

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on March 2, 2011, in Room 346-S of the Capitol.

All members were present.

Committee staff present:

Jill Wolters, Office of the Revisor of Statutes  
Matt Sterling, Office of the Revisor of Statutes  
Tamera Lawrence, Office of the Revisor of Statutes  
Lauren Douglass, Kansas Legislative Research Department  
Robert Allison-Gallimore, Kansas Legislative Research Department  
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:

Professor Jim Concannon, Kansas Judicial Council  
Natalie Gibson, Staff Attorney, Kansas Judicial Council  
Todd Sheppard, Kansas Bar Association

Others attending:

See attached list.

The Hearing on **SB 35 - Attorney-client privilege and work-product protection** was opened.

Tamera Lawrence, Staff Assistant Revisor, provided an overview for the committee. ([Attachment 1](#))

Professor Jim Concannon, on behalf of the Kansas Judicial Council, addressed the committee in support of the bill, and stated it is based on Federal Rule of Evidence 502, which was enacted on September 19, 2008 and governs whether a disclosure of information protected by the attorney-client privilege or work-product protection results in a waiver of that privilege or protection. He cited several specifics of the bill:

- Limits waiver of the privilege to the communication disclosed and not the entire subject matter of the conversation
- Restricts the scope of any waiver to the information disclosed unless fairness requires further disclosure
- Clarifies that inadvertent disclosure does not result in a waiver when the holder of the privilege "took reasonable steps to rectify the error"
- Addresses the circumstances where the disclosure was first made in a proceeding in another state or at the federal level and is later considered in a Kansas proceeding
- Provides for the controlling effect of a court order or a party agreement

He stated four other states have adopted this in their statutes, Iowa, Arizona, Virginia, and Washington. ([Attachment 2](#))

Chairman Kinzer asked the staff to provide for clarification of jurisdiction within the United States.

There were no opponents.

The Hearing on **SB 35** was closed.

The Hearing on **SB 38 - Children; permanency and priority of orders** was opened.

Tamera Lawrence, Staff Assistant Revisor, provided an overview for the committee. ([Attachment 3](#))

Natalie Gibson, Staff Attorney, Kansas Judicial Council, appeared before the committee in support of the bill. She explained in 2010 **SB 460**, the Kansas Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee (JO/CINC committee) proposed a bill that provided child in need of care orders or juvenile offender orders would take priority over similar orders in other domestic cases such as divorce, paternity, protection from abuse, and guardianship or conservatorship. She stated this had been the practice generally, but it had not been clarified by statute. This bill was passed by the Legislature and

## CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on March 2, 2011 in Room 346-S.

enacted by the Governor. In August, 2010, it was brought to the JO/CINC committee's attention that the priority language throughout the bill was not consistent as was intended and this was causing some confusion; therefore, this bill was initiated by the JO/CINC Committee to provide clarification and consistency throughout the relevant statutes. ([Attachment 4](#))

There were no opponents.

The hearing on **SB 38** was closed.

The Hearing on **SB 45 - Removing the trust's taxpayer identification number from the certification of trust** was opened.

Matt Sterling, Staff Assistant Revisor, provided an overview for the committee. ([Attachment 5](#))

Todd Sheppard appeared before the committee on behalf of the Kansas Bar Association in support of the bill, which amends K.S.A. 58a-1013 by removing the Tax Identification number. He explained the KBA's position is the TAX ID number or social security number is no longer necessary to identify the trust and should not be in a document that is placed in the public record. ([Attachment 6](#))

There were no opponents.

The hearing on **SB 45** was closed.

The next meeting is scheduled for March 3, 2011.

The meeting was adjourned at 4:10 p.m.

## JUDICIARY COMMITTEE GUEST LIST

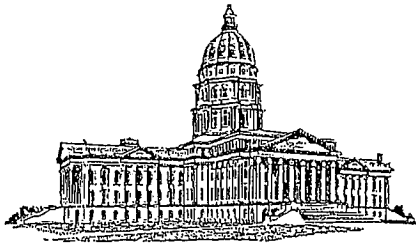
DATE: 3-2-11

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MARY ANN TORRENCE, ATTORNEY  
REVISOR OF STATUTES

JAMES A. WILSON III, ATTORNEY  
FIRST ASSISTANT REVISOR

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To: House Judiciary Committee

From: Tamera Lawrence, Assistant Revisor of Statutes

Date: March 2, 2011

Subject: SB 35, Attorney-Client Privilege and Work-Product Protection

SB 35 would adopt federal rule of evidence 502, which concerns attorney-client privilege and work-product protection. It governs whether a disclosure of information protected by the attorney-client privilege or work-product protection results in a waiver of that privilege or protection.

