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February 4, 2015

Kansas House Committee on Judiciary
Representative John Barker, Chair

RE: 2015 HB 2114: Civil Procedure; Non-Party Business Records
Hearing Date: February 5, 2015

TESTIMONY OF RONALD W. NELSON
SUPPORTING HB 2114

Chairman Barker and Members of the Committee:

I am a litigation attorney. I've practiced primarily in the area of family law for over 25 years; before that, I litigated other kinds of cases, both plaintiff and defense, including product liability, professional liability, and automobile negligence. My practice involves both trial – and appellate – cases. And I've focused much of my practice on jurisdiction, discovery practice, and trial procedure.

Lately, I've become concerned about the use – and misuse – of the power to subpoena non-party business records; and I've heard the same concerns and complaints from others.

K.S.A. 60-245a allows any party to a Kansas civil lawsuit to subpoena nonparty business records. The powers granted by the statute are necessarily broad. The statute allows "any party" to "request production of business records from a nonparty by causing to be issued a nonparty business records subpoena." Usually, these requests for "nonparty business records" are directed to a bank, financial institution, or other entity that possesses documents of a party that may be relevant to the underlying claims or defenses made in the case. The issuance of a nonparty business records subpoena for party records is one way to assure that complete and accurate records are obtained from that nonparty entity for use in litigation and at trial.

To protect a party from the improper request and disclosure of privileged and other private information not relevant to the underlying litigation or trial issues, K.S.A. 60-245a requires that:

> "Not less than 14 days before issuance of a nonparty business records subpoena, the requesting party must give notice to all parties of the intent to request the subpoena. A copy of the proposed subpoena must be served on all parties with the notice. If prior to the issuance of the subpoena any party objects to the production of the records sought, the subpoena must not be issued unless ordered by the court."

This required notice allows the party whose records are being requested from a third-party to object to the issuance of the business records subpoena, to know what records are sought, and to have a judge decide if those records are appropriate for disclosure. This procedure works well and most disputes are worked out between the litigants without needing to involve the court.

But the statute is not limited to requesting *only* party records held by a nonparty; the statute also allows for any party in the litigation to request – and obtain – *nonparty* records from a nonparty. But because the statute does not require that parties give notice to anyone other than a *party* to the litigation that records are being sought from a nonparty, a nonparties records held by a nonparty can be obtained without that nonparty ever knowing the records are being requested or have been disclosed.

With growing hostility in litigation, the problem is growing worse. In just the past few months, I've encountered a number of requests for nonparty records where no notice was given to the nonparty. Cases in which it seems clear the purpose of the request was to intrude more than to enlighten. Specifically, in family law litigation – the area of law in which I practice – I've encountered situations where financial and other personal and business records requested are those of a party's girlfriend or boyfriend, new spouse or significant other, parents and siblings, and business associates. But because the current statute requires notice of the desire to issue a nonparty records subpoena only to a *party*, those nonparties are not entitled to receive advance notice of the request and the ability to challenge the disclosure of those records.

This also is a problem in criminal discovery – because the criminal discovery rules reference the civil rule. K.S.A. 22-3214(1) provides:

> "The prosecution and any person charged with a crime shall be entitled to the use of subpoenas and other compulsory process to obtain the attendance of witnesses. *Except as otherwise provided by law, such subpoenas and other compulsory process shall be issued and served in the same manner and the disobedience thereof punished the same as in civil cases*."

And because no one other than the State and the defendant are party to a criminal matter, nonparty records held by nonparties are subject to subpoena. This recently happened in a case in which I was involved. Both civil and criminal cases were pending. But instead of requesting those records in the civil case, the defendant instead subpoenaed those business records in the *criminal* case and did not give any notice to the victim, who was also engaged in civil litigation with that defendant. The only way the party found out about the request was because the entity who was subpoenaed notified the customer that records were requested – but that the entity itself was compelled to produce the documents because of the subpoena.

Certainly it is understandable that the State needs to be able to investigate crimes without interference and should be able to obtain nonparty records from nonparties when appropriate; but the ability for either the State or a defendant to obtain any records of any nonparty from another nonparty should be limited.

There is an easy fix to the problem. And that "fix" is the language proposed in HB2114.

HB2114 provides for two changes to the current K.S.A. 60-245a to correct this problem and give notice to any person whose records are requested:

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First, it would require that notice of the intended issuance of a nonparty business records subpoena be given not only to every *party*, but also to "any person whose individual or jointly held personal or business records are requested." (Page 1, Line 27-28)

Second, it would not allow the issuance of the subpoena for nonparty records "unless ordered by the court" if "any party or any person whose individual or jointly held personal or business records are requested objects to the production of the records sought." (Page 1, Line 32-34)

This bill would also change one other provision in K.S.A. 60-245a which has is a growing problem: notification to others by the party who requested and obtained nonparty records that the records have been received so that others can review and obtain copies of those records.

Before 2010, any nonparty records subpoenaed under K.S.A. 60-245a were delivered to the Clerk of the district court in which the action was pending. The Clerk would notify all parties to the litigation that the records were received. " When any party desired to review or copy the subpoenaed records, K.S.A. 60-245a(e) required a party to give "reasonable notice" of the party's intent to view and copy the records:

> "After the copy of the record is filed, a party desiring to inspect or copy it shall give reasonable notice to every other party to the action. The notice shall state the time and place of inspection."

But amendments to K.S.A. 60-245a passed in 2010 did away with that requirement (because it removed the district court clerk from the middle of the process). Instead, the statute presumes that the records will be delivered to the party requesting the, rather than to the court clerk. Although the amendments provide that, "After the copy of the records is delivered, a party desiring to inspect or copy them must give reasonable notice to the parties[,]" the amendments did *not* require that the party who subpoenaed the records give any notice that the records were received.

HB 2114 remedies this oversight by adding a new subsection (C) providing:

> "(C) *Notification required to allow access to and copying of requested records*. Within seven days after receipt of the requested records, the requesting party shall notify every other party and any person whose individual or jointly held personal or business records were requested to allow access to and copying of such records."

(Page 2, Line 39-43)

These proposed changes would help correct these existing problems. I strongly support this bill. And I ask the Committee to approve it and advance it to the full House.

Ronald W. Nelson