

# KANSAS APPELLATE PRACTICE HANDBOOK

6<sup>TH</sup> EDITION



KANSAS JUDICIAL COUNCIL

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## PREFACE TO THE SIXTH EDITION

This is the first edition of the Handbook since the advent of electronic filing of appellate cases. All prior editions, while containing some useful suggestions, are obsolete. With clear marching orders from our Supreme Court, all appellate attorneys must enroll and monitor their cases. Paper filing is now relegated to litigants that are unrepresented.

Prompted by these massive changes we have consolidated some chapters and subjects and created new sections for electronic filing. But there is more to an appeal than just getting in the door. Scheduling, briefing, and pre- and post-opinion motion practice are dealt with.

We sincerely hope that this work will be helpful to all who practice in this important area of the law. It is an attempt to open up the mysteries of electronic filing of appellate cases in Kansas.

I must shout from the rooftops my praise for Christy Molzen with the Kansas Judicial Council, who has done all of the heavy lifting in putting this handbook together. She has taken all of these separate parts and assembled them into a work that is clear, concise, and cogent. Because of her diligence and insight, this handbook should be useful to all.

Speaking of those separate parts, I acknowledge with awe and pride the hard work of the authors of the various chapters. They are: Hon. Caleb Stegall, Justice, Kansas Supreme Court, Patty Aska, Heather Cessna, Stephen M. Kerwick, Chelsey G. Langland, Steven J. Obermeier, Barry L. Pickens, Sarah Reichart, Nicki Rose, Doug Shima, Clerk of the Appellate Courts, and Jenny Bates, Deputy Clerk. I also acknowledge Sam Schirer and Clayton Perkins who contributed their work on the sample brief and petition for review.

These authors are involved, day to day, with the appellate courts. In this handbook they offer fresh insights and valuable advice about how to get things done and done right. I thank them all.

Stephen D. Hill  
Kansas Court of Appeals

## ADDENDUM

The 2022 supplement to the *Kansas Appellate Practice Handbook*, 6th Edition, was prepared by Gayle B. Larkin, Christy R. Molzen, Michelle R. Moore, and Douglas T. Shima.

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# **CHAPTER 1**

## **History and Personnel of the Appellate Courts**

### **§ 1.1 History**

Even prior to the advent of statehood, appellate justice in Kansas was administered by three justices of a Supreme Court. With statehood and an increasing population, the volume of litigation and the number of appeals grew. Several separate revisions of the appellate court system have taken place over the years in an effort to meet the citizens' growing demands on the appellate judiciary.

The first revision was the addition of three commissioners in the late 1880's to assist the three justices. Then, in 1893, the commissioner system was abolished and, in 1895, the first Court of Appeals of Kansas came into being. There were actually two such courts, a northern department and a southern department, each with three judges. Each department had three divisions—an eastern, a central, and a western. In the northern department the eastern division sat at Topeka, the central division at Concordia, and the western at Colby. In the southern department the eastern division of the court sat at Fort Scott, the central at Wichita, and the western at Garden City. The decisions of those courts may be found in the *Kansas Appeals Reports*, Volumes 1 through 10.

The third revision occurred in 1901, when the Court of Appeals was abolished and the Supreme Court was enlarged to seven justices.

By 1963 the volume of cases in the Supreme Court had substantially increased and the legislature again authorized the appointment of a commissioner to aid the court in disposition of appeals and writing of opinions. The fifth revision was the creation of a second commissioner position in 1965.

Effective January 10, 1977, the present Court of Appeals was established consisting of seven judges. At the same time the two commissioner positions on the Supreme Court were abolished, reducing that court to its present complement of seven justices. The two commissioners, then in office, by statute became the first members of the newly-created Court of Appeals. Other members were appointed by the Governor.

On July 1, 1987, the Court of Appeals was expanded from seven to ten members. On January 1, 2003, an eleventh position was created, on January 1, 2005, a twelfth, on January 1, 2008, a thirteenth, and on July 1, 2013, a fourteenth position was created. The modern Court of Appeals has no geographical divisions but is authorized to sit in any courthouse in the state. The Supreme Court sits in Topeka.

For a more detailed history of the Kansas Appellate Courts, see *Requisite Learning and Good Moral Character: A History of the Kansas Bench and Bar*, Robert W. Richmond, editor, Kansas Bar Association (1982).

A list of the justices of the Supreme Court since statehood, its commissioners, and the judges of the Court of Appeals appears at Appendix A.

## **§ 1.2 Supreme Court Justices and Staff**

The Supreme Court consists of seven justices who serve six-year terms, subject to retention by the voters. The justice who is senior in continuous tenure serves as Chief Justice. In the event more than one have the same tenure, the oldest is deemed the senior. Kan. Const. art. 3, § 2.

The Chief Justice has general administrative supervision over the affairs of the court and of the unified judicial department of the state. In the latter function, the Chief Justice is assisted by

the judicial administrator and by the departmental justice of each of the six judicial departments. See Judicial Department Reform Act of 1965, K.S.A. 20-318 *et seq.*

Each justice is assisted by two research attorneys who must be admitted to practice law in this state. Their primary function is to prepare memoranda for their respective justices and generally assist on cases assigned to their justice for opinion writing. A central core of attorneys performs case management functions, prepares memoranda on petitions for review, and conducts individual research projects as directed.

Shared executive assistants aid the justices in the preparation of opinions, orders, correspondence, and memoranda; maintain the justices' files; work with the court clerk and reporter of decisions; compile and index volumes of the justices' opinions; and generally assist the justices in handling the administrative duties of the office. The Chief Justice employs a single executive assistant.

### **§ 1.3 Court of Appeals Judges and Staff**

The Court of Appeals consists of fourteen judges who serve four-year terms, subject to retention by the voters. One of the judges is appointed by the Supreme Court to serve as Chief Judge. The court normally sits in panels of three judges, with panel members assigned on a rotating, random basis by the Chief Judge. By statute the Chief Judge presides over panels on which he or she sits and designates the presiding judge on other panels.

Each judge employs two research attorneys and an executive assistant who perform essentially the same functions as their counterparts with the Supreme Court. The Court of Appeals also has a central core of attorneys who perform case management functions and conduct research as directed.

## **§ 1.4 Clerk of the Appellate Courts**

The clerk of the Supreme Court is a constitutional officer who, by statute, is also clerk of the Court of Appeals. The clerk is, therefore, referred to as the clerk of the appellate courts. Rule 1.01(c).

The office of the clerk of the appellate courts is located in the Kansas Judicial Center, Room 108, 301 S.W. 10th Avenue, Topeka, Kansas 66612-1507. The office is open Monday through Friday from 8:00 a.m. to 5:00 p.m.

In addition to processing cases in the two appellate courts, the clerk's office is responsible for a wide variety of activities including the conduct of bar examinations, record-keeping of admissions to the Kansas bar, and annual attorney registration. The clerk is also secretary for the Judicial Qualifications Commission, the Client Protection Fund Commission, the Board of Law Examiners, the Board of Examiners of Court Reporters, and the Supreme Court Nominating Commission. The clerk conducts elections for the lawyer members of the Supreme Court Nominating Commission and also conducts elections in seventeen of the thirty-one judicial districts to elect lawyer members of the District Judicial Nominating Commissions.

## **§ 1.5 Appellate Reporter**

The reporter of the Supreme Court is a constitutional officer and, by statute, also serves as reporter of the Court of Appeals. This position is generally referred to as the reporter of decisions. The reporter's primary function is to publish the official reports of those opinions that each court has designated for publication.

Opinions of the Supreme Court designated by the court for publication are published in an advance sheet. Court of Appeals opinions that are ready for publication form a separate section of each advance sheet. For each court a bound volume is printed when the advance sheets exceed 750 pages. Pagination in the bound volumes will conform to that in the advance sheets.

In a formal opinion the reporter adds the “catch-line,” which appears in the published opinion in italics at the beginning of each paragraph of the syllabus. This language is added for indexing purposes only and is not part of the syllabus approved by the court.

All opinions of the appellate courts, whether or not designated for publication, are submitted to the reporter before filing. Personnel in the reporter’s office make a source check on all authorities cited; proofread all quotations; check dates and other references to the record for accuracy; and check for typographical errors, punctuation, grammar, and usage.

### **§ 1.6 Judicial Administrator**

The judicial administrator, a statutory officer, implements the policies of the Supreme Court in the exercise of its general administrative authority over all courts in this state. The judicial administrator’s duties include assistance in the management of fiscal affairs in the unified judicial system, presentation of educational programs for judges and other court personnel, the collection and reporting of judicial statistical information, and assistance in the assignment of district judges beyond their districts and of retired judges.

### **§ 1.7 Law Librarian**

The law librarian, a statutory officer, is responsible for the staffing and operation of the Kansas Supreme Court Law Library. The library supports the research needs of the judicial branch but also numbers among its users employees of state agencies and the state legislature, attorneys from across the state, and the public. The library’s extensive collection includes relevant statutes and reports for all state and federal entities.

The library staff is also responsible for the sale and distribution of *Kansas Reports* and *Kansas Court of Appeals Reports*.

**§ 1.8 Disciplinary Administrator**

The disciplinary administrator, an officer of the Supreme Court appointed pursuant to statutory authority, reviews complaints of misconduct against lawyers, conducts investigations, holds public hearings when appropriate, and recommends discipline to the Supreme Court in serious matters.

# **CHAPTER 2**

## **Electronic Filing**

**CAUTION:** Kansas courts will soon be converting to a centralized case management system called eCourt, which will allow all district and appellate case data to reside on a single web-based platform. The conversion process is expected to take three or four years and, when complete, the electronic filing procedures described in this chapter will change. Always check the Supreme Court's website, [www.kscourts.org](http://www.kscourts.org), for the most up-to-date information.

### **I. INTRODUCTION**

#### **§ 2.1 Who May File Electronically**

All district and appellate courts in Kansas require electronic filings from lawyers in good standing who are licensed in Kansas. Self-represented litigants (who are not Kansas-licensed attorneys in good standing) must file paper documents in all courts. Rules 1.14 and 122.

