



**32nd Annual
Gene F. Anderson
Memorial CLE**

**Thursday, April 28, 2022
12:00 noon – 4:50 p.m.**

**Friday, April 29, 2022
8:00 a.m. – 3:50 p.m.**

www.elliscountyksbar.org

Email: elliscountyksbar@gmail.com

Program Schedule

Thursday, April 28, 2022

12:00 p.m. - 5:00 p.m.

12:00 – 12:50 p.m.

Appellate Update

- Hon. Amy Fellows Cline, Kansas Court of Appeals
- Hon. Lesley Isherwood, Kansas Court of Appeals

1:00 – 1:50 p.m.

Revisiting the Guardianship and Conservatorship Code and Helpful Practice Hints

- Emily A. Donaldson, Certified Elder Law Attorney, Stevens & Brand, LLP
 - Rachael K. Pirner, Attorney, Triplett Woolf Garretson, LLC
 - Kip Elliot, Attorney, Disability Rights Center of Kansas

2:00 – 2:50 p.m.

Implicit Bias Basics (Ethics)

- Meryl Carver-Allmond, Training Director
Kansas State Board of Indigents' Defense Services

3:00 – 3:50 p.m.

Family Law in Kansas Update

- Linda Elrod, Richard S. Righter Distinguished Professor of Law,
Director of Children and Family Law Center, Washburn University School of Law

4:00 – 4:50 p.m.

The Basics of Blockchain & Cryptocurrency ... and Why You Should Care

- Robert A. Anderson, Jr., Ellis County Attorney
 - Levi Morris, Barton County Attorney

Program Schedule

Friday, April 29, 2022

8:00 a.m. - 4:00 p.m.

8:00 – 8:50 a.m.

Medicaid Planning Basics

- Molly M. Wood, Attorney, Stevens & Brand, L.L.P.

9:00 – 9:50 a.m.

Ethics Refreshers (Ethics)

- Gayle B. Larkin, Disciplinary Administrator, Kansas Judicial Branch

10:00 – 10:50 a.m.

Kansas eCourt Rules

- John T. Houston, Assistant General Counsel
Kansas Supreme Court Office of Judicial Administration

11:00 – 11:50 a.m.

Mediation from the Mediator's Perspective

- Hon. Robert J. Schmisser, Schmisser Law Firm

12:00 – 12:50 p.m.

Lunch

1:00 – 1:50 p.m.

Updates in Criminal Law

- Aaron J. Cunningham, Assistant Ellis County Attorney

2:00 – 2:50 p.m.

2022 Legislative Update

- Joseph N. Molina, Director of Legislative Services, Kansas Bar Association

3:00 – 3:50 p.m.

Technology in the Law Practice: Avoiding Ethical Pitfalls in the Digital Age (Ethics)

- Danielle Hall, Executive Director, Kansas Lawyers Assistance Program

Appellate Update

Hon. Amy Fellows Cline, Kansas Court of Appeals

Hon. Lesley Isherwood, Kansas Court of Appeals

Thursday, April 28th

12:00 – 12:50 p.m.

RECENT DECISIONS AND HOT ISSUES: CIVIL CASES

Cases: April 1, 2021-April 1, 2022

The following are summaries of case highlights from opinions filed in the last 12 months by the Kansas Supreme Court or the Kansas Court of Appeals. They have been prepared by staff attorneys for the two courts and are not to be used as an authoritative reference regarding the cases described. Only the portion of each case related to the topic noted is discussed. You are encouraged to read the entire case before relying upon it.

The effect of a petition for review: Pending determination of the Supreme Court on a petition for review and during the time in which a petition for review may be filed, an opinion of the Court of Appeals is not binding on the parties or on the district courts. If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate will not issue until disposition of the appeal on review. If review is denied, the decision of the Court of Appeals is final as of the date of the denial. A denial of a petition for review expresses no opinion of the Supreme Court on the merits of the case. See Kan. Sup. Ct. R. 8.03

ADMINISTRATIVE LAW

PRESUMPTION OF VALIDITY. The Kansas Board of Healing Arts sanctioned Seyed Sajadi, MD, because Sajadi had been sanctioned in Missouri. Sajadi argued that the Board could only sanction him for being sanctioned in another jurisdiction, not for the underlying sanctionable conduct that occurred in another jurisdiction. Sajadi also contended that the

Kansas sanction could not be more punitive than the Missouri sanction. The Court of Appeals affirmed, concluding that Sajadi had not overcome the presumption of validity attached to agency actions to show that the Board erred in limiting his practice.

Sajadi v. Kansas Bd. of Healing Arts, 61 Kan. App. 2d 114, 500 P.3d 542 (Sept. 24, 2021).

UTILITIES. A natural gas utility that bills customers on the basis of the energy content of gas consumed engages in an unjust, unreasonable, or unfair practice when it manipulates measurement data to charge customers for more energy than was actually consumed.

Hanson v. Kansas Corporation Commission, 313 Kan. 752, 490 P.3d 1216, (Jul. 16, 2021).

APPELLATE PRACTICE

PRO SE LITIGANTS. Catherine A. Joritz appealed the trial court's denial of her petition for judicial review of the termination of her tenure-track employment with the University of Kansas. The Court of Appeals rejected her request that the court adopt a more lenient standard when reviewing her arguments because she is pro se.

Catherine A. Joritz v. University of Kansas, 61 Kan. App. 2d 482, P.3d __, 2022 WL 187435 (Jan. 21, 2022), *petition for rev. filed* (Feb. 22, 2022).

SCOPE OF REMAND. After the Court of Appeals remanded the district court's order, Harold Johnson moved for trial attorney fees. The district court denied the motion, finding that the Court of Appeals had fully addressed the merits of Johnson's right to attorney fees by denying his appellate attorney fees motion as untimely. On appeal, the Court of Appeals held that its mandate's silence as to Johnson's right to attorney fees upon remand did not mean that Johnson could not move for attorney fees upon remand; it just meant that it had fully decided Johnson's right to appellate attorney fees in his initial appeal.

Harold Johnson v. Board of Directors of Forest Lakes Master Association, __ Kan. App. 2d __, P.3d __, 2021 WL _____ (Dec. 10, 2021).

ATTORNEY SANCTIONS

FEES RELATED TO MOTIONS TO ENFORCE PROTECTIVE ORDERS. Yudi Hernandez hired Brad and Brian Pistotnik's law firm to pursue a bodily injury claim. Yudi later replaced the firm with Stephen Brave. Brave sued Brad, Brian, and the firm on Yudi and other clients' behalf, alleging false advertising. The district court entered a protective order in Yudi's case, precluding use of confidential material obtained during Brave's deposition of Brad. Brave continued to litigate the issue and Brad successfully moved to

enforce the order. The district court assessed expenses incurred by Brad in filing those motions against Brave. The Kansas Court of Appeals upheld the sanctions, holding the district court has leeway in sanctioning discovery abuses.

Hernandez v. Pistotnik, 60 Kan. App. 2d 393, 494 P.3d 203 (July 23, 2021).

CHILD IN NEED OF CARE

VIDEOCONFERENCE—DUE PROCESS. After the district court terminated Mother's rights, she appealed arguing that her due process rights were violated because the court proceedings, including a hearing on the motion to terminate her rights, were held by videoconference. The Court of Appeals affirmed, holding that videoconferencing does not violate due process rights as long as adequate safeguards ensure meaningful participation.

In the Interest of C.T., 61 Kan. App. 2d 218, 501 P.3d 899 (Oct. 29, 2021).

UCCJEA. Mother of A.W., a child suffering from diabetic ketoacidosis, transferred A.W. from Missouri to a hospital in Kansas to avoid Missouri child services. Kansas filed a CINC petition after Missouri social services declined. The district court adjudicated A.W. a child in need of care. On appeal, the Court of Appeals reversed, holding that, under the UCCJEA, Missouri was A.W.'s home state and Missouri did not waive jurisdiction because a court of Missouri, not an administrative agency, must decline jurisdiction. The "unjustifiable conduct" provision was also inapplicable because the unjustifiable conduct must be from the party seeking to invoke the state's jurisdiction. The district court had the authority under emergency jurisdiction to enter temporary orders, but it could not enter permanent orders.

In the Interest of A.W., 60 Kan. App. 2d 296, 493 P.3d 298 (June 18, 2021).

CIVIL PROCEDURE

ORIGINAL ACTIONS. The Kansas Secretary of State filed an original action seeking writs of mandamus and quo warranto for the dismissal of pending district court cases challenging the congressional districts drawn by the 2022 legislature. Relief in mandamus and quo warranto did not lie, as the district judges did not have a mandatory duty to dismiss the cases, and the district judges were not exercising unlawfully asserted authority.

Schwab v. Klapper, No. 124,849, 2022 WL 627748, __ Kan. __, __ P.3d __ (Mar. 4, 2022).

CLAIM PRECLUSION—FEDERAL SUPPLEMENTAL JURISDICTION. A litigant may reassert state-law claims in state court that previously were dismissed without prejudice by a federal court that declined to exercise its discretionary, supplemental jurisdiction over them after resolving any federal law claims. The state law claims are not res

judicata since the decision to decline jurisdiction is not a final judgment on the claims. Overruling *Stanfield v. Osborne Industries*, 263 Kan. 388 (1997) and *Rhoten v. Dickson*, 290 Kan. 92 (2010).

Herrington v. City of Wichita, 314 Kan. 447, 500 P.3d 1168 (Dec. 17, 2021).

APPEALS TO DISTRICT COURT. Scott Brown won a judgment against Casey Zimmerman in small claims court. Zimmerman appealed to the district court. The district court affirmed the judgment after a review of the record. Zimmerman appealed, arguing that he was entitled to a trial de novo, not merely a review of the record. The Court of Appeals reversed, finding that the appeal should have been tried and determined de novo by a district judge.

Scott Brown v. Casey Zimmerman, 61 Kan. App. 2d 537, __ P.3d __, 2022 WL 333411 (Feb. 4, 2022).

MOTION TO STRIKE—PUBLIC SPEECH PROTECTION ACT. A former student, proceeding as John Doe, sued Kansas State University and its Administrator, Heather Reed, alleging Reed communicated false and defamatory information to another university. KSU and Reed filed motions to strike under Kansas' Public Speech Protection Act, asserting Reed's communication was an exercise of rights protected under the Act. The district court granted the motions and dismissed Doe's case. The court of appeals affirmed, finding Doe failed to meet his burden of producing substantial competent evidence to support his claims and to overcome the university's prima facie showing that the claims involved the exercise of a protected right. Thus, the district court did not err in granting the motions to strike.

John Doe v. Kansas State University and Heather Reed, 61 Kan. App. 2d 128, 499 P.3d 1136 (Oct. 1, 2021).

PLEADING REQUIREMENTS. Stevie Kucharski-Berger sued Hill's Pet Nutrition, alleging violations of Kansas' restraint of trade and consumer protection laws, after learning that Hill's prescription pet food contains no medicine or drug, and that no prescription is legally required to purchase it. Kucharski-Berger also raised an unjust enrichment claim on the same grounds. The district court dismissed the suit, holding that Kucharski-Berger failed to state a claim upon which relief could be granted. The Court of Appeals reversed holding, in part, that Kucharski-Berger's pleadings sufficiently apprised Hill's of the claims against the company. The court also held that Kucharski-Berger could bring her statutory

claims and her unjust enrichment claim even if she would ultimately be unable to recover on both theories.

Kucharski-Berger v. Hill's Pet Nutrition, Inc., 60 Kan. App. 2d 510, 494 P.3d 283, (Aug. 20, 2021), *petition for rev. filed* (Sept. 17, 2021), *petition for rev. denied* (Dec. 9, 2021).

ONE-ACTION RULE. Curtis Rodina sued a dental practice and some dentists for malpractice and other claims. Because the defendants did not respond, the district court entered a default judgment against them. The district court ruled it was unnecessary to apportion fault in the default judgment. Rodina subsequently learned that Dr. Alberto Castanedo performed the allegedly negligent dental procedures. Rodina brought another suit against Castanedo. The district court dismissed the second suit under the one-action rule. The Court of Appeals reversed, holding that Rodina was entitled by law to an apportionment of fault. Since the default judgment did not apportion fault, Rodina's suit against Castaneda was not barred by the one-action rule.

Curtis Rodina v. Alberto R. Castaneda, D.D.S., 60 Kan. App. 2d 384, 494 P.3d 172, (July 16, 2021), *petition for rev. filed* (Aug. 12, 2021), *petition for rev. denied* (Dec. 6, 2021).

APPEAL OF ORDER MADE BY JUDGE PRO TEM. The district court entered a protection from abuse order against J.L.B. The presiding judge was appointed under K.S.A. 2020 Supp. 20-310a(d), as a judge pro tem. J.L.B. first filed her appeal from the order in the district court. The district court dismissed the appeal and directed it be filed in the Court of Appeals. Acknowledging conflicting language within the statute, the Court of Appeals found the judge pro tem acted within the authority of a district magistrate judge, requiring J.L.B. to take her appeal to the Court of Appeals.

J.B.B. v. J.L.B., 60 Kan. App. 2d 310, 495 P.3d 1036 (July 9, 2021).

CONSTITUTIONAL LAW

AVOIDANCE. Parents of school children sued to challenge a school district's Covid-19 mask mandate under the provisions of 2021 Kansas Senate Bill 40. A district court denied relief, finding the parents' claim was untimely and also that the law was unconstitutional. The Kansas Supreme Court held the trial court erred reaching the constitutional question when the case could be resolved on non-constitutional grounds.

Butler v. Shawnee Mission School District, 314 Kan. 553, 502 P.3d 89 (Jan. 7, 2022).

FIFTH AMENDMENT—APPLICABILITY IN CINC PROCEEDINGS. The district court relied, in part, on Mother's failure to comply with a clinical or substance abuse

evaluation in a child in need of care proceeding to terminate Mother's parental rights. During the evaluation, Mother failed to explain injuries to E.L.'s siblings. On appeal, Mother argued that it was improper for the court to base its unfitness findings on her failure to explain the injuries because she had a criminal case pending on the subject and she wanted to maintain her Fifth Amendment right against self-incrimination. The Court of Appeals affirmed, holding that the right against self-incrimination does not prohibit a court from relying on a parent's failure to complete court ordered evaluations when terminating parental rights.

In the Interest of E.L., 61 Kan. App. 2d 311, 502 P.3d 1049 (Nov. 24, 2021), *petition for rev. filed* (Dec. 27, 2021), *petition for rev. denied* (Mar. 25, 2022).

RIGHT TO A JURY TRIAL; RIGHT TO A REMEDY. A Kansas statute that abrogated wrongful birth actions, which had been previously recognized by the state supreme court, violates neither the right to a remedy nor the right to a jury trial under sections 5 and 18 of the Kansas Constitution, even though some parents would have had a viable cause of action but-for the statute. Wrongful birth had been recognized as a new cause of action, and thus it was not constitutionally shielded from statutory abrogation.

Tillman v. Goodpasture, 313 Kan. 278, 485 P.3d 656 (Apr. 30, 2021).

CONTRACTS

PROMISSORY NOTES. A promissory note's waiver of the statute of limitations is not void as against public policy when the waiver is only "to the full extent permitted by law," the loan underlying the note is a commercial contract, and the borrower does not claim prejudice from the lender's delay in bringing suit.

First Security Bank v. Buehne, 314 Kan. 507, 501 P.3d 362 (Dec. 30, 2021).

MUNICIPALITIES. The Topeka city council entered into a contract to purchase an interest in a racetrack, in which it agreed to finance the purchase with Sales Tax and Revenue bonds. New members were elected to the council, and the new membership decided not to pursue the bond issue. The purchase contract imposed obligations on the city outside the general administrative functions of a municipality, so it was a governmental decision

that was not binding on the subsequent council. Accordingly, the seller was not entitled to damages for the council's breach of contract.

Jayhawk Racing Properties, et al. v. Topeka, 313 Kan. 149, 484 P.3d 250 (Apr. 9, 2021).

ESTATES AND TRUSTS

TIMELY FILING OF A WILL. Alma Faye Lessley died testate in June 2018. Shortly before her death, Lessley materially changed her will to substantially benefit one of her four children to the exclusion of her other three children. The heir given a larger share of assets under the terms of the will filed a petition for probate but did not file the will until almost 18 months after Lessley's death. The Court of Appeals held that the heir was not an innocent beneficiary and that the failure to timely file the will within six months from the date of the decedent's death rendered the will ineffective and not admissible to probate.

Matter of Estate of Lessley, ___ Kan. App. ___, ___ P.3d ___ 2022 WL 731363 (Mar. 11, 2022).

FAMILY LAW

SERVICE OF PROCESS. The district court terminated Father's parental rights after he failed to appear at the termination hearing. The State had sent notice of the hearing by certified mail, with a return receipt signed by someone who was not Father. Father appealed, arguing that service of notice of the hearing was invalid unless he signed for the notice's receipt. The Court of Appeals rejected Father's arguments, holding that Kansas law does not require restricted delivery when serving notice of a termination hearing by return receipt delivery, such as service by certified mail.

In re A.P., ___ Kan. App. 2d ___, ___ P.3d ___, 2022 WL 817026 (Mar. 11, 2022).

INTERNATIONAL TREATY – CHILD CUSTODY. Dutch child protective services took S.L. into custody when she was in the Netherlands. Her father and stepmother petitioned for her return under the 1980 Hague Convention on the Civil Aspects of Child Abduction. Dutch courts held that S.L. had sufficient age and maturity to take her views into consideration and S.L. did not want to return to the U.S. because of her stepmother's abuse. Then, S.L.'s father and stepmother petitioned the Johnson County District Court to

order S.L. returned, which it did. The Kansas Court of Appeals reversed, saying that the Dutch courts correctly applied the 1980 Hague Convention.

In the Interest of S.L., A Minor Child, No. 123,535, 2021 WL 5274575, 61 Kan. App. 2d 276, 503 P.3d 244 (Nov. 12, 2021), *petition for rev. filed* (Dec. 8, 2021).

CHILD SUPPORT. Under the Uniform Interstate Family Support Act, a Kansas court's power to modification of an out of state's order is not conditioned on proper registration of the order. Failing to file a copy of another state's child support order when registering the order in Kansas does not deprive a Kansas court of jurisdiction to consider a subsequent motion to modify the order.

Chalmers v. Burrough, 314 Kan. 1, 494 P.3d 128 (Aug. 27, 2021).

CHILD SUPPORT. In a proceeding to determine paternity, a district may impose support comprising the mother's prenatal medical care and childbirth expenses only in the initial support award entered in conjunction with the paternity order.

Carman v. Harris, 313 Kan. 315, 485 P.3d 644 (Apr. 30, 2021).

GRANDPARENT VISITATION

JURISDICTION. The district court granted Grandmother's petition for grandparent visitation with her grandsons. Mother appealed, arguing that the district court violated her constitutional rights as a parent to decide the care, custody, and control of her children. The Court of Appeals affirmed, first addressing jurisdiction and agreeing with a previous panel that independent actions by grandparents are authorized by statute. The Court then ruled that Mother's proposed plan for her children to have no contact with Grandmother was not reasonable.

Schwarz v. Schwarz, __ Kan. App. 2d __, __ P.3d __, 2022 WL 815699 (Mar. 18, 2022).

GOVERNMENT LIABILITY

MEDICAL TREATMENT FOR PERSONS IN CUSTODY. A governmental entity's obligation to pay an indigent criminal offender's medical expenses under K.S.A. 22-4612 is triggered when the entity has custody over the offender at the time the decision to

obtain medical treatment is made. The definition of custody for the statute's purposes is discussed and applied.

University of Kansas Hospital Authority v. Board of Franklin County Commissioners, 314 Kan. 74, 495 P.3d 1 (Sept. 10, 2021).

INSURANCE

DUTY TO SETTLE. Nancy Granados filed a garnishment against Key Insurance after she won a wrongful death judgment against Key's insured, John Wilson. The district court awarded the garnishment, finding Key acted in bad faith or negligently. On appeal, a panel of the Court of Appeals determined that Key had not acted in bad faith because there was no causal connection between Key's purported breach of duty and the excess judgment. The panel also found that an insurer owes no affirmative duty to initiate settlement negotiations with a third party until the third party makes a claim for damages.

Nancy Granados, Individually, as Heir-at-Law of Francisco Granados, Decedent, and as Class Representative of all Heirs-At-Law of Francisco Granados, Decedent v. John Wilson and Key Insurance Company, __ Kan. App. 2d __, __ P.3d __, 2022 WL 497315 (Feb. 18, 2022), *petition for rev. filed* (Mar. 9, 2022).

UNDERINSURED MOTORIST COVERAGE. Plaintiff sought underinsured motorist benefits from his employer's automobile insurance carrier. Reversing the district court's rulings on competing motions for summary judgment, the Court of Appeals held: (1) The carrier wrongfully denied coverage based on a written rejection of coverage by the employer because the rejection specified only uninsured coverage, not underinsured coverage. (2) Plaintiff forfeited his right to underinsured motorist benefits by failing to provide notice of a tentative settlement under K.S.A. 40-284(f).

McLean v. National Union Fire Ins. Co., 60 Kan. App. 2d 283, 493 P.3d 968 (June 18, 2021), *petition for rev. filed* (July 14, 2021), *petition for rev. denied* (Sept. 27, 2021).

JUDGMENTS

WAGE GARNISHMENT. A judgment creditor may not attach a judgment debtor's wages which have been deposited into the judgment debtor's bank account. The bank garnishment statute, K.S.A. 61-3505, permits the judgment creditor to reach only "intangible

property, other than earnings" After wages are paid to the judgment debtor, they remain earnings and their garnishment is subject to limitations set out in the wage garnishment statutes.

Stormont-Vail Healthcare, Inc. v. Sievers, 314 Kan. 355, 498 P.3d 1217 (Nov. 24, 2021).

JURISDICTION

APPELLATE COURT'S ABILITY TO REMAND. Travelers Casualty Insurance was ordered by the Director of the Worker's Compensation Fund to reimburse OneBeacon American Insurance Company for preliminary medical benefits OneBeacon paid to a beneficiary. Unhappy with the order, Travelers sought review of the order by the district court. The district court denied Travelers' prayer for relief. Travelers appealed and, after review, this court remanded the case to the Workers Compensation Board. Before the Board, the parties agreed that the Board did not have jurisdiction to address the case on remand. The Board reluctantly disagreed and issued an opinion. The case was appealed to this court and a majority held that an intermediate appellate court cannot vest jurisdiction in a tribunal that does not otherwise have jurisdiction by remanding a case to the tribunal.

Travelers Casualty Insurance v. Larry G. Karns and OneBeacon American Insurance Company, 61 Kan. App. 2d 43, 499 P.3d 491 (Sep. 17, 2021).

OPEN RECORDS ACT

STANDING. An attorney who sues for access to recordings of a court proceeding under the Kansas Open Records Act loses standing on the claim if the recordings are produced during discovery. The attorney must allege a future injury stemming from the policy under which the records were originally withheld. An attorney who has received the recordings originally requested has lost any personal stake in the KORA litigation.

Baker v. Hayden, No. 117,989, 313 Kan. 667, 490 P.3d 1164 (July 2, 2021).

REAL PROPERTY

MORTGAGE FORECLOSURE — LOAN ACCELERATION. The district court granted Ashley and Timothy Holversons' summary judgment motion, ruling that Wilmington's foreclosure action fell outside a five-year statute of limitations because the prior noteholder's 2011 letter threatening foreclosure triggered the statute of limitations when the Holversons failed to cure their default by the letter's listed deadline. Wilmington appealed, arguing that the statute of limitations was not triggered until a later date because only a noteholder's clear and unequivocal expression of its intent to accelerate a loan triggers the

five-year statute of limitations. The Kansas Court of Appeals agreed, reversing and remanding for further proceedings.

Wilmington Savings Fund Society, FSB v. Holverson, 60 Kan. App. 2d 142, 492 P.3d 492 (May 14, 2021).

SEXUALLY VIOLENT PREDATOR PROGRAM

CIVIL PROCEDURE. In 2018, Max R. Saiz petitioned for release from the Sexually Violent Predator Treatment Program alleging, in part, that the State failed to comply with a prior court order. The district court agreed and ordered Saiz' immediate release from the program. On appeal, the Kansas Court of Appeals reversed, holding that while courts have inherent authority to enter sanctions against a party for failing to comply with court orders—even in SVP proceedings—courts cannot ignore the SVPA's procedural requirements for release. In addition, the panel found the court erred in finding that the State violated the prior order.

In re Care and Treatment of Saiz, 60 Kan. App. 2d 178, 492 P.3d 484 (May 14, 2021)

STATUTORY INTERPRETATION

RETAIL ELECTRIC SUPPLIERS ACT. Garden City and Wheatland Electric had an oral agreement permitting Garden City to supply electricity to an ethanol plant outside the city limits in Wheatland's service area. When Wheatland wanted to begin supplying electricity to the ethanol plant, Garden City annexed the land the plant was on. Wheatland sought fair and reasonable compensation under K.S.A. 66-1,176. The Court of Appeals held: Because K.S.A. 66-1,175 does not permit retail electric suppliers to make agreements that alter their service territories without the Kansas Corporation Commission's approval, equitable principles do not permit the court to enforce an agreement made without such approval. Wheatland never transferred its service rights to Garden City and was entitled to compensation under K.S.A. 66-1,176(c) even though it had no customers in the annexed area.

Wheatland Electric Cooperative, Inc. v. City of Garden City, Kansas, 61 Kan. App. 2d 343, 504 P.3d 447, 2021 WL 5750942 (Dec. 3, 2021), *petition for rev. filed* (Dec. 30, 2021).

SUMMARY JUDGMENT

SHAM AFFIDAVIT DOCTRINE. Anita Christiansen filed a personal injury lawsuit after breaking her ankle in a parking lot owned by the Howard Silverbrand Living Trust.

Silverbrand moved for summary judgment, asserting Christiansen admitted only to slipping on ice, which the lessee of the parking lot was supposed to remove. Christiansen later submitted an affidavit stating she slipped on the ice before breaking her ankle on a crack/pothole. The district court struck the affidavit because it contradicted her prior statements and granted Silverbrand's motion. The panel reversed, finding the affidavit was not a sham affidavit because Christiansen was clarifying her previous statements.

Christiansen v. Silverbrand, 61 Kan. App. 2d 8, 497 P.3d 1155 (September 3, 2021).

TAX

TAX CLASSIFICATION. Three well servicers (Well Servicers) challenged Pratt County's classification of their mobile well service rigs as oil and gas property in tax years 2015 and 2016. Well Servicers claimed their rigs should be tax exempt and that the applicable valuation guidelines violated their equal protection rights. On appeal, the Court of Appeals held the service rigs were properly taxed because Well Servicers' equipment was used in the operation of oil and gas leaseholds. The court reasoned that the tax classification did not involve a fundamental right or suspect classification and scrutiny under a rational basis standard was appropriate. The court concluded that the Legislature had a rational basis for imposing the tax.

Alliance Well Service, Inc. et al v. Pratt County, 61 Kan. App. 2d 454, ___ P.3d ___, 2022 WL 186578 (January 21, 2022).

VALUATION OF COMMERCIAL PROPERTY. The Board of Johnson County Commissioners sought judicial review of the Board of Tax Appeal's decision establishing the value of nine Walmart stores and two Sam's Club stores for ad valorem tax purposes. Johnson County argued that *In re Prieb Properties*, 47 Kan. App. 2d 122, 275 P.3d 56 (2012), was wrongly decided. After reviewing the record, the panel majority concluded that Johnson County failed to satisfy its burden of showing the invalidity of BOTA's decision regarding the valuation of the Walmart Properties. The dissent opined that *Prieb*, which limited what BOTA may consider in determining the appraised value of real estate, should be overturned.

In re Equalization Appeals of Walmart Stores, Inc., ___ Kan. App. 2d ___, ___ P.3d ___ (Oct. 8, 2021).

TAXATION

OIL AND GAS. Oil and gas properties must be appraised at fair market value for tax purposes. In determining value, appraisers must use guides promulgated by the State Department of Revenue's Director of Property Valuation unless the taxpayer supplies just

cause to deviate from them. County Appraisers properly valued the taxpayer's working interest in natural gas leases and associated property using the applicable guide. The guide's minimum lease value provision, used under certain conditions to avoid zero-dollar valuations for working interests in producing leases, does not violate the statutory mandate that property be valued for property tax purposes at its fair market value. The taxpayer's evidence was insufficient to compel deviation from the guide.

In re River Rock Energy Company, No. 120,387, 313 Kan. 936, 492 P.3d 1157, (Aug. 6, 2021).

TERMINATION OF PARENTAL RIGHTS

UNFITNESS OF A PARENT. The district court terminated Father's parental rights after Father was sentenced to concurrent 68-month prison sentences. On appeal, Father argued the district court's decision he was unfit to parent T.H. was not supported by clear and convincing evidence. The Court of Appeals reversed, finding that Father's incarceration, standing alone, was not an automatic basis for a finding of parental unfitness.

In the Interest of T.H., 60 Kan. App. 2d 536, 494 P.3d 851 (Aug. 20, 2021), *petition for rev. filed* (Sept. 7, 2021), *petition for rev. denied* (Dec. 9, 2021).

TORTS

GOVERNMENTAL IMMUNITY. Absent evidence of wanton or malicious misconduct, a police officer's erroneous determination that reasonable suspicion exists to initiate an investigatory detention is a discretionary decision for which the officer is immune from civil liability under the Kansas Tort Claims Act, K.S.A. 75-6101 *et seq.*

Schreiner v. Hodge, __ Kan. __, 504 P.3d 410 (Feb. 18, 2022).

NEGLIGENCE—CAUSATION. After General Pest Control (GPC) sprayed the plaintiffs' office building for insects, the plaintiffs filed negligence claims against GPC alleging that the pesticides caused them medical injury. The district court ruled for GPC as a matter of law after finding that the plaintiffs failed to present sufficient evidence on causation. The Court of Appeals reversed, holding that circumstantial evidence of causation need not exclude every other reasonable conclusion. The plaintiffs' evidence, which showed that

they developed symptoms consistent with exposure to the pesticides GPC used to spray their office, was sufficient to present a question of fact to a jury.

Najera and Shope v. General Pest Control, LLC, 61 Kan. App. 2d 363, 503 P.3d 1054 (Dec. 10, 2021).

MALICIOUS PROSECUTION. H. Reed Walker and his law practice were sued by Donald E. Budd, Jr. for malicious prosecution stemming from an underlying divorce case asserting a claim of common law marriage. In the underlying case, the district court found there was no common law marriage and awarded Budd's former partner an equitable interest in the home the couple shared. But the formula used to calculate the former partner's share resulted in a net payment of \$0 to her. In the malicious prosecution suit, a jury found for Budd. The Kansas Court of Appeals reversed, holding that, because Budd's former partner prevailed in being awarded an equitable interest in the home, Budd was not successful in the entire underlying litigation.

Budd v. Walker, 60 Kan. App. 2d 189, 491 P.3d 1273 (May 21, 2021), *petition for rev. filed* (Jun. 17, 2021), *petition for rev. denied* (Aug. 27, 2021).

TRUSTS

BENEFICIARY STANDING. James Kurt Schaake, beneficiary and co-trustee to a trust that owns properties in Lawrence, hired a law firm to represent the trust in a lawsuit against the City of Lawrence, alleging illegal taxation and seeking a temporary injunction of the City's plans to improve Lawrence districts. After the firm withdrew as counsel, the district court ordered Schaake to hire replacement counsel. Schaake did not comply, so the court dismissed the case. Schaake appealed pro se. The Court of Appeals found it did not have jurisdiction because Schaake, a non-attorney beneficiary, lacked standing and thus dismissed the appeal.

Schaake, Trustee of Donald Dean Schaake Revocable Trust v. City of Lawrence, 60 Kan. App. 2d 88, 491 P.3d 1265 (May 7, 2021), *petition for rev. filed* (Jun. 7, 2021), *petition for rev. denied* (Mar. 21, 2022).

BREACH OF TRUSTEE DUTIES. Casey Galloway appealed the denial of his requests to remove co-trustees for breach of duties and self-dealing and to assess double damages for loss incurred by an improper loan of trust funds. He also challenged the trustee and attorney fees awarded, alleging error in allowing any trustee fees and limiting his award to costs incurred before he declined co-trustees' settlement offer. The Court of Appeals affirmed, finding the trust provided co-trustees broad discretion in making investments and

managing the trust, the record lacked evidence of self-dealing or bad faith, and any benefit Galloway's lawsuit added to the trust ended before trial.

Matter of O.E. Bradley & E.L. Bradley Trust, 60 Kan. App. 2d 66, 490 P.3d 51 (May 7, 2021).

WORKERS COMPENSATION

WORKERS COMPENSATION FUND. Where the Workers Compensation Fund pays workers compensation benefits to an employee of a subcontractor that is financially unable to pay, the general contractor—the subcontractor's principal—is an "employer" against which the Fund has a cause of action under K.S.A. 44-532a(b) to recover the amounts paid.

Schmidt v. Trademark, Inc., No. 122,078, 2022 WL 815713, __ Kan. __, __ P.3d __ (Mar. 18, 2022).

SUBROGATION LIENS. Kendall Turner sustained a work-related injury as a result of a car accident. Turner subsequently filed both a workers compensation claim and a federal lawsuit against his employer's uninsured motorist carrier. Turner succeeded in his workers compensation action and also received a settlement in his federal lawsuit. The Kansas Workers Compensation Fund challenged the award on appeal. The Court of Appeals affirmed the award but held that the Board erred as a matter of law in finding that the Fund is not entitled to a subrogation lien under K.S.A. 44-504 for any duplicative recovery received in the settlement of his federal lawsuit.

Turner v. Pleasant Acres, LLC, __ Kan. App. 2d __, 2022 WL 815834 (March 18, 2022).

FUNCTIONAL IMPAIRMENT RATING. In a divided opinion, the Court of Appeals reversed a Workers Compensation Board decision denying Guadalupe Garcia's application for work benefits. The court held that the Board erred by relying solely on the Sixth Edition of the AMA Guides in determining Garcia's functional impairment rating. The Board should also have considered any competent medical evidence a doctor determines to be relevant in calculating an accurate impairment rating.

Garcia v. Tyson Fresh Meats, Inc., 61 Kan. App. 2d 520, __ P.3d __, 2022 WL 261927 (Jan. 28, 2022).

COLLATERAL ESTOPPEL. KVC fired Carolyn Miller shortly after she filed a workers compensation claim. Miller sued KVC for wrongful termination. In the workers compensation case, the administrative law judge found KVC legitimately terminated Miller's employment when addressing Miller's eligibility for temporary total disability compensation. After the parties settled the remaining issues in the workers compensation case, KVC

moved for judgment on the pleadings in the wrongful termination case on the basis of collateral estoppel. The district court granted KVC's motion and dismissed Miller's wrongful termination suit with prejudice. The Court of Appeals reversed and remanded because the ALJ's disability ruling was a preliminary order and did not satisfy the elements of collateral estoppel.

Carolyn L. Miller v. KVC Behavioral Healthcare, Inc., d/b/a/ KVC Prairie Ridge Hospital, 61 Kan. App. 2d 512, ___ P.3d ___, 2022 WL 262157 (Jan. 28, 2022).

DEADLINE EXTENSIONS. Debbie Gerlach showed good cause to extend her workers compensation action beyond the statutory time limit of three years. An administrative law judge gave her a six-month extension. But when those six months had elapsed, Gerlach had not completed her claim or requested another extension. The employer and insurer moved to dismiss. But the administrative law judge adjudicated Gerlach's claim and awarded her compensation. On appeal, the Kansas Court of Appeals affirmed, holding the statutory time limit applies to the first extension and further extensions are at the discretion of the administrative law judge for good cause shown.

Gerlach v. Choices Network, Inc., 61 Kan. App. 2d 268, 503 P.3d 1033 (Nov. 12, 2021).

STATUTORY INTERPRETATION—IMPAIRMENT RATING. Gerline Zimero sustained injuries while working for Tyson. An ALJ found she sustained a 3% whole body permanent partial impairment based on the Sixth Edition of the AMA Guides. The Legislature adopted the Sixth Edition over the Fourth Edition in 2015 for determining the impairment rating. The Court of Appeals held the Fourth Edition is no longer relevant because the Sixth Edition is now the statutorily required starting point but must still be supported by competent medical evidence.

Zimero v. Tyson Fresh Meats, Inc., __ Kan. App. 2d. ___, 499 P.3d 1153, 2021 WL 4501808 (October 1, 2021)

PREVAILING FACTOR. Prudencio Cuevas Perez filed a workers compensation claim for a knee injury he suffered at work for National Beef Packing Company (NBP). Following surgery to repair the knee, Perez' doctor recommended a total knee replacement. NBP referred Perez to a different doctor, who determined Perez' work injury was not the prevailing factor in his need for replacement surgery. The Board of Workers Compensation Appeals ultimately found that Perez' work injury was not the prevailing factor prompting the replacement. In reaching its decision, the Board consulted the American Medical Association Guides to the Evaluation of Permanent Impairment to assess its own impairment rating. Both Perez and NBP appealed. The Court of Appeals affirmed the Board, holding that (1) all injuries, including secondary injuries, must be caused primarily by the work

accident; (2) the Board may take judicial notice of the AMA Guides; and (3) the prevailing-factor rule was constitutional as applied to Perez.

Perez v. National Beef Packing Co., 60 Kan. App. 2d 489, 494 P.3d 268 (August 13, 2021).

WORKERS COMPENSATION FUND. The Fund paid compensation to an injured worker of an insolvent subcontractor that had no workers compensation insurance. The issue on appeal was whether the Fund could, in a separate lawsuit, recover from the contractor that hired the subcontractor under K.S.A. 44-503(a) and K.S.A. 44-532a(b). The court held it could. The court further held K.S.A. 44-532a(b) does not authorize the Fund to recover attorney fees.

Schmidt v. Trademark, Inc., 60 Kan. App. 2d 206, 493 P.3d 958 (May 28, 2021), *petition for rev. filed* (Jun. 28, 2021), *petition for rev. granted* (Aug. 27, 2021).

EMPLOYER'S SUBROGATION AND FUTURE CREDIT RIGHTS. When an employer has paid workers compensation benefits and the employee recovers for the injury from a third-party tortfeasor, the jury-determined percentage of the employer's fault for the employee's injury may be used to calculate the employer's subrogation right if settlement proceeds under a settlement agreement reached before verdict. The method of calculating the extent of the employer's subrogation interest is also discussed.

Hugh Michael Hawkins v. Southwest Kansas Co-Op Service, 313 Kan. 100, 484 P.3d 236 (Apr. 2, 2021).

RECENT DECISIONS AND HOT ISSUES: CRIMINAL CASES

Cases: April 1, 2021-April 1, 2022

The following are summaries of case highlights from opinions filed in the last 12 months by the Kansas Supreme Court or the Kansas Court of Appeals. They have been prepared by staff attorneys for the two courts and are not to be used as an authoritative reference regarding the cases described. Only the portion of each case related to the topic noted is discussed. You are encouraged to read the entire case before relying upon it.