Specifically, the bill limits waiver of the privilege to the communication disclosed and not the entire subject matter of the communication. This restricts the scope of any waiver to the information disclosed unless fairness requires further disclosure. It clarifies that inadvertent disclosure does not result in a waiver when the holder of the privilege "took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error." It addresses the circumstances where the disclosure was first made in a proceeding in another state or at the federal level and is later considered in a Kansas proceeding. The bill also provides for the controlling effect of a court order or a party agreement.

House Judiciary  
Date 3-02-11  
Attachment # 1



Prof. Jim Concanion

## KANSAS JUDICIAL COUNCIL

CHIEF JUSTICE LAWTON R. NUSS, CHAIR, SALINA  
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BRANDY M. WHEELER

### MEMORANDUM

**TO: House Judiciary Committee**  
**FROM: Kansas Judicial Council**  
**DATE: March 2, 2011**  
**RE: Judicial Council Testimony on 2011 SB 35 Relating to Protection Against Waiver of Attorney-Client or Work-Product Privilege**

SB 35 was drafted by the Judicial Council Civil Code Advisory Committee and is based on Federal Rule of Evidence 502, which was enacted on September 19, 2008 and governs whether disclosure of information protected by attorney-client or work-product privilege results in waiver of the privilege.

The substance of section 1 of SB 35 is summarized below in comments taken from the federal Advisory Committee Notes and adapted for Kansas. Enactment of SB 35 would provide 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.

House Judiciary  
Date 3-02-11  
Attachment # 2

- ***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.

For consistency, Sections 2 and 3 of SB 35 contain amendments to K.S.A. 60-426 and 60-3003 to change "lawyer" to "attorney."

**Office of Revisor of Statutes**

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**MEMORANDUM**

To: Chairman Kinzer and members of the House Judiciary Committee

From: Jill Ann Wolters, Senior Assistant Revisor

Date: March 2, 2011

Subject: SB 38, priority of custody, residency, parenting time and visitation orders; child in need of care case, allowing the child 10 and older to address the court

SB 38 amends several statutes concerning court orders relating to custody, residency, parenting time and visitation and which orders would have priority. The policy adopted by the 2010 Legislature in SB 460 provided that any custody, residency, parenting time or visitation order, or order relating to the best interests of a child, issued pursuant to the revised Kansas code for care of children (CINC) or the revised Kansas juvenile justice code (JO), would have precedence over any order relating to the adoption and relinquishment act, determination of parentage, divorce, protection from abuse act or guardians and conservators, (except the uniform child custody jurisdiction and enforcement act) until jurisdiction under the CINC or the JO is terminated. The amendments in this bill would adopt language that any order under the CINC or JO would have precedence over those other orders until jurisdiction is terminated.

Further, in a CINC hearing, the bill would allow a child 10 years and older, to address the court. Under current law, the statute provides the court shall hear the testimony of the child as to the desires of the child concerning the child's placement if the child is 10 or older and of sound intellect. (Page 8, lines 1 through 4)



Natalie Gib...

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BRANDY M. WHEELER

TO: Representative Lance Kinzer, Chair, House Judiciary Committee  
From: Kansas Judicial Council Juvenile Offender and Child in Need of Care Committee  
Re: Testimony in support of 2011 Senate Bill 38  
Date: March 2, 2011

### TESTIMONY OF THE JUDICIAL COUNCIL JUVENILE OFFENDER/CHILD IN NEED OF CARE ADVISORY COMMITTEE ON 2011 SENATE BILL 38

In 2010 Senate Bill 460, the Kansas Judicial Council Juvenile Offender / Child in Need of Care Advisory Committee (JO/CINC committee) proposed a bill that provided that child in need of care orders or juvenile offender orders would take priority over similar orders in other domestic cases such as divorce, paternity, protection from abuse, and guardianship or conservatorship. This had been the practice generally, but it had not been clarified by statute. 2010 Senate Bill 460 was passed by the Legislature and enacted by the Governor. In August, 2010, it was brought to the JO/CINC committee's attention that the priority language throughout the bill was not consistent as was intended and this was causing some confusion. Therefore, the

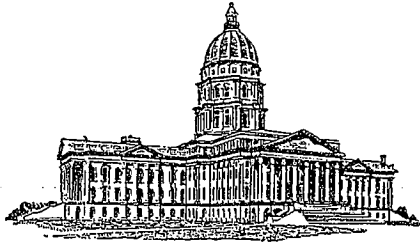


JO/CINC committee proposes 2011 Senate Bill 38 to provide clarification and consistency throughout the relevant statutes.

