mail address and telephone number. By signing, an attorney or
34 party certifies that to the best of the person's knowledge, information and
35 belief formed after a reasonable inquiry:

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

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

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

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

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

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

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

14 Sec. 3. K.S.A. 2019 Supp. 60-245 is hereby amended to read as
15 follows: 60-245. (a) *In general.*

16 (1) *Form and contents.*

17 (A) *Requirements; in general.* Every subpoena must:

18 (i) State the court from which it is issued;

19 (ii) state the title of the action, the court in which it is pending and the
20 file number of the action;

21 (iii) command each person to whom it is directed to do the following
22 at a specified time and place: Attend and testify; produce designated
23 documents, electronically stored information or tangible things in that
24 person's possession, custody or control; or permit the inspection of
25 premises; and

26 (iv) set out the text of subsections (c) and (d).

27 (B) *Command to attend a deposition; notice of the recording method.*

28 A subpoena commanding attendance at a deposition must state the method
29 for recording the testimony.

30 (C) *Combining or separating a command to produce or to permit
31 inspection; specifying the form for electronically stored information.* A
32 command to produce documents, electronically stored information or
33 tangible things or to permit the inspection of premises may be included in
34 a subpoena commanding attendance at a deposition, hearing or trial, or
35 may be set out in a separate subpoena. A subpoena may specify the form or
36 forms in which electronically stored information is to be produced.
37 Subpoena and production of records of a business that is not a party may
38 be in accordance with K.S.A. 60-245a, and amendments thereto.

39 (D) *Command to produce; included obligations.* A command in a
40 subpoena to produce documents, electronically stored information or
41 tangible things requires the responding party to permit inspection, copying,
42 testing or sampling of the materials.

43 (2) *Issued from which court.* A subpoena must issue as follows:

1 (A) For attendance at a hearing or trial, from the court where the
2 hearing or trial is to be held;

3 (B) for attendance at a deposition, from the court in which the action
4 is pending or from the officer before whom the deposition is to be taken,
5 or, if the deposition is to be taken outside this state, from an officer
6 authorized by the law of the other state to issue the subpoena; and

7 (C) for production or inspection, if separate from a subpoena
8 commanding a person's attendance, from the court in which the action is
9 pending, or, if the production, inspection, copying, testing or sampling is
10 to be made outside this state, from an officer authorized by the law of the
11 other state to issue the subpoena.

12 (3) *Issued by whom.* Every subpoena issued by the court must be
13 issued by the clerk under the seal of the court or by a judge. The clerk
14 must issue a subpoena, signed but otherwise in blank, to a party who
15 requests it. The blank subpoena must bear the seal of the court and the
16 clerk's signature. The party to whom a blank subpoena is issued must fill it
17 in before service.

18 (b) *Service.* Service of a subpoena may be made anywhere within this
19 state, must be made in accordance with K.S.A. 60-303, and amendments
20 thereto, and must, if the subpoena requires a person's attendance, be
21 accompanied by the fees for one day's attendance and the mileage allowed
22 by law. If, independently of a deposition, the subpoena commands the
23 production of documents, electronically stored information or tangible
24 things or the inspection of premises before trial, then before it is served, a
25 notice must be served on each party in accordance with ~~subsection (b) of~~
26 K.S.A. 60-205(b), and amendments thereto.

27 (c) *Protecting a person subject to a subpoena.*

28 (1) *Avoiding undue burden or expense; sanctions.* A party or attorney
29 responsible for issuing and serving a subpoena must take reasonable steps
30 to avoid imposing undue burden or expense on a person subject to the
31 subpoena. The issuing court must enforce this duty and impose an
32 appropriate sanction, which may include lost earnings and reasonable
33 attorney's fees, on a party or attorney who fails to comply.

34 (2) *Command to produce materials or permit inspection.*

35 (A) *Appearance not required.* A person commanded to produce
36 designated documents, electronically stored information or tangible things,
37 or to permit the inspection of premises, need not appear in person at the
38 place of production or inspection unless also commanded to appear for a
39 deposition, hearing or trial.

40 (B) *Objections.* A person commanded to produce designated materials
41 or to permit inspection may serve on the party or attorney designated in the
42 subpoena a written objection to inspecting, copying, testing or sampling
43 any or all of the designated materials or to inspecting the premises, or to

1 producing electronically stored information in the form or forms
2 requested. The objection must be served before the earlier of the time
3 specified for compliance or 14 days after the subpoena is served. If an
4 objection is made, the following rules apply:

5 (i) At any time, on notice to the commanded person, the serving party
6 may move the issuing court for an order compelling production or
7 inspection; and

8 (ii) these acts may be required only as directed in the order, and the
9 order must protect a person who is neither a party nor a party's officer
10 from significant expense resulting from compliance.