The effect of a petition for review: Pending determination of the Supreme Court on a petition for review and during the time in which a petition for review may be filed, an opinion of the Court of Appeals is not binding on the parties or on the district courts. If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate will not issue until disposition of the appeal on review. If review is denied, the decision of the Court of Appeals is final as of the date of the denial. A denial of a petition for review expresses no opinion of the Supreme Court on the merits of the case. See Kan. Sup. Ct. R. 8.03

AFFIRMATIVE DEFENSES

SELF-DEFENSE IMMUNITY. The State charged Dexter Betts with reckless aggravated battery after a girl sustained injuries from bullet fragments when Betts discharged a firearm inside her home after a dog barked and lunged at him. Betts filed a pretrial motion to dismiss based on statutory immunity. The district court granted Betts' motion and dismissed the case. The Court of Appeals affirmed, holding that, for self-defense immunity claims, a district court is permitted to consider a defendant's claim of self-defense regardless of whether the State charged the defendant with conduct that constitutes an intentional, knowing, or reckless crime.

State v. Betts, 60 Kan. App. 2d 269, 489 P.3d 866 (June 18, 2021), *petition for rev. filed* (Jul. 15, 2021), *petition for rev. granted* (Sept. 27, 2021).

SPEEDY TRIAL-CROWDED DOCKET EXCEPTION. Tony Lee Foster's trial was continued after the district court failed to summon jurors. There were no trial settings available before Foster's speedy trial deadline. The district court rescheduled the trial for three days after the speedy trial deadline, citing the "crowded docket" provision in K.S.A. 2020 Supp. 22-3402(e)(4). Foster objected, arguing that the district court's reason for con-

tinuing the trial was its failure to summon jurors, not a crowded docket. The Court of Appeals held that the district court properly relied on the exception because the crowded docket was the reason the trial could not be rescheduled within the deadline.

State v. Foster, 60 Kan. App. 2d 243, 493 P.3d 283 (June 11, 2021), *petition for rev. filed* (Jul. 15, 2021), *petition for rev. denied* (Sept. 27, 2021).

APPELLATE PROCEDURE

ISSUES RAISED FOR FIRST TIME ON APPEAL. When an issue raised for the first time on appeal requires factual determinations that could have been resolved before the appeal, an appellate court may not reach the issue even if a recognized exception permitting it to do so has been invoked. An appellate court cannot make credibility determinations, resolve evidentiary conflicts, or reweigh evidence.

State v. Allen, 314 Kan. 280, 497 P.3d 566 (Nov. 5, 2021).

PROCEEDINGS ON REMAND—RESTITUTION. When restitution is awarded in a criminal case, but on appeal it is determined that the award is not supported by substantial competent evidence, on remand the State may not present new evidence. Any award must be based on the existing evidentiary record.

State v. Dailey, 314 Kan. 276, 497 P.3d 1153 (Nov. 5, 2021).

JURISDICTION. An appellate court lacks jurisdiction over an untimely appeal by a defendant adjudicated as a juvenile offender who failed to appeal within 10 days of sentencing, as required by statute. Due process does not require an appellate court to exercise jurisdiction based on a district court's failure to inform the defendant of the right to appeal. No constitutional provision, statute, or court rule requires a district court to inform a defendant of the statutory right to appeal, and the district court's failure to do so does not offend a fundamental principle of justice.

In re I.A., 313 Kan. 803, 491 P.3d 1241 (Jul. 23, 2021).

JURISDICTION. An appellate court lacks jurisdiction to review the imposition of a consecutive sentence for a crime committed while on felony probation, as authorized by K.S.A. 21-6606, over the defendant's objection that the consecutive sentence results in a manifest injustice.

State v. Young, 313 Kan. 724, 490 P.3d 1183 (Jul. 9, 2021).

JURISDICTION. Although K.S.A. 22-3602 supplies limited statutory grounds for the State to file an appeal in a criminal case, that list is not exclusive. An appellate court has

jurisdiction under K.S.A. 60-2101 to hear the State's appeal of a sentence claimed to be illegal under K.S.A. 22-3404.

State v. Clark, 313 Kan. 560, 486 P.3d 591 (May 14, 2021).

CRIMINAL LAW

ILLEGAL SENTENCE. Robert Glenn Terrell appealed the denial of his motion to correct illegal sentence. The Kansas Court of Appeals reversed, holding the district court improperly scored Terrell's 2004 conviction for failure to register under the Kansas Offender Registration Act (KORA) as a person felony. The court ruled that the district court erred in applying the 2016 version of KORA to classify Terrell's prior conviction rather than applying the classification in effect at the time of the prior conviction.

State of Kansas v. Robert Glenn Terrell, 60 Kan. App. 2d 39, 488 P.3d 520 (Apr. 9, 2021), *petition for rev. filed* (Apr. 14, 2021), *petition for rev. granted* (Jun. 9, 2021).

DUE PROCESS

POST REMAND DELAY. Jose Jesus Rodriguez appealed the district court's denial of his motion to dismiss for failure to conduct a timely remand hearing. A prior Court of Appeals panel had remanded Rodriguez' case, but the district court had taken no action for nearly four years. In this appeal, the Court of Appeals adopted and applied the four-factor speedy trial test from *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), but concluded that Rodriguez' claim failed because he did not assert his right and he did not allege any prejudice.

State of Kansas v. Jose Jesus Rodriguez, 60 Kan. App. 2d 320, 494 P.3d 155 (July 16, 2021), *petition for rev. filed* (Aug. 16, 2021), *petition for rev. denied* (Jan. 31, 2022).

BATSON CHALLENGE—TIMING. After the district court released the venire and empaneled the jurors, Shon Jackson challenged the State's peremptory strikes. The court denied the challenge as untimely. The Court of Appeals affirmed the ruling. Noting its prior

decision in *State v. Heiskell*, 21 Kan. App. 2d 105, 896 P.2d 1106 (1995), the panel reaffirmed that a *Batson* challenge requires a timely objection. And an objection is timely if raised before the jury is sworn and the venire dismissed.

State v. Jackson, 60 Kan. App. 2d 424, 494 P.3d 225 (July 30, 2021).

ELEMENTS

IDENTITY THEFT. The defendant obtained employment with a fraudulent social security number several years before the prosecution commenced. The defendant's receipt of a recent paycheck from the same employment constituted "using" the social security number on the date the paycheck was received, such that the crime was committed on the date of receipt.

State v. Valdiviezo-Martinez, 313 Kan. 614, 486 P.3d 1256 (May 21, 2021).

ELEMENTS OF CRIMES

DRIVING UNDER THE INFLUENCE. The Kansas DUI statute, K.S.A. 8-1567, requires determining if the defendant has any out-of-state convictions for a comparable offense to determine whether the crime charged is a first, second, third, or fourth or subsequent offense. Under 2018 amendments to the statute, an out-of-state conviction with elements broader than those required for a conviction under K.S.A. 8-1567 may be used to make this determination.

State v. Myers, 314 Kan. 360, 499 P.3d 1111 (Dec. 3, 2021).

DRUG POSSESSION—INTENT TO DISTRIBUTE. A jury instruction that intent to distribute narcotics may be inferred from the defendant's possession of a statutorily-prescribed amount of the substance is legally inappropriate. The statute upon which the instruction is based provides for a rebuttable presumption of intent, not a permissive inference. And though instructing the jury on a permissive inference of intent based on quantity might not be error per se, the statutory threshold designated in the instruction lacked any connection to the evidence at trial, which demonstrated possession of a much larger amount of narcotics.

State v. Holder, 314 Kan. 799, 502 P.3d 1039 (Jan. 28, 2022).

KNOWLEDGE OF AGE OF CHILD VICTIM. Alexander Hunt was convicted of two counts of aggravated indecent liberties with an eight-year-old child. On appeal, Hunt argued that because the statute for aggravated indecent liberties with a child did not require the State to prove he knew the child victim's age, the offense violated his state jury trial right and his state substantive due process rights. The Court of Appeals found Hunt lacked

standing to raise these constitutional challenges because evidence admitted at trial established that Hunt knew the age of the child.

State v. Hunt, 61 Kan. App. 2d 435, 503 P.3d 1067, 2021 WL 5992121 (Dec. 17, 2021), *petition for rev. filed* (Jan. 18, 2022).

MISTREATMENT OF AN ELDER PERSON. A jury convicted Shelby Frias of mistreatment of an elder person for taking her stepmother's money under "false pretenses." Frias had claimed to pay for her stepmother's nursing home bills but instead deposited the blank checks into her personal account. The Court of Appeals affirmed the conviction, interpreting "false pretenses" to mean "a representation of a fact that is untrue, calculated to mislead, and intended to induce the person to whom it is made to part ways with something of value."

State of Kansas v. Shelby Frias, 61 Kan. App. 2d 234, 502 P.3d 650, 2021 WL 5143762 (November 5, 2021), *petition for rev. filed* (Dec. 5, 2022).

STATUTORY RAPE. Rape of a child under 14 years of age, K.S.A. 2020 Supp. 21-5503, does not require proof of any level of mental culpability. The requirement that a defendant's conduct be voluntary for criminal liability to attach to it is discussed.

State v. Dinkel, 314 Kan. 146, 495 P.3d 402 (Sept. 24, 2021).

MENS REA-REBUTTABLE PRESUMPTION. Shameke Strong challenged his conviction for possession of methamphetamine with intent to distribute within 1,000 feet of school property, arguing that K.S.A. 2018 Supp. 21-5705(e) was facially unconstitutional by creating a mandatory presumption of intent from the amount of drugs possessed. The panel upheld the statute's constitutionality, finding it created a rebuttable presumption, which merely authorized the jury to infer intent to distribute if the State proved the defendant possessed the requisite weight of the drugs.

State v. Strong, No. 121,865, 2021 WL 4127490, 61 Kan. App. 2d 31, 499 P.3d 481 (Sept. 10, 2021), *petition for rev. filed* (Oct. 12, 2021).

IDENTITY THEFT. A conviction for identity theft under K.S.A. 21-6107, requires that the personal identifying information stolen by a defendant belongs to a natural person. The defendant, convicted of identity theft for using a coworker's stolen credit card, was not eligible to be convicted of or sentenced for what the defendant alleged was a more specific

crime of criminal use of a financial card, since identity theft required an additional element that the victim be a natural person.

State v. Euler, 313 Kan. 901, 492 P.3d 1147 (Aug. 6, 2021).

RAPE. A defendant challenged his conviction for rape, arguing that it is a strict liability offense on account of K.S.A. 2020 Supp. 21-5503(e), which provides that it is not a defense that a defendant is not aware that the victim does not consent, is overcome by force or fear, or is unconscious or physically powerless. Assuming, arguendo, the defendant correctly characterized the provision's effect, the Legislature is free to create strict liability felony offenses and the defendant failed to show any lack of a *mens rea* requirement violated due process.

State v. Thomas, 313 Kan. 660, 488 P.3d 517 (Jun. 18, 2021).

UNLAWFUL VOLUNTARY SEXUAL RELATIONS. Kansas' Romeo and Juliet law, K.S.A. 2020 Supp. 21-5507, prohibits unlawful voluntary sexual relations with a child between 14 and 16 years old, when the offender is both under 19 years old and less than 4 years older than the child. The statute may be applied against both underage participants in a sexual relationship, overruling *In re E.R.*, 40 Kan. App. 2d 986 (2008).

In re A.B., 313 Kan. 135, 484 P.3d 226 (Apr. 2, 2021).

EVIDENCE

ADMISSION OF PHOTOGRAPHIC EVIDENCE. Ernesto Vazquez was arrested and charged with three counts of aggravated indecent liberties with a child. At trial, the State showed Vazquez's mugshot to the child witnesses for the purpose of identification and then published the mugshot to the jury. On appeal the Court of Appeals held the district court did not abuse its discretion when it allowed publication of the mugshot because it was clearly taken upon Vazquez's arrest for the crime for which he was on trial and did not suggest he had a history of criminality.

State v. Vazquez, __ Kan. App. 2d __, __ P.3d __, 2022 WL 817003 (March 18, 2022)

PRESERVATION UNDER K.S.A. 60-405. After Christopher Bliss was charged with various crimes, his wife provided a written recantation. Bliss sought to introduce the recantation but did not disclose its contents to the district court. The court denied the request, and a jury convicted him. Bliss challenged the exclusion on appeal. The court of appeals affirmed, finding Bliss had not preserved the issue under K.S.A. 60-405. Noting preservation exceptions do not apply to the erroneous admission of evidence under K.S.A. 60-404, the court questioned whether a similar bar applies to its erroneous exclusion under K.S.A.

60-405. The court, however, concluded controlling Kansas Supreme Court precedent permitted consideration of those exceptions but found none of the exceptions applied in this case.

State of Kansas v. Christopher M. Bliss, 61 Kan. App. 2d 76, 498 P.3d 1220 (Sept. 24, 2021), *petition for rev. filed* (Oct. 20, 2021), *petition for rev. denied* (Jan. 31, 2022).

ELEMENTS OF CRIMES. A defendant's possession of a controlled substance is a necessary element of distribution of that controlled substance. Evidence does not support a defendant's conviction for conspiracy to distribute a controlled substance when the defendant gives another person money to obtain methamphetamine for her and there is no evidence concerning the defendant's intended use of the drugs. There was no evidence of an agreement for the defendant to distribute the drugs beyond herself.

State v. Hillard, 313 Kan. 830, 491 P.3d 1223 (July 23, 2021).

ADMISSIBILITY OF POLYGRAPH. On appeal from his conviction for aggravated indecent liberties with a child, Johnny White challenged the exclusion of polygraph evidence. White failed the polygraph exam but sought to introduce evidence related to the circumstances of his interrogation and voluntariness of his current confession. The Court of Appeals affirmed White's conviction, upholding the longstanding rule precluding the use of unstipulated polygraph evidence.

State v. White, 60 Kan. App. 2d 458, 494 P.3d 248 (Aug. 6, 2021), *petition for rev. filed* (Sept. 3, 2021), *petition for rev. granted* (Nov. 24, 2021).

ELEMENTS OF CRIMES. Intent to defraud Medicaid is an essential element of the crime of Medicaid fraud codified at K.S.A. 2019 Supp. 21-5927(a)(1)(B). The defendant's conviction stemming from inaccurate timesheets was reversed due to prejudice arising from prosecutorial and jury instruction error. The prosecutor's argument tended to negate the intent element, and the error was exacerbated by a jury instruction that permitted the jury to infer the defendant's employer, who merely passed the timesheets on for payment, had been convicted of the offense with which defendant was charged or a similar crime.

State v. Watson, 313 Kan. 170, 484 P.3d 877 (Apr. 23, 2021).

EXPERT TESTIMONY—RELIABILITY. An expert's testimony must not only be plausible, but also reliable for it to be admissible. In this case, the trial court abused its discretion when it admitted a botanist's opinion testimony of the duration between a grave being dug and the interment of bodies in it, that had been based on the rate of leaf-fall from box elder trees. While the opinion was plausible, it was not reliable. The botanist had

admitted that he knew little about the leaf-fall rate of such trees and that he had not considered other variables that might have affected the opinion.

State v. Aguirre, 313 Kan. 189, 485 P.3d 576 (Apr. 23, 2021).

EXPERT TESTIMONY—RELIABILITY. The State charged Hatfield, a daycare provider, with aggravated battery after a child began exhibiting symptoms consistent with abuse while in her care. To exclude one of the State's proposed experts, who believed the injuries immediately preceded the onset of symptoms, Hatfield argued the expert's opinion was unreliable. The district court denied the challenge. The Kansas Court of Appeals affirmed, explaining the reliability of an expert's opinion is gauged by the soundness of the underlying methodology, not by the conclusion's correctness. Conclusions based on contested methodologies should generally be tested through cross-examination, not by excluding the witness.

State of Kansas v. Paige Hatfield, 60 Kan. App. 2d 11, 484 P.3d 891 (April 9, 2021), *petition for rev. filed* (May 7, 2021), *petition for rev. denied* (Aug. 31, 2021).

EXCLUSIONARY RULE

GOOD-FAITH EXCEPTION. Two Atchison police officers relied on a dispatcher's twice-made mistake regarding Randall Gilliland's driver license's status. Although Gilliland was driving on a restricted license, the dispatcher told the officers Gilliland's license was revoked. The officers arrested Gilliland for driving on a revoked license and, upon a search incident to arrest, found drugs on his person. The Court of Appeals held that the good faith exception applied because the mistake was the result of mere negligence, as opposed to systematic error or reckless disregard.

State v. Gilliland, 60 Kan. App. 2d 161, 490 P.3d 66 (May 14, 2021), *petition for rev. filed* (Jun. 14, 2021), *petition for rev. denied* (Aug. 31, 2021).

JURIES

TIME TO REQUEST A JURY TRIAL AFTER MUNICIPAL APPEAL. Geli Grasty was convicted in municipal court of offering to sell sexual services. Grasty appealed to the district court and the case was assigned to the district judge who would preside over the trial. The district court denied Grasty's request for a jury trial because she made it more than seven days after the case was assigned to the presiding judge. The Court of Appeals

affirmed the denial, holding that the seven-day clock to request a jury trial in an appeal from municipal court begins when a judge is appointed to preside over the case at trial.

City of Wichita v. Geli Grasty, 61 Kan. App. 2d 202, 500 P.3d 1201, 2021 WL 4928764 (Oct. 22, 2021), *petition for rev. filed* (Nov. 22, 2021).

DELIBERATIONS—ALTERNATE JURORS. A jury convicted Leland L. Jackson of multiple child sex crimes, after he admitted at trial to paying and having sex with a 15-year-old girl. At trial, the district court inadvertently allowed the alternate juror into the jury room for a couple of minutes, during which the jury selected a foreperson. The Court of Appeals held that an alternate juror's participation in selecting the jury is not presumptively prejudicial requiring reversal of a conviction because such selection is not part of jury deliberations.

State of Kansas v. Leland L. Jackson III, 61 Kan. App. 2d. 184, 500 P.3d 1188 (October 15, 2021), *petition for rev. filed* (Nov. 12, 2021), *petition for rev. denied* (Feb. 25, 2022).

JURISDICTION

STANDING. The district court dismissed as unconstitutional Arlando Trotter's municipal charges for operating an unlicensed after-hours and entertainment establishment. The State appealed, arguing that the district court lacked jurisdiction to make its rulings and otherwise relied on flawed legal analysis. The Court of Appeals agreed, holding that the district court lacked jurisdiction to sua sponte raise constitutional arguments that Trotter lacked standing to raise himself and that the properly raised First Amendment issue was meritless because the Wichita ordinances did not significantly compromise his assembly rights.

City of Wichita v. Arlando Trotter, 60 Kan. App. 2d 339, 494 P.3d 178 (July 16, 2021), *petition for rev. filed* (Aug. 16, 2021), *petition for rev. granted* (Feb. 25, 2022).

JURY SELECTION

DEFENDANT'S PRESENCE DURING VOIR DIRE. Daniel Klavetter was convicted of two counts of aggravated indecent liberties. On appeal, Daniel Klavetter argued

he was denied his right to be present during voir dire. The Court of Appeals affirmed, finding the jury-selection proceedings were fair and that any error in questioning venire members outside of Klavetter's presence was harmless.

State of Kansas v. Daniel J. Klavetter, 60 Kan. App. 2d 439, 494 P.3d 235 (August 6, 2021), *petition for rev. filed* (Sept. 7, 2021), *petition for rev. denied* (Sept. 27, 2021).

JUVENILES

APPELLATE JURISDICTION. S.L. pleaded no contest to aggravated robbery and aggravated battery. The district court committed her to a juvenile correctional facility as a violent offender and gave her a presumptive sentence under the revised Juvenile Justice Code. The Court of Appeals ruled it possessed jurisdiction to review the presumptive sentence because the district court failed to make the required statutory finding before directly committing a juvenile. Accordingly, S.L.'s sentence was illegal.

In the Matter of S.L., ___ Kan. App. 2d ___, 2022 WL 414253 (Feb. 11, 2022).

OFFENDER REGISTRATION

CONSTITUTIONAL CHALLENGES. Mandatory lifetime registration under the Kansas Offender Registration Act does not constitute a punishment. Retroactive application of amendments to the registration scheme does not violate the United States Constitution's Ex Post Facto Clause, as applied to both adult and juvenile offenders. And the lifetime registration requirement as applied to a juvenile offender does not violate the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishment. The court reaffirmed its decision in *State v. Petersen-Beard*, 304 Kan. 192 (2016).

State v. Davidson, 314 Kan. 88, 495 P.3d 9 (Sept. 17, 2021); *State v. N.R.*, 314 Kan. 98, 495 P.3d 16 (Sept. 17, 2021)

MUNICIPAL CONVICTIONS. Under the Kansas Offender Registration Act, offenses that are "comparable" to specifically enumerated sex crimes require registration. A defendant's municipal conviction for sexual battery requires registration since sexual battery as

defined by statute is one of the enumerated offenses, and the municipal ordinance under which the conviction arose was identical to the statute.

City of Shawnee v. Adem, 314 Kan. 12, 494 P.3d 134 (Aug. 27, 2021).

POSTCONVICTION MOTIONS

POSTCONVICTION MOTION FOR DNA TESTING. A motion for postconviction DNA testing under K.S.A. 21-2512, seeking to test biological material related to a defendant's investigation or prosecution, may be made before the defendant's conviction is final. A district court had jurisdiction to entertain the defendant's motion, even though the defendant's appeal from the underlying convictions and sentences has not been finally resolved.

State v. Thurber, 313 Kan. 1002, 492 P.3d 1185 (Aug. 13, 2021).

DISCOVERY. K.S.A. 22-3212 and K.S.A. 22-3213 set out notice and discovery requirements for parties in criminal trials. The statutes do not supply a basis for a defendant's postconviction motion to compel the State to produce discovery material from the trial that resulted in the conviction.

State v. Marks, 313 Kan. 717, 490 P.3d 1160 (July 2, 2021).

MANIFEST INJUSTICE. James Edward Rowell filed an untimely K.S.A. 60-1507 motion. At a hearing, Rowell's appointed counsel simply conceded the motion's untimeliness. The district court dismissed. Rowell filed a second K.S.A. 60-1507 motion challenging counsel's effectiveness. The district court again dismissed the motion as untimely. The Court of Appeals held that barring Rowell's ineffectiveness claim before it arose established manifest injustice warranting an extension of the one-year filing requirement. Applying the prison mailbox rule, the panel also found Rowell's second motion was timely as it was filed within one year of his first.

Rowell v. State, 60 Kan. App. 2d 235, 490 P.3d 78 (June 4, 2021).

SEARCHES & SEIZURES

ARREST—MISDEMEANORS. K.S.A. 22-2401(c)(2)(A) allows a police officer to arrest a suspect if there is probable cause to believe the offender is committing or has committed a misdemeanor and if there is probable cause to believe the suspect will not be

apprehended if not immediately arrested. The totality-of-the-circumstances test for the latter requirement is discussed and applied.

State v. Goodro, No. 121,944, __ Kan. __, __ P.3d __ 2022 WL 982132 (Apr. 1, 2022).

GOOD-FAITH EXCEPTION. Police arrested Corey Posa on a bench warrant and found methamphetamine in a search incident to the arrest. Posa moved to suppress the evidence, arguing he provided police reliable proof the court vacated the warrant days earlier. The district court applied the good-faith exception to the exclusionary rule, finding police reasonably relied on dispatch and court records showing the warrant was still active. On appeal, Posa challenged the constitutionality and applicability of the good-faith exception. The Court of Appeals rejected Posa's claim, applying Supreme Court precedent extending the good-faith exception to reasonable reliance on inaccurate court records and negligently maintained police records.

State of Kansas v. Corey Posa, 61 Kan. App. 2d 250, 500 P.3d 1212 (November 5, 2021), *petition for rev. filed* (Dec. 6, 2021), *petition for rev. denied* (Feb. 25, 2022).

SENTENCING

CONSOLIDATION FOR TRIAL. After a consolidated trial of two criminal cases, the district court sentenced Myers separately in each case. Myers argued that this violated his equal protection rights. A panel of the Court of Appeals agreed, holding that for K.S.A. 2020 Supp. 21-6819(b) to comply with the Equal Protection Clause of the Fourteenth Amendment, when two or more cases are consolidated for trial because all the charges could have been brought in one charging document, and the defendant is convicted of multiple charges at trial, the defendant must be sentenced using only one primary crime of conviction and one base sentence, as though all the charges had been brought in one complaint.

State of Kansas v. Anthony D.A. Myers, __ Kan. App. 2d __, __ P.3d __, 2022 WL 1052077 (April 8, 2022).

PROBATION REVOCATION. Under K.S.A. 22-3716(e), within 30 days after a probation period ends, a district court may require a defendant to answer a charge that a probation term was violated, by issuing either an arrest warrant or a notice to appear. This

provision does not apply when a parole officer—not the court—issues an arrest-and-detain notice after the probation period ends.

State v. Darkis, 314 Kan. 809, 502 P.3d 1045 (Jan. 28, 2022).

CRUEL AND UNUSUAL PUNISHMENT—MINORS. A mandatory sentence of life without the possibility of parole for 50 years, imposed on a defendant who was convicted of a murder he committed while under the age of 18, does not violate the Eighth Amendment to the United States Constitution as construed by *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller*, which prohibits the mandatory imposition of life without parole sentences on juvenile offenders, does not apply to sentences that offer parole within the offender's lifetime.

State v. Gulley, 2022 WL 628172, __ Kan. __, __ P.3d __ (Mar. 4, 2022).

CRUEL AND UNUSUAL PUNISHMENT—MINORS. The Eighth Amendment to the United States Constitution does not prohibit a hard 50 life sentence imposed on a juvenile offender under a statute requiring the penalty upon the sentencing court's finding that one or more statutory aggravating factors both existed and were not outweighed by any mitigating factors. The statutory scheme afforded the sentencing court the discretion in sentencing juvenile offenders required by the United States Supreme Court's Eighth Amendment precedent.

Williams v. State, 314 Kan. 466, 500 P.3d 1182 (Dec. 17, 2021).

PROBATION REVOCATION. A district court's failure to apply the correct legal standard when revoking probation is not amenable to harmless error review.

Williams v. State, 314 Kan. 517, 501 P.3d 885 (Jan. 7, 2022).

ILLEGAL SENTENCE—CRIMINAL HISTORY SCORE. If a defendant fails to object before sentencing to including a prior conviction in the criminal history score, then the defendant has the burden when subsequently challenging the prior conviction's validity to make that showing by a preponderance of the evidence.

State v. Roberts, 314 Kan. 316, 498 P.3d 725 (Nov. 19, 2021).

DRIVING UNDER THE INFLUENCE. K.S.A. 8-1567 establishes sentencing requirements for repeat driving-under-the-influence convictions. When imposing a sentence

for a repeat driving-under-the-influence conviction, the sentencing court must use the version of the statute in effect at the time of sentencing, except when a post-offense amendment increases the defendant's penalty or otherwise disadvantages the defendant.

State v. Patton, __ Kan. __, 503 P.3d 1022 (Feb. 11, 2022).

DEATH PENALTY. The right to life guaranteed by Section 1 of the Kansas Constitution Bill of Rights does not preclude application of the death penalty. A defendant forfeits the right upon conviction beyond a reasonable doubt of capital murder, and a lawful sentence may be imposed. On remand from the United States Supreme Court, the Kansas Supreme Court affirmed the death sentences imposed on Reginald and Jonathan Carr arising from a December 2000 Wichita crime spree that culminated in a home invasion and quadruple homicide.

State v. R. Carr, 314 Kan. 615, 502 P.3d 546 (Jan. 21, 2022); *State v. J. Carr*, 314 Kan. 744, 502 P.3d 511 (Jan. 21, 2022).

CRIMINAL HISTORY—OUT-OF-STATE CONVICTIONS. Matthew D. Hasbrouck pleaded guilty to possession of methamphetamine. The sentencing court found his criminal history score was A. On appeal, Hasbrouck challenged his criminal history score, contending the district court erred in classifying a prior Missouri conviction for burglary as a person felony. The Court of Appeals affirmed Hasbrouck's sentence. Analyzing the amended sentencing statute, the panel held that two of the eight listed "circumstances" in K.S.A. 21-6811(e)(3)(B)(i) were present in Missouri's burglary statute.

State of Kansas v. Matthew D. Hasbrouck, __ Kan. App. __, __ P.3d __, 2022 WL 628546 (Mar. 4, 2022).

ALTERNATIVE COUNTS. When a jury convicts a defendant of multiple alternatively-charged counts for a single crime, the verdicts merge into a single conviction. In this case, the defendant was convicted of alternative counts of fleeing and eluding police under different subsections of the statute. While the district court lacked authority to hold the sentence for the alternative count in abeyance pending the State's appeal of the conviction upon which sentence was imposed, the convictions merged to form one conviction for fleeing and eluding.

State v. Vargas, 313 Kan. 866, 492 P.3d 412 (Jul. 30, 2021).

DEPARTURE MOTIONS. For the purposes of deciding a defendant's motion for a downward departure sentence, the fact that the defendant's criminal history does not include crimes that are similar or identical to the crime of conviction cannot, as a matter of

law, be a mitigating factor. The sentencing guidelines already account for the difference in character between the defendant's past and present offenses.

State v. Montgomery, 314 Kan. 33, 494 P.3d 147 (Aug. 27, 2021).

POSTRELEASE SUPERVISION. Upon revoking Amber Sheets' probation, the district court failed to address postrelease supervision when announcing the sentence from the bench but imposed a term in its written order. On appeal, Sheets argued the district court imposed a postrelease supervision term of zero. The Court of Appeals disagreed, holding that the district court, by failing to announce postrelease supervision at sentencing, imposed an illegal sentence which required resentencing.

State v. Sheets, 60 Kan. App. 2d 378, 494 P.3d 168 (July 16, 2021).

PROBATION. A district court's imposition of probation violation sanctions cannot constitute an illegal sentence under K.S.A. 22-3504.

State v. McCroy, 313 Kan. 531, 458 P.3d 988 (May 14, 2021).

APPRENDI VIOLATION. A jury convicted Tristan Letterman of lewd and lascivious behavior for publicly masturbating, and the court imposed an increased postrelease supervision period, finding that Letterman committed the act for his own sexual gratification. Letterman appealed, arguing the court violated *Apprendi*. The Court of Appeals affirmed, explaining the error was harmless because the court's finding was encompassed by the jury verdict when there was no evidence Letterman sought to gratify the sexual desires of another.

State of Kansas v. Tristan T. Letterman, 60 Kan. App. 2d 222, 492 P.3d 1196 (May 28, 2021), *petition for rev. filed* (Jun. 28, 2021), *petition for rev. denied* (Aug. 31, 2021).

CRIMINAL HISTORY. Jeffrey Allen Rankin appealed his criminal history score, which included a juvenile adjudication for terroristic threat. Rankin asserted that if his adjudication was for reckless conduct, it should not have been included. The State included Rankin's terroristic threat complaint in the record on appeal and asked the panel to find he had been charged with intentional conduct. The Court of Appeals found that the complaint did not necessarily resolve whether Rankin was adjudicated of the reckless version and

declined to make such factual findings for the first time on appeal and, instead, remanded the case for further proceedings.

State of Kansas v. Jeffrey Allen Rankin, 60 Kan. App. 2d 60, 489 P.3d 471 (April 30, 2021).

DOUBLE RULE. A jury convicted De'Andrew V. Dixon with multiple crimes after a consolidated trial on two complaints. The district court sentenced Dixon in each criminal case. On appeal, Dixon claimed that the district court's failure to apply the double rule—which states that the total prison sentence imposed in a case involving multiple convictions arising from multiple counts within a single charging document cannot exceed twice the base sentence—to his consolidated cases violated his equal protection rights. The panel agreed, holding that when a defendant is convicted of multiple charges arising from two or more cases consolidated for trial because all the charges could have been brought in one charging document, the defendant shall receive the benefit of the double rule.

State of Kansas v. De'Andrew V. Dixon, 60 Kan. App. 2d 100, 492 P.3d 455 (May 14, 2021), *petition for rev. filed* (Jun. 4, 2021), *petition for rev. denied* (Sept. 27, 2021).

SPEEDY TRIAL

PRESUMPTIVE PREJUDICE. In 2013, the State filed a criminal complaint against Cass Wayne McDonald, alleging rape of a child under 14. The State failed to locate and arrest McDonald until 2019. McDonald filed a pretrial motion to dismiss the State's complaint based on a speedy trial right violation, which the district court granted. The Court of Appeals affirmed the dismissal, finding the six-year delay between the complaint and arrest

presumptively prejudicial based on the length of the delay and the State's negligence in locating McDonald.

State v. McDonald, __ Kan. App. __, __ P.3d __, 2022 WL 727647, at *1 (Mar. 11, 2022).

SUFFICIENT EVIDENCE

DRUG POSSESSION. For the purposes of the Kansas statute dividing possession of narcotics into different degrees based on discrete ranges of the quantity possessed, possession of a given quantity is sufficient to support a conviction for a degree encompassing a quantity range lower than the given quantity.

State v. Scheuerman, 314 Kan. 583, 502 P.3d 502 (Jan. 14, 2022).

STIPULATED FACTS. Robert Scheuerman stipulated to possessing at least 3.5 grams but less than 100 grams of methamphetamine with the intent of distribution. In exchange for his stipulation, the State amended the complaint to a lesser charge—possession of methamphetamine with intent to distribute at least 1 gram but less than 3.5 grams. The Court of Appeals reversed the conviction for insufficient evidence because the elements of the crime of conviction were not covered by the stipulation.

State v. Scheuerman, 60 Kan. App. 2d 48, 486 P.3d 676 (Apr. 16, 2021), *petition for rev. filed* (May 6, 2021), *petition for rev. granted* (Jul. 7, 2021).

SUFFICIENCY OF THE EVIDENCE

CRIMINAL THREAT—THREAT TO COMMIT VIOLENCE. A jury convicted Justin McFarland of intentional criminal threat after he posted on Facebook that he was going to kill his ex-wife Chelsea. McFarland appealed, arguing the criminal threat jury instruction was erroneous. The Court of Appeals held the jury instruction was not erroneous because the complaint and the jury instruction both alleged intentional criminal threat and used the language of the statute. The court also concluded that the State supported the criminal threat conviction with evidence that McFarland intended to place "another"—

Chelsea—in fear and that McFarland threatened to commit violence by threatening to kill her.

State v. McFarland, 60 Kan. App. 2d 1, 458 P.3d 178, 2021 WL 1229578 (Apr. 2, 2021), *petition for rev. filed* (Apr. 28, 2021), *petition for rev. denied* (Aug. 27, 2021).

TRIAL RIGHTS

PLEA WITHDRAWAL. Evidence of the defendant's lack of criminal history and lack of experience with the criminal justice system did not compel a finding that the defendant demonstrated excusable neglect, as necessary to permit an untimely motion to withdraw the defendant's plea.

State v. Ellington, 314 Kan. 260, 496 P.3d 536 (Oct. 15, 2021).

PROSECUTORIAL ERROR. The phrase "we know" used in a prosecutor's arguments in connection with an inference drawn from the evidence—as opposed to an uncontroverted fact—is error.

State v. Alfaro-Valleda, 314 Kan. 526, 502 P.3d 66 (Jan. 7, 2022).

JURY TRIAL RIGHT—RESTITUTION. Criminal restitution orders imposed solely by judge-made findings do not violate the jury trial rights guaranteed by the state and federal constitutions. But the Kansas statutory provision giving restitution awards the effect of civil judgments violates the right to jury trial guaranteed by the Kansas Constitution.

State v. Arnett, 314 Kan. 183, 496 P.3d 928 (Oct. 15, 2021).

SPEEDY TRIAL—WAIVER. When a defendant waives the statutory right to a speedy trial in conjunction with a requested continuance and does not place clear conditions on the waiver's length, the waiver is presumed to be unconditional.

State v. Shockley, No. 117,216, 314 Kan.46, 494 P.3d 832 (Sept. 10, 2021).

MISTRIAL—SPECTATOR CONDUCT. The arrival of 15-20 police officers in the courtroom just before the jury instructions were read in the defendant's trial for attempted

capital murder of a police officer did not warrant a mistrial. The defendant failed to demonstrate the incident had any prejudicial impact. The standards for determining whether the courtroom spectators' conduct necessitates a mistrial are discussed.

State v. Harris, 313 Kan. 579, 486 P.3d 576 (May. 14, 2021).

PRETRIAL PUBLICITY. The statute governing the public availability of testimony or affidavits supporting arrest warrants or summonses after charges are filed, K.S.A. 2020 Supp. 22-2302, does not prevent courts from considering a defendant's constitutional rights when determining whether to redact or seal affidavits or sworn testimony.

State v. Bodine, 313 Kan. 378, 486 P.3d 551 (May. 7 2021).

JURY TRIAL RIGHT—SENTENCING. The right to a jury trial guaranteed by Section 5 of the Kansas Constitution Bill of Rights does not require the State to prove to a jury a defendant's prior conviction for purposes of enhancing a defendants' sentence. The traditional function of the jury is to determine the accused's guilt or innocence, and the traditional function of the court is to impose the legally appropriate punishment. When a prior conviction is an element of a statutory offense, the issue must be decided by a jury. But when prior convictions are considered in deciding punishment, the issue falls within the traditional function of the court to impose the sentence.

State v. Albano, 313 Kan. 638, 487 P.3d 750 (May 28, 2021).

Revisiting the Guardianship and Conservatorship Code and Helpful Practice Hints

Emily A. Donaldson, Certified Elder Law Attorney,
Stevens & Brand, LLP

Rachael K. Pirner, Attorney,
Triplett Woolf Garretson, LLC

Kip Elliot, Attorney,
Disability Rights Center of Kansas

**Thursday, April 28th
1:00 – 1:50 p.m.**

Revisiting the Guardianship and Conservatorship Code

Rachael K. Pirner
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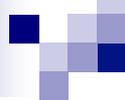
Have Guardianships and Conservatorships become Toxic?

From the Mickey Mouse club.....

Video 1:

<https://www.youtube.com/watch?v=rrjZk9ddKOY>

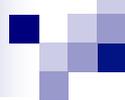




To 2008.....

Video 2

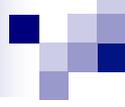
<https://www.youtube.com/watch?v=Vh0oMAIkVzA>



In Britney's words today....

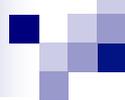
Video 3:

<https://www.youtube.com/watch?v=OxT6bCBvGI4>



Allegations against conservator

- Imposed in 2008 out of concern for her health (26 years old)
- Could not hire her own lawyer; did not have copy of her medical record
- Held captive; forced to work
- Isolated and spied upon (cameras placed in home)
- Forced to be on birth control (IUD)



NY Times documentary “Framing Britney Spears” (available on Hulu)

■ Interviews with key insiders, including:

- a lifelong family friend who traveled alongside Spears for much of her career
- the marketing executive who originally created Spears’s image
- a lawyer working on the conservatorship for Spears’s father
- and the lawyer Spears tried to hire in the early days of the conservatorship to challenge her father

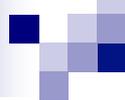
From Britney to “I Care a Lot”...