Johnson County District Court maintains an electronic filing system that is separate from Kansas Courts e-Filing and an attorney must contact the court directly to gain access to it. When using the Johnson County e-Filing system, be aware of service requirements.

Submitting a document for filing through the e-Filing system does not mean it is filed. It must first be approved by the clerk. It is the attorney's responsibility to make sure that it was approved. If it was rejected, it is as if the document was never submitted at all. An attempted filing will not be recorded in the docket events.

**PRACTICE NOTE:** If you are providing service on a pro se litigant or a pro hac vice attorney, you must serve by traditional means because only attorneys licensed in Kansas, and in good standing, will receive electronic notifications of filings. If you are a pro se litigant, you must serve all parties by traditional means because your paper filings will not generate electronic notices.

## **§ 2.2 Register to eFile**

Before registering to eFile, watch tutorials on the Kansas Courts e-Filing Training Videos page. Then, go to the Kansas Courts e-Filing application (<http://www.kscourts.org/Cases-and-Opinions/E-Filing/default.asp#Register To eFile>), and select Request Account under the New User heading.

Before an account request is processed, the user must read, accept, and agree to abide by the terms of use for Kansas Courts e-Filing. The terms of use include a requirement that the user follow technical standards set out in Supreme Court Administrative Order No. 268 for filing and transmitting electronic court documents.

Once an account is approved, the user will receive an email that explains how to log in for the first time. The email will include several useful documents, including an explanation of rules and technical standards, and a list of documents currently accepted by Kansas Courts e-Filing. For help with questions or problems with the registration process, email [e-Filingadministrator@kscourts.org](mailto:e-Filingadministrator@kscourts.org).



### **§ 2.3 Your e-Filing Account**

Up to three e-mail accounts can be attached to an e-Filing account. Notifications will be sent to all of the e-mail addresses associated with the account. E-mail addresses can be changed at any time by logging in and choosing “My Profile” and clicking on “Modify User Profile.”

**PRACTICE NOTE:** These e-mail accounts can be for another person, such as a legal assistant. Using more than one e-mail address is a good way to avoid missing a notification.

Do not give your password to anyone else.

## **II. TECHNICAL STANDARDS**

Supreme Court Administrative Order No. 268 sets out the mandatory requirements of the electronic document filing and transmission systems in Kansas appellate and district courts. The purpose of the standards is to ensure the integrity of the court record and provide a capability for filing that is at least as good as existing paper systems.

### **§ 2.4 Electronic Filing and Transmission**

E-Filing is the process by which documents are delivered using a court-approved electronic system rather than in a conventional paper form. This includes a record of any documents that normally become part of the case file, whether submitted by the court or by the litigants.

### **§ 2.5 Document and File Format Standards**

Documents filed electronically in the Appellate Courts must be submitted through the Court’s e-Filing system in an Adobe portable document format (PDF) or another format later specified by the Supreme Court. See Rule 1.05.

An electronically filed document must not exceed 10 MB. For a document that exceeds this size restriction, an attorney should contact the office of the clerk of the appellate courts for assistance.

**PRACTICE NOTE:** To make your PDFs a small digital package –

- don't use color
- scan in black and white (not grayscale, not automatic)
- look at your scanner settings
  1. set your DPI at 300
  2. set the size of the document to 8.5" x 11"
- convert a Word document to a PDF instead of printing and scanning
- don't insert scanned signatures into a PDF
- don't insert graphics

Documents submitted to the court in paper form will be imaged to facilitate the creation of an electronic case file. The paper document will not be retained by the court. The Clerk's office can accommodate submission of non-electronic documents or exhibits in special circumstances as defined by Supreme Court or local court rule.

A docket entry that is electronically visible will record the date and time a document is received into the court file by a Clerk of the Appellate Courts.

## § 2.6 Authorization of Electronic Filers

Persons intending to file documents electronically with a court must follow the established procedures for enrolling in the e-Filing system. The court may require information necessary to establish that person as an authorized system user. The information will include, at a minimum, the filer's full name, business address, phone number, e-mail address, and Kansas Supreme Court registration number if the filer is an attorney. Supreme Court Rules 1.05 and 111. A person that has enrolled in and is authorized to use the e-Filing system is a Filing User.

Kansas attorneys enrolling as a Filing User will use their Kansas bar number for the Filing User identification (ID). An initial password will be assigned to a Filing User upon registration. A Filing User is responsible for maintaining the security of this password.

No person may file documents electronically with a court until the filer has received confirmation of registration approval from the court.

Payment of court costs through authorized electronic means satisfies the statutory requirements for payment of court costs as stated in K.S.A.60-2001, K.S.A 61-2704, and K.S.A. 20-110.

The Appellate Courts use KanPay. The district courts use Cite Pay. If you experience a problem with KanPay, please call 1-800-452-6727.

## § 2.7 Signatures

### *Signature Defined*

A Filing User ID and password will serve as the Filing User's signature on a filing for all purposes, including as an "electronic signature" defined at K.S.A. 16-1602(i), K.S.A. 60-271.

### *Signature Requirements*

- **Electronic Signature.** Filings must include a signature block with the name of the Filing User under whose ID and password the document is submitted along with “/s/[Name of Filing User]” typed in the space where the signature would otherwise appear along with other information required by K.S.A. 60-211, and Kansas Supreme Court Rule 111.
- **Written Signature.** A Filing User may also satisfy the signature requirement by scanning a document containing the Filing User’s written signature.
- **Noncompliance.** A filing that does not comply with this provision will be deemed in violation of K.S.A. 60-211, and Supreme Court Rule 111. The document may be rejected via electronic notice or may be ordered stricken from the record.

### *Signatures of Multiple Parties*

Documents requiring signatures of more than one party may be filed electronically:

- by submitting a scanned document containing all necessary written signatures, or
- all necessary electronic signatures.

### *Signature of the Clerk of the District Court*

Records and judicial proceedings requiring the attestation of the clerk of the district court may be authenticated by the clerk by using an electronic signature in lieu of the clerk’s manual signature. An electronic signature has the same legal effect as a manual signature. K.S.A. 20-365.

## **§ 2.8 Notarial Acts, Electronic Notarization, and Unsworn Declarations**

Documents subject to a notarial act may be scanned and electronically filed (e-filed) if the notarial act meets the requirements of the revised uniform law on notarial acts, as set forth in K.S.A. 53-5a01, *et seq.*

Electronic notarization may be used for e-filed documents if the electronic notarization meets the requirements of K.S.A. 16-1611.

Documents subject to unsworn declarations may be e-filed if the declaration meets with requirements of K.S.A. 53-601.

## **§ 2.9 Electronic Filing and Transmission Process Standards**

Court computers must be available on a 24-hour basis to receive e-filed documents. This provision does not prevent the court from providing for normal repair and maintenance of the receiving computer.

All electronic document submissions generate a positive acknowledgment or notice that is sent to the filer to indicate that the document has been received by the court. The positive acknowledgment must include the date and time of the document receipt and a computer generated reference number.

E-filed documents received by the clerk and subsequently accepted into the court file are deemed filed as of the time the transmission ends. The court must provide acknowledgement to the sender of the successful acceptance of the e-filed document.

After the document has been received and approved by the clerk, it is filed into the court file by a clerk of the appellate courts. At that point, the e-Filing system generates a “Notice of Electronic Filing” to registered case participants. This Notice is given to the filer and other parties associated with the case who have enrolled in the e-Filing system to indicate that the document has been accepted by the court.

An electronically filed document is deemed filed on the date and time reflected in the file stamp on the document. Electronically filed documents received on a Supreme Court holiday or after 12:00 a.m. Saturday through 11:59 p.m. Sunday will be deemed filed on the next business day that is not a Saturday, Sunday, or Supreme Court holiday.

The court must provide notice to the filer if a transmission is received with errors.

The unavailability of the e-Filing system does not constitute a basis for an extension of time in which to file any matter with the court and does not affect any applicable statute of limitations or other statutory deadlines, except as provided by law. The provisions of K.S.A. 60-206 apply to the extent a clerk’s office is inaccessible due to unavailability of the e-Filing system.

## **§ 2.10 Pro Se Filings**

The Supreme Court in the future may permit pro se filers to file documents electronically. At present, all pro se documents are paper documents, filed manually. Filing of a paper document will never generate a notice of electronic filing. Pro se litigants must serve other litigants by traditional means. Attorneys using the e-Filing system must serve pro se litigants by traditional means.

## § 2.11 Possession of Documents

A person filing or transmitting court documents electronically must retain, in his or her possession or control, a record of the transmission from which a full copy of the document can be made during the pendency of the action and must produce such document upon request under K.S.A. 60-234 by the court or any party to the action. Upon failure to produce such document, the court may strike the e-filed document and may impose sanctions under K.S.A. 60-211. Retention of electronic documents includes all documents filed with the court and any other electronic communication related to the action.

## § 2.12 Service by Electronic Means

If a proceeding has been initiated under the Kansas Courts e-Filing system, a party consents in that proceeding to service by electronic means under K.S.A. 60-205(b)(2)(E) after an attorney who is a registered Filing User has entered an appearance on behalf of the party. Under the Kansas Courts e-Filing system, transmission of the “Notice of Electronic Filing” to a registered attorney appearing as a case participant on behalf of a party constitutes service by electronic means.

If a proceeding has been initiated under the Johnson County e-Filing system, the attorney filing the document must serve notice of the document being filed on the other parties to meet service requirements of K.S.A. 60-205.

An attorney can rely on the notice of electronic filing (NEF) to serve parties (other than *pro se* parties and *pro hac vice* attorneys), but the certificate of service still must state that the manner of service was by notice of electronic filing.

Court reporters cannot be served by NEF.

A docketing statement or motion to docket out of time cannot be served by NEF. Those documents must be served by traditional means, including e-mail and fax.

### III. ADDITIONAL INFORMATION

#### § 2.13 Training

Training beyond what is offered in online tutorials is available. Register to participate in a webinar through Kansas e-Filing Training. More information is available at: [www.kscourts.org/ECourt/Kansas-Courts-eFiling/Training](http://www.kscourts.org/ECourt/Kansas-Courts-eFiling/Training)

#### § 2.14 Support

An attorney with an existing e-Filing account who needs support may contact the helpdesk by calling 1-844-892-3721 (toll free), or by emailing [kansassupport@tybera.com](mailto:kansassupport@tybera.com). Telephone and email support are available 8 a.m. to 6 p.m. CST, Monday through Friday, excluding federal holidays.