11 (3) *Quashing or modifying a subpoena.*

12 (A) *When required.* On timely motion, the issuing court must quash
13 or modify a subpoena that:

14 (i) Fails to allow a reasonable time to comply;

15 (ii) requires a resident of this state who is neither a party nor a party's
16 officer to travel more than 100 miles from where that person resides, is
17 employed or regularly transacts business in person or requires a
18 nonresident who is neither a party nor a party's officer to travel more than
19 100 miles from where the nonresident was served with the subpoena, is
20 employed or regularly transacts business in person, except that, subject to
21 paragraph (3)(B)(iii), the person may be commanded to travel to the place
22 of trial;

23 (iii) requires disclosure of privileged or other protected matter, if no
24 exception or waiver applies; or

25 (iv) subjects a person to undue burden.

26 (B) *When permitted.* To protect a person subject to or affected by a
27 subpoena, the issuing court may, on motion, quash or modify the subpoena
28 if it requires:

29 (i) Disclosing a trade secret or other confidential research
30 development or commercial information;

31 (ii) disclosing an unretained expert's opinion or information that does
32 not describe specific occurrences in dispute and results from the expert's
33 study that was not requested by a party; or

34 (iii) a person who is neither a party nor a party's officer to incur
35 substantial expense to travel more than 100 miles to attend trial.

36 (C) *Specifying conditions as an alternative.* In the circumstances
37 described in subsection (c)(3)(B), the court may, instead of quashing or
38 modifying a subpoena, order appearance or production under specified
39 conditions as the serving party:

40 (i) Shows a substantial need for the testimony or material that cannot
41 be otherwise met without undue hardship; and

42 (ii) ensures that the subpoenaed person will be reasonably
43 compensated.

1 (4) *Nonparty subpoenas in third-party funded action.* A party that has
2 entered into an agreement subject to K.S.A. 60-226(b)(3)(B), and
3 amendments thereto, shall reasonably compensate a person who is neither
4 a party nor a party's officer the cost of responding to a subpoena to
5 produce designated documents, electronically stored information or
6 tangible things, to permit the inspection of premises or to appear at a
7 deposition. Reasonable costs incurred include, but are not limited to: (A)
8 Costs incurred in identifying, collecting, reviewing and producing the
9 designated materials; (B) the measurable cost of disruption to the
10 nonparty's normal business operations; (C) costs of travel to appear at a
11 deposition; and (D) fees charged by outside counsel directly related to
12 compliance with the subpoena.

13 (5) *Person in prison.* A person confined in prison may be required to
14 appear for examination by deposition only in the county where the person
15 is imprisoned.

16 (d) *Duties in responding to a subpoena.*

17 (1) *Producing documents or electronically stored information.* These
18 procedures apply to producing documents or electronically stored
19 information:

20 (A) *Documents.* A person responding to a subpoena to produce
21 documents must produce them as they are kept in the ordinary course of
22 business or must organize and label them to correspond to the categories in
23 the demand.

24 (B) *Form for producing electronically stored information not*
25 *specified.* If a subpoena does not specify a form for producing
26 electronically stored information, a person responding to a subpoena must
27 produce it in a form or forms in which it is ordinarily maintained or in a
28 reasonably usable form or forms.

29 (C) *Electronically stored information produced in only one form.* The
30 person responding need not produce the same electronically stored
31 information in more than one form.

32 (D) *Inaccessible electronically stored information.* The person
33 responding need not provide discovery of electronically stored information
34 from sources that the person identifies as not reasonably accessible
35 because of undue burden or cost. On motion to compel discovery or for a
36 protective order, the person responding must show that the information is
37 not reasonably accessible because of undue burden or cost. If that showing
38 is made, the court may nonetheless order discovery from such sources if
39 the requesting party shows good cause, considering the limitations of
40 ~~subsection (b)(2)(A)~~ of K.S.A. 60-226(b)(2)(A), and amendments thereto.
41 The court may specify conditions for the discovery.

42 (2) *Claiming privilege or protection.*

43 (A) *Information withheld.* A person withholding subpoenaed

1 information under a claim that it is privileged or subject to protection as
2 trial-preparation material must:

3 (i) Expressly make the claim; and
4 (ii) describe the nature of the withheld documents, communications
5 or things in a manner that, without revealing information itself privileged
6 or protected, will enable the parties to assess the claim.

7 (B) *Information produced.* If information produced in response to a
8 subpoena is subject to a claim of privilege or of protection as trial-
9 preparation material, the person making the claim may notify any party
10 that received the information of the claim and the basis for it. After being
11 notified, a party must promptly return, sequester or destroy the specified
12 information and any copies it has; must not use or disclose the information
13 until the claim is resolved; must take reasonable steps to retrieve the
14 information if the party disclosed it before being notified; and may
15 promptly present the information to the court under seal for a
16 determination of the claim. The person who produced the information
17 must preserve the information until the claim is resolved.

18 (e) *Contempt.* The issuing court may hold in contempt a person who,
19 having been served, fails without adequate excuse to obey the subpoena.
20 Punishment for contempt should be in accordance with K.S.A. 20-1204,
21 and amendments thereto. A nonparty's failure to obey must be excused if
22 the subpoena purports to require the nonparty to attend or produce at a
23 place outside the limits of subsection (c)(3)(A)(ii).

24 Sec. 4. K.S.A. 2019 Supp. 60-226 and 60-245 are hereby repealed.

25 Sec. 5. This act shall take effect and be in force from and after its
26 publication in the statute book.