- Rebecca Fierle, Guardian in Florida



Fiduciary abuse and exploitation

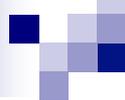
- Came to light due to Steven Stryker, 75 year old who died at a Tampa hospital;
- Guardian signed a DNR against the wishes of the ward and the protests of his daughter, health-care surrogate and psychiatrist
- Later admitted to signing multiple DNRs
- Charged with aggravated abuse and neglect
- Later discovered she mismanaged finances, double-billed for services and defrauded AdvantHealth for nearly 4 million dollars in unauthorized charges



Financial exploitation by fiduciary

Rosamund Pike accepted her Golden Globe for her performance in *I Care a Lot*, she quipped in her speech, "Maybe I just have to thank America's broken legal system for making it possible to make stories like this."

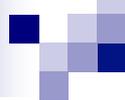
https://www.youtube.com/watch?v=jn_IROB9Z4U



How big is the problem?

About one in 10 Americans aged over 60 experience some kind of elder abuse, and only one in 14 cases report them, according to the National Council on Aging. In 2018, the Senate Aging Committee called to reform the guardianship system in the U.S. after troubling cases about American seniors in abusive guardianships arose.

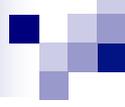
"An estimated **1.3 million adults** are under the care of guardians—family members or professionals—who control approximately **\$50 billion of their assets**," Senator Susan Collins said in a statement. "Guardianship is a legal relationship created by a court that is designed to protect those with diminished or lost capacity. We found, however, that in many cases, the system lacks basic protections leaving the most vulnerable Americans at risk of exploitation."



Is our legal system broken?

Florida: State lawmakers passed legislation Wednesday to fix those flaws by requiring guardians to get a judge's approval before signing DNRs on behalf of incapacitated clients, prohibiting them from seeking their own appointment to specific cases and revising provisions related to conflicts of interest. If signed by Gov. Ron DeSantis, the law would go into effect July 1.

California: ?



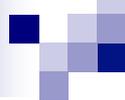
Is Federal oversight needed?

- Senate Judiciary subcommittee on The Constitution
- Chaired by Richard Blumenthal, D – CT
- Ranking member, Ted Cruz, R – TX
- Hearing held 9.28.2021



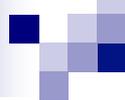
Video 4

<https://www.c-span.org/video/?514983-1/experts-testify-conservatorships>



Reform requests by advocates

- Alternates to adjudications
- Civil Rights protection
- Data Collection
- Federal enforcement – oversight and intervention, with targeted funding
- Coordination between SS Rep payees and fiduciaries
- Interstate compact creating national registry of fiduciaries



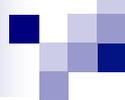
So, what's happening in Kansas?

Due process protections in current code (Ch. 59, Article 30)

- mandated court appointed attorney (not GAL)
- Guardian cannot make end of life decisions for ward unless previously expressed by ward, or obtains court approval
- Plans are discretionary, but accountings are mandatory

Supported Decision-making

- HB 2122
- Introduced on 1/22/2021; Referred to Committee on Judiciary; Committee Report recommending bill be passed by Committee on Judiciary; Committee of the Whole - Passed over and retained a place on the calendar on 3/24/2021



How does this work?

- Adult enters into agreement voluntarily and without coercion, if she understands the nature and effect of the agreement.
- Can name one or more decision-makers to act as supporters
- Can monitor health, manage income and assets, handle personal health care and financial matters; monitor support services, living arrangements, and work arrangements.

Cont....

- Agreement would name one or more adults to provide a principal with decision-making assistance;
- Describes the assistance that each supporter may provide the principal; and contains a notice to third parties that summarizes the rights and obligations of the supporter under the agreement.
- The bill specifies the requirements for making a supported decision-making agreement valid; defines the effective date and termination process for the agreement; outlines the roles and responsibilities of the supporter operating under a decision-making agreement; and provides for the protection of those acting in reliance on a supported decision-making agreement.

Other practice tips...

- Capture the moment of lucidity for POA execution (but no court oversight)
- Include in Order appointing a Guardian the requirement to file annual report and plan (and have approved by court)
- Instructional class (not just the booklet) on fiduciary obligations

Implicit Bias Basics (Ethics)

Meryl Carver-Allmond, Training Director,
Kansas State Board of Indigents' Defense Services

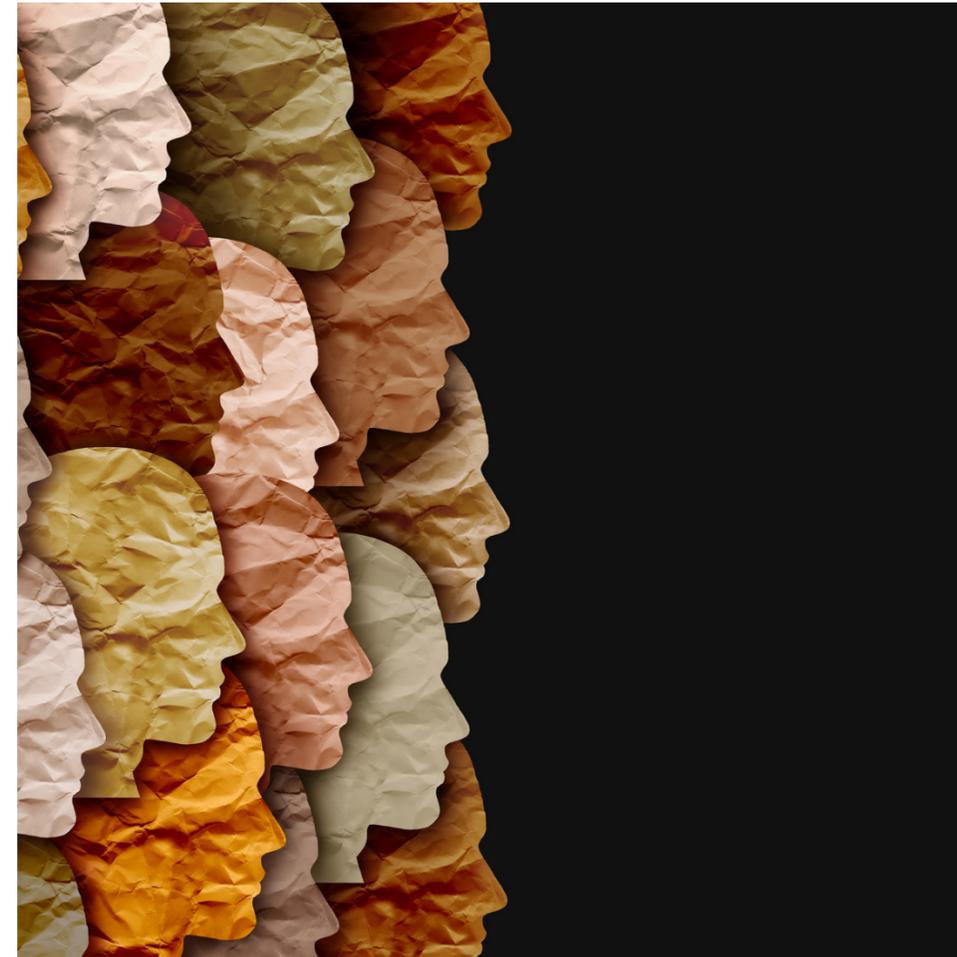
**Thursday, April 28th
2:00 – 2:50 p.m.**

Implicit Bias Basics for Attorneys

MERYL CARVER-ALLMOND
TRAINING DIRECTOR
MCARVER@SBIDS.ORG

KANSAS STATE BOARD OF INDIGENTS'
DEFENSE SERVICES

SPRING 2022



Why does learning about implicit bias matter?

What is implicit bias?

What are ways that implicit bias
impacts our representation of clients?

What are some ways you can de-bias yourself?



Why does
this matter?

KRPC Preamble

A lawyer must:

Give their client an informed understanding of their rights.

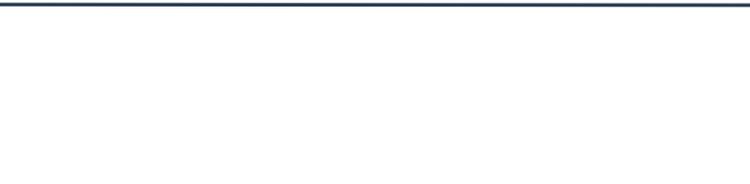
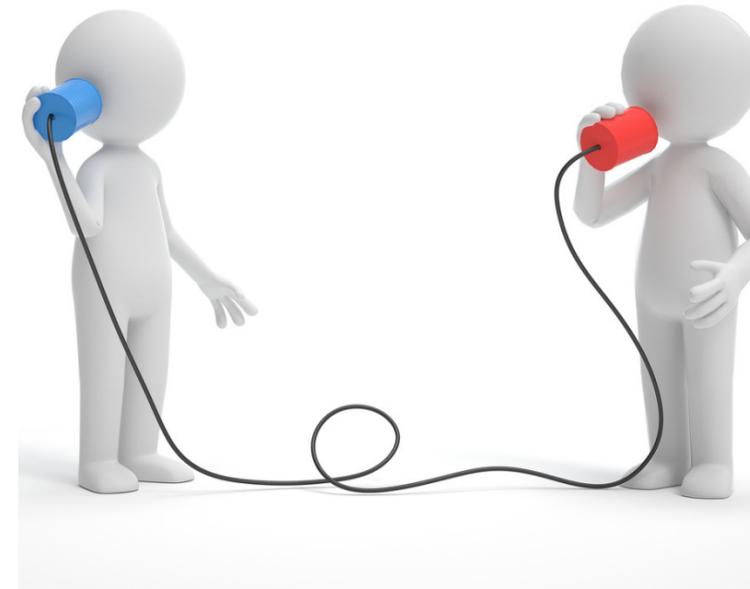
Explain the practical implications of those rights.

Zealously assert the client's position.

Communication

Rule 1.4(b)

"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."



Lawyer as an Advisor

Rule 2.1

"...In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."



What is implicit bias?

Implicit bias is when we have attitudes towards people or associate stereotypes with them without our conscious knowledge.

This is explicit bias.



Tell me about this
cowboy.





Brain Tricks - This Is How Your Brain Works



BRAIN



TRICKS



Watch on  YouTube

But even if we don't mean for it to,
implicit bias can impact how we
represent our clients.

Culture

You can advise your client better if you understand how they see the world.



What are your client's cultural understandings of time?

Do they come from a culture that values truth-telling or peace-keeping?

What is the role of emotion in their culture? What do expressions of guilt look like?



Virtual Hearings

We perceive people as less human when they are appearing through a screen.



Northwestern study found that call-in bail hearings resulted in a 51% increase in bail amounts over in-person hearings.

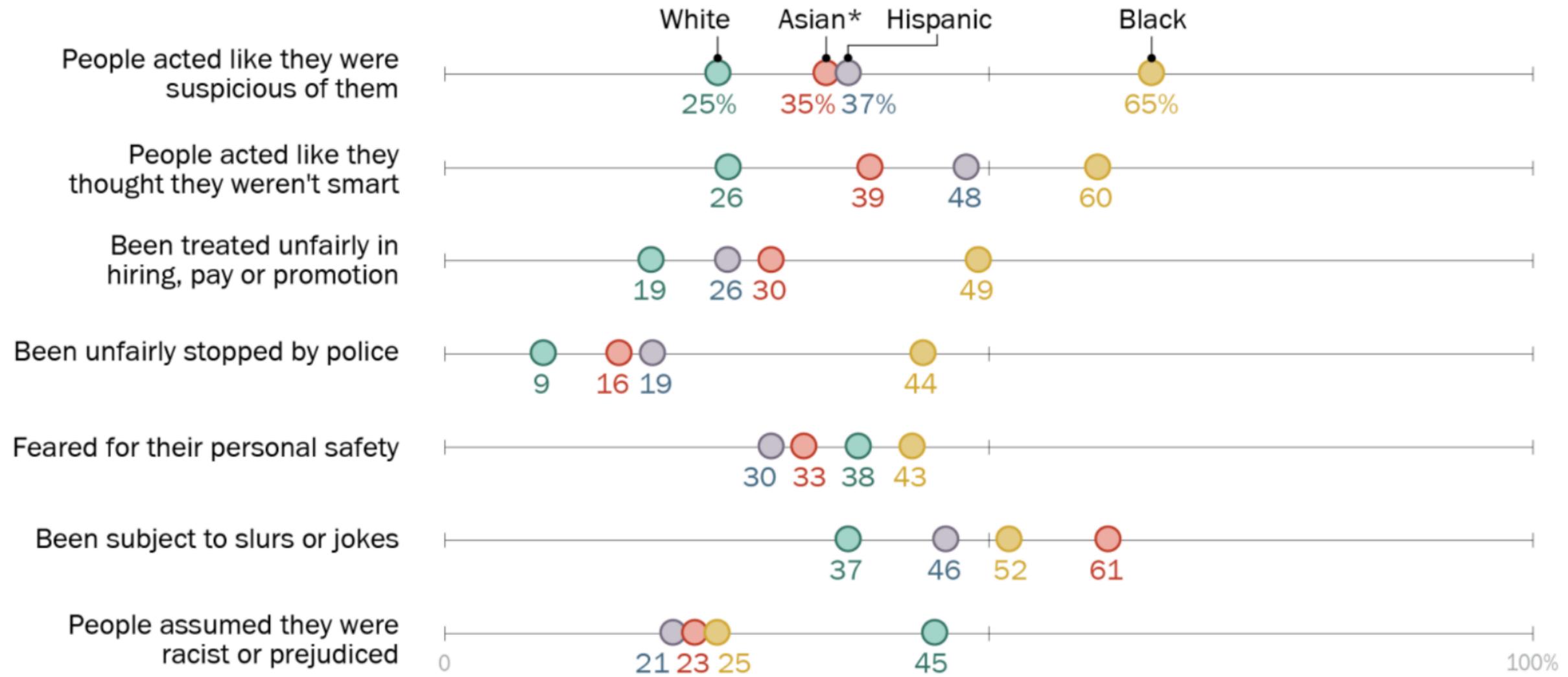
Georgetown Immigration Law Journal article found that asylum hearings over video resulted in more deportations.



"Reasonable Person" Standard

Who is that?





2019 Pew Research Center Data

Criminal Legal System Decision Points

Defenders, Prosecutors, &
Judges all have
tremendous discretion.



In 2018 in Kansas, almost 48% of homicide victims were white. Of the 15 cases that have resulted in death sentences in Kansas, 86% of the victims were white.

Nationally, in 96% of places reviewed, including every major death penalty state, there is a pattern of either race-of-victim or race-of-defendant discrimination in death sentencing, or both.



Health Care Law

Standards of care and assumptions about risk are based on white men.



-
- Non-white patients receive fewer cardiovascular interventions and fewer renal transplants.
 - Black women are more likely to die after being diagnosed with breast cancer.
 - Non-white patients are less likely to be prescribed pain medications (non-narcotic and narcotic).
 - Black men are less likely to receive chemotherapy and radiation therapy for prostate cancer and more likely to have testicle(s) removed.
-

-
- Patients of color are more likely to be blamed for being too passive about their health care
 - Hispanic patients significantly less likely to receive analgesia in the ER
 - Women have longer wait times in ER for cardiac and stroke events.
 - Women less likely to be offered surgical interventions and drugs for prevention of heart disease.
-

Property Law

What is a "good"
neighborhood?

How does it get that way?



-
- What makes buyers see a neighborhood as "safe"?
 - What do appraisers use to establish the value of a home?
 - How do lender's evaluate credit-worthiness?
 - Where do local governments decide to invest?
-

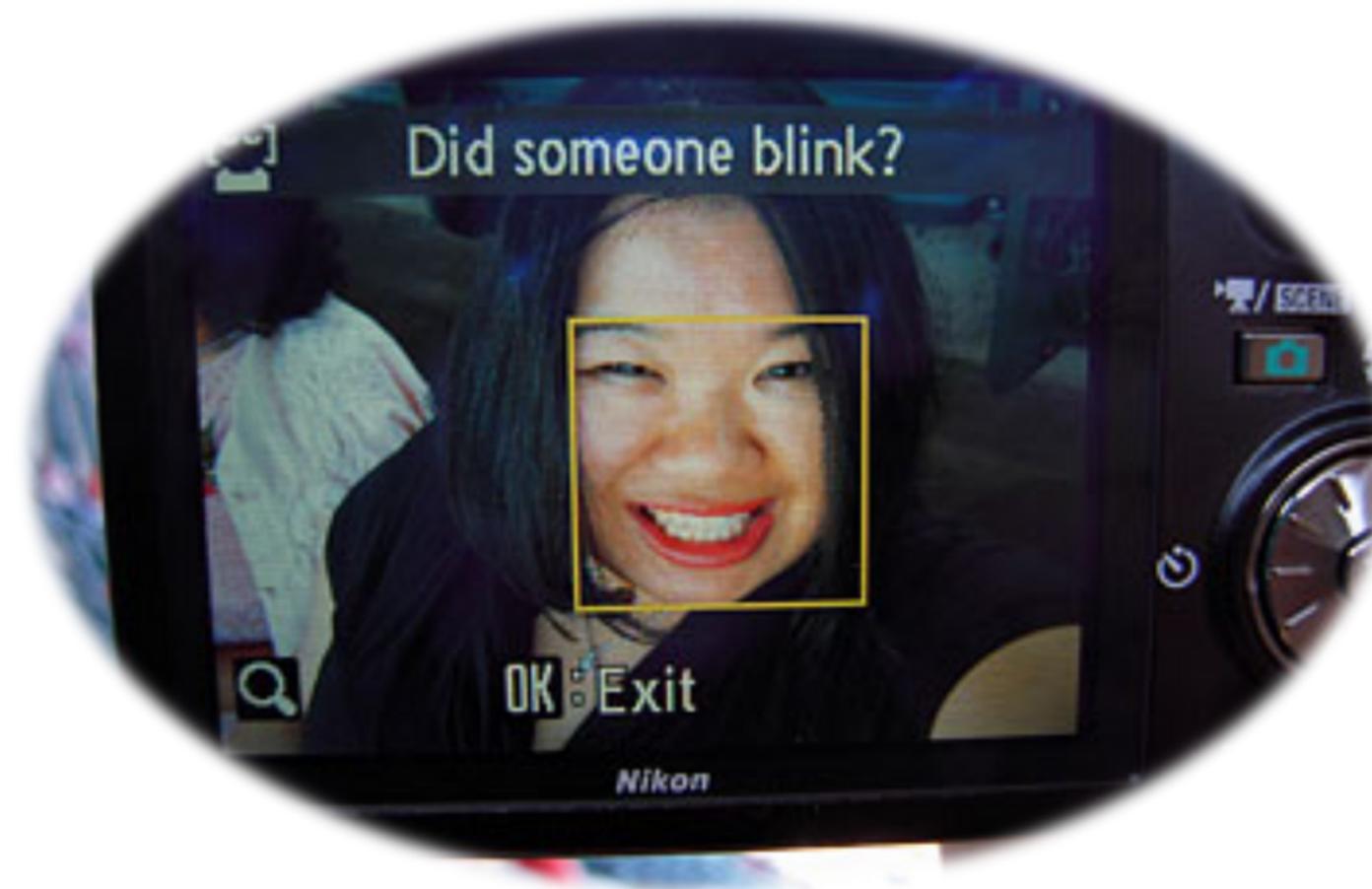
Education Law

Which kids are "good" and
which ones are "bad"?



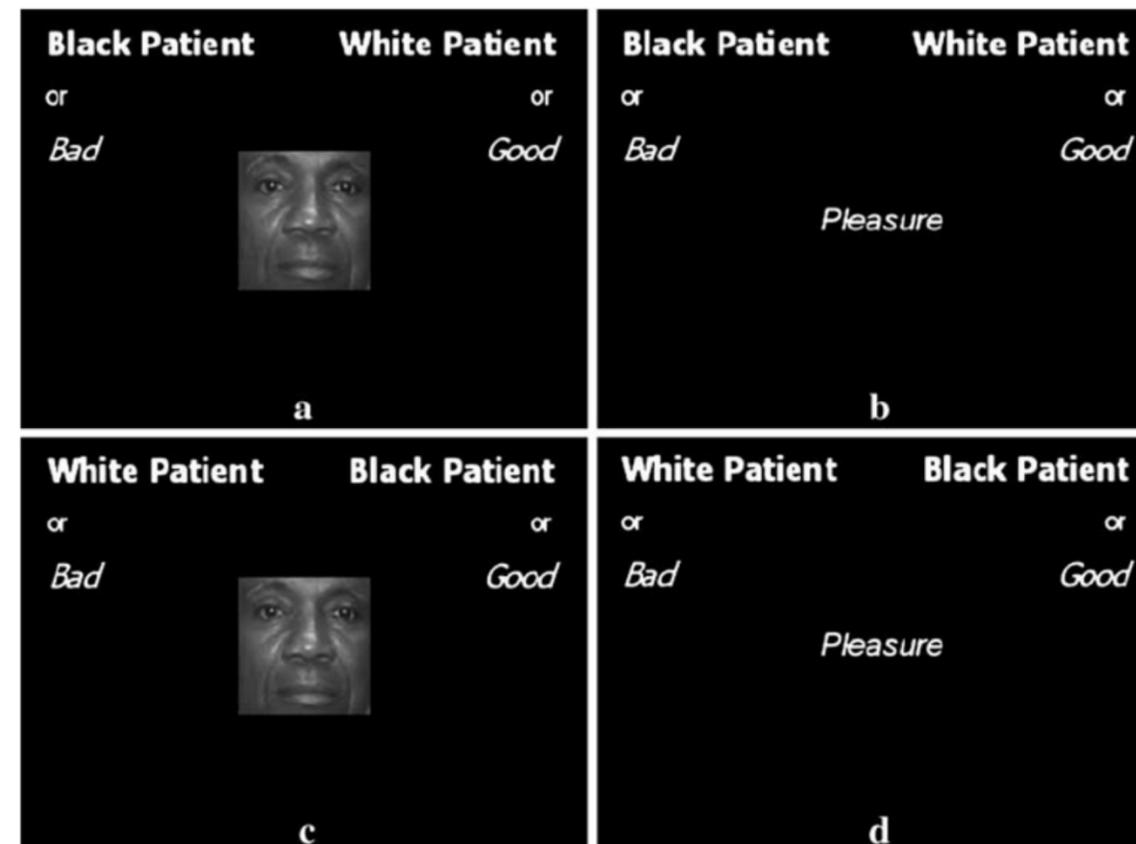
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- 2017 Kansas school funding decision noted that 15,000 Black students and 33,000 Hispanic students are struggling math and reading.
 - Teachers commonly perceive Black students to have more negative demeanors. They are more likely to be labeled "troublemakers" after minor indiscretions.
 - Read The Rage of Innocence by Kristin Henning
-

Software Development & Tech Law



Way to De-Bias Yourself

Know that no one is immune from unconscious bias.



<https://implicit.harvard.edu/implicit/>

RED GREEN BLUE YELLOW PINK
ORANGE BLUE GREEN BLUE WHITE
GREEN YELLOW ORANGE BLUE WHITE
BROWN RED BLUE YELLOW GREEN

Slow down!

Be thoughtful about
the language &
imagery you use.

...**AROUND BLACKS**



...**NEVER RELAX!**



Ask "why" or use
race-switching to
catch yourself.



Use data to catch yourself.

You can't manage what you aren't measuring!



Empower your
colleagues &
clients to call
you out.



Call attention to
implicit bias for others
who have less power
than you.





Surround
yourself with
diversity.

Family Law in Kansas Update

Linda Elrod,
Richard S. Righter Distinguished Professor of Law,
Director of Children and Family Law Center,
Washburn University School of Law

**Thursday, April 28th
3:00 – 3:50 p.m.**

FAMILY LAW UPDATE: ATTORNEYS, PARENTAGE, AND MISCELLANEOUS

by

Linda D. Elrod
Richard S. Righter Distinguished Professor of Law
Director, Children and Family Law Center
for
Ellis County Bar Association
April 28, 2022

I. Attorneys and Family Law

A. Adoption

1. Consent of unwed fathers

K.S.A. 59-2136(h)(1)(D) provides reasons to dispense with a parent's consent to adoption. The mother gave birth claiming she did not know she was pregnant. Unwed father certainly did not know. When notified for consent, he immediately filed a paternity action in Shawnee County. The attorney for adoptive parents, Kenney, filed for adoption in Wyandotte claiming the father's rights could be terminated because the father had not assumed the duties of a parent. After two years of litigation, the Kansas Supreme Court reversed the adoption and ordered that father was entitled to his child. To use failure to support, the father must know there is a pregnancy. *In re Adoption of C.L.*, 308 Kan. 1268, 427 P.3d 951 (2018).

2. Termination of parental rights

The baby was born on September 19, 2018. After the mother consented to the adoption and relinquished the child, the adoptive parents filed to terminate the mother and two possible fathers' parental rights. The natural father argued that he supported the mother during her last six months of pregnancy but the evidence showed otherwise and father suffered from drug addiction. The court of appeals affirmed the district court's termination of his rights. The Kansas Supreme Court found that father failed to preserve the issue of the constitutionality of K.S.A. 59-2136(h)(1)(D) for appeal. The evidence showed the father failed to provide adequate support to the mother six months before birth and the

court affirmed termination. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 466 P.3d 1207 (2020).

3. A Verified Petition Must Be True

Kenney, the attorney in *C.L. supra*, was disbarred for false allegations under oath. *In re Kenney*, 313 Kan. 785, 490 P.3d 1194 (2021). The 28 page opinion includes this language:

The respondent's admitted pattern of conduct in these cases is egregious. He knowingly made false statements to a court with the intent to circumvent a father's constitutional rights to parent his own child and to obtain a fraudulent termination of that father's parental rights. In so doing, he "won" adoptions of the children for his clients which a significant time later had to be overturned due to the respondent's fraud. In effect, respondent used the legal process to traffic children. It is not hyperbole to put the matter this starkly, and we can think of no breach of trust more significant or damaging than this. Our legal system depends on the highest standards of professionalism, integrity, truthfulness, and trustworthiness of our lawyers. Without this, we cannot be said to have a system of law, only a corrupt game of power and manipulation with a façade of lawfulness. A lawyer cannot come back from a breach of trust so grave. The confidence of the public and the sanctity of the rule of law can only be protected and preserved by meting out the most serious sanction available to us— disbarment. Disbarment is the appropriate sanction when "a lawyer, with the intent to deceive the court, makes a false statement . . . and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." ABA Standards for Imposing Lawyer Sanctions, § 6.11 (1992).

The harm respondent caused can hardly be understated—to his own clients (who were forced to suffer the heartbreaking judicial reversal of the adoptions of their children); to the fathers (who lost years of crucial parenting time with their children); to the children (who doubtless will suffer early childhood trauma which may reverberate through their lives); and to the people of Kansas whose confidence in our legal system's ability to arrive at just and

suitable resolutions to such disputes is seriously undermined by such misconduct.

B. What is a Reasonable Fee?

A father's refusal to pay his share of uninsured medical expenses and the resulting litigation also involved an appeal. The court found that since the district court had authority to grant attorney fees, it had the authority to award attorney fees for services on appeal. The mother's motion for fees specified that her attorney (Joe Booth) and his paralegal spent 42.1 hours working on the appeal. The attorney billed at an hourly rate of \$400 and the paralegal billed at an hourly rate of \$150. *The motion was appropriately itemized and documented.* * * * the equities related to the "the nature of the issues before this court" weighed in favor of awarding the mother appellate attorney fees because of the father's failure to reimburse her for his share of the children's reasonable and necessary, but uninsured, medical expenses. The court noted that "*rather than accept the district court's ruling and expeditiously reimburse Kathryn as ordered, which would have been in the best interests of both parties, he prolonged the litigation by taking this appeal.*" Based on the court's decision that the father failed to properly reimburse mother for his share of the uninsured medical expenses, justice and equity compel us to conclude that he was responsible for the costs incurred by Kathryn in defending the appeal. *In re Marriage of Lask*, No. 122,147, 2020 WL 5849366 (Kan. Ct. App. Oct. 02, 2020) (unpublished). The court evaluated the reasonableness of the fee by looking at the factors in the Kansas Model Rules of Conduct 1.5(a):

- a. *The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly*
Appellate counsel was hired based on his experience as an appellate attorney practicing solely in the area of family law. Appellate counsel was not the attorney who tried the matter before the district court. This meant appellate counsel was required at the outset to spend time reviewing the record, briefs, and motions filed with the district court. After getting up to speed with the case, appellate counsel's billing records reflect that he reviewed father's 38-page brief, conducted research, drafted mother's 35-page response brief, reviewed father's 14-page reply brief, and then prepared for and participated in oral argument.
- b. *The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer*
Appellate counsel stated his practice is full time, and he regularly must turn away business because of scheduling.
- c. *The fee customarily charged in the locality for similar legal services*

Appellate counsel stated his fee is customarily \$400 per hour with \$150 an hour for his paralegal's time and both are similar to those charged by attorneys focusing on family law issues in the Johnson County Court and nearby areas.

d. *The amount involved and the results obtained*

Father sought to be relieved from a judgment in excess of \$96,299.92 as well as some undesignated amount in refund of child support he already paid. Mother was the prevailing party on all claims.

e. *The time limitations imposed by the client or by the circumstances*

The circumstances required appellate counsel to file mothers' brief within 30 days after receiving father's brief. Appellate counsel stated he filed a timely response brief and did not request additional time to do so because a delay would have been costly to his client.

f. *The nature and length of the professional relationship with the client*

Appellate counsel was retained for the appeal and did not represent the mother in proceedings before the district court.

g. *The experience, reputation, and ability of the attorney performing the services*

Appellate counsel states he has a practice that includes a significant amount of appellate work in Kansas, as well as other jurisdictions, and has focused primarily on family law issues since 1998. Appellate counsel further states that many of the appeals are filed under his name but that he does act as a consultant and assistant in drafting appellate briefs that are filed under the names of other attorneys. Appellate counsel was the liaison between the American Bar Association and the Uniform Law Commission (formerly NCCUSL) to the drafting of the Uniform Interstate Family Support Act (2001 and 2008 versions). Counsel is the co-chair of the ABA Family Law Section Publications Board and sits on the ABA Family Law Section Counsel. He also is a Fellow in the American Academy of Matrimonial Lawyers, a Fellow of the International Academy of Family Lawyers, has served in the past as a judge pro tem for the Johnson County District Court, and teaches family law issues as an Adjunct Professor for Washburn University School of Law.

h. *Whether the fee is fixed or contingent*

Fees were hourly and appellate counsel charged \$400 per hour for the time spent on this appeal and \$150 an hour for his paralegal's time.

The court evaluated the factors and found the \$15,840 requested by former wife for appellate attorney fees was a reasonable sum.

C. Sanctions for Incivility - Inherent Power of Court

Civility has been on the wane in some areas. An interesting unpublished case found a trial court has broad inherent power to fashion remedies and impose sanctions when “reasonably necessary for the administration of justice, provided these powers in no way contravene or are inconsistent with substantive statutory law.” Even if the district court lacked authority under K.S.A. 60-211 to sanction for an abusive unfiled paper, the court had inherent authority to do so. The case involved a long-standing contentious child custody dispute. Conciliation and case management had failed. The father and his attorney had exhibited particularly egregious conduct. The father repeatedly filed baseless accusations and derogatory statements against the Washburn Law Clinic, the GAL, a former case manager, the court trustee, and the court’s administrative assistant - basically anyone who disagreed with him. The guardian ad litem filed an emergency motion to move the case to CINC court and submitted a report which the attorneys could read. Shawnee County District Court Rule 3.407(4) prohibits attorneys from giving copies of, or allowing them to read, investigative reports in domestic cases. The father’s attorney allowed him to read it. The mother filed for sanctions under Rule 3.407 and K.S.A. 60-211. While the court did not find the lawyer in contempt, it did impose a sanction of \$2500 as a deterrent to future conduct and a requirement that the lawyer pay for and attend six hours of CLE on civility. The Court of Appeals upheld the sanction. *Mboumi v. Horton*, No. 123,546, 2022 WL 263112 (Kan. App., Jan. 28, 2022).

D. Malicious Prosecution

Client tells lawyer she thinks she is married – long term cohabitation. Lawyer Walker filed a petition for divorce on September 15, 2016, on client Tanking's behalf in Johnson County. The petition alleged the existence of a common-law marriage between Tanking and Budd, requested a dissolution and division of the marital assets, and asserted an alternative claim for equitable division of the assets based upon *Eaton v. Johnston*, 235 Kan. 323, 681 P.2d 606 (1984). Walker testified he believed that if the district court did not find a common-law marriage, it would then follow *Eaton* and equitably divide the jointly owned property. Budd, the male cohabitant. filed in Wyandotte county for declaratory judgment that no marriage existed. Judge agreed. Budd then brought malicious prosecution action

against female cohabitant and her attorney, alleging that female cohabitant's claims in divorce action that there was a common law marriage between the parties were without probable cause and brought with malicious intent. Male and female cohabitants settled their claims, and attorney moved for summary judgment. Court denied. Jury found lawyer guilty and awarded compensatory and punitive damages. The Court of Appeals reversed. The Johnson County court deferred to no marriage decision but did award the female cohabitant a 20% interest in the house and the piano. *Budd v. Walker*, 60 Kan. App. 2d 189, 491 P.3d 1273 (2021).

II. Parentage Issues

1. Kansas Parentage Act is the “oldest” version based on the 1973 Act. K.S.A. 23-2202 et seq.

K.S.A. 23-2208 includes presumptions of parentage based on the traditional “presumption of legitimacy” based on marriage and attempted/void marriage, notorious recognition, and court order of parentage. Later additions were for genetic testing of 97% and voluntary acknowledgments of parentage. After *Obergefell v. Hodges*, 576 U.S. 644 (2015), same sex married couples have the same presumption of legitimacy. The U.S. Supreme Court required the same-sex spouse’s name to be put on the child’s birth certificate. *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

2. Unmarried partners and parentage.

The Kansas Supreme Court found that a woman could bring an action to establish visitation with two children born of artificial insemination during a thirteen year same-sex partnership. The parties had co-parenting contracts and both acted as parents for several years. The Kansas Supreme Court found that the nonbiological partner was a presumed mother under K.S.A. 23-2208(a)(4). *Frazier v. Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013). The concurring opinion found that a gender neutral reading of the UPA presumptions could come to same result. Biles, J. concurring.

See also In re Parentage of M.F., 312 Kan. 322, 475 P.3d 642 (2020). Same-sex partners lived together from 2007 to approximately 2014. One became a mother through artificial insemination. After the couple separated, the non biological partner sought a judicial recognition of legal parentage under K.S.A. 23-2208(a)(4). Both the district court and the court of appeals ruled that the partner had no parenting rights because she failed to meet the burden of proof established in *Frazier*. The Supreme Court reversed because the trial court had not applied the correct legal standard. Under *Frazier*, the court must analyze whether the individual became a parent and not whether they are a fit parent. Tests that

measure an individual's parenting abilities are irrelevant. The same-sex partner of a woman who conceives through artificial insemination may establish a legal fiction of biological parentage by asserting the KPA presumption of maternity. A written or oral co-parenting agreement is not required to establish parentage, only proof that an individual "notoriously recognized" parentage and the duties arising from it. The evidence that is permitted to establish parentage through (a)(4) includes "evidence material and probative of it." A written parenting agreement is not essential. The biological mother must have "implicitly or explicitly consented to share parenting duties with the partner. On remand, the court should consider the party's intentions at the time of the child's birth because this is the "crystallization" which "configures the family."

In a companion case, same-sex partners had a serious relationship from 2012 to 2015. Nine months after one partner gave birth to twins, the couple separated, and the other partner filed a parentage petition through K.S.A. 23-2208(a)(4). The District Court had ruled that the partner had no parenting rights based on a parentage test from Wisconsin because the KPA was not "tailored to the situation" and required clear and convincing evidence. The Court of Appeals affirmed. The Kansas Supreme Court reversed in accordance with the guidelines set out by *In re M.F.* which established that the quality of parenting is not relevant to these cases. The birth mother also should not change their opinion regarding who is considered the child's legal parent as time progresses. *In re W.L.*, 312 Kan. 367, 475 P.3d 338 (2020).

3. Uniform Parentage Act (2017)

Kansas did not adopt the Uniform Parentage Act (2002) which added presumptions of maternity and paternity based on marriage and gestational surrogacy provisions. Kansas, however, is looking at the UPA (2017). The UPA (2017) reflects a transformative and unified scheme of parentage regulation. It frames parentage around five separate parentage classifications: acknowledged, adjudicated, alleged genetic, intended, and presumed. Six states have already enacted it: California, Connecticut, Maine, Rhode Island, Vermont, Washington. Several others have introduced it into their legislatures this year.

- a. Gender neutral language. It removes gendered divisions in establishing paternity versus maternity by using gender neutral language.
- b. It applies equally to same-sex couples.
- c. It recognizes parental relationships based on functional de facto relationships.
- d. It precludes the creation of a parent-child relationship between a perpetrator of sexual assault and the child conceived through sexual assault.

- e. It modernizes parentage laws in the context of surrogacy, gestational vs. traditional.
- f. It adds a new article governing assisted reproductive technologies. This includes new children’s rights to access information about their donors, requiring disclosure of non-identifying donor medical history. It also requires clinics and institutions to ask donors whether they would like their identifying information revealed at the age of majority.

III. CHILD SUPPORT - UNIFORM INTERSTATE FAMILY SUPPORT ACT

A. Initial Jurisdiction

To impose an obligation for child support, the court must have personal jurisdiction over the obligor. *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). *See Tompkins v. Tompkins*, 597 S.W.3d 99 (Ark. Ct. App. 2020) (Arkansas court had personal jurisdiction over the father even though the child had lived in Germany with the mother for several years. The court had subject matter jurisdiction to establish a support order upon the mother’s request, absent an existing order elsewhere).

1. Kansas Code of Civil Procedure and Long Arm Statute; K.S.A. 60-308(b)(1)(H).
2. The Uniform Interstate Family Support Act (UIFSA) (1992) provides for establishing and enforcing support orders. In 1996, PRWORA, the welfare reform legislation, mandated states adopt UIFSA by 1998. All states did. In 2001, UIFSA was amended to add an expanded long arm. In 2008, UIFSA was amended to ratify the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance.

Uniform Interstate Family Support Act § 201(a); K.S.A. 23-36,201(a)

* * *

- (1) the individual is personally served * * *within this State;
- (2) the individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- (3) the individual resided with the child in this State;
- (4) the individual resided in this State and provided prenatal expenses or support for the child;
- (5) the child resides in this State as a result of the acts or directives of the individual;
- (6) the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse;

- (7) [the individual asserted parentage in the [putative father registry] * * *;
or
(8)] there is any other basis consistent with the constitutions of this State
and the United States for the exercise of personal jurisdiction.

B. Continuing Exclusive Jurisdiction

1. Decree state retains as long as one party there.

UIFSA uses the principle of continuing, exclusive jurisdiction. If the state properly had jurisdiction to issue the child support order and one party or the child continues to reside in the state, the decree state retains continuing exclusive jurisdiction. Even if the state is not the residence of the obligor, the parties can make a written consent to jurisdiction. UIFSA Section 205.