#### § 2.15 Docketing

Add the other parties and counsel in the e-Filing system correctly:

- Pay attention to the drop-down menus and select the correct party identifiers (*i.e.* appellant, appellee, guardian ad litem, intervenor, petitioner, respondent, etc.).
- Do not add contact information for Kansas licensed attorneys – the clerk’s office has that information in its database, and that contact information will be pulled directly from the e-Filing system into the court’s case management system.
- Do not add contact information for the parties represented by attorneys, but DO add their names.
- Enter in the contact information for any unrepresented party and any out-of-state attorney.



Upload the required docketing documents in the correct order as specified in Rule 2.04:

- If filing a Motion to Docket Out of Time, the motion MUST be the first document, followed by the Docketing Statement.
- If not filing a Motion to Docket Out of Time, you MUST upload the Docketing Statement first.
- Then upload the remaining documents in this order:
  1. Notice of Appeal
  2. Final Order
  3. Post-trial Motions and Orders – in chronological order by date stamp
  4. Transcript Requests/Orders
  5. Orders of Appointment, if any

Court reporters cannot be served through the e-Filing system. If a request for transcript is e-filed in the district court, the court reporter must be served by traditional means and the means of service must be stated in the certificate of service.

Each request/order for transcript should be served on only one court reporter. Each court reporter should receive a request/order for transcript – that request can list multiple hearing dates as long as the court reporter served is the correct court reporter responsible for those hearing dates.

Upload each document as a separate PDF.

- One document per PDF. *E.g.*, do not scan or combine the notice of appeal and the journal entry being appealed into one PDF.
- Even documents of the same type must be separated. For example, when filing three journal entries, upload three separate PDFs.

## § 2.16 Entering an Appearance

Any attorney listed on the docketing statement, even if just in the certificate of service, is considered counsel of record. An entry of appearance by that attorney will be rejected because the attorney is already counsel of record on that case.

If an attorney is not already counsel of record, the attorney must file an Entry of Appearance in order to receive NEFs in the case and in order to file anything in the case.

An Entry of Appearance must be filed from the e-Filing account of the attorney entering the case. *I.e.*, Attorney A cannot log in to her e-Filing account and upload an Entry of Appearance signed by Attorney B, even if they are in the same firm.

**PRACTICE NOTE:** If two attorneys from the same firm both want to enter their appearance, they must upload and file an entry of appearance from each of their e-Filing accounts. The document can be identical – and signed by both. Or it can be a separate document for each. But the key is that each e-Filing account must upload it separately in order for that account to be linked to the case.

### *Government attorneys*

If an agency is filing documents under an umbrella registration number, then attorneys should not file separate entries of appearance under their bar registration numbers. If an attorney other than the one on the brief cover is going to argue a case, do not file an entry of appearance. Simply file a notice stating which attorney will be arguing the case. It must be filed under the umbrella number and signed by either the attorney who will be arguing or the attorney on the brief's cover.

*Counsel for an amicus*

Do not file an entry of appearance. A motion requesting permission to file an amicus brief may be filed without first entering an appearance. If the motion is granted, then the attorney is automatically entered as counsel of record on that case for that *amicus*.

*Pro hac vice attorneys as counsel for amici curiae*

If counsel for an *amicus* is not a Kansas licensed attorney, the attorney must find a local counsel to file the motion requesting permission to file an amicus brief. Once the motion to file amicus brief is granted, the local counsel can file a motion requesting that the out-of-state attorney be admitted *pro hac vice* in the case. If granted, the out-of-state attorney will be listed as *pro hac vice* counsel for the *amicus*.



# **CHAPTER 3**

## **Appellate Court Practices**

### **I. SUPREME COURT**

#### **§ 3.1 Hearings**

After an appeal is docketed, it is subjected to the court's screening procedures. Most appeals are placed on the general calendar with oral argument limited to 15 minutes per side. Either the appellant or the appellee may request 20, 25, or 30 minutes by printing "oral argument" on the lower right portion of the front of the brief cover, followed by the desired amount of time. The appellant and the appellee will be granted the same amount of time and the amount of time granted will be designated on the oral argument calendar. See Rule 7.01(e).

Appeals meeting the criteria of Rule 7.01(c)(2) may be placed on a summary calendar. Summary calendar appeals are generally deemed submitted on the record and the briefs. However, the parties will be notified if an appeal is placed on a summary calendar and, within 14 days of receiving notification, any party may file a motion for oral argument. If the motion is granted, oral argument will be limited to 15 minutes per side, unless sufficient reason is given to grant additional time. See also § 7.39, *infra*.

The Supreme Court regularly sits in Topeka six times a year for one – week periods periods and convenes occasionally for one – day "travel dockets" at different locations around the state.

Shorter special sessions may be scheduled as needed. The Chief Justice sets the hearing docket four to six weeks ahead of each session. The court gives priority to expedited appeals and hears other appeals in the order docketed. See Rule 7.01(b).

At the time the hearing docket is prepared, each appeal is tentatively assigned to an authoring justice. A research attorney, under supervision of the assigned justice, prepares a prehearing memorandum setting forth the essential facts, the contentions of the parties, the main authorities relied upon, any additional authorities discovered, and the attorney's analysis. Those prehearing memoranda are distributed to all justices prior to oral argument, eliminating the need for extensive factual recitation during arguments. The Supreme Court often asks counsel to begin oral arguments with a brief summary of the facts and relevant procedural history for the benefit of the live stream audience following the proceedings online.

### **§ 3.2 Decision**

The Supreme Court's decision conference begins on the day an appeal is argued with additional conferences scheduled as needed. Each case is presented to the court for discussion by the tentatively assigned authoring justice. The form of the opinion, whether formal (published) or memorandum (unpublished), also is tentatively determined at the decision conference. The tentatively assigned justice retains the assignment if he or she is in the majority.

### **§ 3.3 Opinions**

After the authoring justice has drafted an opinion, the opinion is circulated among the other justices for comments and suggestions. When a written dissent or concurrence is to be attached, the majority opinion and the dissent or concurrence are returned to the justice writing the opinion and then both are circulated to all justices.

When approved, opinions generally are filed on Fridays at 9:30 a.m. in the appellate clerk's office. Copies are sent to unrepresented parties and the district judge on the day of filing.

See Rules 7.03 and 7.04. Published opinions are also posted to the Kansas Judicial Branch website each Friday, generally within ten minutes of being filed in the clerk's office. See [www.kscourts.org/Cases-and-Opinions/opinions](http://www.kscourts.org/Cases-and-Opinions/opinions).

The Supreme Court has adopted internal time standards to aid in the timely issuance of opinions. The Court has set for itself the goal to publish 25% of its opinions within 90 days of the completion of case conferencing, 50% of its opinions within 180 days of the completion of case conferencing, and 95% of its opinions within 270 days of the completion of case conferencing. More information about time standards, including the Court's annual time standards performance report, can be found on the Court's website.

### **§ 3.4 Motions and Original Actions**

Routine motions may be ruled on by the Chief Justice. Other motions are assigned to the justices for presentation to the full court based on a predetermined rotation. Those motions are taken up at motions conferences scheduled by the Chief Justice or, if expedited consideration is warranted, at special ad hoc meetings.

Petitions in original actions (quo warranto, mandamus, habeas corpus) are assigned to justices, except the Chief Justice, on a predetermined rotation basis for presentation to the full court in conference. The court takes appropriate action under Rule 9.01.

Motions for rehearing are referred to the authoring justice; that justice presents the motion in conference to the full court. Four votes are required to grant or deny a motion for rehearing or modification.

### **§ 3.5 Petitions for Review**

Petitions for review of Court of Appeals decisions are assigned to individual justices for consideration and suggested disposition. Three votes are sufficient to grant a petition for review. See § 7.48-7.60.

### § 3.6 Disqualification and Recusal

A justice who is disqualified or who otherwise recuses from an appeal does not participate in the consideration or decision of that appeal. This situation can create unique issues in the court's ability to reach a decision. If the remaining justices are evenly divided as to the decision, the decision appealed from is affirmed. See *NEA-Topeka v. U.S.D No. 501*, 269 Kan. 534, 540, 7 P.3d 1174 (2000) (discussing prior appeal in which trial court's judgment controlled in light of an equally divided Supreme Court); *Pierce v. Pierce*, 244 Kan. 246, 767 P.2d 292 (1989) (review of Court of Appeals decision by equally divided Supreme Court); *Paulsen v. U.S.D. No. 368*, 239 Kan. 180, 182, 717 P.2d 1051 (1986) (review of trial court decision by equally divided Supreme Court). In all cases, whether appeals or original actions, four votes are required for a decision. See Kansas Const. art. 3, § 2.

Accordingly, when one or more justices is disqualified or recused from an appeal, the court may assign an active district judge, an active Court of Appeals judge, or a retired justice or judge to sit with the court and participate fully in the hearing and decision process in lieu of the disqualified or recused justice. Kansas Const. art. 3, § 6(f); K.S.A. 20-2616; K.S.A. 20-3002(c).

## II. COURT OF APPEALS

### § 3.7 Prehearing

The Chief Judge's Office establishes all the dockets for the Court of Appeals. As soon as the docketing statement is filed, all cases are screened by the court's staff. They assess the cases for factual and legal complexity, determine whether jurisdictional questions exist, and generally assist in the process of placing the case on an appropriate calendar.

After the appellant's and appellee's briefs are filed, cases are then again screened by senior staff attorneys to focus the Court's research on the issues and to help in making the final placement of the case on the Court's calendar. At this point,



cases may be placed on the summary calendar if they meet the criteria found in Rule 7.02(c)(2). All other cases are placed on the Court's general calendar.

Summary calendar cases are deemed submitted to the court on the briefs without oral argument. Any party who wants oral argument on a case assigned to the summary calendar docket may file a motion requesting oral argument. The written motion for oral argument must be served on all parties and filed with the appellate court clerk within 14 days after notice of calendaring has been mailed by the clerk. Rule 7.02(c)(4).

