

2018 Kansas Statutes

60-237. Compelling discovery; failure to comply; sanctions; failure to preserve electronically stored information. (a) *Motion for an order compelling disclosure or discovery.* (1) *In general.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action and must describe the steps taken by all attorneys or unrepresented parties to resolve the issues in dispute.

(2) *Appropriate court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the district where the discovery is or will be taken.

(3) *Specific motions.* (A) *To compel disclosure.* If a party fails to make a disclosure required by K.S.A. 60-226(b)(6), and amendments thereto, any other party may move to compel disclosure and for appropriate sanctions.

(B) *To compel a discovery response.* A party seeking discovery may move for an order compelling an answer, designation, production or inspection. This motion may be made if:

(i) A deponent fails to answer a question asked under K.S.A. 60-230 or 60-231, and amendments thereto;

(ii) a corporation or other entity fails to make a designation under K.S.A. 60-226(b)(6) or 60-231(a)(4), and amendments thereto;

(iii) a party fails to answer an interrogatory submitted under K.S.A. 60-233, and amendments thereto; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted, or fails to permit inspection, as requested under K.S.A. 60-234, and amendments thereto.

(C) *Related to a deposition.* When taking an oral deposition the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or incomplete disclosure, answer or response.* For purposes of this subsection, an evasive or incomplete disclosure, answer or response must be treated as a failure to disclose, answer or respond.

(5) *Payment of expenses; protective orders.* (A) *If the motion is granted, or disclosure or discovery is provided after filing.* If the motion is granted, the court must, and if disclosure occurs before the motion is granted, the court may, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) The movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the motion is denied.* If the motion is denied, the court may issue any protective order authorized under K.S.A. 60-226(c), and amendments thereto, and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the motion is granted in part and denied in part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under K.S.A. 60-226(c), and amendments thereto, and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) *Failure to comply with a court order.* (1) *Sanctions in the district where the deposition is taken.* If the court in the district where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions in the district where the action is pending.* (A) *For not obeying a discovery order.* If a party or a party's officer, director or managing agent, or a witness designated under K.S.A. 60-230(b)(6) or 60-231(a)(4), and amendments thereto, fails to obey an order to provide or permit discovery, including an order under subsection (a) or under K.S.A. 60-235, and amendments thereto, the court where the action is pending may issue further just orders. They may include the following:

(i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For not producing a person for examination.* If a party fails to comply with an order under K.S.A. 60-235(a), and amendments thereto, requiring it to produce another person for examination, the court may issue any of the orders listed in paragraphs (2)(A)(i) through (2)(A)(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of expenses.* Instead of, or in addition to, the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) *Failure to disclose, to supplement an earlier response or to admit.* (1) *Failure to disclose or supplement.* If a party fails to provide information or identify a witness as required by K.S.A. 60-226(b)(6) or (e), and amendments thereto, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing or at a trial, unless the failure was substantially justified or is harmless. In addition to, or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) May order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in subsections (b)(2)(A)(i) through (b)(2)(A)(vi).

(2) *Failure to admit.* If a party fails to admit what is requested under K.S.A. 60-236, and amendments thereto, and if the requesting party later proves the document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) The request was held objectionable under K.S.A. 60-236(a), and amendments thereto;

(B) the admission sought was of no substantial importance;

- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.
- (d) *Party's failure to attend its own deposition, serve answers to interrogatories or respond to a request for inspection.* (1) *In general.* (A) *Motion; grounds for sanctions.* The court where the action is pending may, on motion, order sanctions if:
 - (i) A party or a party's officer, director or managing agent, or a person designated under K.S.A. 60-230(b)(6) or 60-231(a)(4), and amendments thereto, fails, after being served with proper notice, to appear for that person's deposition; or
 - (ii) a party, after being properly served with interrogatories under K.S.A. 60-233, and amendments thereto, or a request for inspection under K.S.A. 60-234, and amendments thereto, fails to serve its answers, objections or written response.
- (B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action and must describe the steps taken by all attorneys or unrepresented parties to resolve the issues in dispute.
- (2) *Unacceptable excuse for failing to act.* A failure described in paragraph (1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under K.S.A. 60-226(c), and amendments thereto.
- (3) *Types of sanctions.* Sanctions may include any of the orders listed in subsections (b)(2)(A)(i) through (b)(2)(A)(vi). Instead of, or in addition to, these sanctions, the court must require the party failing to act, the attorney advising the party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
- (e) *Failure to preserve electronically stored information.* If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
 - (1) Upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
 - (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:
 - (A) Presume that the lost information was unfavorable for the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

History: L. 1963, ch. 303, 60-237; amended by Supreme Court order dated July 20, 1972; L. 1997, ch. 173, § 20; L. 2008, ch. 21, § 5; L. 2010, ch. 135, § 106; L. 2017, ch. 75, § 8; July 1.