Where all parties lived in Kansas when the child support order was entered in 1991 and the mother and children continued to live in Kansas, Kansas retained exclusive continuing jurisdiction. Even though California where father was living entered a support order against him and he made some payments, the order was void. The parties did not consent in writing to the jurisdiction of the California court. The district court could not order income withholding or an award of arrearages of \$80,000 based on the void California order. *In re Henson*, 58 Kan. App. 2d 167, 464 P.3d 963 (2020). *See also Harvey v. Harvey*, 432 So. 3d 786 (La. Ct. App. 2020) (Louisiana court lacked jurisdiction under UIFSA to modify the Florida child support order where the mother and children were still in Florida).

2. All parties leave the state - play an “away game”

If all parties leave the decree state, the person seeking relief must go to the state in which the other party “resides.” Alaska courts determined that the term “presently resides” in UCCJEA and UIFSA provisions governing exclusive, continuing jurisdiction should be interpreted consistently with “residency” under Alaska law. Father intended to return to Alaska at end of his military deployment so all of the parties' physical presence in South Carolina did not deprive the Alaska court of its exclusive, continuing jurisdiction. *Mouritsen v. Mouritsen*, 459 P.3d 476 (Alaska 2020).

C. Interstate Enforcement - Registration of Support Order

1. History

Interstate enforcement of child support has always been problematic. Prior to 1995, there were two acts - Uniform Reciprocal Enforcement of

Support Act (URESAs) (1950) and Revised Act (RURESAs) (1968), neither of which were particularly effective because of modification issues. The Uniform Law Commission replaced URESAs and RURESAs with the Uniform Interstate Family Support Act (UIFSA). It provides for a one court order procedure and allows for registration and enforcement in other states without modification of the order.

2. Registration of Other State Order - UCCJEA vs. UIFSA

UCCJEA and UIFSA are different in the registration requirements because custody and support issues are not the same. A mother properly registered a Florida child custody order in North Carolina, but it was found insufficient to register a foreign child support order. The Virginia father, as the non-registering party, was entitled to notice. The court rejected the “substantial compliance” argument because the petition in form and substance was a petition to register a foreign custody order. The mother did not follow UIFSA requirements. The North Carolina court summed it up:

. . . Mother's arguments overlook the essential differences in registration of foreign orders under the UCCJEA and UIFSA. For purposes of child custody, the focus is on the residence of the children, and personal jurisdiction over a parent is not required. . . For purposes of child support modification and enforcement, the focus is on the residence of the obligor, since the obligee who is seeking enforcement normally registers the order in the state of the obligor's residence so the court will have personal jurisdiction over the obligor. . . .

. . . Jurisdiction for modification of child support . . . is distinct from modification of custody under the federal Parental Kidnapping Prevention Act (PKPA), 42 U.S.C. § 1738A, and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) §§ 201-202. These acts provide that the court of exclusive, continuing jurisdiction may “decline jurisdiction.” ***Declining jurisdiction, thereby creating a potential vacuum, is not authorized under UIFSA.*** Once a controlling child-support order is established under UIFSA, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing tribunal no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a tribunal with modification jurisdiction issues a new order in conformance with this article. [Emphasis added]

UIFSA and UCCJEA seek a world in which there is but one order at a time for child support and custody and visitation. Both have similar restrictions on the ability of a tribunal to modify the existing order. The major difference between the two acts is that the basic jurisdictional nexus of each is founded on different considerations. UIFSA has its focus on the personal jurisdiction necessary to bind the obligor to payment of a child-support order. UCCJEA places its focus on the factual circumstances of the child, primarily the “home state” of the child; personal jurisdiction to bind a party to the custody decree is not required. An example of the disparate consequences of this difference is the fact that a return to the decree state does not reestablish continuing, exclusive jurisdiction under the UCCJEA. *See* UCCJEA § 202. Under similar facts UIFSA grants the issuing tribunal continuing, exclusive jurisdiction to modify its child-support order if, at the time the proceeding is filed, the issuing tribunal “is the residence” of one of the individual parties or the child. *See* Section 205.

The court upheld father’s motion to dismiss the mother’s registration under UIFSA. *Halterman v. Halterman*, 855 S.E.2d 812 (N.C. Ct. App. 2021).

2. Proper Registration is not subject matter jurisdiction

A Kansas case involved an unwed father who was a member of the Miami Heat who had a Florida child support order. The mother and child had moved to Kansas. When the father retired and moved out of Florida, he attempted to reduce his child support obligation by registering the Florida judgment in Wichita, Kansas, but a paralegal failed to attach the two certified copies of the support order. Even though the mother failed to contest the registration within 20 days, the court found that she could challenge the court’s subject matter jurisdiction under UIFSA. The Court of Appeals upheld the trial court’s decision that failure to file the certified copies meant the court lacked jurisdiction to modify the award. *Chalmers v. Burrough*, 472 P.3d 586 (Kan. Ct. App. 2020), rev’d 2021.

The Kansas Supreme Court reversed, agreeing with the dissenting judge. There is a difference between subject matter jurisdiction over a type or class of cases and judicial authority to adjudicate a specific legal dispute between specified parties. Registration alone is not enough to permit a court to modify an out-of-state support order. The party seeking modification of the order also must show: (1) the payor of the support, the recipient of the payments, and the child for whose benefit the support is due no longer reside in the state that issued the order; (2) he or she is not a

resident of the state in which modification is sought; and (3) the district court can exercise personal jurisdiction over the party who is not seeking modification. All of those requirements were met. The failure to properly register the out of state child support order did not deprive the district court of subject matter jurisdiction. *Chalmers v. Burrough*, 314 Kan. 1, 494 P.3d 128 (2021).

The Basics of Blockchain & Cryptocurrency... and Why You Should Care

Robert A. Anderson, Jr., Ellis County Attorney

Levi Morris, Barton County Attorney

**Thursday, April 28th
4:00 – 4:50 p.m.**



**The Basics of Blockchain & Cryptocurrency ...
& Why You Should Care**



DISCLAIMER:

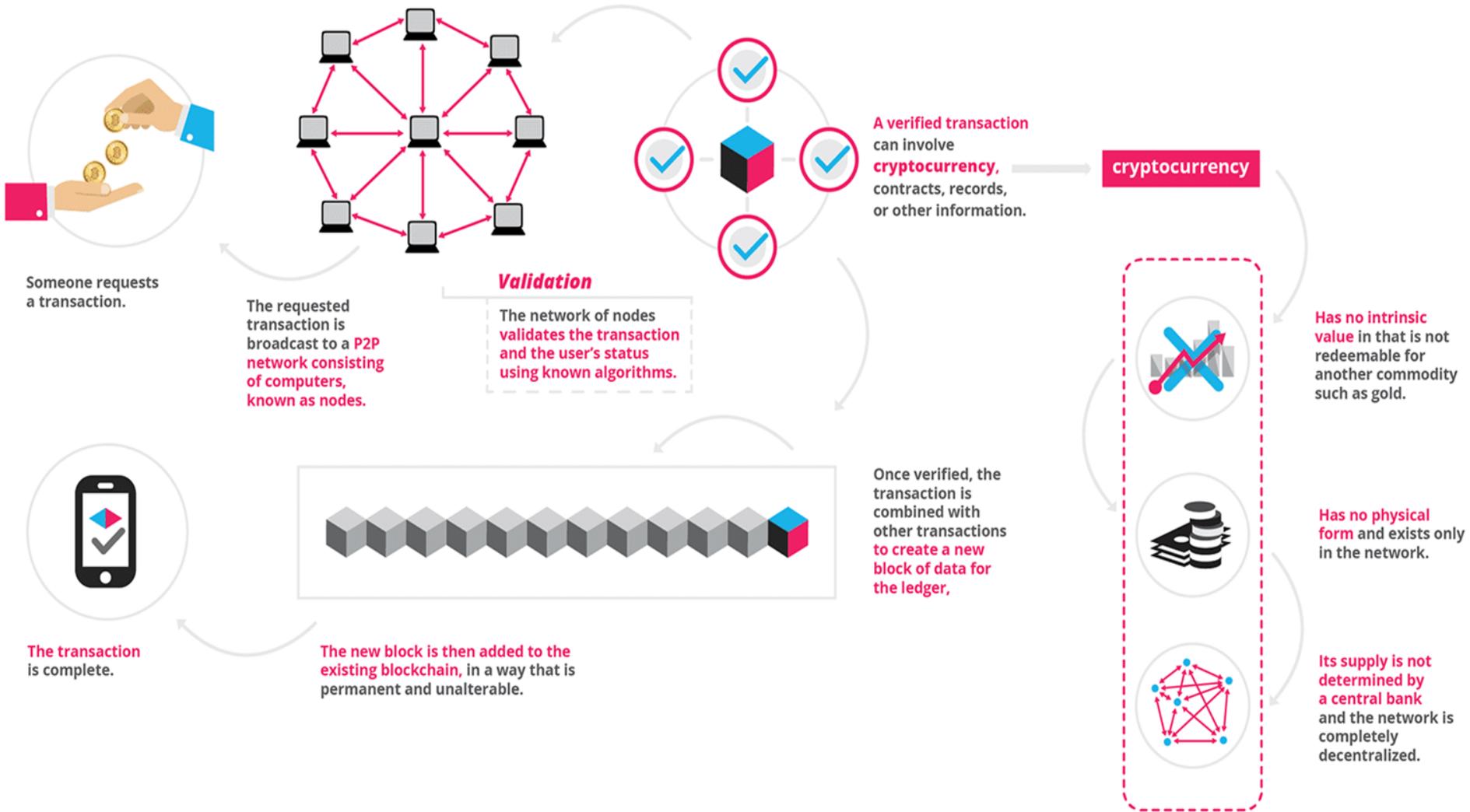
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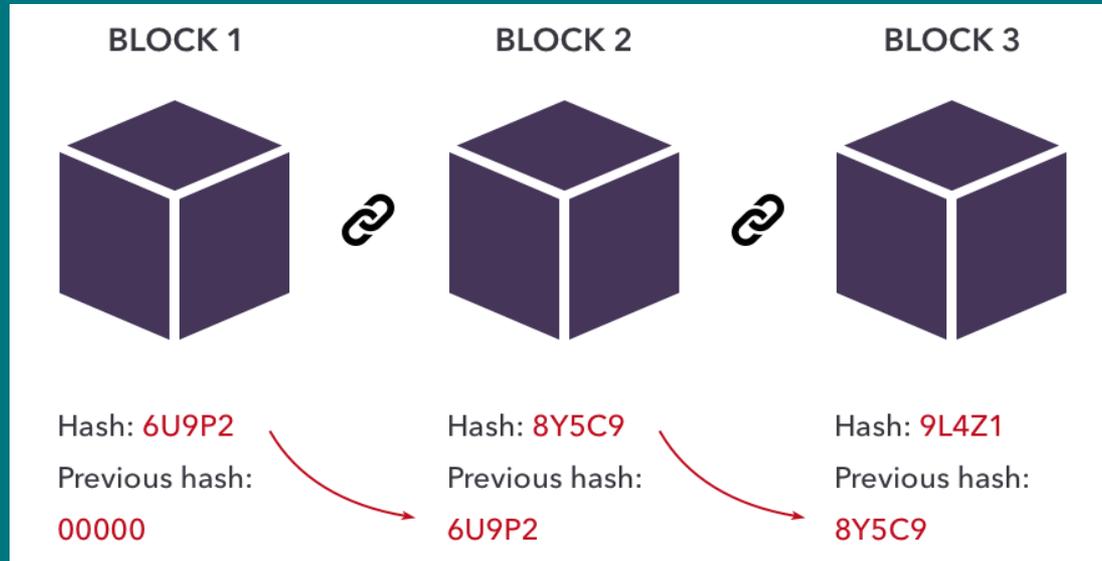
INVESTMENT RISKS

There are risks associated with obtaining, purchasing, and/or investing in cryptocurrency and other digital assets. Participation in any manner may involve risk of loss.

OVERVIEW of the Block Chain & Cryptocurrency

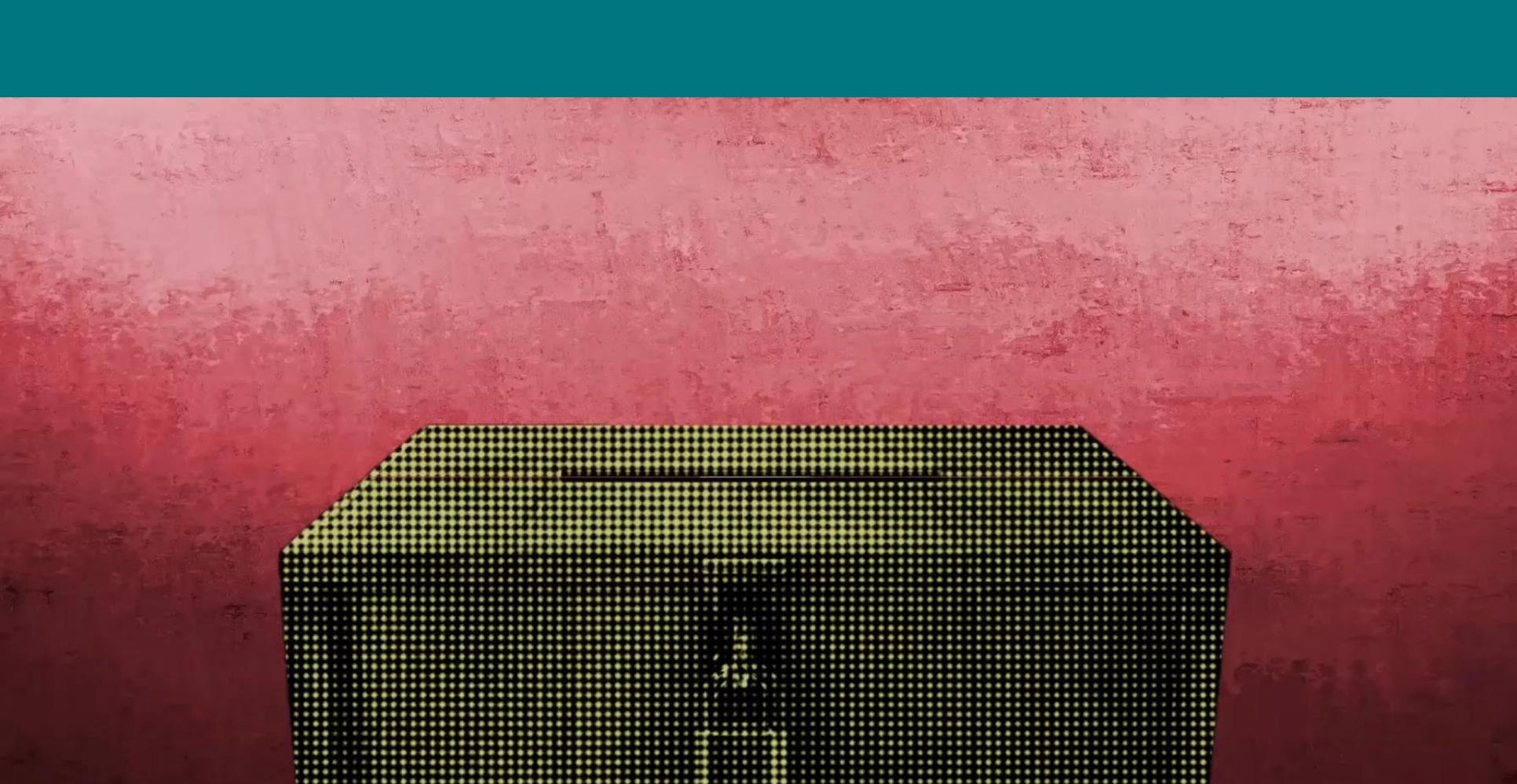


What is a Blockchain?



**Answer: a decentralized,
distributed ledger that
records the provenance of a
digital asset.**





So, who does own or operate the different blockchains?

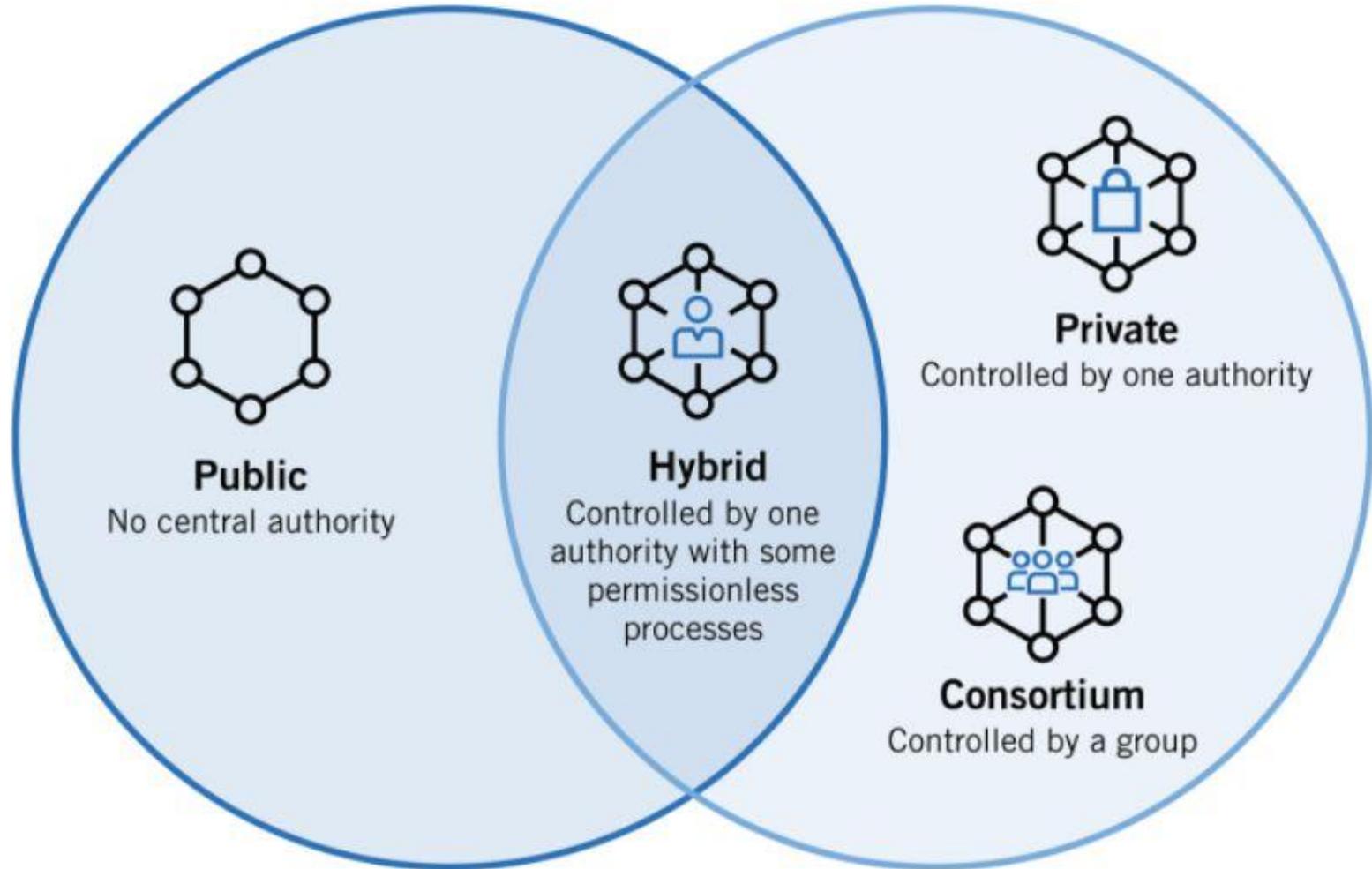
Who owns/operates the computers that are part of these networks?

Why would they do this?



Permissionless

Permissioned



Types of Blockchains

Public Blockchains: Mining

- **Verifying Transactions**
- **By solving computational puzzles, “Miners” compete to win rewards for their efforts**
- **Awarded transaction fees as well as new “mined” or “minted” (fractional) coins/tokens.**

- **“Proof of Work” versus “Proof of Stake”**
 - **PofW: requires physical hardware and immense amounts of power to solve complicated algorithms (costly)**
 - **PofS: can be done with basic computers but requires “staked” tokens/coins**
 - **Either way: other “nodes” must validate**



What sorts of things go on (or are recorded by) a blockchain?

- digital assets
 - currency
 - NFTs
 - information
 - contracts



DETOUR: NFTs



\$3,400,000.00



What is cryptocurrency?

- **Digital or virtual currency (money) utilizing cryptography (encoded) and (most of the time) blockchain technology**
 - **Held in digital “wallets”**
 - **Cannot be counterfeited**
 - **Admittedly, they are typically highly volatile (but they are also in their infancy)**
 - **IRS classifies cryptocurrencies as property subject to long-term and short-term capital gains taxes, just like any other asset.**
 - **What cryptocurrency is NOT . . . Fake money/stocks.**



When a cryptocurrency utilizes blockchain technology, you can think of it as a ledger of credits and debits (like a bank statement) that can be viewed publicly, but the sender & receiver remain anonymous. Again, it cannot be “hacked” or faked because of the security protocols.



Different types of cryptocurrencies/tokens

- **Cryptocurrencies** – meant to be digital money (volatile)
 - **Stable Coins** – value affixed to real-world asset like the U.S. Dollar
 - **USD Coin; Tether (not volatile)**
- **Altcoins/Tokens** – sometimes used as a store of value, but often times used for voting power and governance of the blockchain network
- **Meme Coins** – sometimes a literal joke, sometimes meant for “tipping”.





Detour: Memecoins & Market Cap

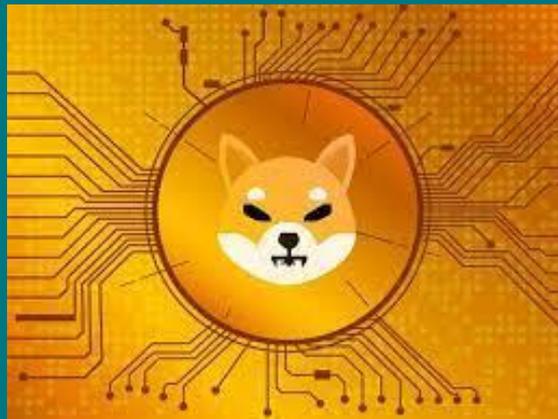
02/27/2019 TO 04/17/2022



CoinDesk

Detour: Memcoins & Market Cap

- You can purchase 1 million Shib for approx. \$ 28.00 USD
- 550 Trillion circulating supply
- \$1.00/coin = \$550 Trillion Dollars
- Total money in the world is estimated to = \$ 40 trillion
- Do you see the problem?



Market Cap Context

BTC = \$802 billion (9th most valued asset on earth)

Berkshire Hathaway = \$770 billion

* yea, BTC is bigger than Buffet

Samsung = \$367 billion

Proctor & Gamble = \$376 billion

Exon Mobile = \$374 billion



Rank	Name	Market Cap	Price	Today	Price (30 days)	Country
1	 Gold GOLD	\$12.369 T	\$1,947	-0.42%		
2	 Apple AAPL	\$2.729 T	\$167.23	-0.10%		 USA
3	 Saudi Aramco 2222.SR	\$2.307 T	\$11.55	-0.23%		 S. Arabia
4	 Microsoft MSFT	\$2.146 T	\$286.36	0.37%		 USA
5	 Alphabet (Google) GOOG	\$1.691 T	\$2,565	-1.75%		 USA
6	 Amazon AMZN	\$1.566 T	\$3,080	-2.60%		 USA
7	 Silver SILVER	\$1.399 T	\$24.86	-1.63%		
8	 Tesla TSLA	\$1.009 T	\$977.20	-4.96%		 USA
9	 Bitcoin BTC	\$803.20 B	\$42,240	0.92%		
10	 Berkshire Hathaway BRK-A	\$769.85 B	\$522,901	-0.07%		 USA
11	 Meta (Facebook) FB	\$573.00 B	\$200.42	-7.77%		 USA

So, what are the names of these coins and tokens?

- **First, understand that there are thousands of different cryptocurrencies, altcoins/tokens, memecoins, etc.**
- **Cryptocurrency: Bitcoin**
 - **Stablecoins: USD Coin & Tether**
- **Altcoins:**
 - **Ethereum, Litecoin, Solana, Chainlink, Tezzos, Cardano, etc.**
- **Memecoins:**
 - **Dogecoin & Shibalnu**





Bitcoin



Ethereum



Bitcoin Cash



Ripple



Litecoin



Ardor



Monero



Ethereum Classic



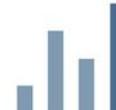
NEO



OmiseGO



Hshare



Ionomi



Qtum



Stratis



Tether



Zcash



Ark



Nexus



MaidSafeCoin



Bytecoin



Basic Attention Token



Dash



Golem



BitShares



EOS



Decred



Stellar Lumens



BitConnect



Augur



TenX



IOTA



NEM



Komodo



Waves

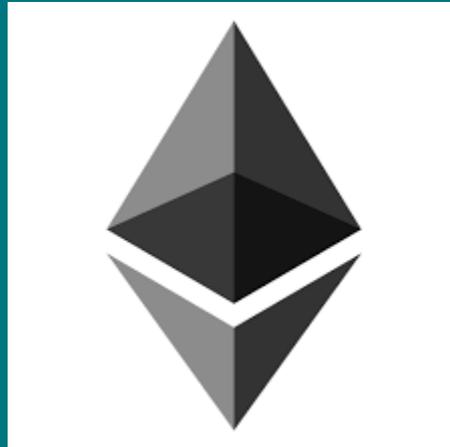


Steem



PIVX





Volatility of Bitcoin

11/03/2014 TO 04/17/2022



CoinDesk

Stability of stablecoins like USD Coin

USD Coin to USD Chart



Buying, holding (HODL), and Selling

- **Requires a Wallet**
- **Many wallets are tied to an Exchange**
 - **You can (and should) use physical “cold storage” wallets**
- **The major exchanges: Coinbase, Crypto.com, Kraken, Binance, & Gemini.**
 - **Cautionary exchanges: “Not your keys, not your coins” – CashApp, Robinhood, Venmo, Paypal (with these exchanges, you don’t fully own and control the cryptocurrency they sell).**
- **Buy and Sell based on the current exchange value**



Personal security in addition to the security provided by the blockchain itself:

Most exchanges not only have, but require 2FA

Wallet seed phrases
(wallet recovery)



Again, you can use physical “cold storage” wallets (which allows you to hold coins offline).



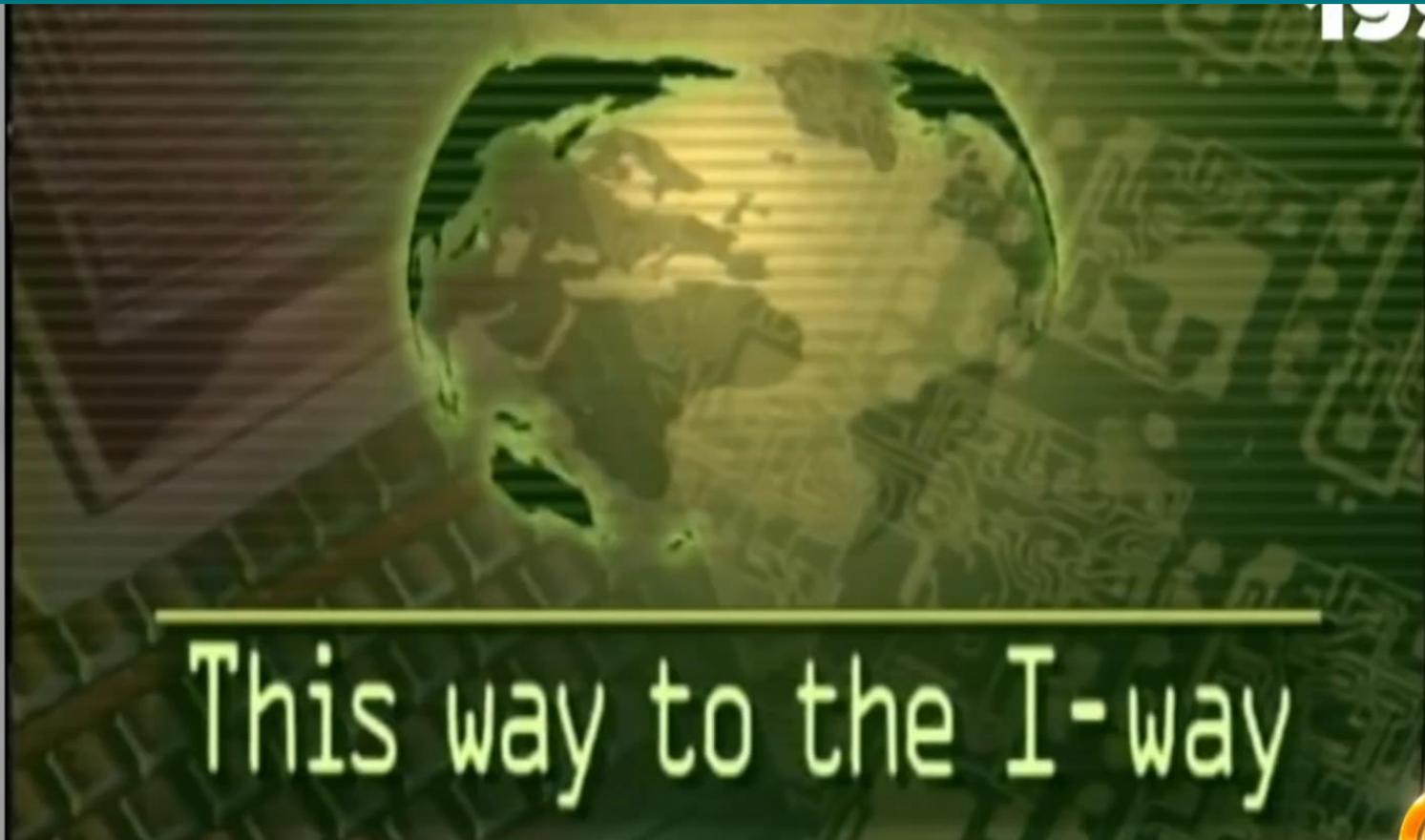
Paying with Cryptocurrency

- **This was a HUGE problem for a lot of years (know-how, slow, and costly)**
- **Best solution thus far: exchange issued debit cards**



Why should you care about any of this?

- Well, let's take a trip back to '94/'95



**Why should you care as
lawyers?**

**Like email and the internet
back in 1995, this
technology will change
how we conduct business
in ways we cannot even
comprehend.**



Why should you care?

Soon, if you haven't already, you are going to have divorce cases, transactional disputes, and other matters involving blockchain technology and cryptocurrency. It's coming.



Useful tip for attorneys:

All major exchanges can and will provide an excel sheet or pdf of ALL transactions of a given account upon request (this information is discoverable).



Ethics!

**Can lawyes accept cryptocurrency
as a form of payment?**

How about as a retainer?



Questions?



Thank You!

Robert A. Anderson, Jr.

Ellis County Attorney

(785) 624-0021

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Barton County Attorney

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Levi.morris@bartoncounty.net



TIME ON THE CLOCK?

Interesting possibility: How will this affect criminal prosecution?

- Self-driving cars**
- not owned by individuals**
- These cars will not commit traffic violations**
- No traffic tickets? No searches?**



Medicaid Planning Basics

Molly M. Wood, Attorney, Stevens & Brand, L.L.P

Friday, April 29th

8:00 – 8:50 a.m.



Molly M. Wood
MWood@StevensBrand.com
(785) 843-0811

April 29, 2022

MEDICAID ELIGIBILITY AND DIVISION OF ASSETS: REVIEW OF THE BASICS

It is a cliché to refer to the Medicaid eligibility rules as “byzantine,” but it’s true. When representing clients who are seeking assistance with the cost of long-term care, the first obstacle the elder law practitioner encounters is the law’s layers of sources including federal law,¹ regulation² and policy,³ state law,⁴ regulation⁵ and policy,⁶ and both federal and state case law.⁷

I. MEDICAID AND LONG-TERM CARE

Medicaid is a welfare program, that is, a Medicaid applicant must demonstrate that he or she does not retain more than \$2,000 in “non-exempt resources,” among other things, to establish eligibility.⁸

A. Eligibility

A brief review of the eligibility rules: Applications for medical assistance with the cost of nursing facility care are submitted to the KanCare Clearinghouse. Applicants for long-term care assistance must meet a four-part eligibility test.

¹ See 42 U.S.C. §§ 1396p and 1396r-5; 38 U.S.C. §1501 *et seq.*

² 20 C.F.R. §§ 416 *et seq.*; 39 C.F.R. 3.1 *et seq.*

³ Social Security's Program Operations Manual System (POMS) can be found at: <https://secure.ssa.gov/apps10/poms.nsf/aboutpoms>.

⁴ See K.S.A. 39-709.

⁵ K.A.R 129-6-34 *et seq.*

⁶ The latest version of KDHE’s operating policy, the Kansas Economic and Employment Services Manual – KEESM – can be found at:

https://khap2.kdhe.state.ks.us/KEESM/Apr_2022_Output/2022_Final.htm

⁷ See, for example, *Miller v. SRS*, 275 Kan. 349, 64 P.3d 395 (2003); *Brewer v. Schalansky*, 278 Kan. 734, 102 P.3d 1145 (2004); *White v. Kansas Health Policy Authority*, 198 P.3d 172 (2008); *Brown ex rel. Brown v. Day*, 555 F.3d 882 (10th Cir. 2009); *Hutson v. Mosier*, 401 P.3d 673 (Kan. App. 2017); *Baker v. Brown*, 479 F.Supp.3d 1182 (W.D. Okla. 2020).

⁸ KEESM 5130.

1. Medical Need

Nursing home care, whether skilled, intermediate, or custodial, must be the appropriate level of care for the medical assistance applicant. In Kansas, anyone seeking nursing facility care must be assessed to determine whether he or she needs a nursing home level of care – a CARE assessment, and the method for doing that is through the Kansas Department of Aging and Disability Services (KDADS).

Long Digression . . . A nursing home resident obviously meets the “nursing home level of care” that is documented by a CARE assessment, but all potential nursing home residents must be assessed, even those who are paying privately for their care so as to develop individualized information on long-term care options and appropriate placements in long-term care facilities.⁹

So even though the Medical Need test question – Do you meet a nursing home level of care? – seems as though it should be straightforward, here are a couple of problems:

- There are lots of folks who are living at home who would, if assessed, meet a nursing home level of care, but are not in nursing homes because they have family members – mostly spouses, but also adult children and others – or paid helpers, who are providing enough care to keep them at home. So their functional limitations are not documented.
- If you are married, how do you trigger the snapshot that sets the protected resource amount for the Community Spouse under Division of Assets when you meet a nursing home level of care but do not want to be institutionalized? Contact the local Area Agency on Aging and ask them to complete a “functional assessment” on the client for purposes of documenting if they meet the medical criteria. They will document the need on Form ES-3160. The month this form is completed showing that the client meets the medical criteria and chooses to receive Home and Community Based Services (HCBS) is the month used to determine the Community Spouse Resource Allowance under a Division of Assets.¹⁰

2. The Income Test

Kansas does not have a specific income limitation for eligibility. Rather, if the Medicaid applicant’s countable income is less than the applicant’s cost of care at the nursing facility, the applicant meets the income test.¹¹

Once a Medicaid applicant becomes eligible for nursing facility assistance, most of his income will be used to meet his patient liability (a/k/a “client obligation”), and he will retain only \$62 for his personal use.¹² For a single person without dependent minor children, therefore, all of the Medicaid recipient’s income would normally be applied to nursing home expenses except the amount he pays in premiums for health insurance –

⁹ See K.S.A. 39-931a & 39-968; K.A.R. 26-9-1 & 120-1-2.

¹⁰ KEESM §8244.1.

¹¹ KEESM §8172.2.

¹² KEESM §8160(2).

Medicare supplemental insurance and, sometimes, dental¹³ – for himself and his \$62/month personal needs allowance. Only a Medicaid recipient with qualified dependents—spouse and minor children or adult disabled child—could divert income to those dependents’ support and shelter and pay less toward the cost of his care.¹⁴

Short Digression . . . Muir v. Kansas Health Policy Authority, 334 P.3d 876 (Kan.App., Sept. 5, 2014). Medicaid recipient not permitted to deduct court-ordered child support and maintenance payments from available income.

3. The Resource Test

A Medicaid recipient cannot retain over \$2,000¹⁵ in available,¹⁶ non-exempt resources. Except for the special Medicaid rules permitting division of assets (married applicants), the resource rules are drawn from the law and regulations governing eligibility for Supplemental Security Income (SSI) which deal with the availability and exempt status of resources.¹⁷ Practitioners can also rely upon the large body of case law in this area for guidance.¹⁸

a. **Exempt** resources include:

- A home and contiguous acreage valued at less than \$636,000.¹⁹ At least for the first 6 months of institutionalization, an applicant is entitled to exempt the home even if there is no real expectation that he or she will be able to return home.²⁰
- A car of any value.²¹
- Household goods, tools, personal effects, family keepsakes, memorabilia.²² Guns?
- Life insurance with a face value of \$1,500 (regardless of built-up cash value) or less, and unlimited term insurance.²³
- Contract Sales. A contract from the sale of real or personal property is exempt if the property is sold at fair market value, is actuarially sound, the proceeds are attributable as income, and the income is commercially reasonable.²⁴

¹³ But not Part D prescription drug coverage, because a Medicaid recipient is eligible for “zero premium” coverage of Part D, unless you opt to pay for coverage and the premium is over the benchmark.

¹⁴ KEESM §8144.2 (institutional LTC).

¹⁵ KEESM §5130.

¹⁶ KEESM §5200(3).

¹⁷ 20 C.F.R. §§416 *et seq.*

¹⁸ For a comprehensive treatment of Medicaid and SSI cases, law, and regulations, see Dayton, Garber, Mead, and Wood, *ADVISING THE ELDERLY CLIENT* (Thompson/West 2022).

¹⁹ KEESM §5331.1; the cap on the homestead exemption is not applicable when a spouse or dependent or disabled child resides there. §5331.1(1)(a), (b), and (c).

²⁰ KEESM §5331.3.

²¹ KEESM §5520.

²² KEESM § 5430(12), (14), & (21).

²³ KEESM § 5430(17).

- Annuities, IF they are irrevocable, actuarially sound, have no cash value, and Kansas Estate Recovery is named as the primary contingent beneficiary (or the secondary contingent beneficiary, if the annuitant is married) if the Medicaid recipient dies before the annuity payments terminate.²⁵
- Burial plans.²⁶ The recipient can have a revocable burial fund set aside up to \$1,500 **or** an irrevocable plan up to \$7,000, not including the burial plot or mausoleum, headstone or grave marker, or casket.²⁷
- Real property, equipment or materials used in an income-producing trade or business.²⁸

b. All other resources are non-exempt, including, but not limited to:

- Cash, stocks, CDs, mutual funds, savings bonds, etc.
- Fair market value of real estate other than the home and contiguous acreage.
- Cash value of life insurance policies of which the applicant or the applicant's spouse is the owner (except if the total face value per person does not exceed \$1,500).²⁹
- Resources available to the applicant as the beneficiary of a grantor trust created *after* August 10, 1993, assets of a Medicaid applicant conveyed to a trust (other than by Will) for the benefit of the individual or the individual's spouse are considered available, regardless of the purposes of the trust, if the trust is revocable, or, if irrevocable, the trustee has any discretion with respect to distributions of principal or income.³⁰ Transfers to irrevocable trusts in which all or part of the corpus is unavailable to the applicant will bring into play the transfer penalty provisions.³¹
- Trust property – When owned by a trust, real property is countable, regardless of other potential exemptions.³² NOTE: To be considered exempt, therefore, the home cannot be owned by the applicant's trust.

