

SESSION OF 2011

SUPPLEMENTAL NOTE ON SENATE BILL NO. 35

As Recommended by Senate Committee on
Judiciary

Brief*

SB 35 would provide certain protections against waiver of attorney-client or work-product privilege. The protections would include:

- If a waiver is found, it would apply only to information actually disclosed, unless: the waiver was intentional, undisclosed information concerned the same subject matter, and fairness required the disclosed and undisclosed information to be considered together.
- Inadvertent disclosure in a court or agency proceeding would not operate as a waiver if the holder of the privilege took reasonable steps to prevent disclosure and took prompt, reasonable steps to rectify the error.
- Disclosure made in a non-Kansas proceeding would not waive the privilege in a Kansas proceeding if the disclosure would not constitute a waiver under Kansas law or under the law of the jurisdiction where the waiver occurred. Whichever law provides the most protection against waiver would apply.
- A court would be able to order that disclosure in litigation pending before the court does not constitute a waiver.
- Parties would be able to enter into agreements as to the effect of disclosures within the proceeding, although

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

such agreements would not be binding upon non-parties unless incorporated into a court order.

The bill also would provide definitions for “attorney-client privilege” and “work-product protection” and make technical amendments to K.S.A. 60-426 and K.S.A. 60-3003 to ensure consistency in wording.

Background

Confidential communications between attorneys and their clients are protected from disclosure under the attorney-client privilege, which is codified at K.S.A. 60-426. Similarly, materials produced or assembled by an attorney in preparation for or in the course of litigation is protected from disclosure under the work-product doctrine, which is codified at K.S.A. 2010 Supp. 60-226(b)(4). The attorney-client privilege or protection under the work-product doctrine may be waived if the protected party or the party's attorney reveals the protected information to a third party.

The Kansas Judicial Council requested the Senate Judiciary Committee introduce SB 35.

In the Senate Judiciary Committee, a representative of the Kansas Judicial Council appeared in support of SB 35, explaining that SB 35 is based on Federal Rule of Evidence 502, which was enacted in 2008. No opponents provided testimony. The Committee made no changes to the bill and recommended it be passed.

The fiscal note on the bill states the bill is expected to produce litigation to interpret and apply the law, but that it does not appear there will be a substantial fiscal effect to the Judicial Branch. A precise fiscal effect cannot be determined until the courts have operated under SB 35.