In cases on the general calendar or where a motion for oral argument has been granted, oral argument is limited to 15 minutes per side. Either the appellant or appellee may request additional time for oral argument by printing "oral argument" on the lower right portion of the front cover of the parties' initial brief, followed by the desired amount of time: 20, 25, or 30 minutes. If oral argument is granted, the court will designate the amount of time allowed on the docket. The appellant and the appellee will be granted the same amount of time. Rule 7.02(f)(2).

About 60 days ahead of each scheduled hearing the Chief Judge sets the docket. Cases expedited by statute, or by court policy, are the first assigned to a docket. The docket is electronically filed by the Clerk of the Appellate Courts. Counsel may then view a digital copy of the docket by signing on to the e-filing system. The Clerk will mail a copy to parties who appear without counsel.

**PRACTICE NOTE:** If counsel know ahead of time the days when they are unavailable, they may send a letter to the Chief Judge's Office advising the staff of those dates.

Factors taken into account in setting each hearing docket include: where the cases arose; suggestions by counsel as to the desired location for hearing (Rule 7.02[d][3]); suitability and availability of courtroom facilities; and the number of cases in a given area that are ready for argument. The court hears cases in panels of three judges each. Normally, five panels sit simultaneously, each in a different location, once a month for

eleven months of the year. The Court of Appeals often uses retired senior judges to complete panels, two full-time Court of Appeals judges plus one senior judge on a panel.

Each case is tentatively assigned by the Chief Judge to a judge on the hearing panel. Under judicial supervision, the research attorney for the judge to whom the case is assigned then prepares a prehearing memorandum setting forth the essential facts, the contentions of the parties, the main authorities relied upon, any additional authorities discovered, and the attorney's analysis.

The prehearing memorandum is distributed to each judge on the panel at least one week prior to hearing. Before the hearing, each judge on the panel reads at least the briefs and the prehearing memorandum. When feasible, a prehearing conference of the panel members may be held to sharpen issues and guide questions to counsel from the bench.

### **§ 3.8 Decision**

The panel of judges that heard a case holds a decision conference after the hearing. Time permitting, decision conferences are often held after the day's hearings are concluded. Otherwise, they begin the day after a session is completed, although they may be adjourned from time to time to permit further research. If the judge to whom the case was tentatively assigned is in the majority, that judge prepares the opinion. If that judge is in the minority, the presiding judge reassigns the case to another judge in the majority. The now-dissenting judge receives a case of the transferee's choice. At the decision conference, a tentative decision is made as to whether a formal (published) or memorandum (unpublished) opinion is required. Rule 7.04.

### **§ 3.9 Opinions**

Draft opinions are circulated first to members of the hearing panel for comments, suggestions, and approval. Any dissent is returned with the original opinion to the author of the majority opinion. If the majority opinion is modified in response to the dissent, it is submitted again first to the dissenter for possible

modification of the dissent. Each published opinion is circulated to the entire court, but only after judges joining in the majority opinion and dissent are satisfied with the respective opinions. Further modifications to the opinions may be made but, if modifications go beyond formalities of punctuation or style, each member of the court is given an opportunity to read and comment on the opinion in final form before filing.

All opinions ready for filing are delivered to the clerk and the reporter's office for filing. Copies are sent to unrepresented parties and the district judge at the same time the opinions are officially filed and made public at 9:30 a.m. on Friday.

### **§ 3.10 Motions**

All routine motions not disposed of by the clerk under Rule 5.03 are referred to the court's motions attorney who works under the supervision of a motions panel composed of three Court of Appeals judges designated by the Chief Judge. Each member of the panel serves as motions judge on a rotating basis. The motions judge is responsible for ruling on most routine motions that come before the court. The motions judge has discretion to refer any matter to the full motions panel for decision.

Motions for rehearing are decided by the panel that decided the case. Motions for rehearing by the entire court are distributed to all members of the court and, on the request of any member of the court, a nonbinding poll is taken of the entire court for the guidance of the panel ruling on the motion.

### **§ 3.11 Disqualification**

Before a docket is set, the Chief Judge circulates to each judge on the panel a list showing case captions, the name of the trial judge, and the names of counsel in each case. Each judge examines the list and reports to the Chief Judge if disqualified in a case. Another judge is then assigned to sit with the panel on that case, or the case is assigned to another panel.

### **III. CONFIDENTIALITY**

#### **§ 3.12 Confidentiality in the Appellate Courts**

The integrity of the judicial process requires that many of the internal workings of the appellate courts be held in strictest confidence. Justices, judges, and court staff and personnel must keep confidential the results of a decision conference or the views expressed by, or vote of, any participant. Likewise, the identity of a justice or judge to whom a case has been assigned is confidential until the opinion is filed. If the opinion is filed *per curiam*, the identity of the author remains confidential indefinitely. Copies of all writings and papers concerning court matters, including the contents of research memoranda, are confidential.

# CHAPTER 4

## Original Actions in the Appellate Courts

### § 4.1 Exercise of Concurrent Jurisdiction

The Kansas Supreme Court has original jurisdiction in quo warranto, mandamus, and habeas corpus proceedings. Kansas Constitution art. 3, § 3. The Court of Appeals has original jurisdiction only in habeas corpus proceedings. K.S.A. 60-1501(a). Supreme Court Rule 9.01 establishes the procedures for original actions in the appellate courts.

Since district courts also have concurrent jurisdiction over quo warranto, mandamus, and habeas corpus proceedings, those actions should be filed in the district court. The original jurisdiction of the Kansas Supreme Court will not ordinarily be exercised if adequate relief appears to be available in the district court. See *Krogen v. Collins*, 21 Kan. App. 2d 723, 724, 907 P.2d 909 (1995); see also *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 656, 367 P.3d 282 (2016) (“[T]his court has traditionally been somewhat lenient on enforcement of that general rule”).

If relief is available in the district court, the petition must state the reasons why the action is brought in the appellate court instead of the district court. Rule 9.01(b). Considerations relevant to the exercise of discretionary jurisdiction over a mandamus action include judicial economy, the need for speedy adjudication of an issue, and avoidance of needless appeals. *Ambrosier v. Brownback*, 304 Kan. 907, 909, 375 P.3d 1007 (2016). If the appellate court finds that adequate relief is available in the district

court, the action may be dismissed or ordered transferred to the appropriate district court. Rule 9.01(b). Even if district court relief is available, the appellate court has discretion to exercise its original jurisdiction. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 405, 197 P.3d 370 (2008).

## **§ 4.2 Procedure Upon Filing an Original Action**

The petition must contain a statement of the facts necessary to an understanding of the issues presented and a statement of the relief sought. The petition must be accompanied by a short memorandum of points and authorities, and such documentary evidence as is available and necessary to support the facts alleged. Rule 9.01(a)(1).

**PRACTICE NOTE:** Since the appellate court may not choose to order further briefing, the memorandum should be complete as well as concise. Assume that there will not be an opportunity to present further briefing.

Pro se petitioners must file the original and one copy of the petition with the clerk of the appellate courts. Rule 9.01(a)(1); Rule 1.14(c). Kansas licensed attorneys who are active and in good standing must file electronically. Rule 1.14(a). The petition must contain proof of service on all respondents or their counsel of record. Rule 9.01(a)(1).

When the relief sought is an order in mandamus against a judge that involves pending litigation before that judge, the judge and all parties to the pending litigation are deemed respondents. Rule 9.01(a)(1). This is true regardless of whether the parties to the pending litigation are named.

**PRACTICE NOTE:** An attorney representing a respondent should not file a response unless one is ordered under K.S.A. 60-1503(a). If the attorney for a respondent was not served a copy of the petition, the attorney may want to file an entry of appearance in order to receive electronic

notifications concerning the status of the case. However, be aware that there will never be an electronic notice of a pro se filing.

Habeas corpus petitions must be verified. They must state the place where the person is restrained and by whom; the cause or pretense of the restraint; and why the restraint is wrongful. Petitioners who are in the custody of the Department of Corrections must include a list of all civil actions, including habeas corpus actions, they have participated in or filed in any state court within the last five years. K.S.A. 60-1502.

**PRACTICE NOTE:** Where inconsistency or conflict exists between the procedure provided in the statutes and Rule 9.01, the latter governs actions filed in the appellate courts. See *State v. Mitchell*, 234 Kan. 185, 193-95, 672 P.2d 1 (1983).

### **§ 4.3 Docket Fees**

The plaintiff in an original action in quo warranto or mandamus must either file a poverty affidavit under K.S.A. 60-2001(b) or pay the docketing fee of \$145 and any applicable surcharge. If the petitioner is an inmate, the clerk will assess the initial \$3 filing fee after a poverty affidavit and a certified statement of the inmate's trust fund are submitted. Upon receipt of the prescribed docket fee or poverty affidavit, the clerk of the appellate courts must docket the original proceeding and submit the petition to the court. Rule 9.01(a)(2).

No docket fee will be charged to file a petition for writ of habeas corpus. Rule 9.01(a)(2). No docket fee will be required for habeas corpus actions in the district court as long as the petitioner complies with the poverty affidavit provisions of K.S.A. 60-2001(b). K.S.A. 60-1501(a).



## § 4.4 Disposition

The court will deny a petition in an original action if it believes the relief should not be granted. Rule 9.01(c)(1). If the right to the relief sought is clear and it is apparent that no valid defense to the petition can be offered, the relief sought may be granted *ex parte*. Rule 9.01(c)(2).

If the petition is neither granted nor denied *ex parte*, the court will order that the respondent either show cause why the relief should not be granted or file an answer to the petition within a fixed time. Rule 9.01(c)(3). Two or more respondents may jointly respond to an order to show cause or to the petition. Rule 9.01(c)(3)(B). This response may include additional documentary evidence that is necessary for the court's understanding of the case. Rule 9.01(c)(3)(D).

K.S.A. 60-1503(a) contains a similar screening process. The petition must be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the plaintiff is not entitled to relief in the district court, the petition will be dissolved. If the judge finds that the plaintiff may be entitled to relief, the judge will issue the writ and order the person to whom the writ is directed to file an answer within the period of time fixed by the court or to take such other action as the judge deems appropriate. K.S.A. 60-1503(a).