B. Division of Assets (a/k/a Spousal Impoverishment)

Division of assets modifies the resource test (<\$2,000 of non-exempt resources) in the context of a well spouse (a/k/a “community” spouse) remaining in the community.³³

²⁴ KEESM § 5430(7).

²⁵ KEESM § 5630 *et seq.*; Section 6012 of the Deficit Reduction Act of 2005.

²⁶ KEESM § 5430(2).

²⁷ KEESM § 5430(2) & (3).

²⁸ KEESM § 5332 & KEESM § 5430(15); 42 U.S.C. §1382b.

²⁹ KEESM 5430(15)(b).

³⁰ K.S.A. 39-709(e)(3).

³¹ KEESM § 5434.1; 42 U.S.C. § 1396p(d).

³² KEESM 5340 Nonexempt Real Property – [. . .] Trust Property - When placed in a trust, real property is considered.

1. The community spouse retains all the exempt property. She may wish to transfer all the retained property into her sole ownership for ease of management or estate planning purposes.

PRACTICE TIP: The work-related pension funds of the community spouse—Keogh plans, IRAs, 401(k)s, etc.—are not countable against the community spouse’s resource allowance.³⁴

2. When the Medicaid applicant is otherwise eligible, typically at the time of institutionalization, all the non-exempt resources of the married couple are pooled, regardless of ownership and regardless of pre- or -post-nuptial agreements—the so-called “snapshot” of the marriage partnership’s total non-exempt resources—and a portion is set aside for the community spouse. The community spouse retains a minimum of **\$27,480** (2022), and a maximum of **\$137,400** (2022);³⁵ therefore, if the total non-exempt resources of the couple are greater than \$54,960 (2 x \$27,480) and less than \$274,800 (2 x \$137,400), the community spouse retains one-half of the couple’s non-exempt resources. This amount is designated the “community spouse resource allowance.”

3. After the institutionalized spouse has spent his share down to the protected \$2,000 amount, he has met the resource test. (Actually, it would be more precise to say that once the combined non-exempt resources of the marriage partnership are reduced below the community spouse resource allowance as determined through the Division of Assets process, plus \$2,000, the applicant has met the resource test.)

Proper spenddown techniques include:

- purchase of prepaid exempt burial plans for both marital partners;
- pay off or reduce the principal on any loans, including a mortgage;
- any and all improvements and repairs to the exempt home;
- any and all improvements to exempt income-producing property;
- upgrade of exempt family car;
- payment of medical and other expenses for both marital partners;
- payments to care providers under an appropriate personal services contract.³⁶
- purchase of a “Medicaid compliant annuity”

³³ KanCare’s general operating procedure with respect to Division of Assets is found at KEESM §§8140 & 8240 *et seq.*

³⁴ KEESM § 5430(20)(c)(iii); but see *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162 (10th Cir. 2004).

³⁵ KEESM § 8144.1(1). Amounts in bold are for 2022 and increase annually with cost of living adjustments. See also Form ES-3162.

³⁶ See K.S.A. 39-709(e) (4).

4. The community spouse of a Medicaid recipient is also potentially eligible for a spousal income allowance, sort of a "division of income," in which her income can be supplemented up to **\$2,177.50** (as of July 2021)³⁷ (known as the Minimum Monthly Maintenance Needs Allowance, or "MMMNA") from the income of the institutionalized spouse after the Medicaid applicant has become eligible. Community spouses who pay rent, have mortgage payments, or high costs of property taxes and homeowners insurance premiums, can become eligible for an additional amount—an "excess shelter allowance"—of up to \$1,257.50 per month. The maximum Community Spouse Income Allowance as of July 2021 is \$3,435.³⁸

PRACTICE TIP: Pre-eligibility transfers between spouses are exempt from the transfer penalty provisions.³⁹ Therefore:

- *Generally*, the home should be transferred to the community spouse.
- Significant income-producing property should ordinarily be transferred to the community spouse so that all the income is attributable to him/her and not countable as part of the Medicaid eligible spouse's income for client obligation calculation purposes.
- Purchase of an actuarially sound, irrevocable, annuity which pays equal payments (no balloon) to the Community Spouse -- a Medicaid compliant annuity -- is an opportunity to transfer "spenddown" excess resources by converting a non-exempt asset into a stream of income attributable to the Community Spouse.

C. Transfers

Transfers for less than adequate consideration – gifts – may incur eligibility penalties if the transfers took place within 5 years of application for Medicaid assistance. The penalty is calculated by taking the total amount of the gift and dividing that amount by \$221.96 (April 2022)⁴⁰ which produces the number of penalty days. The Medicaid applicant who is *otherwise eligible* is not eligible for Medicaid during a penalty period, which gets him or her in hot water with the nursing home.

1. KDHE defines transfers that may incur a penalty to include:

- Purchase of an annuity or insurance plan to make the resource value unavailable except as income, *unless* it is "Medicaid compliant."⁴¹

³⁷ KEESM §8144.2(1)(a); see also Form ES-3163.

³⁸ KEESM §8144.2(1)(b); see also Form ES-3163.

³⁹ KEESM §5721(8).

⁴⁰ KEESM § 5724.4. The penalty divisor is adjusted quarterly to reflect the average daily cost of nursing facility care in Kansas.

⁴¹ KEESM § 5720. KEESM 6220.2 explicitly defines annuities as "countable unearned income." KEESM 5630 describes an annuity as "a contract or device which conveys a right to receive a

- Disclaimer of an inheritance⁴² or failure to exercise spousal election⁴³ which diminishes the applicant's resources;

PITFALL: If the community spouse dies first, the institutionalized spouse has a right to an elective share, right? So don't be in a hurry to permit the survivor to be disinherited.

- A triggering event which makes a revocable trust irrevocable; and
- Addition of other owner in joint tenancy or as remainderman to real property.⁴⁴

PRACTICE TIP: One can “cure” a problematic transfer at any time by restoring the transferred asset to the applicant.⁴⁵

2. Exempt transfers include:

- Transfers beyond the lookback period;⁴⁶
- Transfers of the institutionalized person's home to the spouse, a child under age 21 or an adult child who is blind or disabled, a sibling with an equity interest in the home and who was residing in the home for one year immediately before institutionalization, or an adult child who has resided in the home for two years before institutionalization and who provided care permitting the applicant to stay at home;⁴⁷
- Transfers at or near fair market value;⁴⁸
- Transfers pre-approved by KDHE;⁴⁹ and
- Transfers of assets to the spouse or conservator or relative, if the assets are used solely to support the community spouse.⁵⁰
- Transfer to a 42 U.S.C. 1396p(d)(4)(C) pooled supplemental needs trust.

CASE LAW NOTE: Funding of a d(4)(C) Trust by Medicaid Applicant
>64-years-old

Hutson v. Mosier, Kansas Ct. of Appeals, 54 Kan.App.2d 679 (2017)

Transfers into the ARCare Trust II and other pooled supplemental needs trusts are clearly exempt from transfer penalty IF the Medicaid application is under age 65, but the statutory analysis for disabled applicants age 65 and older is not clear. Ms. Huston

fixed, periodic source of income for a specified period of time.” See, also, Section 6012 of the Deficit Reduction Act of 2005.

⁴² KEESM § 5722(3).

⁴³ KEESM § 2124.1(4).

⁴⁴ KEESM § 5720.

⁴⁵ 42 U.S.C §1396p(2)(C); KEESM § 5721(10).

⁴⁶ KEESM § 5721(1).

⁴⁷ KEESM §5721(2)(a-d).

⁴⁸ KEESM §5721(9).

⁴⁹ KEESM §5721(6).

⁵⁰ KEESM §5721(8).

transferred approximately \$60,000 into a pooled supplemental needs trust prior to applying for Medicaid. The Court held that persons over 64 who transfer assets to a pooled supplemental needs trust under 42 U.S.C. 1396(d)(4)(C) are subject to the transfer penalty IF the transfer is for less than fair market value. However, the court also found that the determination of fair market value of property- whether real or personal- is generally a question of fact. The case was remanded to the Office of Administrative Hearings to rule on whether fair market value for the transfer was received, however the plaintiff died before the hearing on remand.

PRACTICE TIP: Pre-eligibility transfers between spouses do not incur transfer penalties.⁵¹ This exception creates some planning opportunities. Depending upon the relative health of the spouses, it is usually a good idea to convey ownership of the home or other exempt property to the community spouse. The community spouse can, after the institutionalized spouse becomes eligible for assistance, liquidate the house and use the proceeds as she chooses, because under the federal law⁵² there is no post-eligibility assessment of the assets of the community spouse.

3. Suggestions for addressing a transfer penalty:
 - Promissory note – convert the gift into a loan and set up a payment schedule that the donee can manage. NOTE: Be on the lookout for issues arising from “self-dealing” if the donee is the attorney-in-fact.
 - Cure the gift, that is, the donee either returns the gift voluntarily or pays the long-term care expenses until the penalty period expires.
4. Medicaid Divorce -- Is divorce ever an option?
 - a. Do Medicaid liens change anything? Spouse’s estate is subject to estate recovery, therefore, divorce cuts off claim or lien.
 - b. Consider a divorce when:
 - Enforceable Prenuptial Agreement which produces a more desirable outcome than Division of Assets methodology.
 - Inherited property which has not been co-mingled.
 - Other assets to protect, for example the family farm.
 - Large disparity in ages or health (or both) of spouses.

PRACTICE TIP: Proceed with caution.

- Medicaid may take a close look at a divorce that looks like it was for the purpose of achieving Medicaid eligibility.
- Be careful about a property settlement agreement – recitation that agreement was “fair, just, and equitable.” Is it really?
- Consider an equitable division of the assets.

⁵¹ KEESM §5721(2)(a) & (8).

⁵² 42 U.S.C. §1396r-5.

II. ESTATE RECOVERY

Since 1993, the federal government mandated estate recovery against, at least, the probate estate of the Medicaid recipient, and Kansas has had an estate recovery program since 1992. Kansas's estate recovery program was generally limited to the probate estate and Transfer/Pay on Death designations, but the Kansas legislature expanded the definition of estate for medical assistance recovery purposes and imposed a pre-death lien provision in 2004,⁵³ and added a post-death lien provision in 2013.⁵⁴

A. The State has a **claim** for the amount of medical assistance provided against any property owned by the Medicaid recipient or her spouse at or immediately prior to the death of the survivor. The 2004 Kansas legislature clarified estate recovery's reach in amendments to K.S.A. 39-709(g)(3) by instituting a new definition of the "all real and personal property and other assets in which the deceased individual had any legal title or interest immediately before or at the time of death to the extent of that interest or title. The medical assistance estate includes, without limitation, assets conveyed to a survivor, heir or assign of the deceased recipient through joint tenancy, tenancy in common, survivorship, transfer-on-death deed, payable-on-death contract, life estate, trust, annuities or similar arrangement." In cases involving a decedent's estate, the claim will be a first class claim against the estate of the deceased person. Payments of reasonable funeral expenses are the only allowable claim superior to a medical assistance claim.

1. The claim may not be collected while the deceased Medicaid recipient has a surviving spouse, but the claim may be asserted against the survivor's estate.
2. An adult disabled or minor dependent child can defer the estate recovery claim, too.
3. Credit against estate recovery claim for every dollar paid by long-term care insurance.

B. Since 2004, the state has been authorized to file and enforce a **pre-death lien** against the real property of a living recipient of medical assistance—usually the home, but it could include the acreage contiguous to the home — when the property is not occupied by a spouse or other qualified dependent.⁵⁵ Although the lien may only be enforced upon competent medical testimony that the Medicaid recipient cannot reasonably be expected to return home, once the fair market value of the real property is consumed by the lien, HMS may force the sale of the real property to satisfy the lien. (The lien "will be dissolved" if the nursing facility resident gets well enough to return home, however.) If the medical assistance recipient has a spouse, a minor child, an adult disabled child, or a sibling who's

⁵³ K.S.A. 39-709(g)(2); KEESM 1725 *et seq.*

⁵⁴ K.S.A. 39-709(g)(3).

⁵⁵ K.S.A. 39-709(g)(4-7).

resided in the home for at least one continuous year, HMS cannot enforce the lien.⁵⁶

PRACTICE TIP: It is generally advisable to transfer the home and other exempt property to the sole ownership of record of the community spouse, if possible. This transfer does not incur a penalty but, of course, does not cut off the institutional spouse's inchoate claim on the real property or an estate recovery claim at the death of the survivor.

C. **Post-death lien.** K.S.A. 39-709(g) (4) (substitute for HB 2183 – expansion of estate recovery) became effective on July 1, 2013:

- Requires KDHE to notify estate recovery (HMS) within 60 days of becoming aware of death of a Medicaid recipient; and
- Permits state to “place a lien on any interest in real property owned by” a Medicaid recipient after death within one year. NOTE: One-year exposure to lien provision exceeds non-claim period for creditors.

⁵⁶ These exemptions parallel the protected transferees in federal regulation and state operating procedure.

Ethics Refreshers (Ethics)

Gayle B. Larkin, Disciplinary Administrator,
Kansas Judicial Branch

**Friday, April 29th
9:00 – 9:50 a.m.**

**Materials for this session include Q&A.
As such, they will be emailed to
attendees following the CLE program.**

Kansas eCourt Rules

John T. Houston, Assistant General Counsel,
Kansas Supreme Court
Office of Judicial Administration

**Friday, April 29th
10:00 – 10:50 a.m.**



Kansas eCourt Rules

John T. Houston

OJA – Assistant General Counsel

April 29, 2022



Disclaimer -

- To the extent that any personal opinions are expressed during this presentation, they are mine, and mine alone. They do not necessarily reflect the views of the Kansas Supreme Court, the Office of Judicial Administration, or the Kansas Judicial Branch. In other word, don't begin your legal argument with "*John said....*"
It won't help you!

RULES
ADOPTED BY THE
SUPREME COURT
OF THE
STATE OF KANSAS
2021 Edition



OFFICIAL REPORTER
SARA R. STRATTON
RULES AND ANNOTATIONS EDITOR
CHRISTOPHER STILLIE

Rules include amer



Kansas Supreme Court Rules 20-25

- Can also be located at -
<https://www.kscourts.org/KSCourts/media/KsCourts/Rules/Website-Rulebook.pdf>

Change is nothing to fear





Rule 20 – Prefatory Rule

- (b) Purpose
 - Centralized case management system
 - Standard case filing procedures
 - Allows for workshare
 - Expands access to case records via internet
 - Balance public right to know vs. protecting sensitive information

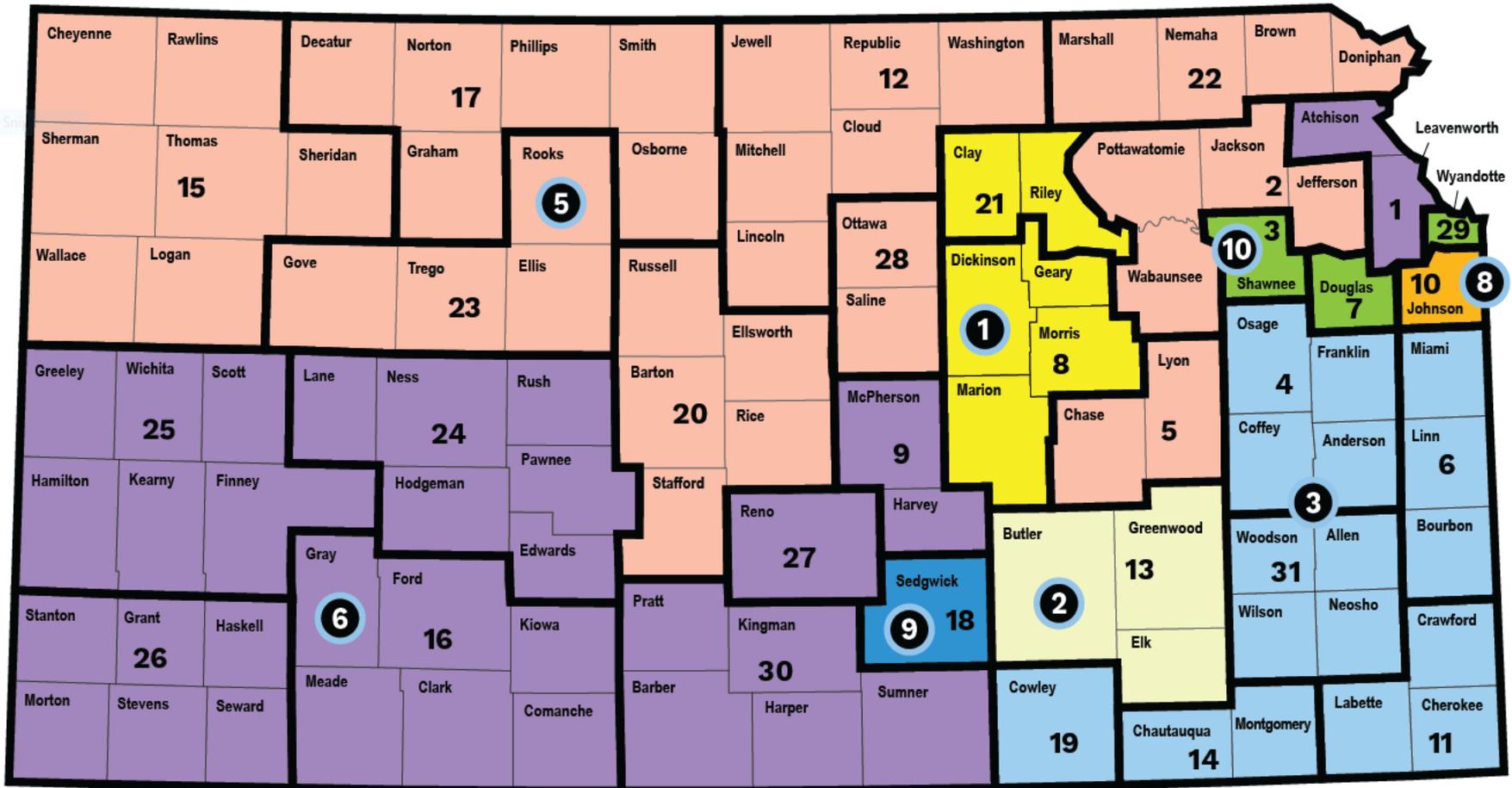


Rule 20 – Continued

- (d) Applicability
 - Only applies if court has converted to Centralized Case Management System (CCMS) (f/n/a Odyssey)
 - Does NOT apply if court still using FullCourt/JIMS



Statewide rollout plan





Rule 21 - Definitions

- Most eCourt rule definitions are found here
- Many terms are familiar
- Some new terms –
 - Courthouse terminal
 - Events index
 - Nondocketable event
 - Nonpublic case record
 - Public access portal



Public access portal

- Internet based
- Access to most documents
- No need to file limited entry of appearance to view documents
- Free!!!

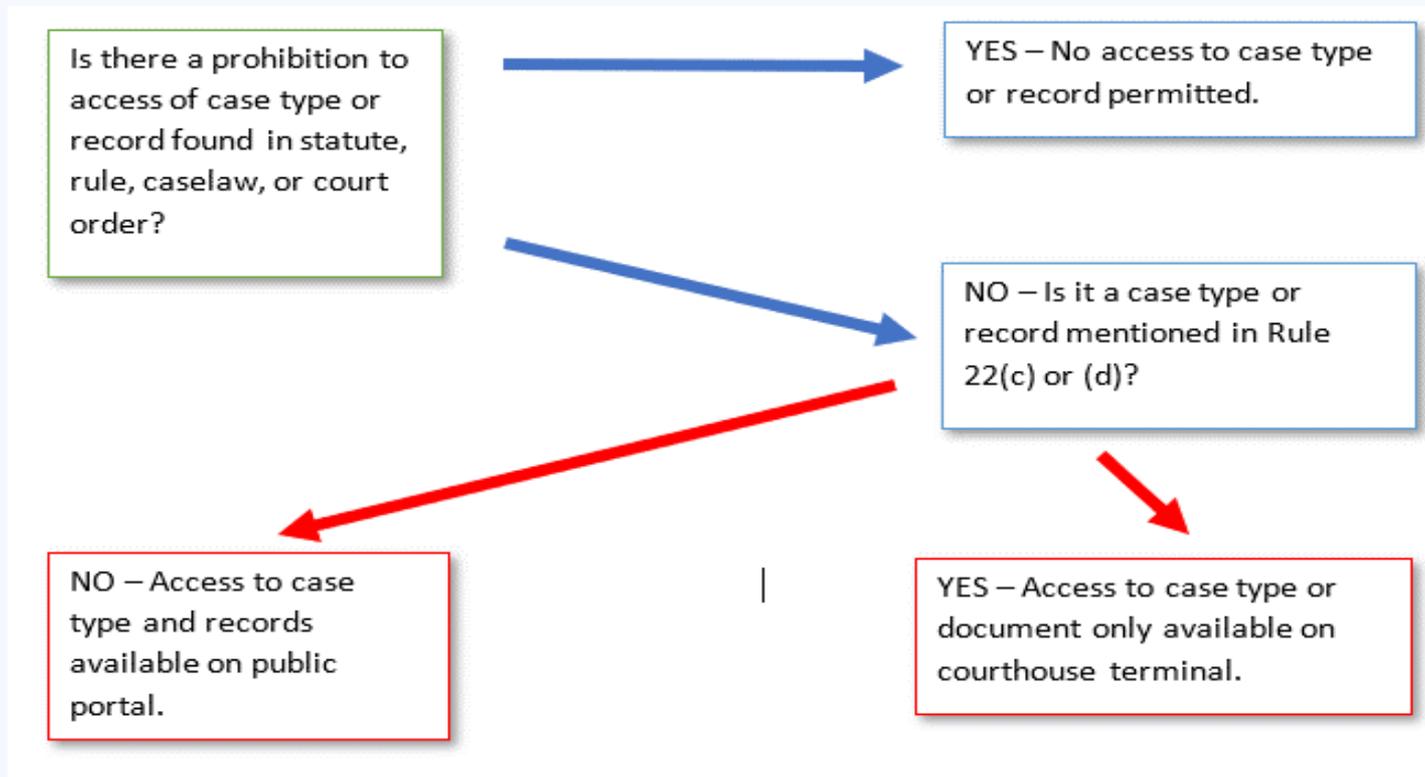


Courthouse terminal (kiosk)

- Public access portal +
- Access to case types or public documents considered sensitive
- Only at courthouse
- No access to case types or documents prohibited by statute, Rule, caselaw, or court order



Rule 22 – Access to Public Electronic District Court Case Records





Types of cases not on public portal

- Adoptions
- Care and treatment
- Child custody
- CINC
- Divorces
- PFA/PFS
- Etc.



Types of documents not found

- Coroner reports
- Marriage license documents
- PSI
- Probable cause affidavits
- Trial exhibits
- Warrants (unexecuted)
- Etc.



Advantages/Disadvantages

- Pros

- Access to most documents and cases anywhere you have internet access
- FREE searching
- FREE documents
- No need to file limited entry of appearance

- Con

- Must go to courthouse to look at some case types and documents
- In limited situations, access may be more restrictive



Confused???





Rule 23 – Filing in a District Court

- (a) Filing user's obligations
 - Designate correct case and document type
 - Sealed?
 - Certify document complies with PII rule
 - Court does not have to verify compliance
 - But can segregate document from public view until compliance checked



Rule 23 - continued

- (b) Filing under seal
 - Already an existing order?
 - Should be an order?
 - Is there a document already filed that should be sealed?

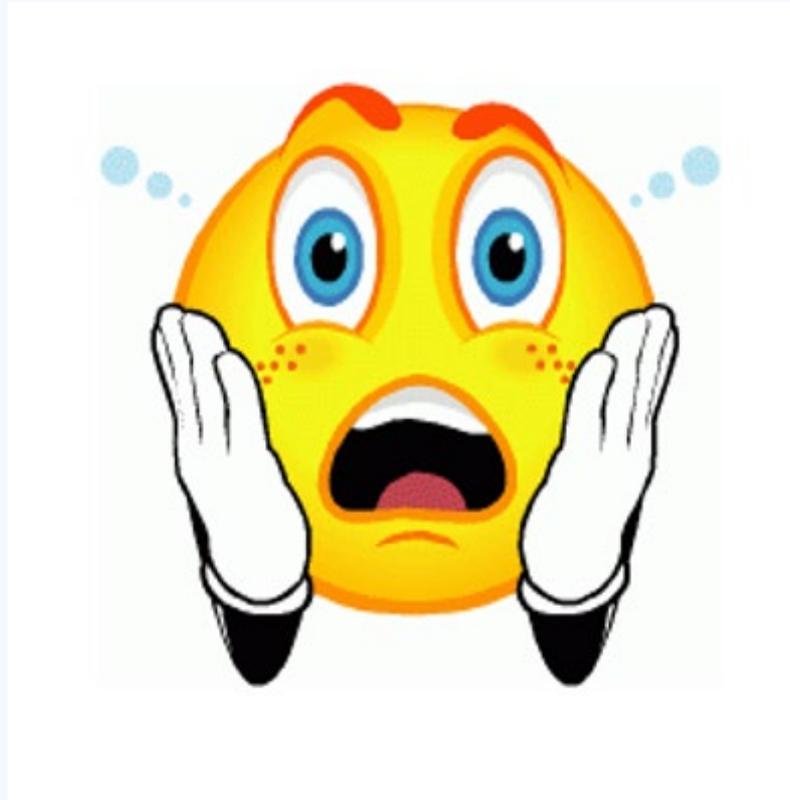


Rule 23 - continued

- District Court Clerk processing of efiled document
 - Only 4 reasons to reject pleading –
 - Illegible or will not open
 - Insufficient space for file stamp
 - Wrong county, case number, or caption
 - Fee not paid
 - Clerk must tell you why it is rejected
 - Clerk must process within 4 business hours and file stamp will be for the day it is submitted
 - *NOTE: Some technical issues may cause rejection of document – until fix can be put in place, short term Administrative Orders may fill the gap*



And now, it gets more difficult





Rule 24 – Protection of Personally Identifiable Information

- Section (a) -
 - Filer is solely obligated to make sure no confidential personally identifiable information is in a document
 - Filer must certify at the time of filing that document complies with rule
 - District court clerk has no obligation to review document to ensure compliance



Rule 24 – continued

- Section (b) -
 - Personally identifiable information includes:
 - Names of minors (not a party to the case)
 - Names of petitioners in PFA/PFS cases
 - Dates of birth (except birth year)
 - Email addresses (except as req'd by statute or rule, e.g., Rule 111)
 - Computer username, password & PIN



Rule 24 – continued

- Numbers (except last 4) that can be used to identify, including:
 - SSN, TIN, EIN
 - Bank, credit/debit cards
 - Driver's license
 - Loan account
 - VIN
- Physical address of individual's residence



Rule 24 – continued

- Section (c) - Exceptions
 - Identifies property alleged to be subject of proceeding
 - Emancipated minor
 - Case maintenance info not open to public
 - Information believed to be relevant and material to issue before court
 - Initials
 - Required by statute or rule



Rule 24 – continued

- Section (d) - Still have to supply PII when initiating new case
 - Used for administrative purposes
 - Not available to the public
- Section (e) – Filer must certify that PII not in document
- Section (f) - Failure to exclude PII could result in sanctions



Don't fret...read the **WHOLE** rule





Rule 25 – Expanded Access

- Some groups have statutory right to information over and beyond public or courthouse terminal access
- Special access to information, including PII
- Intended for governmental agencies and private entities acting as subcontractors for governmental agencies



Rule 25 - Continued

- These include:
 - Law enforcement
 - District/county attorneys
 - Court trustees
 - Others TBA
- Supreme Court has designated OJA to work with these groups to develop expanded access



Questions?



Kansas Judicial Branch



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Rule 20

PREFATORY RULE

- (a) **Kansas eCourt Rules.** This set of rules when referred to as a whole will be identified as the Kansas eCourt Rules.
- (b) **Purpose.** The Kansas Supreme Court has developed a centralized case management system that maintains case records of the Kansas judicial branch. The case management system provides efficient, effective court operations and increases access to justice for the people of Kansas. This set of rules standardizes the processing of case filings to provide consistent user experience and allow for workshare among judicial branch employees. These rules expand access to case records available publicly through an internet, browser-based access point using a public access portal. These rules balance the importance of protecting the interests of parties participating in the judicial system, including personally identifiable information and proprietary business information, with the goal of expanding access to case records and increasing transparency of the judicial branch.
- (c) **Statutory References.** In these rules, a reference to a statute includes any subsequent amendment to the statute.
- (d) **Applicability.** Unless otherwise indicated, these rules apply to courts as the Kansas eCourt case management system is implemented.

[**History:** New rule adopted effective June 14, 2019; Am. effective June 12, 2020.]

Rule 21

DEFINITIONS

- (a) **“Attachment”** means a document efiled simultaneously with a pleading that is referenced within the pleading as support for the filing user’s statement of facts or legal argument.
- (b) **“Business hours”** means the hours of the day the court is open to the public to conduct court-related business.
- (c) **“Case management system”** means the Kansas judicial branch system to receive, maintain, and store electronic case records in an internet, browser-based format.
- (d) **“Case record”** means all electronic documents filed in a case. Each document in a case record must either be certified by the filer as compliant with Rule 24 or be filed under Rule 23(b).
- (e) **“Certification”** means that an attorney or a party if not represented by an attorney certifies that, to the best of the person’s knowledge, the document being submitted for filing complies with requirements of K.S.A. 60-211(b).
- (f) **“Citation”** means:
 - (1) a Uniform Notice to Appear and Complaint issued by a law enforcement officer to a person alleged to have violated any of the statutes, rules, or regulations listed in, or authorized by, K.S.A. 8-2106 when signed by the officer and filed with a court having jurisdiction over the alleged offense;
 - (2) an electronic citation as that term is defined by K.S.A. 8-2119; and
 - (3) a citation, as defined by K.S.A. 32-1049a(b), by a conservation officer or employee of the Kansas Department of Wildlife, Parks, and Tourism having law enforcement authority as described in K.S.A. 32-808 to a person alleged to have violated any of the wildlife, parks, or tourism statutes, rules, or regulations listed in, or authorized by, K.S.A. 32-1049(a) when signed by the officer or employee and filed with a court having jurisdiction.
- (g) **“Courthouse terminal”** means a computer terminal available to the public to access public case records at a courthouse. The courthouse terminal may be in a kiosk.
- (h) **“Efiling”** means the submission of a document through the use of either an approved district court electronic filing system as defined in Rule 122 or the appellate courts’ electronic filing system as mandated by Rule 1.14.
- (i) **“Efiling interface”** means the contact point where a filing user submits an electronic document.

- (j) **“Electronic access”** means access to case records available to the public through a courthouse terminal or remotely through the public access portal, unless otherwise specified in these rules.
- (k) **“Events index”** means items listed in a chronological index of filings, actions, and events in a specific case, which may include identifying information of the parties and counsel; a brief description or summary of the filings, actions, and events; and other case information. The events index, also referred to as the register of actions, is a record created and maintained by the judicial branch only for administrative purposes that is not part of the case record. The events index must comply with Rule 24.
- (l) **“Filing user”** means any individual who is authorized to submit a document through the Kansas Court eFiling System. This term does not include the following individuals when acting in their official capacity:
 - (1) an employee of the Kansas judicial branch;
 - (2) a judge of the district court as defined by K.S.A. 20-301a;
 - (3) a temporary judge assigned as described by K.S.A. 20-310b(a); or any retired justice of the Supreme Court, retired judge of the Court of Appeals, or retired judge of the district court assigned as described by K.S.A. 20-2616;
 - (4) a retired justice of the Supreme Court, a retired judge of the Court of Appeals, or a retired judge of the district court who has entered into a written agreement with the Supreme Court under K.S.A. 20-2622;
 - (5) a judge of the Court of Appeals as described by K.S.A. 20-3002(d); and
 - (6) a justice of the Supreme Court as described by Kansas Constitution, article 3, section 2.
- (m) **“Judicial branch”** means the judicial branch of government, which includes all district and appellate courts, judicial officers, offices of the clerks of the district and appellate courts, the Office of Judicial Administration, court services offices, and judicial branch employees.
- (n) **“Kansas Court eFiling System”** means the Kansas Court Electronic Filing System that the Kansas Supreme Court has approved for use to submit documents in an electronic format to the case management system for Kansas district and appellate courts. The Kansas Court eFiling System (also referred to as the eFiling system) provides a means to view case histories, check the status of submissions, send follow-up documents, and access service lists.

- (o) “**Nondocketable event**” means a note, bench note, memorandum, draft, worksheet, or work product of a judge or court personnel that does not record court action taken in a case.
- (p) “**Nonpublic case record**” means any case record that is sealed or made confidential by statute, caselaw, Supreme Court rule, or court order.
- (q) “**Public**” means any person, business, nonprofit entity, organization, association, and member of the media.
- (r) “**Public access portal**” means an internet, browser-based access point for the public to freely and conveniently access certain public case records. At the discretion of the Kansas judicial branch, the public access portal may require user registration, email or identity verification, or other protocol and may restrict bulk record access.
- (s) “**Public case record**” means any case record that is not sealed or made confidential by statute, caselaw, Supreme Court rule, or court order.
- (t) “**Sealed**” means a case type or document to which access is limited by statute, Supreme Court rule, or court order.
- (u) “**Standard operating procedures**” means those procedures adopted by the judicial administrator, with input from stakeholders, that ensure documents submitted electronically are processed efficiently, increase effectiveness of court operations, and enhance access to justice for the people of Kansas.
- (v) “**Transcript**” means any written verbatim record of a court proceeding or deposition taken in accordance with the rules of civil or criminal procedure.
- (w) “**Trial exhibit**” means a document or object introduced or admitted into evidence in a court proceeding.

[**History:** New rule adopted effective June 14, 2019; Am. effective June 12, 2020.]

- [2] Rule 22(d)(10): Search Warrants. If a search warrant is filed in a criminal case, the warrant is sealed when issued and will remain sealed until a return is filed. Upon filing of the return, the search warrant and return will become public unless sealed by a court order. If a request for a search warrant is filed in a separate case, the case is sealed when the request is filed and remains sealed until the return is filed. Upon filing of the return, the search warrant and return will become public unless sealed by a court order.
- [3] Rule 22(d)(10): Bench Warrants. A bench warrant is sealed when issued and will remain sealed until a return is filed. Upon filing of the return, the bench warrant and return will become public unless sealed by a court order.
- [**History:** New rule adopted effective June 14, 2019; Am. effective June 12, 2020.]

Rule 22

ACCESS TO PUBLIC ELECTRONIC DISTRICT COURT CASE RECORDS

- (a) **Purpose.** Members of the public may access a public case record and the events index through multiple outlets, including a courthouse terminal and the public access portal. Allowing use of the public access portal, an internet, browser-based access point, expands access to public case records and events indices and increases transparency of the judicial branch. Not all public case records and events indices will be available using the public access portal due to their sensitive nature. This rule identifies the types of cases and documents that will not be accessible through the public access portal. These cases and documents may still be accessible through alternative means, such as at a courthouse terminal. Nonpublic case records are not available at the public access portal or the courthouse terminal.
- (b) **Access.** The ability of the public to access a case record and the events index will depend on the type of case; the nature of the document; and the applicable statutes, caselaw, Supreme Court rules, and court orders. Access to a case record and the event index by an attorney of record or a party if not represented by an attorney is not governed by this rule. Two levels of public access are possible.
- (1) **Public Access Through the Public Access Portal.** Unless excluded under subsections (c) or (d), a public case record and the events index are accessible for viewing using the public access portal as permitted by statutes, caselaw, Supreme Court rules, and court orders.
 - (2) **Public Access at a Courthouse Terminal.** A public case record and the events index are accessible for viewing at a courthouse terminal as permitted by statutes, caselaw, Supreme Court rules, and court orders.
 - (A) Each district court must maintain a courthouse terminal accessible to the public for viewing and obtaining case records and events indices.
 - (B) A clerk will not compile information or provide bulk distribution of information under Rule 106B(e).
 - (C) A request for documents is subject to the Kansas Open Records Act, K.S.A. 45-215 et seq., and other statutes, caselaw, Supreme Court rules, and court orders.

- (c) **Inaccessible Cases.** The following case types are not accessible through the public access portal:
- (1) **Adoptions:** a case filed under the Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 et seq.;
 - (2) **Care and treatment:** a case filed under the Care and Treatment Act for Mentally Ill Persons, K.S.A. 59-2945 et seq., or under the Care and Treatment Act for Persons with an Alcohol or Substance Abuse Problem, K.S.A. 59-29b45;
 - (3) **Child custody or support proceedings:** a child custody or support proceeding under the Kansas Family Law Code, K.S.A. 23-2101 et seq.;
 - (4) **Child in need of care:** a case filed under the Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq.;
 - (5) **Coroner inquests:** a coroner inquest under K.S.A. 22a-230;
 - (6) **Divorces:** a dissolution of marriage case filed under the Kansas Family Law Code, K.S.A. 23-2101 et seq.;
 - (7) **Expunged cases:** a case expunged under K.S.A. 21-6614 or K.S.A. 22-2410;
 - (8) **Grand jury proceedings:** a grand jury proceeding under K.S.A. 22-3001 through K.S.A. 22-3016;
 - (9) **Guardianship and conservatorship cases:** a proceeding under the Act for Obtaining a Guardian or a Conservator, or Both, K.S.A. 59-3050 et seq.;
 - (10) **Inquisitions:** an inquisition proceeding under K.S.A. 22-3101 through K.S.A. 22-3105;
 - (11) **Juvenile offender:** a juvenile offender proceeding under the Revised Kansas Juvenile Justice Code, K.S.A. 38-2301 et seq.;
 - (12) **Parentage:** a case filed under the Kansas Parentage Act, K.S.A. 23-2201 et seq.;
 - (13) **Parental bypass:** a parental bypass proceeding under K.S.A. 65-6705;
 - (14) **Protection from abuse:** a case filed under the Protection from Abuse Act, K.S.A. 60-3101 et seq.;
 - (15) **Protection from stalking, sexual assault, or human trafficking:** a case filed under the Protection from Stalking, Sexual Assault, or Human Trafficking Act, K.S.A. 60-31a01 et seq.; and
 - (16) **Uniform interstate enforcement of domestic violence protection orders:** a case filed under the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, K.S.A. 60-31b01 et seq.

