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MEMORANDUM

TO: Senate Judiciary Committee
FROM: Kansas Judicial Council
DATE: January 25, 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.

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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."