In a mandamus action, if a judge is named as a respondent and decides not to appear, the judge may so advise the clerk and the parties by letter. This does not mean that the petition will be taken as admitted. Rule 9.01(c)(3)(C). This does not exempt the parties to the pending litigation, whether named or not, from having to file a response if one is ordered.

**PRACTICE NOTE:** If the Court has ordered a response, the respondents should focus on addressing the merits of the issue as opposed to procedural arguments as to whether the remedy sought is appropriate.



If the petition, response to the petition or response to an order to show cause, and record clearly indicate the appropriate disposition, the appellate court will enter an order without further briefs or argument. Rule 9.01(e).

If the petition, response and record do not clearly indicate the appropriate disposition, the court will enter an order fixing dates for the filing of briefs. The case will proceed thereafter under the rules of appellate procedure. The court may also order a prehearing conference to consider simplification of the issues and other matters that may aid in the disposition under Rule 1.04. Rule 9.01(e).

Original actions in habeas corpus filed in the Court of Appeals are initially considered by a three-judge motions panel. If the panel does not grant or deny the petition *ex parte*, a procedure similar to that in the Supreme Court is followed.

Since the appellate courts have original jurisdiction, no mandate to the clerk of the district court will issue when the decision becomes final. See K.S.A. 60-2106. The Kansas Court of Appeals has appellate jurisdiction over final orders of the district courts relating to mandamus, quo warranto, or habeas corpus. K.S.A. 60-2102(a)(2).

#### **§ 4.5 The Record**

The record in cases of original jurisdiction in the appellate courts consists of the petition, the response to an order to show cause or to the petition, and any documents accompanying them. The matter may be referred to a district court judge or to a commissioner for the purpose of taking testimony and making a report containing recommended findings of fact if it appears that there are disputed questions of material fact which can be resolved only by oral testimony. When this occurs, the commissioner's report and the transcript of the testimony must be filed with the clerk of the appellate courts as part of the record. Rule 9.01(d).

#### § 4.6 Quo Warranto

“Quo warranto is an extraordinary remedy available when any person usurps, intrudes into, or unlawfully holds or exercises any public office. A writ of quo warranto may issue when it is alleged that the separation of powers doctrine has been violated.” *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, Syl. ¶1, 179 P.3d 366 (2008). “An original action in quo warranto is an appropriate procedure for questioning the constitutionality of a statute.” *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003); *State ex rel. Stephan v. Martin*, 230 Kan. 747, 748, 641 P.2d 1011 (1982). Quo warranto is also an appropriate means of attacking the validity of a municipal ordinance. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, Syl. ¶1, 367 P.3d 282 (2016).

Relief in the nature of quo warranto and mandamus is discretionary. The Kansas Supreme Court may properly entertain an action in quo warranto if it decides the issue is of sufficient public concern. *Wilson v. Sebelius*, 276 Kan. at 90. Since quo warranto is a discretionary and extraordinary remedy, it should only be used in extreme cases and where no other relief is available. *State, ex rel., v. United Royalty Co.*, 188 Kan. 443, 461, 363 P.2d 397 (1961). K.S.A. 60-1201 *et seq.* sets forth the procedure for quo warranto actions.

#### § 4.7 Mandamus

Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law. K.S.A. 60-801. The Supreme Court may properly entertain an action in mandamus if it decides the issue is of sufficient public concern. *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003). An original action in mandamus is an appropriate procedure for compelling an official to perform some action. *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 697, 957 P.2d 379 (1998). Mandamus is a proper remedy where the

essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business, notwithstanding the fact that there also exists an adequate remedy at law. *Landrum v. Goering*, 306 Kan. 867, 870-71, 397 P.3d 1181 (2017); *State ex rel. Slusher v. City of Leavenworth*, 279 Kan. 789, Syl. ¶ 5, 112 P.3d 131 (2005). Hence, the exercise of original jurisdiction is appropriate when the mandamus petition “presents an issue of great public importance and concern” and the exercise of jurisdiction will “settle the question.” *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 52, 687 P.2d 622 (1984). Someone seeking an order (or writ) of mandamus must show that the respondent has a clear legal duty to take the action at issue. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 620, 244 P.3d 642 (2010).

Mandamus provides the remedy of compelling a public officer to perform a clearly-defined duty imposed by law that does not involve the exercise of discretion. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, Syl. ¶ 21, 179 P.3d 366 (2008). In fact, courts generally require public officials to perform only those acts that are strictly ministerial in nature, meaning those acts the official clearly is obligated to perform in a prescribed manner, in obedience to the mandate of legal authority. *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 833, 104 P.3d 378 (2005). Whether to issue a mandamus order depends on statutory interpretation regarding the duties of the officials involved. *Ramcharan-Maharajh v. Gilliland*, 48 Kan. App. 2d 137, 139-40, 286 P.3d 216 (2012). Mandamus is generally appropriate to compel a former public officer to return property belonging to the office. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, Syl. ¶ 9, 197 P.3d 370 (2008). Mandamus has been recognized as a means for nonparties to address court orders directed to them from which they have no statutory right to appeal. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 618, 244 P.3d 642 (2010) (discovery order directed to nonparty). See also *Board of Miami County Comm’rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 255 P.3d 1186 (2011) (mandamus was appropriate avenue for

county to pursue, when county and manager of rail-trail did not agree on amount of bond manager was required to post pursuant to the Kansas Recreational Trails Act).

Mandamus is not a common means of obtaining redress but is available only in rare cases, and as a last resort, for causes which are really extraordinary. Mandamus is not the correct action where a plain and adequate remedy at law exists. *Bohanon v. Werholtz*, 46 Kan. App. 2d 9, 12-13, 257 P.3d 1239 (2011) (inmate's mandamus action against Secretary of Corrections was improper because a plain and adequate remedy at law existed as provided under the habeas corpus statute).

The Supreme Court's jurisdiction is plenary. It may be exercised to control the actions of inferior courts over which the Supreme Court has superintendent authority. *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 1024, 686 P.2d 171 (1984). Relief in the nature of mandamus is discretionary. *Wilson v. Sebelius*, 276 Kan. at 90.

In addition to constitutional authority, the Kansas Supreme Court is guided by the Kansas statutes, as the procedure for mandamus actions is set forth in K.S.A. 60-801 *et seq.*

While mandamus will not ordinarily lie at the instance of a private citizen to compel the performance of a public duty, where an individual shows an injury or interest specific and peculiar to himself, and not one that he shares with the community in general, the remedy of mandamus and the other extraordinary remedies are available. *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 243, 436 P.2d 982 (1968).

#### **§ 4.8 Habeas Corpus**

K.S.A. 60-1501 *et seq.* sets forth the procedure for habeas corpus actions. An original action in habeas corpus is an appropriate vehicle for challenging a trial court's pretrial denial of a claim of double jeopardy under the Fifth Amendment to the United States Constitution and Section 10 of the Kansas

Constitution Bill of Rights. *In re Berkowitz*, 3 Kan. App. 2d 726, 730, 602 P.2d 99 (1999).

Incarcerated people may challenge the circumstances of their confinement, including administrative actions of the penal institution, under the provisions of K.S.A. 60-1501. *State v. Mejia*, 20 Kan. App. 2d 890, 892, 894 P.2d 202 (1995). See also *Safarik v. Bruce*, 20 Kan. App. 2d 61, 66-67, 883 P.2d 1211 (1994).

A person who has been involuntarily confined by the State can file a habeas corpus petition under K.S.A. 60-1501 to challenge the conditions of confinement. “To obtain relief, he or she must show either (1) shocking or intolerable conduct in his or her treatment or (2) continuing mistreatment of a constitutional nature.” *Stockwell v. State*, 54 Kan. App. 2d 325, Syl. ¶1, 399 P.3d 873 (2017).

K.S.A. 60-1501 petitioners are not entitled to discovery as a matter of course. “The language of K.S.A. 60-1501 *et seq.* demonstrates the legislature’s intent for district courts to resolve habeas proceedings in a summary manner. Additionally, the procedure established for the resolution of K.S.A. 60-1501 petitions does not specifically authorize extensive discovery. Based on the language of these statutes, the legislature likely did not intend the rules of discovery to apply to K.S.A. 60-1501 petitions. Furthermore, the purposes of civil discovery are not applicable to K.S.A. 60-1501 proceedings.” *White v. Shipman*, 54 Kan. App. 2d 84, 93, 396 P.3d 1250 (2017).



# CHAPTER 5

## Appellate Jurisdiction

### I. CREATION OF THE KANSAS APPELLATE COURTS

#### § 5.1 Constitutional and Statutory Authority

The Kansas Constitution provides that the judicial power of the state is vested in one court of justice, which consists of one Supreme Court with general administrative authority over all other courts, district courts, and “such other courts as are provided by law.” Kan. Const. art. 3, § 1. K.S.A. 20-3001 provided for the creation of the Kansas Court of Appeals.

The Supreme Court has original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus, and “such appellate jurisdiction as may be provided by law.” Kan. Const. art. 3, § 3. The Court of Appeals has “such jurisdiction over appeals in civil and criminal cases and from administrative bodies and officers of the state as may be prescribed by law.” K.S.A. 20-3001. The Court of Appeals also has “such original jurisdiction as may be necessary to the complete determination of any cause on review.” K.S.A. 20-3001.