- (d) **Inaccessible Documents.** The following documents are not accessible through the public access portal:
- (1) **Child Death Review Board:** a Child Death Review Board document filed under K.S.A. 22a-244;
 - (2) **Citations:** a citation filed under K.S.A. 8-2106, K.S.A. 8-2119, or K.S.A. 32-1049;
 - (3) **Coroner reports:** a coroner report filed under K.S.A. 22a-232;
 - (4) **Marriage license documents:** a marriage license document other than the limited marriage license record the district court clerk creates under Rule 106(d);
 - (5) **Poverty affidavits:** a poverty affidavit prepared under K.S.A. 22-4504 or K.S.A. 60-2001;
 - (6) **Presentence investigation reports:** a presentence investigation report prepared under K.S.A. 21-6703 or K.S.A. 21-6813;
 - (7) **Probable cause affidavits:** a probable cause affidavit or sworn testimony in support of an arrest warrant or summons under K.S.A. 22-2302 or in support of a search warrant under K.S.A. 22-2502 except as permitted by those statutes;
 - (8) **Record of an agency proceeding:** a record of an agency proceeding under the Kansas Administrative Procedure Act, K.S.A. 77-501 et seq., or the Kansas Judicial Review Act, K.S.A. 77-601 et seq.;
 - (9) **Trial exhibits;** and
 - (10) **Warrants:** an arrest warrant issued under K.S.A. 22-2302 that has not been executed, a search warrant issued under K.S.A. 22-2502 that has not been executed, and any bench warrant that has not been executed.

Comments

- [1] Rule 22(d)(10): Arrest Warrants. A criminal complaint initiating a criminal case is not sealed in the new case management system (Odyssey) even if a proposed arrest warrant is filed at the same time or an arrest warrant is signed and issued. In the prior case management system (FullCourt), a criminal case was automatically sealed when an arrest warrant was approved by a judge; when a return on an arrest warrant was filed, the case was unsealed. In Odyssey, unless previously sealed by court order, a criminal complaint remains accessible to the public even when an arrest warrant is issued. In Odyssey, an arrest warrant will be sealed when it is issued and will remain sealed until a return is filed. Upon filing of the return, the arrest warrant and return will become public unless sealed by a court order.

Rule 23

FILING IN A DISTRICT COURT

- (a) **Filing User's Obligations.** When filing a document with the district court, at the eFiling interface, a filing user must correctly designate the case and document type and indicate if the document is submitted under subsection (b) or certify that the document complies with Rule 24. The requirement to certify compliance with Rule 24(b) does not apply to those individuals exempted from the definition of "filing user" in Rule 21(l).
 - (1) A court employee is not required to review a document that a filing user submits to ensure that the filing user appropriately designated a case, document, or information.
 - (2) If a document does not comply with these rules, the court may order that the document be segregated from public view until a ruling has been made on its noncompliance.
- (b) **Filing Under Seal.**
 - (1) If a filing user submits a document under a pre-existing seal order, the filing user must affirm by certification on the eFiling interface that such an order exists.
 - (2) If at the time of filing a filing user believes that a document not covered by a pre-existing seal order should be sealed, the filing user must submit a motion to seal that includes a general description of the document at issue. The filing user must affirm by certification on the eFiling interface that the motion complies with Rule 24.
 - (3) A filing user may file a motion to seal a document already on file. The motion must specify the document that is proposed to be sealed. When a motion to seal is filed, the identified document will be segregated from public view until the court rules on the motion to seal. A court employee is not required to search for a document that is not identified with specificity in a motion to seal.
 - (4) A case or document may be sealed only by a court order that is case or document specific or as required by a statute or Supreme Court rule.
- (c) **District Court Clerk Processing of an eFiled Document.**
 - (1) **Document Review.** Upon receipt of a document submitted to a district court using the Kansas Court eFiling System, a clerk of the district court is authorized to return the document only for the following reasons:
 - (A) the document is illegible or in a format that prevents it from being opened;

- (B) the document does not leave a margin sufficient to affix a file stamp, as required by Rule 111;
 - (C) the document does not have the correct county designation, case number, or case caption; or
 - (D) the applicable fee has not been paid or no poverty affidavit is submitted with the document or already on file in the case.
- (2) **Timeline for a Clerk to Process a Document.** A clerk of the district court must process a document for filing as quickly as possible but not more than four business hours after the filing user submits the document for filing.
 - (3) **Return of Document.** If a clerk determines that a document must be returned for any of the reasons listed in subsection (c)(1), the clerk must designate the reason for its return.
 - (4) **Quality Review.** If a document is not rejected under subsection (c)(1), a clerk will approve the document for filing in the case management system. The clerk may flag the document for further review as authorized by the standard operating procedures adopted by the judicial administrator.
 - (5) **File Stamping a Document.** A document submitted through the Kansas Court eFiling System will be marked with the date and time of original submission.
- (d) **Inclusion of a Paper Document.** If a clerk is authorized to accept a paper document for filing in a case record under a standard operating procedure adopted by the judicial administrator, the clerk must follow the requirements of that procedure for including the document in the case management system.

Comments

[1] Rule 23(c)(1) applies to a document filed in an existing case where the clerk must match the county designation, the names of the parties in the case caption, and the case number with those of the existing case.

[2] The Kansas eCourt Rules make clear that the responsibility for correctly filing a document in a court case rests with the person filing the document.

[**History:** New rule adopted effective June 14, 2019; Am. effective June 12, 2020.]

Rule 24

PROTECTION OF PERSONALLY IDENTIFIABLE INFORMATION

- (a) **Obligation to Redact Personally Identifiable Information.** In all filings, an attorney, or a party if not represented by an attorney, is solely obligated to protect the confidentiality of personally identifiable information as identified in this rule by ensuring that the filing contains no personally identifiable information. A district court clerk has no duty to review a document to ensure compliance with this rule.
- (b) **Personally Identifiable Information.** The following is personally identifiable information:
- (1) the name of a minor who is not a named party in a case and, if applicable, the name of a person whose identity could reveal the name of a minor who is not a named party in a case;
 - (2) the name of an alleged victim of a sex crime;
 - (3) the name of a petitioner in a protection from abuse case;
 - (4) the name of a petitioner in a protection from stalking, sexual assault, or human trafficking case;
 - (5) the name of a juror or venire member;
 - (6) a person's date of birth except for the year;
 - (7) any portion of the following:
 - (A) an email address except when required by statute or rule;
 - (B) a computer username, password, or PIN; and
 - (C) a DNA profile or other biometric information;
 - (8) the following numbers except for the last four digits:
 - (A) a Social Security number;
 - (B) a financial account number, including a bank, credit card, and debit card account;
 - (C) a taxpayer identification number (TIN);
 - (D) an employee identification number;
 - (E) a driver's license or nondriver's identification number;
 - (F) a passport number;
 - (G) a brokerage account number;
 - (H) an insurance policy account number;
 - (I) a loan account number;
 - (J) a customer account number;
 - (K) a patient or health care number;
 - (L) a student identification number; and
 - (M) a vehicle identification number (VIN);
 - (9) any information identified as personally identifiable information by court order; and

- (10) the physical address of an individual's residence.
- (c) **Exceptions.** The following is not personally identifiable information:
 - (1) an account number that identifies the property alleged to be the subject of a proceeding;
 - (2) the name of an emancipated minor;
 - (3) information used by the court for case maintenance purposes that is not accessible by the public;
 - (4) information a party's attorney, or a party if not represented by an attorney, reasonably believes is necessary or material to an issue before the court;
 - (5) the first name, initials, or pseudonym of any person identified in subsections (b)(1) to (b)(5);
 - (6) any information required to be included by statute or court rule; and
 - (7) any information in a transcript.
- (d) **Administrative Information Required.** When a filing user submits a new case through the Kansas Court eFiling System, the filing user must complete the administrative information requested at the eFiling interface to the extent possible. If an initial pleading in a new case is in paper form, the filer must submit a paper cover sheet that substantially complies with the form located on the judicial council website. The following rules apply.
 - (1) Personally identifiable information gathered for administrative purposes when a new case is efiled:
 - (A) if stored electronically, must be accessible only by authorized court personnel and
 - (B) is not subject to reproduction and disposition of court records under Rule 108.
 - (2) Personally identifiable information gathered for administrative purposes using a paper cover sheet:
 - (A) must not be retained in the case file;
 - (B) is not subject to reproduction and disposition of court records under Rule 108; and
 - (C) may be shredded or otherwise destroyed within a reasonable time after the case is entered electronically into the case management system.
 - (3) In an action for divorce, child custody, child support, or maintenance, the administrative information provided must include, to the extent known:
 - (A) the parties' Social Security numbers;
 - (B) the parties' birth dates; and

- (C) the parties' child's full name or pseudonym, Social Security number, and birth date.
- (e) **Certification.** Each document submitted to a court must be accompanied by a certification by an attorney, or by a party if not represented by an attorney, that the document has been reviewed and is submitted under Rule 23(b) or complies with this rule.
 - (f) **Remedies and Sanctions.** Failure to comply with this rule is grounds for sanctions against an attorney or a party. Upon motion by a party or interested person, or sua sponte by the court, the court may order remedies for a violation of any requirements of the Kansas eCourt Rules. Following notice and an opportunity to respond, the court may impose sanctions if such filing was not made in good faith.
 - (g) **Motions Not Restricted.** This rule does not restrict a party's right to request a protective order, to move to file a document under seal, or to request the court to seal a document.
 - (h) **Application.** This rule does not affect the application of constitutional provisions, statutes, or court rules regarding confidential information or access to public information.

Comments

- [1] Rule 24 applies to information contained in a filing, not to information contained in an oral communication, whether made in a court proceeding or otherwise.
- [2] If use of a person's initials is unwieldy, parties may consider using other options such as a first name with the first initial of the last name, a generic descriptor such as "child 1," or a pseudonym in lieu of a name.
- [3] Rule 24(b)(10) includes "the physical address of an individual's residence" in the definition of personally identifiable information. However, if an exception in Rule 24(c) applies, this information is no longer considered to be personally identifiable information. If a party is required by law to include the physical address of an individual's residence, then it may be provided under Rule 24(c)(6). For example, if a document will be served by leaving a copy at a person's dwelling, see K.S.A. 60-205(b)(2)(B)(ii) or K.S.A. 61-3003(d), or by mailing the document to a person's last known address, see K.S.A. 60-205(b)(2)(C) or K.S.A. 61-3003(c), then providing the physical address is required by law to perfect service. In that situation, the physical address is needed and will not be considered personally identifiable information because it meets the exception of Rule 24(c)(6).
- [4] Under Rule 24(c)(4), "necessary" means information essential for the document to make sense or for the proper processing of the

document or information requested on a Judicial Council form. Examples include information necessary to establish the court's personal or subject matter jurisdiction, to process a protective order, to serve a filed document on another party, or to issue and execute a subpoena.

[History: New rule adopted effective June 14, 2019; Am. effective June 12, 2020.]

Rule 25

EXPANDED ACCESS

- (a) **Purpose.** This rule creates a stakeholder access program that allows the judicial administrator to grant governmental agencies and other entities access to information in the Kansas eCourt case management system that is not available to the general public.
- (b) **Definitions.**
 - (1) **“Expanded Access”** means access to specifically identified information in the eCourt case management system that is not available to the general public and might include access to personally identifiable information.
 - (2) **“Stakeholder”** means a governmental agency, a contractor for a governmental agency, or another entity that is not part of the Kansas Judicial Branch and that is granted expanded access through the stakeholder access program.
 - (3) **“User”** means a person performing work on behalf of a stakeholder, including an employee, a subcontractor, and an agent.
- (c) **Methods for Access.** The judicial administrator may provide for expanded access through various methods, including the following:
 - (1) an expanded access portal using a unique username and password;
 - (2) integration; and
 - (3) periodic reports.
- (d) **Standard Operating Procedures.** The judicial administrator is authorized to adopt standard operating procedures for expanded access. In developing these procedures, the judicial administrator will consult with stakeholders when appropriate.
- (e) **Powers and Duties.** In administering the stakeholder access program, the judicial administrator’s powers and duties will include the following:
 - (1) determining the case groups, case types, documents, and information that a stakeholder may access;
 - (2) approving or denying a prospective stakeholder’s request for expanded access;
 - (3) working with a stakeholder to create methods to access information;
 - (4) approving or denying a user’s request for a unique username and password that will allow expanded access;
 - (5) developing procedures to allow expanded access;
 - (6) developing procedures to safeguard information from unauthorized access, use, and disclosure;
 - (7) providing technical support for expanded access;

- (8) monitoring adherence to rules, policies, and procedures regarding access, use, and disclosure of information by a stakeholder and its users, including the use of audits and reports; and
- (9) periodic reporting to the Kansas eCourt project liaison justices and the Chief Justice regarding expanded access efforts.
- (f) **Stakeholder Agreement.** An approved stakeholder must enter into an Expanded Access Agreement that sets forth the following:
 - (1) the procedures for accessing information;
 - (2) the procedures for safeguarding information from unauthorized access, use, and disclosure; and
 - (3) any other procedures or information the judicial administrator deems necessary.
- (g) **User Agreements.**
 - (1) **Information Subscription Agreement.** To obtain expanded access through the expanded access portal, a user must enter into an Information Subscription Agreement.
 - (2) **Confidentiality Agreement.** To obtain expanded access by a method other than through the expanded access portal, a user must complete a Confidentiality Agreement.
 - (3) **Agreement Provisions.** An agreement under subsection (g)(1) or (g)(2) must set forth the following:
 - (A) the procedures regarding the allowable use of information;
 - (B) the procedures for safeguarding information from unauthorized access, use, and disclosure; and
 - (C) any other procedures or information the judicial administrator deems necessary.
- (h) **Penalty for Breach.** If a stakeholder or user breaches this rule, an expanded access policy or procedure, or an agreement described in subsection (f) or (g), the following provisions will apply.
 - (1) The judicial administrator may suspend expanded access for the stakeholder or user. The decision to suspend expanded access is within the sole discretion of the judicial administrator.
 - (2) If the judicial administrator determines the breach warrants revocation of expanded access, the judicial administrator will refer the stakeholder or user to the attention of the Chief Justice.
 - (3) The Chief Justice may revoke expanded access for the stakeholder or user or impose any other lesser restriction.
- (i) **Lift of Suspension; Reinstatement.**
 - (1) The judicial administrator may lift any suspension that has been imposed under subsection (h). The decision to lift a suspension is within the sole discretion of the judicial administrator.
 - (2) Subject to any terms and conditions necessary to prevent unauthorized access, use, and disclosure of information, the Chief

Justice may reinstate expanded access that has been revoked under subsection (h).
[**History:** New rule adopted effective January 26, 2021.]

Mediation from the Mediator's Perspective

Hon. Robert J. Schmisser, Schmisser Law Firm

**Friday, April 29th
11:00 – 11:50 a.m.**

NONTRADITIONAL MEDIATION
(and a few observations from the Mediator's point of view)

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Alternative Dispute Resolution (ADR) has become the customary path for most civil litigation. This presentation will focus on several mediation scenarios beyond traditional face-to-face caucus, non-traditional mediation, selecting a mediator, practical considerations and expectations of the mediator.

A. **Selecting a Mediator**

Mediators are unique. Selecting a mediator is much more than who is closest geographically or who did we use last time. While availability or cost may be factors, more important factors to consider could include how you or your client will work with the mediator, the personality of the other attorney or their client, subject matter expertise, willingness to meet face to face at a convenient location, etc.

B. **Appellate Mediation.**

The Kansas Supreme Court has established a pilot project referring twenty (20) selected civil cases pending before the Kansas Court of Appeals to mediation with the consent of the parties.

Having successfully completed several appellate mediations, I would comment as follows as to the advantages:

1. Appellate mediation allows global settlement including issues beyond the case itself.
2. The process allows the parties to feel they had the chance to tell their story without the limitations of the Court process.
3. Appellate mediation permits prompt resolution.
4. Appellate mediation may allow the final resolution to be confidential.

C. Criminal Mediation

The referral of pending criminal cases to mediation before trial is common in many areas of the United States including several counties in Northeast Kansas.

The format is similar to traditional mediation with the mediator acting as a sounding board and communication facilitator.

In my experience, the mediator in a criminal case assists the process as follows:

1. Frequently, the defense attorney has a client problem or the prosecutor has a victim/family problem that the mediator can address:
 - a) Defendant thinks the defense attorney does not spend enough time/is not fighting hard enough on the case.
 - b) Defendant needs to hear the "truth" from another source.
 - c) Victim/family needs to hear the "truth" from another source.
2. There are issues between defendant/victim/family beyond the criminal case itself.

It is critical that the mediation process does not open a new appellate argument for the defendant in a post-conviction challenge. I am unaware of any Kansas appellate decisions that have commented on mediation in criminal cases.

I believe it is critical that the defendant "consents" to the process and that at both the plea and sentencing hearings that the Judge confirms that the defendant understands his rights and wishes to proceed.

D. Attorneys Not Present

Particularly in domestic matters, I frequently mediate disputes where the attorneys do not attend the mediation.

It is my experience that sometimes the parties are more conciliatory when "it is just them".

Attached is the consent form I use that clearly states they are not bound to any agreement until the document is prepared and the party has had the opportunity to privately review the resolution with their attorney.

I believe the “attorney not present” mediation is particularly useful in the cases where money is a real issue, and the attorney has to limit their involvement for that reason.

E. Attorneys Not Involved

I have conducted several mediations referred to me where all of the parties are not “officially” represented by counsel.

I believe the “attorney not involved” can be useful in several circumstances.

1. The dispute is between clients of the same lawyer.
2. The scope of the dispute does not justify the expense of multiple attorneys.
3. The parties are members of the same family or have a business/personal relationship they want to protect.

Similar to the “attorney not present” format, I use a consent form that clearly states the parties are not bound to any agreement until the document is prepared and the parties have had the “opportunity” to privately review the resolution with their attorney, accountant or other advisor.

F. Submission Materials

Mediators really look at submission materials prior to the session.

If there are problems with your case, I think the best course is to deal with those problems in your submission so I have time to digest how you believe those problems are minimized. I will appreciate your candidness and realize that you understand your case.

Unless there is a real good reason why I should read 600+ pages of deposition transcripts, please send me a witness summary rather than asking me to sort it out.

I probably do not need to look at every page of tax returns for the last five years (but a nice chart showing the key figures is helpful).

Do not assume the mediator is an expert on the legal area of your case. If there are recent legislative changes or appellate court decisions, cite them in your submission materials. If you are going to send me a copy of an appellate court opinion, please highlight the areas you want me to focus on.

I probably will not study your materials a month prior to mediation, but it is nice to receive them before 4 PM on the day before. This is particularly true if your submission is lengthy or will require some research on my end.

Photographs, diagrams, etc. are very helpful.

I do not mind getting a lengthy email submission not followed with a hard copy, but if you chose to submit information to me in this fashion please bring a complete set of documents to the mediation session.

Unless there is a real good reason not to, I think your client should receive a copy of the materials you send to the mediator.

G. Early Mediation

I have conducted hundreds of mediations in which counsel agreed to mediate before depositions or have conducted little or no paper discovery with a goal of saving attorney fees and related expenses.

In my experience, early mediation requires one or more of the following factors to be successful:

1. The lawyers respect each other and have a reasonable working relationship;
2. The parties have a degree of legal experience and general sophistication that allows them to understand how expensive and demanding litigation can be so as to allow them to consider compromise without further participation in the litigation process;
or,
3. The case is of a nature that some of the issues are clear (such as liability, damages compared to insurance policy limits, capacity in a will contest).

One of the problem areas in early mediation is that the attorney may not be ready. While I believe you can effectively mediate without multiple days of depositions, I do believe the attorney needs to have talked to critical witnesses (or have copies of statements taken by an investigator).

H. Talk to the Banker First

I am amazed at how often mediated settlements are conditioned on approval of the bank because a party (who will obviously be paying money if the case is going to get resolved) has not discussed the case with their bank (or other source of money) in advance. I appreciate a mediation where the banker is educated as to the issues in advance and participates in the mediation in person or electronically. **Cash talks!** I think cases settle “cheaper” when there is no “financing contingency”.

I. Medical Liens in Personal Injury Cases

This is another area that I think early work prior to mediation pays off. My recent experiences with ERISA health insurance companies are that they start with the position that their lien is primary, not subject to reduction for comparative fault and not subject to reduction for attorney fees.

I think the plaintiff’s attorney should contact the medical lien claimant in advance and seek an agreement as to reductions for comparative fault and attorney fees.

I have had several cases where the Court “ordered” the medical lien claimant to participate in the mediation. While I am not 100% certain the Court has authority over a non-party, resistance from the lien claimant met with an order for an “apportionment hearing” post mediation will usually soften up even the most resistant medical lien claimant.

Medicare liens are troubling because it takes forever to get an answer. Recently, I mediated a case in which the insurance carrier agreed to issue a check in settlement without naming Medicare as a Payee. The lawyers for the plaintiff (big time television lawyers) agreed to indemnify the insurance carrier for the Medicare lien. The attorneys were going to hold the entire amount of the lien in their trust account pending a final negotiation.

J. Cheering Sections

Usually in the domestic arena, I have conducted a number of mediations in which a party brought along someone for “moral support” or “guidance”.

First, I think the mediator and the attorney on the other side are entitled to “notice” that the team approach will be applied.

Second, sometimes it really helps. If the party lacks confidence or has limited capacity, the moral supporter/friend may help the party do what they really need to do.

I try to have an understanding at the start of the mediation that if I think the “cheering section” is interfering with the process that the supporter will leave. I have had to carry through on that request on a few occasions.

K. Documenting the Settlement

I try to have a handwritten settlement sheet with appropriate detail signed by the parties and counsel before anyone leaves the mediation. Recently, I mediated a case where one side prepared in advance of mediation a five (5) page settlement document with blanks. After a settlement was agreed upon, the lawyers spent 90 minutes arguing about the settlement document (Microsoft Word and on the laptops) including multiple modifications. But, the paperwork was done before we left the mediation.

I have considered having a settlement agreement “template” prepared in advance with blanks to fill in. I have about one case a year where someone tries to get out of what they agreed to in mediation. Usually, the contention is the handwritten settlement agreement was merely “an agreement to agree” or that I (or the lawyer they discharged after mediation) told them they had several days to “walk away” from the settlement.

A bigger problem is whether there has been full disclosure in a business, estate or domestic dispute. Early mediation can exacerbate this problem. A particularly difficult area is a farming operation and how to document prepaid expenses, growing crops, grain in storage (or sold on contract with deferred payment), breeding livestock (and home raised livestock) and feed on hand.

A common settlement agreement may provide that one party receives certain property and funds and the other party receives everything else. If everything else is not documented in the agreement (or discovery), the issue of full disclosure may be open for later argument.

J. Final Thoughts

1. The case will not settle if you are not ready. Your being busy is not an excuse to be unprepared.
2. The case will not settle if your client has unrealistic expectations. It should not be my job to educate your client as to reality.
3. It is hard for the mediator to be ready if you do not submit materials in advance. **But, is it really necessary to send the mediator 20+ or 50+ or 100+ or 500+ pages of materials? Brief good materials are better than voluminous poor materials.**
4. Who the Judge is can really make a difference in domestic matters.
5. Your complaints about the other lawyer or the Judge do not help settle the case.

6. **I think part of your job is making sure I get paid.**
7. Do not be afraid to tell me you disagree with me. I expect you to help me understand where the boundaries of the case are. My job is to settle the case. Your job is to represent a client. My responsibilities and your responsibilities are different.
8. There are things we can do to make the process more comfortable. New boyfriend or girlfriend is/are not present. Arrive and leave separately. No joint session. Mediating at a "neutral" location. Setting a reasonable time limit (flexible if we are close and everyone wants to continue).
9. **There are some cases that need to be tried.**

Conclusion. Many Judges are requiring ADR before any trial. I have mediated a number of cases involving less than \$10,000.00 (including a small claims appeal and several limited action cases) because the Judge ordered ADR. In all candidness, the parties to smaller disputes are often more interested in settlement than the parties to "big" cases. ADR can be cost effective, and the parties appreciate efficiency in resolving their dispute.

Consent to Mediation
State of Kansas v. XXXXXXXXXXXXX
Kingman County District Court

I, XXXXXXXXXXXX, consent to participate in a mediation of all of the felony criminal charges now pending against me in Kingman County, Kansas, District Court.

I understand the purpose of the mediation is to try to find a resolution of all of the charges and cases without having a trial.

I understand I do not have to participate in this process. I further understand that if I am at first willing to participate in the process that I can stop the mediation at any time by clearly telling my attorney XXXXXXXXXXXX or the Mediator Robert J. Schmisser that I no longer want to participate.

I understand the mediation is confidential meaning that a jury would never be told that I participated in mediation or that I was willing to consider any plea proposal. Mediator Robert J. Schmisser will not be allowed to testify at a trial of my case.

I understand Robert J. Schmisser is a retired District Judge from Pratt, Kansas. Although he used to be a judge, he cannot tell me exactly how District Judge XXXXXXXXXXXXX or any other trial judge will decide any of the issues of my case(s).

I understand I have an absolute right to a jury trial. My participation in the mediation does not change my right to have a jury trial to resolve each case.

I understand that Robert J. Schmisser is not my attorney. I understand that if I have any questions about the mediation process or my case in general that I have the right to privately talk to my attorney XXXXXXXXXXXXX about those questions.

I understand that Judge XXXXXXXXXXXXX (or any other judge who might be assigned this case) is not participating in the mediation.

In the sentencing aspects of any case, the judge is not obligated to follow the recommendations of the attorneys and has an independent duty to impose a sentence as may be properly allowed by law.

Date:

_____XXXXXXXXXXXXXXXXXXXX

Consent to Mediation
In the Matter of XXXXXXXXXXXXXXXX
Harper County Case 2019 JO

I, XXXXXXXXXXXXXXXX, consent to participate in a mediation of the felony juvenile offender complaint now pending against me.

I understand the purpose of the mediation is to try to find a resolution of this case without having a trial.

I understand I do not have to participate in this process. I further understand that if I am at first willing to participate in the process that I can stop the mediation at any time by clearly telling my attorney XXXXXXXXXXXXXXXX or the Mediator Robert J. Schmisser that I no longer want to participate.

I understand the mediation is confidential meaning that a jury would never be told that I participated in mediation or that I was willing to consider any plea proposal. Mediator Robert J. Schmisser will not be allowed to testify at a trial of my case.

I understand Robert J. Schmisser is a retired District Judge from Pratt, Kansas. Although he used to be a judge, he cannot tell me exactly how Judge XXXXXXXXXXXXXXXX or any other trial judge will decide any of the issues of my case.

I understand I have an absolute right to a bench (judge) trial or a jury trial. My participation in the mediation does not change my right to have a trial to resolve this case.

I understand that Robert J. Schmisser is not my attorney. I understand that if I have any questions about the mediation process or my case in general that I have the right to privately talk to my attorney XXXXXXXXXXXXXXXX about those questions.

I understand that Judge XXXXXXXXXXXXXXXX (or any other judge who might be assigned this case) is not participating in the mediation. In the disposition (sentencing) aspects of any case, the judge is not obligated to follow the recommendations of the attorneys and has an independent duty to impose a penalty (sentence) as may be properly allowed by law.

Date:

XXXXXXXXXXXXXXXXXXXXX

CONSENT BY PARENT

I am the mother of XXXXXXXXXXXXXXXXXXXX. I have read the foregoing Consent to Mediation. I have had an opportunity to speak to my son XXXXXXXXXXXXXXXXXXXX about this process. I believe he understands this process and wishes to participate in mediation. I consent to the mediation process and will participate as appropriate. If I wish to stop the mediation, I will clearly tell XXXXXXXXXXXXXXXXXXXX or Mediator Robert J. Schmisser that I wish to stop the mediation.

Date:

**Domestic Consent to Mediation
Marriage of XXXXXXXXXXXX
Kingman County Case 2017 DM**

The undersigned interested person/party in the above referenced matter consents to Robert J. Schmisser acting as a mediator to seek agreement and resolution of any disputes in the case. I understand Robert J. Schmisser is an attorney, but he is not acting as an attorney for anyone in this case. While he may comment on the law, he is not giving me legal advice.

Mediation is a confidential process and the details of the mediation discussions are not admissible in Court unless they are admissible by rules unrelated to the mediation.

Robert J. Schmisser has substantial Court experience, but he cannot predict or guarantee how another Judge might decide any of the issues of this case.

The final decision of whether to make or accept any settlement proposal belongs to the client acting with the benefit and advice of their personal attorney.

If I am represented by an attorney of record who is not present during the mediation, I am not bound to any settlement until I have had an opportunity to review the proposed settlement with my attorney and have the opportunity to give final approval.

All issues involving the welfare of children are subject to the continuing jurisdiction of the Court. The Judge has final approval authority regarding any domestic court agreement.

**Domestic Consent to Mediation
Marriage of ██████████
Ford County – Pre-Suit**

The undersigned interested person/party in the above referenced matter consents to Robert J. Schmisser acting as a mediator to seek agreement and resolution of any disputes in the case. I understand Robert J. Schmisser is an attorney, but he is not acting as an attorney for anyone in this case. While he may comment on the law, he is not giving me legal advice.

Mediation is a confidential process and the details of the mediation discussions are not admissible in Court unless they are admissible by rules unrelated to the mediation.

Robert J. Schmisser has substantial Court experience, but he cannot predict or guarantee how another Judge might decide any of the issues of this case.

The final decision of whether to make or accept any settlement proposal belongs to the client acting with the benefit and advice of their personal attorney.

I am not bound to any settlement reached in mediation until I have had an opportunity to review the proposed settlement with an attorney of my choice and have the opportunity to give final approval.

The Judge has final approval authority regarding any domestic court agreement

Updates in Criminal Law

Aaron J. Cunningham,
Assistant Ellis County Attorney

Friday, April 29th
1:00 – 1:50 p.m.

A Ham-Fisted Attempt to Cover Major Changes in Criminal Law in 2021-2022

Attempt by Aaron J. Cunningham

Disclaimer

- The following analysis of changes in law was conducted by humans (specifically lawyers and admittedly one of the lowest classifications of human life) who are capable of error. Just because I interpret these changes in a certain way does not mean a judge will.

Overview

- Changes in Law enacted in 2021-2022
- Analysis of Delta 8 THC
- Major Appellate Law Updates

Felon Firearm Rights Restoration

- What has classically been 10-year prohibition is now 8
- What has classically been 5-year prohibition is now 3
- **HOWEVER**, instead of the clock starting at conviction (earlier), it now starts at completion of sentence (either prison, probation, parole (whichever is later)).

Comparison Chart for KSA 21-6304 as Amended by HB2058

Law Prior to July 1, 2021		Law on and After July 1, 2021	
Prohibition	Included Offenses	Prohibition	Included Offenses
Permanent	Person felony while <u>in possession of</u> a firearm. Article 57 of Ch 21 (any drug felony) while <u>in possession of</u> a firearm. <u>No expungement/pardon provision.</u>	Permanent	Person felony while <u>using</u> a firearm. Article 57 of Ch 21 (any drug felony) while <u>using</u> a firearm. <u>Expungement/pardon provision.</u>
10 year from <u>conviction or release from prison</u>	Felony while <u>not in possession of</u> a firearm under the following statutes 21-5402 1st degree murder 21-5403 2nd degree murder 21-5404 Voluntary manslaughter 21-5405 Involuntary manslaughter 21-5408 Kidnapping 21-5412(b) or (d) Agg assault deadly weapon 21-5413(b) or (d) Agg battery deadly weapon 21-5415(a) Criminal threat 21-5420(b) Agg. robbery 21-5503 Rape 21-5504(b) Agg. sodomy 21-5505(b) Agg. sexual battery 21-5807(b) Agg. burglary article 57 of chapter 21 Drug felonies Expungement/pardon provision exists. Nonperson felony possessing firearm. No expungement/pardon provision.	8 year from <u>end of sentence</u>	Felony while <u>not using</u> a firearm under the following statutes 21-5402 1st degree murder 21-5403 2nd degree murder 21-5404 Voluntary manslaughter 21-5405 Involuntary manslaughter 21-5408 Kidnapping 21-5412(b) or (d) Agg assault deadly weapon 21-5413(b) or (d) Agg battery deadly weapon 21-5415(a) Criminal threat 21-5420(b) Agg. robbery 21-5503 Rape 21-5504(b) Agg. sodomy 21-5505(b) Agg. sexual battery 21-5807(b) Agg. burglary article 57 of chapter 21 Drug felonies <u>No expungement/pardon provision exists.</u> Nonperson felony while using a firearm moved to 3 month prohibition.
5 years from <u>conviction or release from prison</u>	<u>Any felony</u> not listed in the 10 year prohibition group above, was not found to be <u>in possession of</u> a firearm when the crime was committed. No expungement/pardon provision.	3 years from <u>end of sentence</u>	<u>Any person felony</u> not listed in the 8 year prohibition group above, was not found to be using a firearm when the crime was committed. Expungement/pardon provision.
	See 10 year prohibition provisions above for nonperson felony while in possession of firearm. Current law had no prohibition for nonperson felony when no firearm was in possession.	3 Months from end of sentence	Any nonperson felony not listed in the three areas shown above. Use of firearm or no use of firearm included. Expungement/pardon provision.

NOTES:

Expungement/pardon provision provides prohibition ends if charge is expunged or pardoned.

End of sentence is latest of end of prison, probation, or parole.

Changes Made

- Added a provision for people to have their rights restored through expungement
 - - previously, no expungement required for rights to restore under Kansas law
 - - However, Federal law required (and still requires) expungement
- Other changes:
 - Lifetime prohibitions still lifetime.
 - 10-year prohibitions are now 8-years
 - 5-year prohibitions are now 3-years
 - clock starts at the end of sentence/probation/parole/etc.
 - Clock used to start at date of conviction
- Person felony w/ firearm = LIFETIME
- Drug felony w/ firearm = LIFETIME
- Non-person felony w/ firearm = 8 years (used to be 10)
- Person, non-person, and drug w/out firearm = 3 years (used to be 5)
- List of certain crimes w/out expungement or pardon = 8 years (used to be 10)

Example 1

- Defendant, Edward Nigma gets convicted of a level 5 drug felony w/out a firearm on January 1, 2021
- We will assume that Nigma gets put into Drug Court and successfully completes in 18-months
- Under the old law, Nigma not permitted to possess firearms until January 1, 2026
- Under new law, Nigma not permitted to possess firearms until 3-years after probation/drug court ends . . . So, July 1, 2025 (he can possess firearms about 6-months sooner).

Example 2

- Defendant, Harvey Dent is convicted on January 1, 2021 of a non-person felony while in possession of a firearm. For this example, let's assume Dent goes to prison for 2-years and has 1-year of post-release.
- Under the old law, Dent cannot possess firearms until January 1, 2031.
- Under amended law, Dent cannot possess firearms until 8-years after completion of sentence/post-release. Dent gets out of prison on January 1, 2023 and off post-release on January 1, 2024 . . . Then the 8-year ban begins. Dent not allowed to possess firearms until January 1, 2032.
- So, in some instances the duration of their firearms prohibition will be shorter and in some cases it will be longer.

Statutes Impacted:

- K.S.A. 21-6301 Criminal Use of Weapons
- K.S.A. 21-6304 Criminal Possession of a Firearm by Convicted Felon
- K.S.A. 21-6614 Expungement of Certain Convictions

Sexual Extortion

- New Level 4 and Level 7 Person Felony for Sexual Extortion
- Cover actions with intent to coerce or actually causing another person to: A) engage in sexual contact, sexual intercourse or conduct that is sexual in nature; or B) produce, provide or distribute an image, video or other recording of a person in a state of nudity or engaging in conduct that is sexual in nature

Statute Impacted:

- Created K.S.A. 21-5515
- (a) Sexual extortion is communicating by any means a threat to injure the property or reputation of a person, commit violence against a person, or distribute an image, video or other recording of a person that is of a sexual nature or depicts such person in a state of nudity:
 - (1) With the intent to coerce such person to: (A) Engage in sexual contact, sexual intercourse or conduct that is of a sexual nature; or (B) produce, provide or distribute an image, video or other recording of a person in a state of nudity or engaging in conduct that is of a sexual nature; or
 - (2) that causes such person to: (A) Engage in sexual contact, sexual intercourse or conduct that is of a sexual nature; or (B) produce, provide or distribute an image, video or other recording of a person in a state of nudity or engaging in conduct that is of a sexual nature.
- (b) Sexual extortion as defined in:
 - (1) Subsection (a)(1) is a severity level 7, person felony; and
 - (2) subsection (a)(2) is a severity level 4, person felony.
- (c) This section shall be a part of and supplemental to the Kansas criminal code.

Sexual Battery/Aggravated Sexual Battery

- Language excepting the spouse as a potential victim is removed
- Spouses can now be victims of sexual battery (we're married is not a defense)

Statute Impacted:

- K.S.A. 21-5505 Sexual Battery/Aggravated Sexual Battery

Auto Theft

- Creates a prima facie case that someone has intent to permanently deprive the owner of the vehicle if the Defendant tries to elude law enforcement in a stolen vehicle
- Minimum fine if attempting to elude in a stolen vehicle is \$500

Statutes Impacted:

- K.S.A. 8-1568 Fleeing and Eluding LEO
- K.S.A. 21-5804 Prima Facie Evidence to Establish “Intent to permanently deprive”
 - (e) In a prosecution for theft as defined in K.S.A. 21-5801, and amendments thereto, and such theft is of a motor vehicle as defined in K.S.A. 8-126, and amendments thereto, fleeing or attempting to elude a police officer as defined in K.S.A. 8-1568(a)(1)(B) or (b), and amendments thereto, shall be prima facie evidence of intent to permanently deprive the owner of the motor vehicle of the possession, use or benefit thereof.

Attempt to Elude (Oncoming Traffic)

- Creates Level 7 person felony if someone:
 - 1) tries to ditch LEOs by driving into the oncoming lane of traffic IF IT IS A DIVIDED HIGHWAY; or
 - 2) goes into an opposing lane on any roadway which causes a third party to do an evasive maneuver to avoid collision; or
 - 3) drives through an intersection and causes a third party to do an evasive maneuver to avoid collision; or
 - 4) causes a collision involving another driver

Statute Impacted:

- K.S.A. 8-1568 Fleeing and Eluding LEO

Child Abuse/Neglect Investigations

- All investigating agencies in investigating an allegation of child abuse must in some manner visually observe the alleged child victim and document observations in a report.
- (Can't just have one agency do it for everyone)

Statute Impacted

- K.S.A. 38-2226

Officer Exposure to Body Fluids (Court Ordered Testing)

- Expands Court's authority to order testing beyond HIV and Hepatitis B (done for COVID-19 purposes)
- Amendment requires the Court to order the Defendant to be tested for any infectious disease if it "appears from the nature of the charge that the transmission of bodily fluids from one person to another may have been involved" and one of the following exist: 1) victim/prosecutor request the court to order the test; or 2) defendant stated they had infectious disease or used words to suggest it

Statutes Impacted:

- K.S.A. 65-6001 Definition of “Infectious Disease Test”
- K.S.A. 65-6009 Disclosure of Test Results for those Arrested/Convicted

To-Go Alcohol Beverages

- Basically, business otherwise permitted to normally sell alcohol can now sell it for off-premises consumption if they meet all requirements set forth in this change

Requirements for To-Go Alcohol

- Containers with alcohol must've been purchased by patron at licensed premises
- Containers must be sealed or resealed and placed in a clear, tamper-proof bag
- Dated receipt must be given to the patron
- No original/unopened containers of spirits may be removed from the premises (it has to be opened and resealed by the licensed premises)
- Can't be done after 11:00 p.m. unless it was purchased and partially consumed prior to 11:00 p.m.

