

SENATE BILL No. 35

By Committee on Judiciary

1-19

1 AN ACT concerning civil procedure; relating to attorney-client privilege
2 and work-product protection; amending K.S.A. 60-426 and K.S.A.
3 2010 Supp. 60-3003 and repealing the existing sections.
4

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

6 New Section 1. The following provisions apply, in the circumstances
7 set out, to disclosure of a communication or information covered by the
8 attorney-client privilege or work-product protection.

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

14 (1) The waiver is intentional;

15 (2) the disclosed and undisclosed communications or information
16 concern the same subject matter; and

17 (3) they ought in fairness be considered together.

18 (b) *Inadvertent Disclosure.* When made in a court or agency
19 proceeding, the disclosure does not operate as a waiver in any proceeding
20 if:

21 (1) The disclosure is inadvertent;

22 (2) the holder of the privilege or protection took reasonable steps to
23 prevent disclosure; and

24 (3) the holder promptly took reasonable steps to rectify the error,
25 including, if applicable, following subsection (b)(7)(B) of K.S.A. 60-226,
26 and amendments thereto.

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

31 (1) Would not be a waiver under this section if it had been made in a
32 Kansas proceeding; or

33 (2) is not a waiver under the law of the jurisdiction where the
34 disclosure occurred.

35 (d) *Controlling effect of a court order.* A court may order that the
36 privilege or protection is not waived by disclosure connected with the

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

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

6 (f) *Definitions.* As used in this section:

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

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

12 Sec. 2. K.S.A. 60-426 is hereby amended to read as follows: 60-426.

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

29 (b) *Exceptions.* Such privileges shall not extend *to a*
30 *communication*: (1) ~~to a communication~~ If the judge finds that sufficient
31 evidence, aside from the communication, has been introduced to warrant
32 a finding that the legal service was sought or obtained in order to enable
33 or aid the commission or planning of a crime or a tort, ~~or~~; (2) ~~to a~~
34 ~~communication~~ relevant to an issue between parties all of whom claim
35 through the client, regardless of whether the respective claims are by
36 testate or intestate succession or by *inter vivos* transaction, ~~or~~; (3) ~~to a~~
37 ~~communication~~ relevant to an issue of breach of duty by the ~~lawyer-~~
38 ~~attorney~~ to ~~his or her~~ *such attorney's* client, or by the client to ~~his or her~~
39 ~~lawyer, or such client's attorney~~; (4) ~~to a communication~~ relevant to an
40 issue concerning an attested document of which the ~~lawyer attorney~~ is an
41 attesting witness; or (5) ~~to a communication~~ relevant to a matter of
42 common interest between two or more clients if made by any of them to a
43 ~~lawyer an attorney~~ whom they have retained in common when offered in

1 an action between any of such clients.

2 (c) *Definitions.* As used in this section:

3 (1) "Client" means a person or corporation or other association that,
4 directly or through an authorized representative, consults a ~~lawyer~~*an*
5 ~~attorney~~ or ~~lawyer's~~ *attorney's* representative for the purpose of retaining
6 the ~~lawyer~~ *attorney* or securing legal service or advice from the ~~lawyer~~
7 ~~attorney~~ in ~~his~~ ~~or~~ ~~her~~ a professional capacity; and includes an
8 incapacitated person who, or whose guardian on behalf of the
9 incapacitated person, so consults the ~~lawyer~~ *attorney* or the ~~lawyer's~~
10 ~~attorney's~~ representative in behalf of the incapacitated person;.

11 (2) "Communication" includes advice given by the ~~lawyer~~ *attorney* in
12 the course of representing the client and includes disclosures of the client
13 to a representative, associate or employee of the ~~lawyer~~ *attorney*
14 incidental to the professional relationship;.

15 (3) "~~lawyer~~*Attorney*" means a person authorized, or reasonably
16 believed by the client to be authorized, to practice law in any state or
17 nation the law of which recognizes a privilege against disclosure of
18 confidential communications between client and ~~lawyer~~ *attorney*.

19 Sec. 3. K.S.A. 2010 Supp. 60-3003 is hereby amended to read as
20 follows: 60-3003. (a) At the time of the filing of the foreign judgment, the
21 judgment creditor or the judgment creditor's ~~lawyer~~ *attorney* shall make
22 and file with the clerk of the district court an affidavit setting forth the
23 name and last known post office address of the judgment debtor, and the
24 judgment creditor.

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

33 Sec. 4. K.S.A. 60-426 and K.S.A. 2010 Supp. 60-3003 are hereby
34 repealed.

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