“The right to appeal is entirely statutory, and the limits of appellate jurisdiction are imposed by the legislature.” *State v. LaPointe*, 305 Kan. 938, Syl. ¶ 1, 390 P.3d 7 (2017). “K.S.A. 60-2101 provides the starting point for defining the jurisdiction of Kansas appellate courts in both civil and criminal cases.... As to criminal appeals, K.S.A. 60-2101(a) provides: ‘Appeals from



the district court to the court of appeals in criminal cases shall be subject to the provisions of K.S.A. 22-3601 and 22-3602.” *State v. LaPointe*, 305 Kan. at 942. “The Kansas Constitution gives to the district and appellate courts jurisdiction to hear appeals only as provided by law. The Kansas Constitution gives the legislature the power to grant, limit, and withdraw the appellate jurisdiction to be exercised by the courts.” *State v. Lewis*, 27 Kan. App. 2d 134, Syl. ¶ 3, 998 P.2d 1141 (2000). See also *State v. Gill*, 287 Kan. 289, 293-94, 196 P.3d 369 (2008); *In re J.D.B.*, 259 Kan. 872, Syl. ¶ 1, 915 P.2d 69 (1996). Parties cannot create appellate jurisdiction. See *State v. McCarley*, 287 Kan. 167, 175, 195 P.3d 230 (2008); *State v. Asher*, 28 Kan. App. 2d 799, 800, 20 P.3d 1292 (2001). When a record discloses a lack of jurisdiction, the appellate court must dismiss the appeal. *State v. Gill*, 287 Kan. at 294; *In re J.D.B.*, 259 Kan. 872, Syl. ¶ 1.

## **II. APPELLATE JURISDICTION OF THE SUPREME COURT IN CRIMINAL CASES**

### **§ 5.2 Direct Appeals to the Supreme Court**

Any appeal permitted to be taken from a final judgment of the district court in a criminal case is taken to the Kansas Court of Appeals, except in those cases reviewable by law in the district court and those cases where direct appeal to the Kansas Supreme Court is required. K.S.A. 22-3601(a). Direct appeal to the Kansas Supreme Court is required in the following cases:

- In any case in which a state or federal statute has been held unconstitutional. K.S.A. 22-3601(b)(1).
- By all criminal defendants who have: (1) been convicted of a class A felony; or (2) been sentenced to a maximum sentence of life imprisonment, unless the maximum sentence was imposed under K.S.A. 21-6627 or K.S.A. 21-4643 prior to its repeal. K.S.A. 22-3601(b)(2) and (3).



- By some criminal defendants who have been convicted of an off-grid crime committed after June 30, 1993. K.S.A. 22-3601(b)(4). This statute does not apply to some off-grid crimes as set forth in § 5.3, *infra*.

**PRACTICE NOTE:** A party that files a brief or other filing in the appellate courts of Kansas which contests or calls into doubt the validity of any Kansas statute or constitutional provision on the grounds that the law violates the state or federal constitution, or any provision of federal law, must serve the filing on the attorney general of Kansas accompanied by a notice of service under K.S.A. 75-764. Rule 11.01(a). This rule does not apply in an appellate proceeding in which the attorney general is the party disputing or defending the validity of the law at issue. Rule 11.01(e).

A conviction resulting in imposition of a death sentence is subject to automatic review by an appeal to the Kansas Supreme Court. *State v. Cheever*, 295 Kan. 229, 233, 284 P.3d 1007 (2012), *vacated and remanded on other grounds*, 571 U.S. 87 (2013); *State v. Hayes*, 258 Kan. 629, 638, 908 P.2d 597 (1995); K.S.A. 21-6619(a); K.S.A. 21-6629(c). The procedure to be followed on direct appeal following imposition of a death penalty is set out in Supreme Court Rule 10.02.

### **III. APPELLATE JURISDICTION OF THE COURT OF APPEALS IN CRIMINAL CASES**

#### **A. Appeals by the Defendant to the Court of Appeals**

##### **§ 5.3 Generally**

All direct appeals from final judgments in criminal cases are taken to the Court of Appeals, except in those cases reviewable by law in the district court and where direct appeal to the Supreme Court is required. K.S.A. 22-3601(a). Since 2014, any appeal permitted to be taken from an order or final decision of a district magistrate judge who is regularly admitted to practice law in Kansas shall be taken directly to the Court of Appeals. K.S.A. 20-302b(c)(2)(B).

**PRACTICE NOTE:** To find out whether a district magistrate judge is licensed to practice law in Kansas, check the online attorney directory at the Supreme Court’s website: [www.kscourts.org](http://www.kscourts.org).

The Court of Appeals has jurisdiction over a limited number of off-grid crimes. K.S.A. 22-3601(b)(4). Under K.S.A. 22-3601(b)(4)(A) through (H), the off-grid crimes over which the Court of Appeals has jurisdiction are: Aggravated human trafficking, K.S.A. 21-5426(c)(3); rape, K.S.A. 21-5503(b)(2)(B); aggravated criminal sodomy, K.S.A. 21-5504(c)(2)(B)(ii); aggravated indecent liberties with a child, K.S.A. 21-5506(c)(2)(C)(ii); sexual exploitation of a child, K.S.A. 21-5510(b)(2)(B); aggravated internet trading in child pornography, K.S.A. 21-5514(c)(3); commercial sexual exploitation of a child, K.S.A. 21-6422(b)(2); or an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-5301, 21-5302 or 21-5303, of any such felony.

A defendant may appeal as a matter of right to the court having appellate jurisdiction “from any judgment against the defendant in the district court and upon appeal any decision of the district court or intermediate order made in the progress of the case may be reviewed.” K.S.A. 22-3602(a). There are restrictions following

a guilty plea or a no contest plea. See K.S.A. 22-3602(a) and § 5.5, *infra*. However, “a criminal defendant has a nearly unlimited right of review.” *State v. Boyd*, 268 Kan. 600, 605, 999 P.2d 265 (2000); see also *State v. Berreth*, 294 Kan. 98, Syl. ¶ 3, 273 P.3d 752 (2012). Jurisdiction over an appeal of a motion to correct an illegal sentence under K.S.A. 22-3504 lies with the appellate court that had jurisdiction to hear the original appeal. *State v. Thomas*, 239 Kan. 457, Syl. ¶ 2, 720 P.2d 1059 (1986).

**PRACTICE NOTE:** The notice of appeal must specify the parties taking the appeal, designate the judgment or part of the judgment appealed from, and name the appellate court to which the appeal is taken. While the appealing party must cause the notice of appeal to be served on all other parties to the judgment, the party’s failure to do so does not affect the validity of the appeal. K.S.A. 60-2103(b). The Supreme Court has adopted forms for a notice of appeal and docketing statement, which can be accessed at the website for the Kansas Judicial Council. See <http://www.kansasjudicialcouncil.org/legal-forms>. The notice of appeal must be in substantial compliance with the Judicial Council form. See Supreme Court Rule 2.01 (direct appeals to the Supreme Court); Supreme Court Rule 2.02 (direct appeals to the Court of Appeals).

## § 5.4 Following Final Judgment

“For crimes committed on or after July 1, 1993, the defendant shall have 14 days after the judgment of the district court to appeal.” K.S.A. 22-3608(c). The time within which to file a notice of appeal starts when the sentence is pronounced from the bench. *State v. Moses*, 227 Kan. 400, Syl. ¶ 2, 607 P.2d 477 (1980). A criminal sentence is effective upon pronouncement from the bench; it does not derive its effectiveness from the filing of a journal entry. *Abasolo v. State*, 284 Kan. 299, Syl. ¶ 3,

160 P.3d 471 (2007). The journal entry “is thus a record of the sentence imposed; but the actual sentencing occurs when the defendant appears in open court and the judge orally states the terms of the sentence.” *State v. Moses*, 227 Kan. at 402. This is true even under the sentencing guidelines. *State v. Scaife*, 286 Kan. 614, 626, 186 P.3d 755 (2008); *State v. Soto*, 23 Kan. App. 2d 154, Syl. ¶ 1, 928 P.2d 103 (1996).

Except as otherwise provided, a criminal defendant can appeal from any final district court judgment against the defendant and “upon appeal any decision of the district court or intermediate order made in the progress of the case may be reviewed.” K.S.A. 22-3602(a). See also *State v. Walker*, 50 Kan. App. 2d 900, Syl. ¶ 1, 334 P.3d 901 (2014). Criminal defendants do not have the right to appeal intermediate pretrial orders. This avoids piecemeal prosecution of the crimes charged and prevents unnecessary delay in the judicial process. A defendant has the right to appeal such intermediate orders after a final judgment has been entered against him. *State v. Zimmerman*, 233 Kan. 151, 155, 660 P.2d 960 (1983); *State v. Donahue*, 25 Kan. App. 2d 480, Syl. ¶ 2, 967 P.2d 335 (1998) (an order disqualifying counsel from joint representation of several criminal defendants is not an appealable order; there has been no final judgment). Likewise, a defendant may not appeal from the court’s decision to terminate pretrial diversion and reinstate criminal prosecution. *State v. Cameron*, 32 Kan. App. 2d 187, 81 P.3d 442 (2003).

Judgment has been rendered when there has been a conviction and sentence. “Kansas law defines a criminal judgment as consisting of a conviction *and* a sentence.” *State v. Kleypas*, 305 Kan. 224, 242, 382 P.3d 373 (2016) (emphasis in original). To have a final judgment in a criminal case, the defendant must be convicted and sentenced, and no appeal may be taken until judgment is final. *State v. Hall*, 298 Kan. 978, 985-86, 319 P.3d 506 (2014) (until any applicable restitution amount is decided, a defendant’s sentencing is not complete). A defendant’s sentence is not final if the district court has ordered restitution but has not yet set the amount. “A sentencing hearing may be continued or bifurcated so that restitution is ordered at one setting and the amount decided at a later setting. In such instances, a district

judge should specifically order the continuance or bifurcation.” *State v. Hall*, 298 Kan. 978, at Syl. ¶ 2. “Because restitution is part of a defendant’s sentence, the amount of restitution must be determined and imposed in open court in the defendant’s presence, unless the defendant voluntarily waives his or her presence.... [A]t the completion of the restitution hearing, the district court should notify the defendant of his or her appeal rights, including the deadline for filing the appeal.” *State v. Hannebohn*, 48 Kan. App. 2d 921, Syl. ¶¶ 3-4, 301 P.3d 340 (2013).