Statute Impacted:

- K.S.A. 41-2653 Removal of Unconsumed Alcohol from Establishment

Emergency Management Act-Violations

- During COVID-19 Crisis Emergency Management Act Violations were designated as a civil violations as opposed to Class A misdemeanors.
- Since July 1, 2021, it is once again a Class A misdemeanor to violate an emergency management act

Statute Impacted:

- K.S.A. 48-939 – Restored

Industrial Hemp Act Changes

Shamelessly Stolen from Robert A. Anderson Jr.

Fundamentals to Understand

1. Hemp & marijuana, while they look very similar, are not the same thing
2. Hemp and marijuana both fall under the genus “Cannabis”.
3. Both hemp and marijuana contain chemical structures known as cannabinoids
4. The two primary cannabinoids are: CBD and THC
5. There are many different types of CBD and THC
6. When we talk about marijuana and THC, specifically what we are talking about is Delta-9 THC (also found in hemp)
7. THC, in any form, has a psychoactive effect (will get you “high”)
8. CBD, will not get you high.

Cannabis (Plant Genus)

Marijuana

- Contains high-levels of Delta-9 THC (pun intended); but also, Delta-8/6/4, etc. and CBD

Hemp

- Contains low levels of cannabinoids generally, but contains Delta-9/8/6/4, etc. and CBD

K.S.A. 2-3901

Hemp & Hemp Products prior to April 29, 2021

- “Industrial Hemp” (or the plant itself) means: “all parts and varieties of the plant *cannabis sativa* L., whether growing or not, that contain a delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis
- “Hemp Products” means “all products made from industrial hemp, including, but not limited to, cloth, cordage, fiber, food, fuel, paint, paper, particleboard, plastics, seed, seed meal and seed oil for consumption and authorized seed or clone plants for cultivation, if seeds originate from industrial hemp varieties.
- In other words, nearly any “hemp product” made from a lawful hemp plant was legal – regardless of cannabinoid profile or concentration levels.

Is this stuff currently legal?

April 29, 2021 Amendments

- Definition of “Hemp Products” is amended. It reads:
- (4) “Hemp Products” means all products made from industrial hemp, including, but not limited to, cloth, cordage, fiber, food, fuel, paint, paper, particleboard, plastics, seed, seed meal and seed oil for consumption and ~~authorized seed or clone plants for cultivation, if the seeds originate from industrial hemp varieties~~ *any extract from industrial hemp intended for further processing. Final “hemp products” may contain a tetrahydrocannabinol concentration of not more than 0.3%. As used in this paragraph, “tetrahydrocannabinol concentration” means the same as K.S.A. 65-6235(b)(3), and amendments thereto.*

What is the effect of this change?

- “Industrial Hemp” (or the plant itself) is still required to have a Delta-9 THC concentration less than 0.3% on a dry weight basis.
- “Hemp Products” are now products made from industrial hemp that are intended for further processing.
- Final “hemp products” (meant for the consumer) are required to have a tetrahydrocannabinol concentration of not more than 0.3%.
- K.S.A. 65-6235(b)(3) defines “tetrahydrocannabinol concentration” as “the **combined percentage of tetrahydrocannabinol** and its optical isomers, their salts and acids and salts of their acids, reported as free tetrahydrocannabinol on a **percent by weight basis**.”

Questions we might ask ourselves to determine if any given item/product is legal or illegal:

- Does it come from marijuana? – ILLEGAL
- Does it have THC in it? Probably Illegal under K.S.A. 65-4105(h), however, THC (in its many forms) is not necessarily illegal if we are talking about “Industrial hemp”; waste products from industrial hemp; hemp products; and final hemp products
- Ok, so what about products that are hemp-derived?
 - Is the product from a lawful plant (industrial hemp)? If no, ILLEGAL
 - This is actually an interesting point, we don’t know if legal hemp in other states = same
- **Ok, assume the product comes from a lawful industrial hemp plant, and it has THC?**
 - **only legal if the total THC concentration is less than 0.3% on a percent by weight basis**
- So . . . Are the Delta-8 THC products being sold in Hays and throughout Ellis County legal?
 - - almost certainly no – we will have a Judge in Ellis County weigh in on this soon
 - - CBD products are almost certainly 100% legal – again, what is the THC concentration?

Let's make it more complicated . . .

- Law enforcement really doesn't have a way to test this stuff, actually
- Most hemp products, almost certainly violate the consumer protection act
- K.S.A. 2-3908 prohibits manufacture, marketing, sale, or distribution of cigarettes containing **industrial hemp**; cigars containing **industrial hemp**;
- Chew, dip or other smokeless material containing **industrial hemp**;
- Teas containing **industrial hemp**
- Liquids, solids, or gases containing **industrial hemp** for use in vaporizing devices; and
- Any other hemp product containing any ingredient derived from industrial hemp that is prohibited pursuant to the Kansas food, drug and cosmetic act

Legality of Hemp Products Simplified:

(1) Is the thing from Lawful hemp plant?

(2) Is the thing a consumer product that has a total THC concentration of less than 0.3%?

If yes to both, then probably legal

If No to either, then probably illegal

However, Even then, I'm guessing Distributor does not have a license and I'm betting the product actually violates the consumer protection act.

Attorney General's Opinion

- December 2nd, 2021
- Delta-8 tetrahydrocannabinol (Delta-8 THC) comes within the definition of a Schedule I controlled substance and is unlawful to possess or sell in Kansas unless it is made from industrial hemp and is contained in a lawful hemp product having no more than 0.3% total tetrahydrocannabinols (THC). Unlawful hemp products include cigarettes, cigars, teas, and substances for use in vaping devices. Delta-8 THC derived from any source other than industrial hemp is a Schedule I controlled substance and unlawful to possess or sell in Kansas. Other federal and state laws and regulations place additional limits on the legality of products containing THC and other cannabinoids. Cited herein: K.S.A. 2-3901, 2-3908, 21-5702, 65-2365, 65- 4105.

Appellate Law

Shamelessly Stolen from the Attorney General's Office

Exigent Circumstances Aren't Exigent Enough Anymore . . .

- *State v. Lange* - United States Supreme Court case decided on 6/23/21 held under the 4th amendment, pursuit of a fleeing suspect does not always justify a warrantless entry into a home. Whether warrantless entry is merited hinges on case by case totality of the circumstances

State v. Lange

- Officer observe Lange driving and was preparing to do traffic stop
- As officer lit Lange up, Lange was pulling into garage
- As officer got out, Lange began shutting garage door
- Officer entered into garage and began questioning Lange
- Lange was arrested for DUI after subsequent investigation

State v. Lang Court Ruling

- Suspect evading capture alone is not sufficient for warrantless entry into home
- Look for other factors/exceptions (destruction of evidence, possible harm to others, possibility of escape)
- Most of the time these things are also present ^^ in this case, the officer just failed to articulate these things
- If legitimately no other exigency exists, then ask for consent, if the person says “no,” then get a warrant

Community Caretaking Has Limits

- *Caniglia v. Strom* – United States Supreme Court case decided last year
- SCOTUS held community caretaker exception to the warrant requirement does not extend into the home
- *(As always, the specific facts of this case are important)*

Caniglia v. Strom

- Husband and wife are in fight, husband asks wife to shoot him, wife does not (good call wife) and instead goes to hotel
- Next morning, wife can't get ahold of husband, calls law enforcement to do a welfare check
- Law enforcement show up at home, make contact with Caniglia on porch and determine he's a danger to himself
- Caniglia agrees to psychiatric evaluation IF officers do not confiscate firearms

Caniglia v. Strom (cont.)

- Officers say they won't (and cross their fingers behind their back) and then proceed to do exactly that with the wife permitting them to enter into the home and do so
- Supreme Court made clear if this was a gun in a vehicle, it's a different outcome, but the home is sacred and deserves more protection
- Just get a warrant and take the guns . . .

“Benefit Derived” in Identity Theft

- *State v. Valdiviezo-Martinez* – Kansas Supreme Court case decided 5/21/21 which held identity theft can occur even when benefit derived is “legitimately” earned

State v. Valdiviezo-Martinez

- Dude uses fake social security number on employment paperwork to get the job
- Dude works for company for years and is compensated for his employment
- Court ruled that even though the employee put in the hours to earn the money, he was deriving an economic benefit from the fraudulent use of the social security number and could be prosecuted for identity theft

Endangering of a Child Clarification

- *State v. Holley* – Kansas Supreme Court case decided in 2021
- State is not required to establish a likelihood of harm occurring to the child as part of the elements for Endangering/Agg Endangering of a Child

State v. Holley

- Dude pulls out gun in car and points it at adult front seat passenger
- Child/children are in the backseat of same care at this time
- Gun is never pointed at children
- Court says it doesn't matter, it's a situation in which they could be placed in harm
- Probability of harm is just a factor for the jury to consider, not an element required to be proven

Reasonable Suspicion/Waiting on K-9s

- *State v. Arrizabalaga* – Kansas Supreme Court case which reaffirmed the standard for Reasonable Suspicion

Reasonable Suspicion:

- “Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.... Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the ‘totality of the circumstances—the whole picture’ [citation omitted] that must be taken into account when evaluating whether there is reasonable suspicion.”

Law Enforcement is the Standard

- “We make our determination with deference to a trained law enforcement officer’s ability to distinguish between innocent and suspicious circumstances, . . . remembering that reasonable suspicion represents a ‘minimum level of objective justification’ which is ‘considerably less than proof of wrongdoing by a preponderance of the evidence.’”

Practical Takeaway??

- Reaffirms that the standard for suppression is **NOT** “is there a reasonable explanation for all the weird stuff the Defendant was doing,” but rather, “would a well-trained objective law enforcement officer find the Defendant’s behavior suspicious?”

Process for K-9s under Arrizabalaga

- Once officer establishes reasonable suspicion, officer is to take investigative steps by:
 - 1. Engaging in further questioning (consensual encounter)
 - 2. Seeking consent to search the vehicle
 - 3. Deploying a drug dog

But wait . . . (no really, they will have to wait)

- Court determined that once reasonable suspicion has been established and investigative measures have been taken, if defendant refuses consent, you can hold defendant as long as needed for nearest K-9 to respond (but must first undertake other investigative steps of asking more questions and seeking consent).

Appellate Update as of January 2022

Criminal History/Criminal Threats

- Trend in case law starting to develop in appellate courts
- Even if defendant does not object . . . Have to have criminal threat documentation filed to prove up appropriate history (otherwise remand will happen)
- *State v. Herrman*, No. 122,884 (unpublished, 2-1 decision)
- When in doubt – over-document
- Important reminder to make sure PSIs have subsections of statutes for penalties . . .

HOWEVER!!!

- If a defendant wants to allege his or her prior misdemeanor was uncounseled, the defendant must object to the PSI. The issue cannot be raised for the first time on appeal because the defendant cannot meet his or her burden to establish error.
- *State v. Roberts*, ___ Kan. ___, 498 P.3d 725, 726 (2021) (A notice of error in the criminal history prepared for sentencing that is not raised at or before sentencing is a “later challenge” to criminal history under K.S.A. 2020 Supp. 21-6814(c) and shifts the burden to the offender to prove the error.”)

More Criminal History Crisis

- The statutory *Wetrich* fix does not apply to crimes committed prior to its enactment.
 - *State v. Hillard*, __ Kan. __, 491 P.3d 1223, 1240 (2021).

Probation Revocation

- Please remember that the graduated sanctions requirements are set at the time the crime is committed.
 - E.g. The court cannot use the dispositional departure exception if that exception didn't exist when the crime was committed.
 - *State v. Coleman*, 311 Kan. 332, 460 P.3d 828 (2020).

Departures

- “The fact that a defendant's criminal history does not include similar or identical crimes to the crime of conviction cannot be a mitigating factor as a matter of law.”
 - But passage of time can still be a valid factor.
- *State v. Montgomery*, __ Kan. __, 494 P.3d 147, 154 (2021).

Jury Instructions

- Just because an instruction is factually appropriate and legally accurate, it's not automatically error for the instruction not to be given.
 - *State v. Liles*, __ Kan. __, 490 P.3d 1206, 1213–14 (2021) (rejecting the requirement to give a cautionary instruction when a witness testifies with the hope of a benefit).

Jury Instructions (Cont.)

- At the moment, if there is a factual dispute about whether a death occurred during the res gestae of a felony, self-defense instructions are required in felony murder cases.
 - *State v. Holley*, 313 Kan. 249, 485 P.3d 614 (2021) (motion for rehearing granted).

The PIK is Wrong! – PIK 55.031

- For statutory rape, there is no intent requirement.
 - Also, in any crime where one subsection mentions a culpable mental state, the lack of a culpable mental state in other sections could mean the legislature meant to exclude it.
 - *State v. Dinkel*, No. 113,705, 2021 WL 4343322, at *1 (Kan. Sept. 24, 2021).
 - But if the complaint has an intent, match the complaint.

The PIK is Wrong! (Cont.)

- PIK Crim. 4th 64.091 mistakenly omits the knowingly requirement in K.S.A. 21-6422(a)(1) (commercial sexual exploitation of a child)
 - *State v. Jackson*, No. 123,122, 2021 WL 4805240, ___ Kan. App. ___ (October 15, 2021).

The PIK is Wrong (Again)

- *State v. Holder*, 314 Kan. 799
- Arguing about the rebuttable presumption of distribution in K.S.A. 21-5705(e)
- Discussion of rebuttable presumptions vs. permissive presumptions
- K.S.A. 21-5705(e) states:
 - In any prosecution under this section, there shall be a rebuttable presumption of an intent to distribute if any person possesses the following quantities of controlled substances . . .
- PIK 57.022 states:
 - If you find defendant possessed (one of the quantities), you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. The burden never shifts to the defendant.

Rather Presumptuous . . .

- The PIK instruction sets out a *permissive inference*
- K.S.A. 21-5705(e) sets out a *rebuttable presumption*
- Ergo – PIK instruction is legally inappropriate because it does not accurately reflect the law in 21-5705(e)

So is the presumption unconstitutional?

- We don't know . . . They obfuscated
- Supreme Court determined he did not have standing to raise the issue . . .
- The suspense is killing me

Caution on Stipulations

- According to the Kansas Supreme Court, defendants must waive their right to a jury trial for any stipulated element.
 - The case was a criminal possession of a firearm case.
 - “The defendant's stipulation to element of one of charged crimes was tantamount to guilty plea and, thus, jury trial waiver was required prior to acceptance of such stipulation.” *State v. Johnson*, 310 Kan. 909, 453 P.3d 281 (2019).

Multiplicitous Convictions

- If you obtain multiple convictions on alternative counts, the counts merge, and you can only have one sentence.
 - *State v. Vargas*, 492 P.3d 412, 418 (Kan. 2021).
 - Not sure how that works if they are different crimes.

Restitution

- The Kansas Supreme Court took up several cases challenging whether a jury trial is required to impose restitution. The court held no jury trial was necessary but severed multiple provisions dealing with civil judgments.

Restitution is Sort of Constitutional . . .

- Boiled down, anything that gives restitution the effect of a civil judgment is unconstitutional.
 - The lead case is *State v. Arnett*, No. 112752 (decided October 15, 2021).
 - Currently, the Office of Judicial Administration is not permitting collection agencies to collect on restitution.
 - An attempt at a statutory fix is expected.

Garnishment?

- “A court may still enforce its order of criminal restitution through lawful means if the court has cause to believe a defendant is not in compliance. Those means still include the potential for court-ordered garnishment. And the defendant still retains the ability to object to such garnishment and justify why garnishment is not appropriate.”

The Wetrich DUI Fix!

- “When sentencing defendants as repeat offenders under K.S.A. 2020 Supp. 8-1567, driving under the influence (DUI), the Legislature intended courts to count as prior convictions those out-of-state offenses comparable to Kansas' DUI statute in title, elements, and prohibited conduct, even if the elements of the out-of-state crime are broader.”
- *State v. Myers*, ___ Kan. ___, 499 P.3d 1111, 1112 (2021).

The Wetrich DUI fix (cont.)

- Missouri's Driving While Intoxicated will count as prior a DUI.
- The comparability factors in K.S.A. 2020 Supp. 8-1567(j) do not require judicial fact-finding in contravention of *Apprendi*.
 - Elements only comparisons are fine.

Thank You

Send fan/hate mail to:

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2022 Legislative Update

Joseph N. Molina, Director of Legislative Services,
Kansas Bar Association

**Friday, April 29th
2:00 – 2:50 p.m.**

Kansas Bar Association

- 2022 LEGISLATIVE UPDATE
- Presented by:
- Joseph N. Molina III
- April 7, 2022



KANSAS BAR
ASSOCIATION

By the Numbers
Constitutional Amendments
Judicial Branch
BIDS
Bills of Interest
Elections

2022 LEGISLATIVE UPDATE

2022 by the Numbers

Senate Bills
introduced in
2021 = 252

Senate bills
carried over to
2022 = 355

House Bills
introduced in
2021 = 349

House Bills
carried over to
2022 = 398

Bills that
became law in
2022 = 38

Number of
days in session
= 54

Constitutional Amendments

- HCR 5003 – Value Them Both (Senate 28-11; House 86-38) Primary Election
- HCR 5014 – Rules and Regs (Senate 27-12; House 85-39) General Election
- HCR 5022 – Election of Sheriff (Senate 36-2; House 97-24) Primary Election
- SCR 1619 – 2021 Special Committee on Taxation (Senate 28-11; No House vote)
- SCR 1620 – Supermajority to pass certain state tax increases (Senate 25-14; No House vote)



Judicial Selection



SCR 1621 – Federal Model

SCR 1622 – Partisan Elections

HCR 5006 – Nominating Process COA

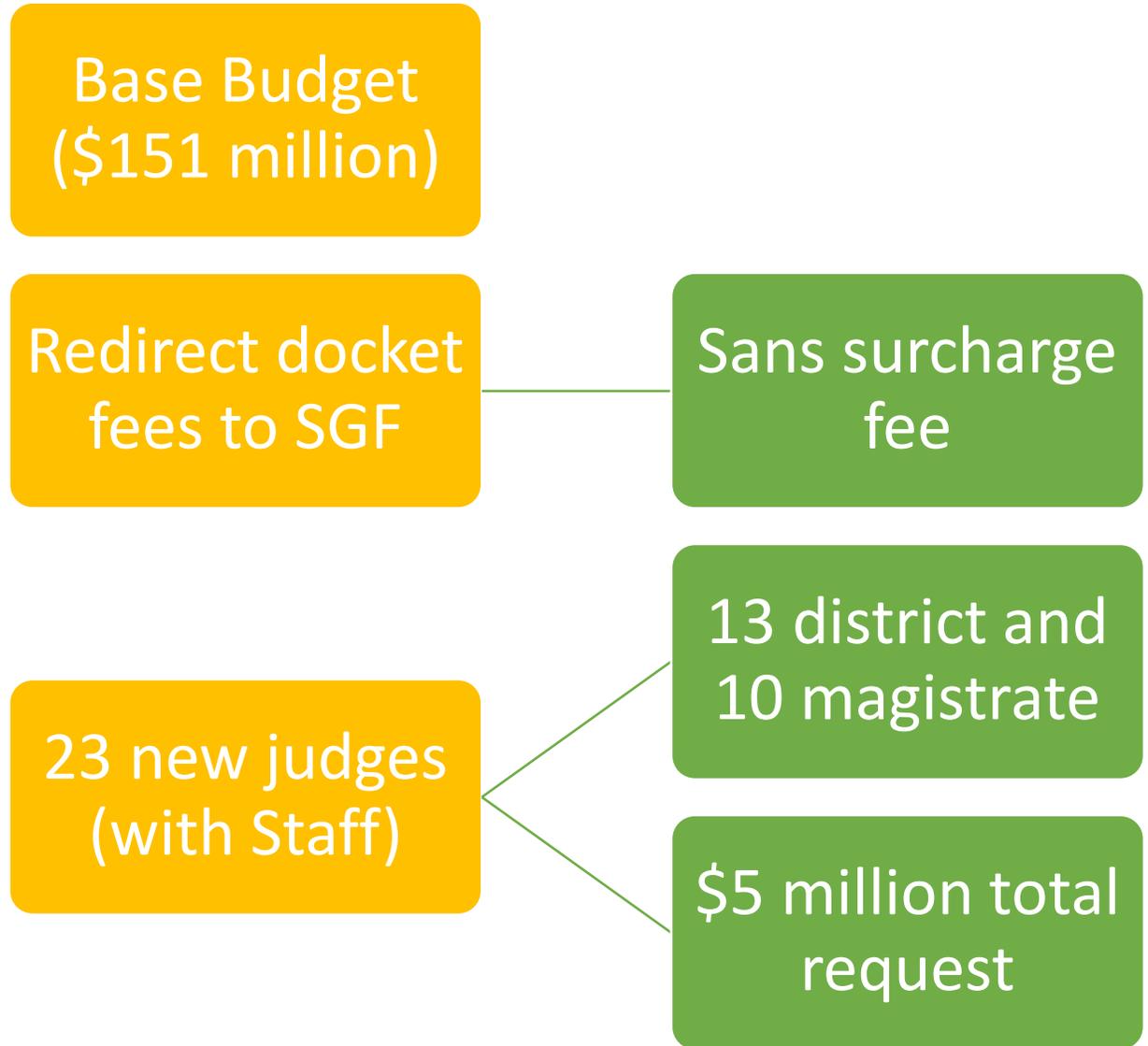
Judicial Branch

Office of Judicial Administration

Judicial Branch Budget

- Website: <https://www.kscourts.org/About-the-Courts/Court-Administration/Budget>
- FY 2022/FY 2023
- HB 2541 – Docket Fee Transition to SGF

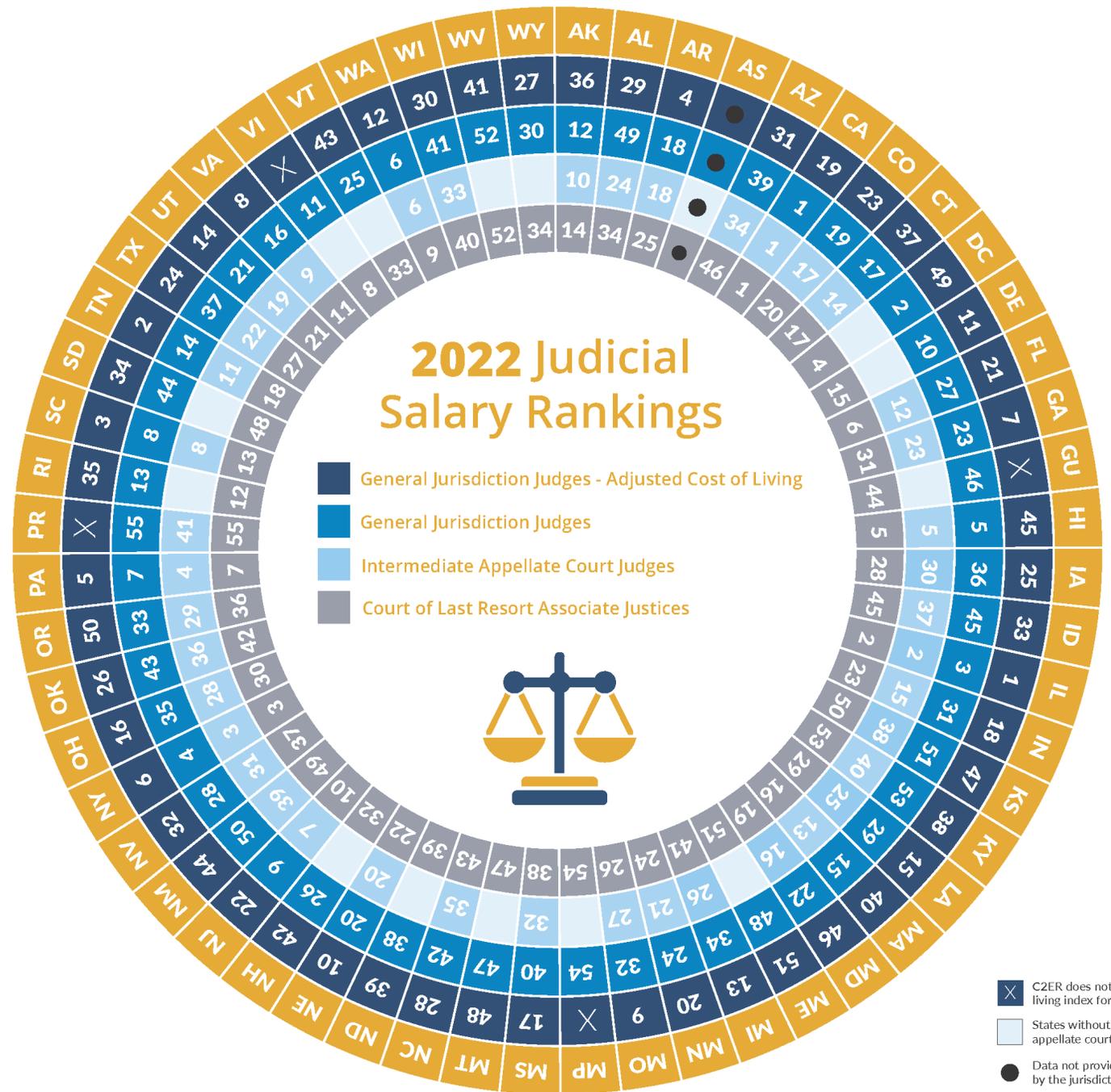
FY 2023 Request



Survey of Judicial Salaries

Kansas
 \$145,641 (50)
 \$140,940 (39)
 \$128,636 (51)
 \$131,355 (49)

Missouri
 \$183,264 (27)
 \$167,535 (24)
 \$157,972 (32)
 \$175,623 (9)

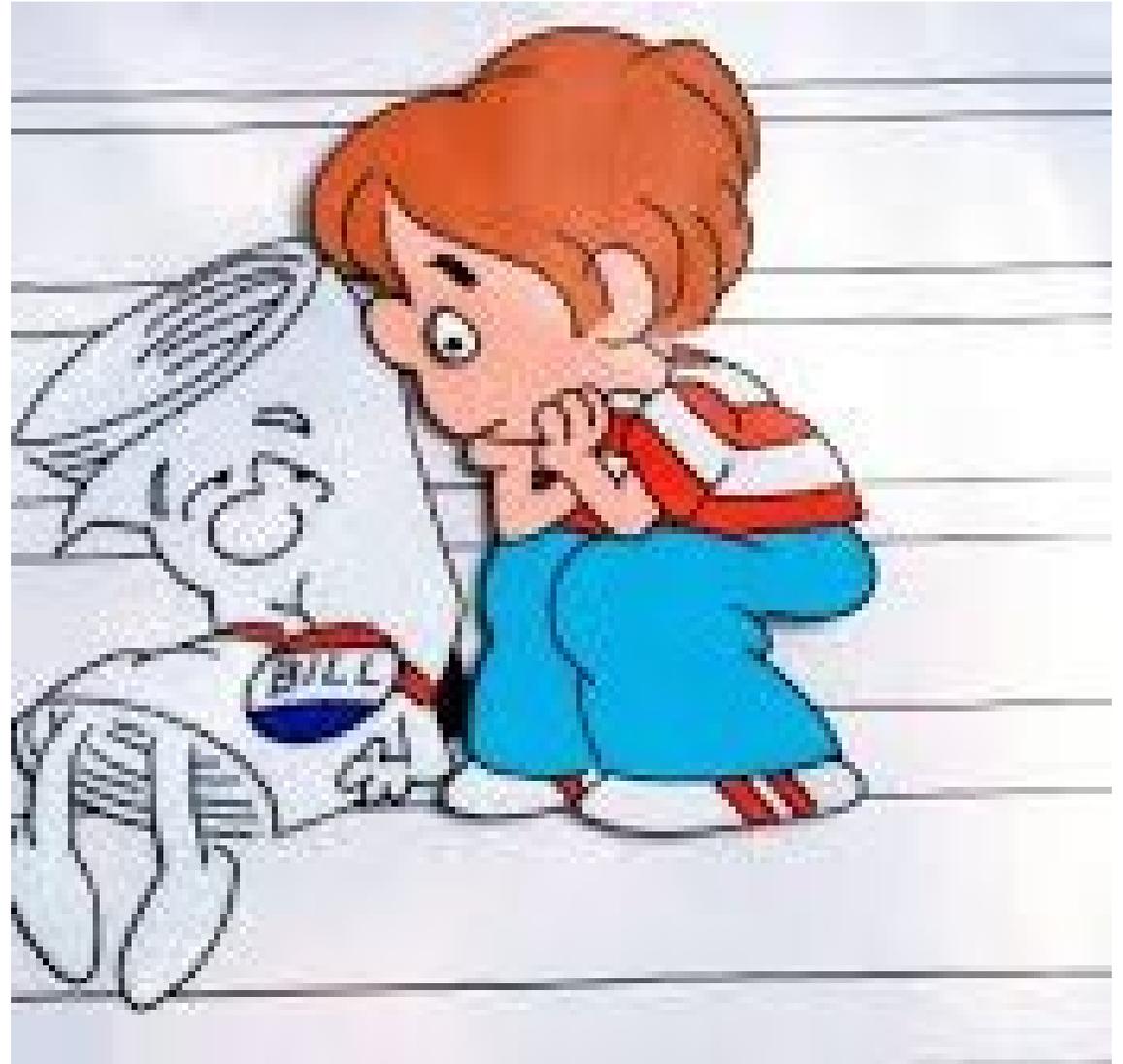


Kansas BIDS

- \$3.9 million for pay parity and employee pay scale adjustment
 - Removed from 5% Cost of Living Adjustment
- \$3.6 million for assigned counsel rate increase - \$100-\$120 for FY 2023
 - Provision for assigned counsel rate increase – HB 2363 not approved
- \$316,000 for technical upgrades and additional office space
 - Funding for WyCo office will be in 2023 request

BILLS

- Conference Committee Reports
- Litigation
- Probate/Real Estate
- Family



Judiciary CCR

- CCR for HB 2299 Law Enforcement Bundle
- CCR for HB 2277 Criminal Law Bundle
- CCR for HB 2377 DUI Bundle
- CCR for HB 2109 Records Bundle

Litigation

- SB 150 Advertising
- SB 151 CAPS
- SB 152 Third Party Financing
- SB 286 COVID-19 response
- SB 2458 Optometrist/Ophthalmologist



Real Estate, Probate & Trusts

- SB 141 Uniform Directed Trust Act
- Sub for SB 400 Uniform Trust Code
- HB 2025 Copy of Will
- SB 382 License requirement for real estate transactions
- HB 2531 Right of Way along county roads

Family Law

- HB 2496 Uniform Family Law Arbitration Act
- HB 2725 Shared Parenting
- SB 575 Presumptive Joint Legal Custody
- HB 2153 Office of the Child Advocate
- HB 2075 Adoption Venue
- CCR for SB 343– Hearing impairment and legal custody

2022
Elections



Kansas Governor Race

- Incumbent Gov. Laura Kelly (D)
- Presumptive Challenger KS AG Derek Schmidt (R)



Kansas Attorney General Race

- Kris Kobach Republican Former Secretary of State/Gubernatorial Candidate
- Tony Mattivi Republican Retired Federal Prosecutor
- Kellie Warren Republican State Senator/Judiciary Chair

- Chris Mann Democrat Lawrence Attorney
- Kristi Welder Democrat Olathe Attorney

Kansas State Treasure

- Lynn Rogers Democrat Incumbent Treasurer
- Michael Austin Republican Former Brownback Economic Advisor
- Steven Johnson Republican State Representative/Chair Insurance & Pensions
- Caryn Tyson Republican State Senator/Assessment & Taxation Chair
- Sara Hart Weir Republican Former 3rd District Congressional Candidate

Legislative Resources

Kansas Legislature
www.kslegislature.org/li

Kansas Leg. Research
<http://www.kslegresearch.org/KLRD-web/Policy.html>

State of Kansas:
www.kansas.gov

Office of the Governor:
www.ksgovernor.org

Judicial Branch:
www.kscourts.org

Contact Information

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**KANSAS BAR
ASSOCIATION**

Technology in the Law Practice: Avoiding Ethical Pitfalls in the Digital Age (Ethics)

Danielle Hall, Executive Director,
Kansas Lawyers Assistance Program

**Friday, April 29th
3:00 – 3:50 p.m.**

TECHNOLOGY IN THE LAW PRACTICE:

AVOIDING ETHICAL PITFALLS

Technology has become an important part of a modern law practice or legal department. Lawyers use technology to do everything from sending communication, storing documents, and even processing payments. Lawyers, however, should not only be able to recognize when to use technology to provide legal services efficiently, but also understand how to use that technology responsibly and ethically. The first ethical duty of a lawyer is to practice competently, which includes understanding and managing technology in the law office while ensuring client confidences. During this seminar, we will discuss how to leverage some of the benefits and risks associated with using technology, as well as your ethical obligations when using technology in your practice.

Danielle M. Hall
Executive Director
Kansas Lawyers
Assistance Program

INTRODUCTION

One of the basic concepts of our Rules of Professional Responsibility is protecting client confidences. KRPC 1.6 explicitly states, “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation...” Protecting client confidences is an obligation we have traditionally applied—and still do—in the “brick and mortar” setting of a physical office, traditionally storing files in a locked cabinet, behind locked doors.¹ We still talk to our clients privately in person and on the phone and in letters. The landscape of client communication, however, has changed dramatically over the last ten years. For instance, items such as email, text messaging, and client portals have all changed how we deliver information to clients.

Just over the last two years, the COVID-19 pandemic has also drastically impacted the landscape in which lawyers and law firms practice law. For forward-thinking, technologically inclined practitioners, the COVID-19 pandemic confirmed that implementing tools to facilitate remote work for employees and communication with clients is the way to go. For many others, the pandemic exposed critical areas where advancements are necessary. Law firms have transitioned towards remote practices and greater flexibility in practice model structures. Virtual meetings platforms—such as Zoom, Microsoft Teams, and WebEx—have become the norm in the law practice for everything from appearing for court to client meetings. Many ethics and legal tech commentators, including myself, anticipate that several of the changes made to the way law is practiced during the pandemic may be here to stay for the long term. While the landscape may have changed, our obligations have not.

As lawyers begin introducing new technologies to their practice—shifting to more virtual environments—they must do so with the Rules of Professional Conduct in mind. In addition to new confidentiality concerns, technology competence is an issue lawyers should be aware of—think lawyer cat. Just twenty years ago, as ethics commentator Andrew Perlman points out, lawyers were not expected to know how to protect confidential information from cybersecurity

¹ Tracy Vigness Kolb, *Technology Competence: The New Ethical Mandate for North Dakota Lawyers and the Practice of Law*, at 2, (2016).

threats, use the Internet for marketing and investigations, employ cloud-based services to manage a practice and interact with clients, implement automated document assembly and expert systems to reduce costs, or engage in electronic discovery.² Heck, just two years ago we were not expected to know how to use Zoom as our primary method of communication, despite its several years of existence.

Because of the digital age we now live and work in, our ethics rules need to reflect this change, giving us both guidance and flexibility to practice in the modern era. As a result, both the ABA and several of the states have started offering guidance. In fact, some guidance can be found in our existing Rules of Professional Conduct, while others can be found in recently released ethics advisory opinions. As such, there is no time like the present to begin improving your technology skill and become more familiar with the applicable rules.

ETHICS AND TECHNOLOGY

The American Bar Association Commission on Ethics 20/20

The American Bar Association (ABA) Commission on Ethics 20/20 was created in 2009 by then-ABA president Carolyn Lamm to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments. The group's challenge over the next several years is to study these issues and, with 20/20 vision, propose policy recommendations that will allow lawyers to better serve their clients, the courts, and the public.³

In August of 2012, the Commission proposed several amendments to the ABA Model Rules of Professional Conduct. These proposals were then adopted by the ABA House of Delegates. The following amended rules contain amended language that encompasses aspects of the use of technology by the legal profession.

² Andrew Perlman, *The Twenty-first Century Lawyer's Evolving Duty of Competence*, *The Professional Lawyer*, Vol. 22, No. 4 (2014).

³ ABA Commission on Ethics 20/20, information available at: http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html.

Amendment Regarding a Lawyer's Duty of Competence (Model Rule 1.1)⁴

Because technology use in law firms and legal departments is now universal, the Commission proposed and the House adopted an amendment to Comment [8] of Model Rule 1.1 to remind lawyers that being competent includes not only staying abreast of changes in the law and its practice, but also includes having a basic understanding of the benefits and risks of relevant technology.⁵ The amendment makes clear that a lawyer or law firm should be versed in the implications of technology used in the course of representation, including knowing any limitations of their personal understanding and hiring the right professionals to help make informed choices.⁶

Amendment to the Rule on Confidentiality of Information (Model Rule 1.6)⁷

The 2012 adopted amendments clarify that lawyers should take reasonable precautions to protect client confidences from inadvertent or unauthorized access or disclosure and identify the factors that lawyers should consider when determining whether they have taken reasonable precautions. To help lawyers better understand how to protect client confidences in the digital age, the Commission proposed, and the House adopted black letter paragraph (c) to Model Rule 1.6.⁸ This paragraph clarifies lawyers have a duty to take reasonable precautions to protect client confidences, not only from inadvertent or unauthorized disclosure, but from inadvertent or unauthorized access. In discussing the duties under Rule 1.6, the Commission made clear that they understand lawyers can't guarantee electronic security any more than they can guarantee the physical security of documents stored in a file cabinet or offsite storage facility. Just like fires and floods, computer systems can suffer catastrophic events and they can also be hacked. This rule, however, does not impose a duty on lawyers to achieve the unattainable.⁹ What constitutes

⁴ ABA Commission on Ethics 20/20 Revised Draft Resolution for Comment – Technology and Confidentiality, at 4 (February 2012) (available at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120221_ethics_20_20_revised_draft_resolution_and_report_technology_and_confidentiality_posting_final.authcheckdam.pdf) (hereinafter *Ethics 20/20 Draft Resolution for Comment Re Technology*).

⁵ Catherin Saunders Reach, *Ethics 20/20, Security, and Cloud Computing*, ABA TECHSHOW, at 4 (2015).

⁶ *Id.*

⁷ *Ethics 20/20 Draft Resolution for Comment Re Technology*, at 8.

⁸ Saunders Reach, *supra* note 5, at 4.

⁹ *Id.* at 5.

reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors.¹⁰ In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.¹¹ Importantly, mere inadvertent or unauthorized disclosure of, or unauthorized access to this information does not, by itself, constitute a violation of the rule.

*Amendment to the Rule on Responsibilities Regarding Non-Lawyers Assistance (Model Rule 5.3)*¹²

The adopted amendments to Model Rule 5.3, added commentary regarding outsourcing. Comment [3] now provides that a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s obligations. Outsourcing refers generally to the practice of taking a specific task or function previously performed within a firm or entity and, for reasons including cost and efficiency, having it performed by an outside service provider.¹³ Examples of outsourced legal work include, “investigative services, offsite online data storage or online practice management tools (e.g. ‘cloud computing services’) ...”¹⁴

The Kansas Ethics 20/20 Commission

In February 2013, the Kansas Ethics 20/20 Commission was appointed and directed by the Kansas Supreme Court to undertake a review of the model rule changes adopted by the ABA in 2012. The Kansas Commission reviewed the adopted amendments and proposed a series of rule changes based upon this review.¹⁵ In the Memorandum to the Supreme Court from the Commission, it stated as a summary of the amendments:

¹⁰ ABA Formal Opinion 477, at 4 (2017). The full opinion is available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.authcheckdam.pdf.