MARY ANN TORRENCE, ATTORNEY  
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FIRST ASSISTANT REVISOR

GORDON L. SELF, ATTORNEY  
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MEMORANDUM

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To: Chairman Kinzer and members of the House Judiciary Committee  
From: Matt Sterling, Assistant Revisor of Statutes  
Date: March 2, 2011  
Subject: Senate Bill 45

SB 45 amends K.S.A. 58a-1013 concerning certification of trusts. Under current law, a trustee may provide a certification of trust instead of a copy of the trust instrument to a person other than a qualified beneficiary. Such certification of trust must include: That the trust exists and the date the trust instrument was executed; the identity of the settlor; the identity and address of the currently acting trustee; the identity and address of the currently acting trustee; the powers of the trustee; the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust; the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; the trust's taxpayer identification number; and the manner of taking title to trust property.

SB 45 would remove the trust's taxpayer identification number from the list of required items in the certification of trust.

House Judiciary  
Date 3-02-11  
Attachment # 5



KANSAS BAR  
ASSOCIATION

**TO:** The Honorable Lance Kinzer  
And Members of the House Judiciary Committee

**FROM:** Todd Sheppard  
On Behalf of the Kansas Bar Association

**RE:** SB 45 – Removing the Tax Identification number requirement from  
K.S.A. 58a-1013

**DATE:** March 2, 2011

Good morning Chairman Kinzer and Members of the House Judiciary Committee. I am Todd Sheppard and I appear on behalf of the Kansas Bar Association in support of SB 45 which amends K.S.A. 58a-1013 by removing the Tax identification number.

Originally it was necessary, under K.S.A. 58a-1013, to use the TAX ID number as a way to identify the Trust. However, when a Certification of Trust is filed it becomes a public record and available to third parties. While the Tax ID number can still be used for this purpose more secure options are now available that increase privacy while decreasing the possibility of identity theft. It is the KBA's position that the TAX ID number of the trust is no longer necessary to identify the trust and should not be in a document that is placed in the public record.

Also, most register of deeds have a policy to remove or redact personal identifying information, such as social security numbers or TAX ID numbers that appear in a filed document. By eliminating the Tax ID number in K.S.A. 58a-1013 Register of Deeds will no longer need to be concerned with concealing this information, thereby saving time and resources.

In addition, many attorneys, abstracters or title insurance companies already request the TAX ID number of the trust in a separate affidavit that is required for IRS purposes. These affidavits are maintained privately by the particular attorney, abstracter or title insurance company.

By amending K.S.A. 58a-1013 to remove the TAX ID requirement we protect the privacy of the trusts and trustees while maintaining the ability of interested parties to ascertain the nature and property held in trust.

House Judiciary  
Date 3-02-11  
Attachment # 6

On behalf of the Kansas Bar Association, I thank you for the opportunity to appear before the committee in support of SB 45.



**About the Kansas Bar Association:**

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 7,000 members, including lawyers, judges, law students, and paralegals. [www.ksbar.org](http://www.ksbar.org)

March 2, 2011

DATE:

(Good morning Chairman Kizer and Members of the House Judiciary Committee. I am today appearing and speaking on behalf of the Kansas Bar Association in support of SB 45 which amends K.S.A. 58a-1013 by removing the tax ID number from the public record.

Currently, it was necessary under K.S.A. 58a-1013, to use the TAX ID number as a way to identify the Trust. However, when a Certification of Trust is filed it becomes a public record and available to third parties. While the Tax ID number can still be used for this purpose more secure options are now available that increase privacy while decreasing the possibility of identity theft. It is the KBA's position that the TAX ID number of the trust is no longer necessary to identify the trust and should not be in a document that is placed in the public record.

Also, most registers of deeds have a policy to remove or redact personal identifying information such as social security numbers or TAX ID numbers that appear in a filed document. By eliminating the Tax ID number in K.S.A. 58a-1013 Register of Deeds will no longer need to be concerned with redacting this information, thereby saving time and resources.

In addition, many attorneys, abstractors or title insurance companies already request the TAX ID number of the trust in a separate affidavit that is required for IRS purposes. These affidavits are maintained privately by the particular attorney, abstractor or title insurance company.

By amending K.S.A. 58a-1013 to remove the TAX ID requirement we protect the privacy of the trust's grantors while maintaining the ability of interested parties to ascertain the nature and property held in trust.