**PRACTICE NOTE:** The filing of a timely notice of appeal is jurisdictional, and any appeal not taken within the statutory deadline must be dismissed. A limited exception to this general rule is recognized in those cases where an indigent defendant either: (1) was not informed of the right to appeal, including the appeal filing deadline; (2) was not furnished an attorney to perfect an appeal; or (3) was furnished an attorney for that purpose who failed to perfect and complete an appeal. *State v. Patton*, 287 Kan. 200, Syl. ¶ 3, 195 P.3d 753 (2008); *State v. Ortiz*, 230 Kan. 733, 735-36, 640 P.2d 1255 (1982). If any of these narrow exceptional circumstances are met, a court must allow an appeal out of time. *State v. Phinney*, 280 Kan. 394, 401-02, 122 P.3d 356 (2005). See also *Kargus v. State*, 284 Kan. 908, 169 P.3d 307 (2007) (if defendant establishes ineffective assistance of counsel in failure to file petition for review in direct appeal, appropriate remedy is to allow filing of petition for review out of time).

K.S.A. 22-3430 gives authority to the trial court to commit a criminal defendant to a state mental institution in lieu of imprisonment. K.S.A. 22-3430(c) states, “The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentence to a jail, or to the custody of the secretary of corrections had been imposed.” A defendant can appeal from an order of commitment under K.S.A. 22-3430; however, a trial court’s refusal to commit

a defendant to a state mental institution in lieu of imprisonment is not reviewable on appeal. *State v. Lawson*, 25 Kan. App. 2d 138, 144, 959 P.2d 923 (1998).

There is no provision for an interlocutory appeal by a defendant in a criminal case. See *Donahue*, 25 Kan. App. 2d at 483. “There is no statutory procedure for a defendant to appeal a question of law after an acquittal of the crime charged.” *State v. Mountjoy*, 257 Kan. 163, Syl. ¶ 4, 891 P.2d 376 (1995). The prosecution can, however, appeal on a question reserved following judgment. *State v. Hermes*, 229 Kan. 531, Syl. ¶ 4, 625 P.2d 1137 (1981). See § 5.9, *infra*.

**PRACTICE NOTE:** Although a defendant cannot pursue an interlocutory appeal, in very limited circumstances defendants may be able to bring claims to an appellate court by way of original habeas action under K.S.A. 22-2710, which is part of the Uniform Criminal Extradition Act. *In re Mason*, 245 Kan. 111, Syl. ¶ 1, 775 P.2d 179 (1989) (defendant allowed to bring double jeopardy claim in original action with appellate court because the double jeopardy clause protects against going through second trial, not just being convicted at a second trial). See also Chapter 4, *supra*.

Defendants are allowed to appeal from judgments on post-conviction/post-appeal motions. See, e.g., *State v. Guzman*, 279 Kan. 812, 112 P.3d 120 (2005) (appeal from denial of pro se motion for jail time credit).

## **§ 5.5 Following a Plea of Guilty or No Contest**

Despite the general rule that a criminal defendant can appeal following judgment, no appeal can be taken from a judgment of conviction upon a plea of guilty or no contest, “except that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in K.S.A. 60-1507 and amendments thereto.” K.S.A. 22-3602(a).



See *State v. Edgar*, 281 Kan. 30, 39, 127 P.3d 986 (2006) (discussing a defendant's waiver of defects or irregularities in the proceedings upon entry of a voluntary plea of guilty).

K.S.A. 22-3602(a) does not, however, preclude a defendant who has pled guilty or no contest from taking a direct appeal from the district court's denial of a motion to withdraw the plea. "By permitting a defendant to seek withdrawal of a plea pursuant to K.S.A. 22-3210(d), the legislature implicitly permitted a defendant to appeal from such denial." *State v. Solomon*, 257 Kan. 212, Syl. ¶ 1, 891 P.2d 407 (1995) (following *State v. McDaniel*, 255 Kan. 756, Syl. ¶ 1, 877 P.2d 961 [1994]).

Following a plea, a defendant may challenge the sentence imposed under limited circumstances; for example, he or she may challenge the severity level of the crime upon which the sentence is based under K.S.A. 21-6820(e)(3) (formerly K.S.A. 21-4721[e][3]); *State v. Barnes*, 278 Kan. 121, 92 P.3d 578 (2004). See § 5.12, *infra*. Or a defendant may argue the sentence qualifies as "illegal" as that term is used in K.S.A. 22-3504. *State v. Harp*, 283 Kan. 740, 743, 156 P.3d 1268 (2007).

Any criminal defendant, including one who has pled guilty or no contest, may take a direct appeal from the district court's denial of a K.S.A. 22-3504 motion to correct an illegal sentence. K.S.A. 21-6820(a). "The court may correct an illegal sentence at any time while the defendant is serving such sentence." K.S.A. 22-3504(a). An "'illegal sentence' means a sentence: Imposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced. A sentence is not an 'illegal sentence' because of a change in the law that occurs after the sentence is pronounced." K.S.A. 22-3504(c). However, "if a motion to correct an illegal sentence is filed while a direct appeal is pending, any change in the law that occurs during the pending direct appeal shall apply." K.S.A. 21-6820(i).

The prohibition against appeals taken by a defendant from a judgment of conviction based upon a plea does not apply to pleas accepted by a district magistrate judge who is not regularly

admitted to practice law in Kansas or by a municipal court judge. In those proceedings the case is appealed to the district court de novo. See *State v. Gillen*, 39 Kan. App. 2d 461, 467-69, 181 P.3d 564 (2008); K.S.A. 22-3609a (a defendant has the right to appeal from any judgment of a district magistrate judge who is not regularly admitted to practice law in Kansas); K.S.A. 22-3609 (a defendant has the right to appeal to the district court from any judgment of a municipal court that adjudges the defendant guilty of a violation of the ordinances of any municipality of Kansas or any findings of contempt). But see *State v. Legero*, 278 Kan. 109, Syl. ¶ 5, 91 P.3d 1216 (2004) (K.S.A. 2003 Supp. 22-3609a is construed and held not to authorize an appeal to the district court by a defendant from an order of a district magistrate judge revoking the defendant's probation).

**PRACTICE NOTE:** “An agreement between parties that the right to appeal is not waived cannot invest an appellate court with jurisdiction when it is otherwise lacking.” *State v. Asher*, 28 Kan. App. 2d 799, Syl. ¶ 1, 20 P.3d 1292 (2001). If the defendant would like to appeal a district court's adverse ruling on a pretrial motion as part of a plea negotiation (for example, the denial of a motion to suppress), he or she should proceed to a conviction based upon stipulated facts as opposed to entering a plea of guilty or no contest. In a case decided on stipulated facts, the appellate court has de novo review. *State v. Downey*, 27 Kan. App. 2d 350, 2 P.3d 191 (2000). However, the appellate court does not have de novo review from a judgment of conviction after a plea of guilty or no contest. K.S.A. 22-3602(a).



## B. Appeals by the Prosecution

### § 5.6 Generally

“The State’s right to appeal in a criminal case is strictly statutory, and the appellate court has jurisdiction to entertain a State’s appeal only if it is taken within time limitations and in the manner prescribed by the applicable statutes.” *State v. Snodgrass*, 267 Kan. 185, 196, 979 P.2d 664 (1999). “The right to an appeal by the State in a criminal proceeding is limited by statute.” *State v. Bliss*, 28 Kan. App. 2d 591, Syl. ¶ 1, 18 P.3d 979 (2001). “The prosecution’s ability to appeal a district court’s ruling is substantially limited when compared to the defendant’s right of appeal.” *City of Liberal v. Witherspoon*, 28 Kan. App. 2d 649, Syl. ¶ 1, 20 P.3d 727 (2001).

The prosecution can appeal to the Court of Appeals from cases before a district judge or district magistrate judge who is regularly admitted to practice law in Kansas only in specific situations under K.S.A. 22-3602(b). These are set forth in § 5.7 through § 5.11, *infra*. The prosecution can appeal to the district court from cases before a district magistrate judge who is not regularly admitted to practice law in Kansas in the same situations under K.S.A. 22-3602(b) and from interlocutory orders listed in K.S.A. 22-3603. K.S.A. 22-3602(d).

The prosecution can also appeal a ruling on a motion to correct an illegal sentence under K.S.A. 22-3504. K.S.A. 21-6820(a) and K.S.A. 22-3602(f).

“Since there is no time limit delineated in K.S.A. 22-3602(b) for the prosecution to appeal, the time specified under the rules of civil procedure apply. Therefore, an appeal by the State must be taken within 30 days from the entry of final judgment as required by the rules of civil procedure. K.S.A. 60-2103.” *State v. Freeman*, 236 Kan. 274, 277, 689 P.2d 885 (1984); K.S.A. 22-3606.

**PRACTICE NOTE:** As a general rule, if the practitioner believes there are multiple bases for the appeal, all grounds should be stated. “Grounds for jurisdiction not identified in a notice of appeal may not be considered by the court.” *State v. Woodling*, 264 Kan. 684, Syl. ¶ 2, 957 P.2d 398 (1998). In *State v. Berreth*, 294 Kan. 98, 115-16, 273 P.3d 752 (2012), the court concluded the State was unable to expand on the statutory basis for jurisdiction asserted in its notice of appeal in the Court of Appeals. Since grounds for jurisdiction not identified in a notice of appeal may not be considered by the appellate court, the State should allege each applicable alternative means of bringing a direct appeal set forth in K.S.A. 22-3602(b).

**§ 5.7 From an Order Dismissing a Complaint, Information or Indictment: K.S.A. 22-3602(b)(1)**

“The State may appeal from an order dismissing a complaint pursuant to K.S.A. 22-3602(b)(1).” *State v. Hernandez*, 40 Kan. App. 2d 525, 527, 193 P.3d 915 (2008). The right to take a direct appeal under this statutory provision is generally the right to appeal from a pretrial order dismissing a complaint, information or indictment. The right to take this appeal belongs to the public prosecutor, not the complaining witness, *State ex rel. Rome v. Fountain*, 234 Kan. 943, Syl ¶ 2, 678 P.2d 146 (1984), nor an attorney hired to assist the public prosecutor under K.S.A. 19-717. *State v. Berg*, 236 Kan. 562, Syl. ¶ 2, 694 P.2d 427 (1985).