¹¹ *Id.*

¹² ABA Commission on Ethics 20/20: Revised Draft Resolution for Comment – Outsourcing, at 2 (February 2012) (available at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120221_ethics_20_20_revised_draft_resolution_and_report_outsourcing_posting_final.authcheckdam.pdf) (hereinafter *Ethics 20/20 Draft Resolution for Comment Re Outsourcing*).

¹³ ABA Commission on Ethics 20/20 Resolution and report, 105 C, at 4 (Aug. 2012).

¹⁴ *Id.*

¹⁵ Information regarding the Commission and the rule changes can be found at: http://www.kscourts.org/pdf_inc/ethics-20_20-recommended-changes.pdf.

1. **ESI.** To keep up with changing times, a number of the amendments address electronic data, electronically-stored information (“ESI”), and electronic communications, including advertising via blogs and websites. The rules also add a requirement that lawyers keep abreast of changes in technology.
2. **Outsourcing.** With the increase in outsourcing of legal services, the need to maintain confidentiality and adequate supervision are addressed in several rules.
3. **Confidentiality.** A renewed focus on confidentiality allows the limited disclosure of information to identify conflicts in relationship to firm mergers and lateral hires, and expands on the need to avoid the inadvertent disclosure of client confidential information...¹⁶

The amendments proposed by the Kansas Commission were adopted by the Kansas Supreme Court in January of 2014 and were effective March 1, 2014. Amendments of note—which relate to technology—can be found in KRPC 1.1, 1.6, and 5.3.¹⁷

KRPC 1.1 Competence

Comment [8]. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)

KRPC 1.6 Confidentiality of Information

1.6(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

¹⁶ Kansas Ethics 20/20 Commission Memorandum Re Ethics 20/20 Commission Report, at 1 (June 2013) (available at: http://www.kscourts.org/pdf_inc/ethics-20_20-commission-report.pdf)

¹⁷ *Id.*

Comment [26]. Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

It then goes on to read:

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

KRPC 5.3 Law Firms and Associations: Responsibilities Regarding Nonlawyer Assistance

Comment [3]. A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to

a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

What Does Technology Competence Even Mean?

KRPC 1.1, Comment [8] makes clear, a lawyer or law firm should be well versed in the implications of technology used in the course of representation, including knowing any limitations of their personal understanding and hiring the right professionals to help make informed choices.¹⁸ It requires every lawyer:

- keep abreast of changes to technology used in legal practice;
- develop an awareness of technology, its functionality, and available offerings;
- gain a grasp of the risks and benefits associated with using technology; and
- attain reasonable level of skill in a chosen technology.¹⁹

¹⁸ *Id.*

¹⁹ Ivy Grey, *Exploring the Ethical Duty of Technology Competence*, Law Technology Today (March 2017). Available at <http://www.lawtechnologytoday.org/2017/03/technology-competence-part-i/>.

To date, 40 states—in addition to Kansas— have formally adopted Model Rule 1.1, Comment [8]. As more and more states continue to adopt this standard, lawyers cannot continue to ignore the focus on technology competence. In fact, the amended commentary to the rule will preclude a lawyer from pleading ignorance to new technologies or the risk associated with technology.²⁰

A lawyer’s fundamental duty has always been to provide competent representation to his or her client. Historically, the concept of a “competent” lawyer primarily focused on a lawyer’s knowledge of a substantive area of the law coupled with his or her experience and ability to represent a client in a particular engagement.²¹ This view, however, has become outdated with regard to technology, and the amendments to the rules were necessary to reflect the importance of technology in the delivery of legal and law related services.²²

Per the rules, lawyers should have a basic understanding of the technology they employ, in addition to acknowledging the risks associated with the use of that technology and what can be implemented to mitigate those risks. It is important to remember, however, that competence does not mean perfection or expertise, instead it requires the baseline understanding of, and reasonable proficiency in, the technology being used.²³ And, just as with any other practice area or skill, a lawyer’s duty of technology competence can be achieved through continuing study and education or through association with others who are well versed in the area.²⁴

While there are plenty of critics of the amended comment to Rule 1.1—saying that the amendment is vague or that the ABA might as well say water is wet—one must keep in mind the area of technology is an ever-changing landscape. The chief reporter of the ABA commission on Ethics 20/20, Andrew Perlman, explained that the standard had to be nebulous, because “a competent lawyer’s skill set needs to evolve along with technology itself,” and “the specific skills

²⁰ Steven Puiszis, *A Lawyers Duty of Technological Competence*, American Bar Association 2017 Professional Responsibility Conference, at 3, available at https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2017%20Meetings/Conference/conference_materials/session4_information_governance/puiszis_lawyers_duty_technological_competence.authcheckdam.pdf.

²¹*Id* at 1.

²² Perlman, *supra* 2, at 25.

²³ Grey, *supra* note 19, at 1

²⁴ KRPC 1.1, Comment 2

lawyers will need in the decades ahead are difficult to imagine.”²⁵

When we consider what it means to stay abreast of the benefits and risks associated with the use of technology, it is clear that the “list” of what a lawyer should know is one that is not static. A good place to start, however, is by asking yourself if you really know how to use the technology that is already implemented in your office. For instance, let’s take Microsoft Word. Do you know how to automatically number paragraphs, insert and fix footers, create a table of contents, convert the document to a PDF, apply and modify styles, and remove metadata?

Lawyer and ethics commentator, Steven Puiszis, has listed several broad areas in which lawyers should be expected to demonstrate technological competency. They are:

- Cybersecurity, or safeguarding electronically stored client information;
- Electronic Discovery, including the preservation review and production of electronic information;
- Leveraging technology to deliver legal services, such as automated document assembly, electronic court scheduling and file share technologies;
- Understanding how technology is used by clients to offer services or manufacture products;
- Technology used to present information and/or evidence in the courtroom; and
- Internet-based investigations through simple Internet searches and other research tools available online.²⁶

As I have already mentioned, this list is certainly not one that is exhaustive, as a lawyer’s duty of competence must evolve as the technologies we use to provide legal services evolve. Additionally, I would argue that in addition to this list, it is important for lawyers to know how the use of technology works with our other Rules of Professional Conduct, and not just the basic idea of technology competence.

²⁵ Perlman, *supra* note 2, at 25.

²⁶ Puiszis, *supra* note 20, at 2.

Using Technology Responsibly

The use of technology presents special ethical challenges, particularly in the areas of competence and confidentiality. Lawyers also have common law duties to protect client information and may have contractual and regulatory duties. The duties to safeguard information relating to clients are minimum standards with which lawyers are required to comply. Lawyers should aim for even stronger safeguards as a matter of sound professional practice and client service.

Together, the changes to KRPC 1.1, 1.6 and 5.3 require lawyers using technology to take competent and reasonable measures to safeguard client data. This duty extends to all use of technology, including computers, networks, smartphones, mobile devices, technology outsourcing, and cloud computing.

The requirement for lawyers is reasonable security, not absolute security. For example, New Jersey Ethics Opinion 701 states:

...[r]easonable care,' however, does not mean that the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access. Such a guarantee is impossible..." Recognizing this concept, the Ethics 20/20 amendments to the Comment to Model Rule 1.6 include "...[t]he unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure."²⁷

Ethics requirements establish minimum standards, and while lawyers are concerned about security, confidentiality, and control when it comes to technology, their reported behavior in the regarding precautionary measures when using technology, however, simply do not reflect their level of concern. For instance, in the *2020 ABA Technology Report* respondents were asked if encryption was used when sending confidential information or document via email to a client.

²⁷ A copy of New Jersey Ethics Opinion 701 can be found at https://www.judiciary.state.nj.us/notices/ethics/ACPE_Opinion701_ElectronicStorage_12022005.pdf.

Only 39% of respondents reported using the precautionary measure²⁸ Similarly, only 39% report using two-factor authentication and 29% report using remote device management and wiping.²⁹ The reason why precautionary measures are so important is because there are certain risks involved when using certain technology. The risks identified by the ABA Ethics Commission 20/20 included:

- Inadequate physical protection for devices or not having methods for deleting data remotely in the event a device is lost or stolen.
- Weak passwords.
- Failure to purge data from devices before they are replaced.
- Lack of appropriate safeguards against malware.
- Infrequent backups of data.
- Using computer operating systems that do not contain the latest security protections
- Inappropriately configured software and networking settings to minimize security risks.
- Not encrypting sensitive information or identifying (and when appropriate, eliminating) metadata from electronic documents before sending them.
- Using Wi-Fi hotspots in public places as a means of transmitting confidential information.
- Unauthorized access to confidential client information by a vendor's employees or by outside parties via the internet.
- The storage of information on servers in countries with fewer legal protections for electronically stored information.
- A vendor's failure to back up data adequately.
- Unclear policies regarding ownership of stored data.

²⁸ John G. Loughnane, *ABA TECHREPORT: Cybersecurity* (2020). Available at: https://www.americanbar.org/groups/law_practice/publications/techreport/2020/cybersecurity/

²⁹ *Id.*

- The ability to access the data using easily accessible software in the event that the lawyer terminates the relationship with the cloud computing provider or the provider changes businesses or goes out of business.
- The provider's procedures for responding to (or when appropriate, resisting) government requests for access to information.
- Policies for notifying customers of security breaches.
- Policies for data destruction when a lawyer no longer wants the relevant data available or transferring the data if a client switches law firms.
- The extent to which lawyers need to obtain client consent before using cloud computing services to store or transmit the client's confidential information.³⁰

Most of the risks addressed by the Commission involve the unauthorized disclosure of client information, and as there are more and more reports of data breaches in the headlines, those risks become more recognizable. For instance, according to data security software company the Digital Guardian, at least 80 percent of the nation's 100 largest law firms have been affected in some way by a data breach.³¹ However, please acknowledge that solos and small firms are not exempt. In fact, as early as February of 2014, a solo firm in North Carolina fell victim to a virus known as Crypto Locker, which held all his firm's data for ransom.³²

The data breach of Panamanian law firm Mossak Fonseca, has been one of the most reported law firm data breaches to date. This breach is more commonly referred to as the Panama Papers, and involved the breach of 11.5 million documents.³³ The documents included emails, PDF and Word documents, and database entries.

The hack on Mossak Fonseca was certainly not complex in nature. In fact, it was so simple that some experts say a teenager with no hacking knowledge other than basic googling skills

³⁰ ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies, For Comment: Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology, at 3-6 (2010).

³¹ Ellen Rose, *Most Big Firms have had Some Hacking: Business of Law*, Bloomberg (March 10, 2015) (available at: <https://www.bloomberg.com/news/articles/2015-03-11/most-big-firms-have-had-some-form-of-hacking-business-of-law>).

³² WSOCTV, *Computer Virus Locking Important Files Targets Local Business* (Feb. 6, 2014) (available at: <http://www.wsocvtv.com/news/local/computer-virus-locking-important-files-targets-loc/113739524>).

³³ Luke Harding, *What are the Panama Papers? A Guide to History's biggest Data Leak*, The Guardian (April 5, 2016) (available at: <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers>).

could have done it.³⁴ The attackers point of entry was through older versions of popular open-source web server software WordPress. Security experts think it is likely that an attacker gained access to the Mossak Fonseca WordPress website via a vulnerability in WordPress.³⁵ This vulnerability had long since been updated prior to the attack, but Mossak Fonseca simply had not updated the software on their web server. From there the attackers were able to infiltrate their entire firm database. And while the stories surrounding the Mossak Fonseca breach are made for TV—they were breached by hacktivist that exposed criminal activity at the firm—the reality is that many firms are vulnerable to cybersecurity incidents and breach potentially exposing client information.

Law firms and legal departments are considered by attackers to be “one stop shops,” because they have high value information that is well organized. Hackers target money, personally identifiable information that can be converted to money, client business strategy, intellectual property and technology, and information about deals and litigation.³⁶ Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.³⁷

Because personal identifiable information is so valuable in the digital age we live in, lawyers must take precautions to protect their client’s information and uphold their duty of confidentiality. Lawyers must be reasonable with the technology they use, and they must be competent in its use to ensure that those client confidences are not broken.

PRACTICAL APPLICATION OF THE ETHIC RULE TO TECHNOLOGY USE

Cloud Technology, Online Data Storage and Third-Party Vendors

File hosting services, such as Dropbox, Box, and Google Drive, all store files via cloud computing. Broadly defined, cloud computing (or "Software as a Service") refers to a class of

³⁴ Jason Bloomberg, *Cybersecurity Lessons Learned from Panama Papers Breach*, Forbes (April 21, 2016)

³⁵ *Id.*

³⁶ Sharon Nelson, *Egregious Data Breaches, Leaks and Hacks*, ABA TECHSHOW, (March 17, 2016).

³⁷ ABA Formal Opinion 477, at 2.

software that's delivered over the Internet via a Web browser—like Safari, Chrome, and Edge—rather than installed directly on the user's computer.³⁸ Lawyers and law firms see the cloud as a fast and scalable way to use advanced legal technology tools without the need for substantial upfront capital investment in hardware, software, and support services.³⁹

Most lawyers have used the cloud for years, even if not in a law practice setting. If you use any online email products, you are using cloud computing. Also, if you have ever used Google Docs, Office 365, or even accessed a bank account online you are using cloud computing. As lawyers become accustomed to the ease of using cloud computing for their personal uses, they come to expect that same ease in a professional setting. Additionally, in the last few years, the use of the cloud has become far more commonplace as cloud service providers recognize the value of the legal marketplace. Everything from case management software, discovery software, and document assembly has been developed now that the use of the cloud is becoming more prevalent in the legal profession. Every year at the ABA TECHSHOW, vendors flock to the exhibit hall to show off their technology—almost all of them run on the cloud.

Even though most of us use or have used some sort of cloud computing in our personal lives, cloud computing continues to be a major topic for the legal profession, despite its uptick in usage. One of the defining—and for lawyers, the most alarming—characteristics of the software is that the data is stored over the internet on a server owned by a third party, rather than on the user's computer.⁴⁰ For example, when you use a web-mail service like Gmail, your actual emails reside on a remote server hosted by Google and not on your own hard drive or server.⁴¹ Because of this characteristic, lawyers often want to know if cloud based software is ethical to use, and if it is secure.

Many states have weighed directly in on answering the question regarding cloud computing and ethics. Those states that touch on the principles of cloud computing generally agree that lawyers should maintain reasonable care in the evaluation of services of a cloud or

³⁸ What is Cloud Computing? IBM (available at: <https://www.ibm.com/cloud-computing/what-is-cloud-computing>).

³⁹ Kennedy, *ABA TECHREPORT: Cloud Computing*, at 2 (2016) (available at <https://www.americanbar.org/content/dam/aba/publications/techreport/2016/cloud/cloud-computing.authcheckdam.pdf>)

⁴⁰ Saunders Reach, *supra* note 5, at 3.

⁴¹ *Id.*

third-party provider. About 20 jurisdictions have ethics opinions about the use of the cloud. All say that lawyers can use the technology, however, you should investigate the products, the methods used, and keep up with any changes the provider may make. While Kansas is not among the 20 jurisdictions to offer an opinion, the rules relating to technology should give guidance on this issue, since their original intent was to address technology. The ABA Legal Technology Resource Center maintains a list of cloud ethics opinions with a summary and links to the opinions at:

https://www.americanbar.org/content/dam/aba/images/legal_technology_resources/CloudEthicsOpinions2019/cloudethicsopinions2019.pdf

When asked about the security of cloud-based software, I often describe it being similar to the difference between holding your money in your back pocket vs. putting it in the bank. Let's say you have a 100-dollar bill. You could walk around town with that 100-dollar bill in your pocket, where you could get pick-pocketed, it could fall out of your pocket, or you simply could misplace the pair of pants it was in. The alternative is that you could put the 100 dollars in the bank. I think we can all agree that the bank is the safer place to put the money, but why?

There is obviously a sense of security in the bank. This is because they have a vault to keep my money in. This vault is locked and may need a key or password, only certain people have access to it, and the bank could have security guards on staff. Think about cloud based systems being the bank with your data. The good programs often need passwords for security reasons, the data is often encrypted, limited people have access to your data and often the location of the server is remote and secure. Now, I am not saying that every system out there is fool-proof and has top-notch security—you should definitely be particular about who holds your data as you will see below—but that is why you as the lawyer have to do your due diligence in researching the security of your provider.

One of the most popular cloud file storage and sharing services is Dropbox, with more than 600 million users according to SaaS Scout Research Group.⁴² Dropbox continues to be the most

⁴² <https://saasscout.com/statistics/dropbox-statistics/#:~:text=Dropbox%20has%20over%20600%20million,of%20content%20uploaded%20to%20Dropbox>

used cloud technology in the legal in the profession, as reported by the *2020 ABA Technology Report*. Dropbox was at the top of the list with 67% of respondents reporting that they use the service.⁴³ In fact, five times as many respondents used Dropbox as the most popular legal-specific cloud tool. However, is the software secure? That is to be debated.

On the Dropbox homepage, it says that it uses “256-bit AES encryption” (the strongest normal standard today) and two-step verification. Encryption and two-step verification are both security aspects that you should search for in a product. Additionally, your Dropbox data is stored on Amazon’s S3 storage service, which means that it is securely encrypted, but Dropbox retains the encryption keys and could theoretically access it. Dropbox’s privacy policy states that certain employees have this power for use when data is legally required to be disclosed. Because the file data arrives at Dropbox in unencrypted form—which is the point of contention for many—the file could be accessed and reproduced in original format by Dropbox to comply with a court order. This is a prime example of why you should pay attention to privacy policies and user agreements.

If you want to address this security risk, one alternative would be to add encryption to some or all your files before placing them in your Dropbox drive on your computer. Carefully consider which of your files need to be encrypted. If you are looking at using Dropbox to back up your personal bank records and tax returns, should those be encrypted? If your client has given you the recipe for something, should it be encrypted before you move it to Dropbox for storage? It is highly unlikely that all documents stored on Dropbox require encryption.

Another example of why reading user agreements is important, is that Dropbox also contains language in the agreement which states that they may “*transfer, store and process your data in another location other than the customer’s country.*” If you work with banks, insurance companies, or healthcare organizations, you are most likely forbidden from offshore data storage.⁴⁴

⁴³ Kennedy, ABA TECHREPORT: 2020 Cloud Computing, available at: https://www.americanbar.org/groups/law_practice/publications/techreport/2020/cloudcomputing/

⁴⁴ Accellis Technology Group, *Ethical Considerations of Using Dropbox for Your Firm*, at 5 (available at: <https://accellis.com/wp-content/uploads/Ethical-Considerations-of-Using-Dropbox-in-Your-Law-Firm-21.pdf>).

One last thing to be aware of with using Dropbox, is that if you need to house documents in a system that is compliant with HIPAA regulations, then you will want to upgrade to Dropbox Business. Neither the free or Pro accounts guarantee compliance with HIPAA, but the Business plan does. This is just another example of why it is important to pay attention to the details, compare plans, and look at your service agreements. The bottom line is that terms and conditions change over time (often silently); companies flop; people get sued and lose; and what was once a no-brainer decision yesterday, may be a mistake today.⁴⁵

Every ethics opinion published to date regarding cloud technology asserts that a lawyer must be reasonable, which includes doing your due diligence when it comes to deciding what products to use. Additionally, KRPC 5.3 Comment [3] states, “When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.” This would of course include the duty of confidentiality. Therefore, it’s important to carefully examine all technology before buying, whether it’s SaaS or traditional. Be sure to ask any vendor some questions before committing your data to their hands. Vendors that aren’t willing or able to answer questions should be treated with caution. Even after a lawyer examines various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess to confirm that the lawyer’s actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.⁴⁶

Email Encryption

Encryption has become a hot topic as it relates to data breaches, remote work environments due to the COVID-19 Pandemic, and lawyer responsibilities. Under our rules, should lawyers use encryption when sending information through email? Should we have our information on mobile devices encrypted? We all know that confidentiality is the foundation to client communications, but do we think about this when sending a routine email? There are many

⁴⁵ *Id.* at 12.

⁴⁶ ABA Formal Opinion 477, at 10.

security issues associated with email, ranging from the simple to the complex, such as hitting the “reply all” instead of reply, or being a victim of a phishing email. When the information you are sending via email is confidential in nature, adding a level of encryption can reduce the risk of those security issues, and help you maintain your duty of confidentiality.

In 2011, the ABA issued formal opinion 11-459 to address sending communications via email to clients. The opinion states:

Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client’s situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.⁴⁷

I will note that this opinion mentions nothing about encrypting emails, but remember the opinion was written in 2011, since then several software services have been developed—some specifically for law offices—that allow you to encrypt your communications via email. The key line to recognize from the above excerpt is the reference to reasonable care. This is a common thread among the use of technology within the profession. So, does reasonable care include encrypting confidential information sent via email to clients? An answer to this question may be found in the State Bar of Texas Opinion No. 648.⁴⁸

The State Bar of Texas Opinion No. 648 was one of the first opinions to tackle the confidentiality issues of email, addressing whether a lawyer has the duty to encrypt their emails. The opinion states:

Having read reports about email accounts being hacked and the National Security Agency obtaining email communications without a search warrant, the lawyers

⁴⁷ ABA Formal Opinion 11-459, at 4 (2011). The full opinion can be found at http://www.americanbar.org/content/dam/aba/publications/YourABA/11_459.authcheckdam.pdf.

⁴⁸ The State Bar of Texas Ethics Opinion 648 can be found at: https://www.texasbar.com/AM/Template.cfm?Section=Past_Issues&Template=/CM/ContentDisplay.cfm&ContentID=30523.

are concerned about whether it is proper for them to continue using email to communicate confidential information.⁴⁹

The opinion goes on to read:

Under the Texas Disciplinary Rules of Professional Conduct, and considering the present state of technology and email usage, a lawyer may generally communicate confidential information by email. Some circumstances, may, however, cause a lawyer to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email or another form of communication.⁵⁰

The opinion also lists 6 examples of when lawyers should consider whether the confidentiality of the information will be protected if communicated by email, and whether it is prudent to use encrypted email or another form of communication. Here are those examples:

1. Communicating highly sensitive or confidential information via email or unencrypted email connections;
2. Sending an email to or from an account that the email sender or recipient shares with others;
3. Sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer;
4. Sending an email from a public computer or a borrowed computer or where the lawyer knows that emails the lawyer sends are being read on a public or borrowed computer or unsecure network;

⁴⁹ Ethics Committee for the State Bar of Texas, *Ethics Opinion No. 648*, Florida B.J. 78, at 480 (2015).

⁵⁰ *Id.*

5. Sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protect by a password; or
6. Sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, without a warrant.⁵¹

Because Rule 1.6 requires fact-based analysis to determine the reasonableness of the methods employed to maintain confidentiality, strong protective measures, like encryption are warranted in some circumstances.⁵² Cyber-threats and the proliferation of electronic communications devices have changed the landscape, and it is not always reasonable to rely on the use of unencrypted email.⁵³ Lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the factors found in Comment [18] of the Model Rules, to determine what effort is reasonable.⁵⁴

The good news is that there are services out there that help make this process easier for the lawyer. A popular service is Citrix ShareFile. ShareFile has an easy to use Outlook or Gmail plugin that allows you to encrypt an entire email or an attached document. The client is then taken to a sign in page to gain access to the document. There are also several other companies out there that offer this type of service for law firms as well, such as RPost, HushMail, Virtru, and Enlocked.

I will also mention that there are ways you can encrypt your emails when using Outlook. Instructions on how, can be found at <https://support.office.com/en-us/article/Encrypt-e-mail-messages-84d7e382-5f76-4d71-8705-324489b710a2>, however, you and the client must share your digital ID or public key certificate with each other before either party can open the encrypted communication. Gmail messages can also be encrypted straight from your Gmail account; those instructions can be found at:

⁵¹ *Id.* at 481.

⁵² ABA Formal Opinion 477, at 5.

⁵³ *Id.*

⁵⁴ *Id.* The factors for determining reasonableness in Kansas can be found in KRPC 1.6 Comment [26].

<http://www.computerworld.com/article/2473585/encryption/easily-encrypt-gmail.html>.

I have, however, found this process to be even more cumbersome than encrypting in Outlook. If you want something that is easy to use to encrypt your emails, I suggest investing in a product that has worked with law firms and understands your need for confidentiality.

One last alternative that is easy to do if you are attaching a document to an email is to simply encrypt the word or pdf document itself. This is a simple process, which requires you to set up a password to have access to the document. Both Microsoft Word and Adobe have simple ways you can do this. The most important thing to remember is to not send the password to the person in the email which contains the attachment or within a subsequent email.

- You can find instructions for password protecting a PDF at:
<https://helpx.adobe.com/acrobat/using/securing-pdfs-passwords.html>.
- You can find instruction for password protecting a Word document at:
<https://support.office.com/en-us/article/Password-protect-a-document-8f4afc43-62f9-4a3a-bbe1-45477d99fa68>.

Finally, when determining whether to employ technology like encryption, remember your duties under KRPC 1.4 with regards to communication. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.⁵⁵ The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted.⁵⁶

Passwords and Two-Factor Authentication

Password security is key when it comes to protecting yourself from potential security risks associated with the use of technology and data breaches, however, many still often reuse passwords or create small variations on a theme in their passwords across sites. A weak password used at a low security website, can allow hackers to gain a foothold and use the password more

⁵⁵ ABA Formal Opinion 477, at 10 (2017).

⁵⁶ *Id.*

easily gleaned there in attempt to gain access to the user's more sensitive information.⁵⁷ I am still amazed at the number of people who use passwords that are easily guessed. For instances, if you Google "top used passwords," all results will tell you the same thing. Passwords like 123456, 1234678, and yes, even "password" are still the most used passwords. Hopefully your password is not one that is on this list of shame.

When it comes to passwords, always be sure that you change your password from the default password setting that many products come with. Many frauds begin simply by entering simple default passwords to see what information can be obtained. Avoid using obvious passwords like your name, your firm name or other things that are easily guessed. Strong passwords (those that contain 12 or more characters with a combination of upper and lowercase letters, symbols and numbers) are best, but can be difficult to remember. Using sentences (ilovelawyers) or sentences with symbols and numbers replacing letters (!L0v3l@wyer\$) is a good way to strengthen your password, while maintaining a password that you can remember.

I often get asked about password managers, and if they are safe to use. Given the extensive number of passwords that people must remember, most security experts agree that passwords managers are one of the best options when it comes to password management. A password manager is designed to help you store, organize, and encrypt your passwords for online accounts and several devices. It is definitely a better alternative to reusing the same two or three passwords, or just writing them down and keeping them at your desk or on your mobile device. Additionally, because complexity matters when it comes to passwords, most password managers can generate them for you. If you use a password manager I suggest that you turn on the two-factor authentication option if available. The most popular password managers offer this as an option.

Even if you don't use a password manager, many popular services support two-factor authentication and you should turn it on when it is available on your accounts. There are three different types of authentications factors that currently exist. These include:

⁵⁷ ABA ETHICSearch, *How Ethical is Your Password*, *Ethics Tip of the Month* (February, 2013).

- Something you know – such as a username and password.
- Something you have – such as a mobile phone or special USB key.
- Something you are – such as a fingerprint or another biometric identifier.⁵⁸

Two-factor authentication combines two of these factors to add an extra layer of security. Many popular services such as Facebook, Twitter, iCloud, Amazon, PayPal, LinkedIn, Snapchat, WordPress, and Gmail offer two-factor authentication. In most instances, your phone will be primarily used. It will be used either to receive codes by SMS or to generate them using special apps like Google Authenticator. While we all know that a phone can be easily lost or stolen, the good news is that most of the companies offering two-factor authentication offer a way to recover your account should that happen.

The Mobile Lawyer, Public Wi-Fi, and BOYD

With advancements in technology, comes advancements in the way we practice law—including where we practice. The practice of law is increasingly happening outside of the traditional law office setting. A lawyer’s “office” is more mobile than it was even 10 years ago. Lawyers now work while they are at home or when traveling, or by simply checking an email while they are in line at a coffee shop.⁵⁹ Beyond their primary workspace, lawyers regularly perform legal work while outside of their office, and use everything from a desktop, laptop, tablet, or mobile phone to do it.

Part of the increase in mobility is, of course, due to cloud computing. The ability to access files, emails, and an abundance of information anytime and anywhere you need it has allowed lawyers to perform law-related tasks outside the traditional setting. This can, for obvious reasons, be both a curse and a blessing. While this modern business model may appear radically different from the traditional brick and mortar law office model of the yesteryears, the underlying

⁵⁸ Lucian Constantin, *5 Things you need to know about two-factor authentication*, PCWorld (March 31, 2016) (available at: <http://www.pcworld.com/article/3050358/security/5-things-you-should-know-about-two-factor-authentication.html>)

⁵⁹ Aaron Street, *ABA TECHREPORT: Mobile Technology*, at 1 (2016) (available at: <http://www.americanbar.org/publications/techreport/2016/mobile.html>).

principles of an ethical law practice remain the same. There is still a duty of confidentiality and competence when using mobile technology.

While this technology allows us to work more conveniently, it does come with some risks. Lawyers' increased use of mobile devices can lead to increased concerns that confidential client information will be lost, stolen, or inadvertently disclosed. Consider the possibilities: a lost iPhone full of attorney-client e-mails and texts; a wireless iPad communication session hacked, allowing the hacker full access to the information stored on the device; a malicious banking app on an Android phone allowing hackers to obtain attorney bank account information⁶⁰

When using mobile devices, lawyers should keep in mind that these devices are easy to lose. Lawyers should consider password protecting and installing a wiping application feature. Many of these apps allow you to remotely find your device, as well as wipe information from the device or reset the device back to the factory settings like it was just out of the box. If a laptop is being used, rather than just using a password to access the device, consider encrypting the information contained on the laptop.

With the use of mobile devices, comes the use of the Internet to access information. According to the *2018 ABA Technology Report*, lawyers regularly use items such as their mobile devices for law related tasks.⁶¹ The number of lawyers that report using public Wi-Fi without security a security measure, however, is a concern. 15% of respondents reported that they surf the net via public Wi-Fi with no security measure at all.⁶² The open nature of a public WiFi network can allow for snooping by hackers, there could be other compromised machines on the network, or the hotspot itself could be malicious. Lawyers should obviously proceed with caution when using public Wi-Fi. You most certainly don't want to do any online banking or access any information sensitive in nature, because public Wi-Fi networks are often unencrypted, and therefore the network traffic is clearly visible to anyone within range.

⁶⁰ Jason Gonzalez and Linn Freedman, *Mobile Devices and Attorney Ethics: What are the Issues?*, The United States Law Week, 80 U.S.L.W. 747 (2011).

⁶¹ Chad Burton, *ABA TECHREPORT: Virtual Law Practice*, at §2 (2018) (available at https://www.americanbar.org/groups/law_practice/publications/techreport/ABATECHREPORT2018/2018VLP/)

⁶² David Ries, *ABA TECHREPORT: Cybersecurity*, at § 11. (2018) (available at https://www.americanbar.org/groups/law_practice/publications/techreport/ABATECHREPORT2018/2018Cybersecurity/)

California Formal Opinion 2010-179 (2010), addresses this issue of concern surrounding the use of public Wi-Fi. In the opinion, the scenario involves a lawyer who takes his work laptop to the local coffee shop and accessed a public wireless Internet connection to conduct legal research on a matter and email a client. He also takes the laptop computer home to conduct the research and email the client from his personal wireless system.⁶³ The opinion recognized that “due to the ever-evolving nature of technology and its integration in virtually every aspect of our daily lives, attorneys are faced with an ongoing responsibility of evaluating the level of security of technology that has increasingly become an indispensable tool in the practice of law.” The opinion outlined factors in which a lawyer should consider when evaluating their duty of confidentiality and competence before using a specific technology, such as public Wi-Fi. Those factors were:

1. The lawyer’s ability to assess the level of security afforded by the technology.
2. Legal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person’s electronic information.
3. The degree of sensitivity of the information.
4. Possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges.
5. The urgency of the situation.
6. Client instructions and circumstances.⁶⁴

Based upon these factors, the California Committee concluded that the lawyer risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on the client’s matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions, and a personal firewall.⁶⁵ One way to solve the issues surrounding using public WiFi is to use a VPN (Virtual Personal Network). A VPN

⁶³ California Formal Opinion 2010-179, at 1 (2010).

⁶⁴ *Id.* at 3-6.

⁶⁵ *Id.* at 7.

allows you to connect to the Internet via server run by a VPN provider. All data traveling between your computer, phone, or tablet and the VPN server is securely encrypted.

In the California Formal Opinion, the Committee also concluded that if a personal home Wi-Fi system is configured with appropriate security features, then the lawyer would not violate his duties of confidentiality and competence by working from home.⁶⁶ One suggestion I have with regards to personal home Wi-Fi is that you want to make sure you are changing your default passwords on your wireless router, because hackers have managed to obtain access to those default passwords. If you don't change your password, then you may not be working from a connection that "has been configured with appropriate security features."

In the circumstance outlined above, the lawyer was using his work laptop to work remotely, however, what if had been his own personal mobile device or tablet, would that change things? It is reported that 74% of lawyers use a personal smartphone to check their email or do a simple legal task.⁶⁷ While many lawyers are using their own mobile devices for legal related work, it is worrisome that the offices they work for may not have clear BYOD guidelines and policies in place regarding the use of these personal devices.

Bring-Your-Own-Device or BYOD, is an approach that permits access to a company's computer network and email system through employee owned mobile devices.⁶⁸ It is estimated that more than half of all employees use their personal mobile technology for work.⁶⁹ While 90% of lawyers reported using remote access to check items such as their email in the *2018 ABA Technology Report*, only about 21% reported that their firm had a BYOD policy.⁷⁰

⁶⁶ *Id.*

⁶⁷ Aaron Street, *ABA TECHREPORT: Mobile Technology*, at 1(2016) (available at https://www.americanbar.org/groups/law_practice/publications/techreport/)

⁶⁸ Steven M. Puiszis, *Can't live with them, Can't Live without them – ethical and risk management issues for law firms that develop a BYOD approach to mobile technology*, at 1 (2015) (available at: http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/can't_live_with_them_cant_live_without_them.authcheckdam.pdf).

⁶⁹ Rachel King, *Forrester: 53% of Employees Use Their Own Devices for Work*, ZDNet (2012) (available at: <http://www.zdnet.com/article/forrester-53-of-employees-use-their-own-devicesfor-work/#!>).

⁷⁰ Ries, *supra* note 30, at §3.

Because the use of personal devices presents several risks, law firms should consider having clear BYOD policies if employees will be allowed to use their personal devices to access firm data. The policy should address:

- The risks associated with the use of mobile technology and security measures that need to be in place.
- What devices are permitted, and who is permitted to use them.
- The employee's responsibilities and the firm's responsibilities.
- The appropriate use of the mobile device, and be sure to clearly spell out that access to the firm's network is conditioned upon full and continuing compliance with the firm's data security policy.
- The right to access the firms' network will be immediately terminated if the policy is violated and upon the resignation, retirement or termination.
- If a violation of the policy occurs, what discipline can be imposed.⁷¹

Another thing to keep in mind is that laptop computers and items such as portable flash drives or external hard drives present risks as well. While the security controls may be different, and stronger than what is available on mobile devices, they still present the risk of being lost or stolen. Technical safeguards such as hard drive encryption, locking down the browser, the use of strong passwords, remote wiping, and other safety measures for laptops should be addressed with employees. Encrypting flash drives and hard drives should also be addressed.

Working Remotely/Virtually

ABA Opinion 498

When assessing the ethical obligations associated with the remote work environment or virtual practice, KRPC 1.1 Competence, 1.6 Confidentiality, and 5.3 Non-Lawyer Assistance are critical to determining one's obligations. KRPC 1.2 Diligence and 1.4 Communication are also relevant.

⁷¹ Puiszis, *supra* note 45, at 38-40.

On March 10, 2021, the American Bar Association issued Formal Ethics Opinion 498 addressing the ethical obligations of lawyer practicing in a virtual practice. This opinion was in direct response to the number of lawyers making the switch to a remote practice as a result of the COVID-19 Pandemic. The opinions states,

When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.⁷²

The opinion also highlights a key comment to the Model Rule on competence, pointing out that in Comment [8], the rule states, “To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...” As a result, should a lawyer practice virtually, he or she must be competent with their use of technology chosen to operate the virtual practice. Additionally, the opinion points to the Model Rule on confidentiality—which should be considered alongside Rule 1.1—stating that lawyers have the duty to, ““make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” These rules should be viewed in connection with one another given their bi-directional relationship. For example, if you are competent with chosen technology, you should be familiar with the risks and therefore will be able to access what precautions you need to protect the confidentiality and prevent inadvertent disclosure.

⁷² American Bar Association Formal Opinion 498 at 2. (March 2021). The full opinion can be found here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf

In a virtual practice, the opinion explicitly states that the lawyer should have plans in place to ensure responsibilities regarding communication and diligence. This duty is no different than in a brick and mortar practice. The way we fulfill this duty might just look a little different. The opinion highlights that Comment [1] to Rule 1.3 it makes clear that lawyers must also “pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor,” and that Rule 1.4 requires that a lawyer, “...keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information. . . .”

Lastly, if the lawyer has any staff working for him or her in the virtual environment, supervision of the staff is still essential. Lawyers with managerial authority have ethical obligations, per Rule 5.3, to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct. These obligations do not change in the virtual environment. Instead, the way we meet these obligations just might look different than what we are used to seeing in the traditional brick and mortar office.

Staff Training

When it comes to your responsibilities as a lawyer, it is important that you remember to train to your staff in the areas of technology and security. Law firms can have advanced technological safeguards, but if the lawyers and staff in the firm don’t know how to use the firm’s technology, then those safeguards are worthless. As a result, technology and data security training is a key component.⁷³

It is also important to remember that, KRPC 5.1 imposes supervisor obligations on partners or lawyers with managerial authority to ensure the firm has effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.⁷⁴

⁷³ Puiszis, *supra* note 45, at 28-29.

⁷⁴ See, KRPC 1.5(a).

This requires lawyers with managerial authority to make reasonable efforts to establish internal policies and procedures.⁷⁵ Additionally, KRPC 5.3 takes a similar approach with non-lawyers who are employed, retained or associated with a lawyer or firm. The rule states, “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”⁷⁶ Nonlawyers who work for the firm should also understand the need to preserve confidentiality.⁷⁷

When it comes to electronic communication, ABA Formal Opinion 477 suggests that lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communication with clients.⁷⁸ Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications.⁷⁹

CONCLUSION

Together, the technology amendments to Rules 1.1 and 1.6 require law offices using technology to take competent and reasonable measures to safeguard client information. This duty extends to use of all technology, including desktop and laptop computers, mobile devices, network servers, cloud computing, and outsourcing. By applying common sense and remembering that the rules do not cease to apply simply because technology is involved, law offices can tackle the challenges of practicing law in the 21st Century with confidence.

⁷⁵ See, KRPC 1.5 [Cmt. 2].

⁷⁶ See, KRPC 5.3(b).

⁷⁷ Puiszis, *supra* note 59, at 28-29.

⁷⁸ ABA Formal Opinion 477, at 8 (2017).

⁷⁹ *Id.*