“A judgment of acquittal entered by the trial court on a motion filed by the defendant at the close of the State’s evidence is final and not appealable by the State, except in those special circumstances when the question reserved by the State is of statewide interest and is vital to a correct and uniform administration of the criminal law.” *State v. Wilson*, 261 Kan. 924,

Syl. ¶ 2, 933 P.2d 696 (1997). “While K.S.A. 22-3602(b)(1) grants the State the right to appeal an order dismissing a complaint, information, or indictment, the State does not have the right to appeal a judgment of acquittal because appellate review of the decision after acquittal would constitute double jeopardy.” *State v. Roberts*, 293 Kan. 29, Syl. ¶ 3, 259 P.3d 691 (2011).

In determining whether a prosecution ended in an acquittal or dismissal, the trial court’s characterization of its action does not control. *City of Wichita v. Bannon*, 42 Kan. App. 2d 196, 199, 209 P.3d 207 (2009). Jeopardy attaches only when a jury is impaneled and sworn or when the judge begins to receive evidence in a bench trial. The State may appeal an order of dismissal entered before jeopardy has attached. *State v. Roberts*, 293 Kan. 29, at Syl. ¶¶ 5-7. Where there has been an erroneous acquittal of a criminal charge, a reinstatement of that charge violates the Fifth Amendment prohibition against double jeopardy if such reinstatement results in further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged. *Evans v. Michigan*, 568 U.S. 313, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013); *Lowe v. State*, 242 Kan. 64, 744 P.2d 856 (1987).

There is no requirement that the prosecutor refile a dismissed complaint before appealing from an order dismissing a complaint, *State v. Zimmerman & Schmidt*, 233 Kan. 151, Syl. ¶ 1, 660 P.2d 960 (1983); however, all counts in a complaint, information, or indictment must be dismissed or otherwise disposed of before an appeal from an order dismissing a complaint, information, or indictment is properly before the appellate court. *State v. Freeman*, 234 Kan. 278, 282, 670 P.2d 1365 (1983). “There is no statutory authority for the State to appeal from the dismissal in a criminal case of some of the counts of a multiple-count complaint, information, or indictment while the case remains pending before the district court on all or a portion of the remaining counts which have not been dismissed and which have not been finally resolved.” *State v. Nelson*, 263 Kan. 115, Syl. ¶ 3, 946 P.2d 1355 (1997). But see *McPherson v. State*, 38 Kan. App. 2d 276, 287-88, 163 P.3d 1257 (2007) (State’s remedies upon dismissal of a complaint not limited only to appeal or the refiling of charges).

K.S.A. 22-3602[d] does not foreclose the State from exercising other posttrial procedural motions).

For a discussion of appeals following the dismissal of a grand jury indictment and the law of the case rule, see *State v. Finical*, 254 Kan. 529, 867 P.2d 322 (1994). The State can appeal the dismissal of an indictment as insufficiently charging a crime. K.S.A. 22-3602(b)(1). See *State v. Wright*, 259 Kan. 117, 911 P.2d 166 (1996).

**PRACTICE NOTE:** A notice of appeal indicating the State was appealing from “the decision of the District Court” on a specified date was deemed sufficient to cover the court’s dismissal of the case immediately after suppressing evidence. See K.S.A. 22-3603 and § 5.11, *infra*, regarding interlocutory appeals following suppression of evidence. “For all practical purposes, the district court’s decision to dismiss and its decision to grant defendants’ suppression motions were one and the same. Thus the State’s citation of the statute authorizing an appeal from the dismissals was sufficient to preserve its right to challenge the basis of the dismissal decisions, *i.e.*, the suppression of the evidence....” *State v. Huff*, 278 Kan. 214, 218-19, 92 P.3d 604 (2004).

### § 5.8 From an Order Arresting Judgment: K.S.A. 22-3602(b)(2)

An order arresting judgment can be entered if a complaint, information, or indictment does not charge a crime or if the court was without jurisdiction of the crime charged. *State v. Unruh*, 259 Kan. 822, Syl. ¶ 2, 915 P.2d 744 (1996); K.S.A. 22-3502. See also *State v. Sims*, 254 Kan. 1, Syl. ¶ 3, 862 P.2d 359 (1993). K.S.A. 22-3503 allows the district court to arrest judgment on its own motion. If a complaint, information or indictment did charge a crime and the court had jurisdiction over the crime charged, there can be no order arresting judgment from which the State can appeal regardless of the State’s characterization of the trial court’s order. See *Unruh*, 259 Kan. at 824-25.

### § 5.9 Upon a Question Reserved by the Prosecution: K.S.A. 22-3602(b)(3)

“Although the State is not permitted to appeal from a judgment of acquittal, the State may appeal on a question reserved.” *State v. Walker*, 260 Kan. 803, 806, 926 P.2d 218 (1996). An appeal by the State on a question reserved must be taken after judgment has been entered, *State v. Hermes*, 229 Kan. 531, Syl. ¶ 4, 625 P.2d 1137 (1981), and such an appeal will not be entertained merely to demonstrate whether error was committed by the trial court. *State v. Tremble*, 279 Kan. 391, Syl. ¶ 1, 109 P.3d 1188 (2005); *State v. Craig*, 254 Kan. 575, 576, 867 P.2d 1013 (1994). An appeal on a question reserved presupposes that the underlying criminal case has concluded but that an answer to a question of statewide importance is necessary for disposition of future cases. Accordingly, an appellate court’s answer to a question reserved has no effect on the criminal defendant in the underlying case. *State v. Jaben*, 294 Kan. 607, Syl. ¶ 2, 277 P.3d 417 (2012); *State v. Berreth*, 294 Kan. 98, 121-23, 273 P.3d 752 (2012). See also *State v. Skolaut*, 286 Kan. 219, 225, 182 P.3d 1231 (2008). The decision on an appeal from a question reserved has no effect on a criminal defendant who has been acquitted. *State v. Gustin*, 212 Kan. 475, 479, 510 P.2d 1290 (1973).

The State may appeal “as a matter of right ... upon a question reserved by the prosecution.” K.S.A. 22-3602(b)(3). The appellate courts have added an additional requirement to the plain language of this statute. “To be considered on appeal, questions reserved by the State in a criminal prosecution must be of statewide interest important to the correct and uniform administration of criminal law and the interpretation of statutes.” *State v. Berreth*, 294 Kan. 98, Syl. ¶ 11. “The purpose of permitting the State to appeal a question reserved is to allow the prosecution to obtain review of an adverse legal ruling on an issue of statewide interest important to the correct and uniform administration of the criminal law which otherwise would not be subject to appellate review.” *State v. Mountjoy*,



257 Kan. 163, Syl. ¶ 3, 891 P.2d 376 (1995). “Appellate courts will not accept appeal of questions reserved when their resolution will not provide helpful precedent. So if a question reserved is no longer of statewide importance because the court has already addressed it in a prior case, an appeal on the question should be dismissed.” *State v. Berreth*, 294 Kan. 98, Syl. ¶ 12. There is no statutory authority for answering a defendant’s inquiries in a State’s appeal upon a question reserved. *Mountjoy*, 257 Kan. 163, Syl. ¶ 5.

New issues and previously uninterpreted statutes are appropriate subjects for appeal on questions reserved. See *State v. Adee*, 241 Kan. 825, 827, 740 P.2d 611 (1987). The appellate courts “uniformly [decline] to entertain questions reserved in which the resolution of the question would not provide helpful precedent.” *Tremble*, 279 Kan. 391, Syl. ¶ 1. For instance, an order granting probation to a particular defendant is not a question of statewide importance that can be appealed as a question reserved. See *State v. Ruff*, 252 Kan. 625, 630, 847 P.2d 1258 (1993). The sufficiency of the State’s evidence in a particular case is not an issue of statewide importance. *State v. Wilson*, 261 Kan. 924, 933 P.2d 696 (1997). The question of whether a plea agreement may be deemed ambiguous if it is silent as to some issue, condition, or fact known to both sides is not an issue of statewide importance because it is fact specific and of limited precedential value. *State v. Woodling*, 264 Kan. 684, 688, 957 P.2d 398 (1998).

Appellate courts have found a variety of areas of the criminal law to be a matter of statewide importance. See, e.g., *State v. Jaben*, 294 Kan. 607, 277 P.3d 417 (2012) (interpreting the prospective application of amendments to the expungement statute); *State v. Stallings*, 284 Kan. 741, 742, 163 P.3d 1232 (2007) (whether a defendant has a right to allocution before the jury during the death penalty phase of a capital murder trial); *State v. Murry*, 271 Kan. 223, 21 P.3d 528 (2001) (decision suppressing evidence of a blood sample taken from the defendant prior to his arrest); *State v. Golston*, 269 Kan. 345, 346, 7 P.3d 1132 (2000) (whether a trial judge can release a prisoner without processing the release through the Department of Corrections);

*State v. Chastain*, 265 Kan. 16, 22, 960 P.2d 756 (1998) (whether the trial court erred in refusing to admit evidence of horizontal gaze nystagmus testing); *State v. Roderick*, 259 Kan. 107, 109, 911 P.2d 159 (1996) (interpretation of Kansas sentencing guidelines provisions); *City of Overland Park v. Cunningham*, 253 Kan. 765, 766, 861 P.2d 1316 (1993) (whether an objection for “lack of foundation” is sufficient when a request for a more specific objection is made); *State v. Toler*, 41 Kan. App. 2d 896, 899-900, 206 P.3d 548 (2009) (whether a person may be found guilty of criminal possession of a firearm on school property even when school is not in session given the number of school districts in Kansas and the legislature’s intent to regulate the presence of firearms on school property); *State v. Moffit*, 38 Kan. App. 2d 414, 166 P.3d 435 (2007) (question of whether statute, which provides that any person who engages in the unlawful manufacturing or attempting to unlawfully manufacture any controlled substance “shall not be subject to statutory provisions for suspended sentence, community work service, or probation,” prohibits a sentencing court from granting probation to a defendant convicted of conspiracy to unlawfully manufacture methamphetamine); *State v. Johnson*, 32 Kan. App. 2d 619, 86 P.3d 551 (2004) (whether it was misconduct for any attorney, prosecutor or defense, to call witnesses “liars” when such statements were not supported by evidence); and *State v. Kralik*, 32 Kan. App. 2d 182, 80 P.3d 1175 (2003) (construing ambiguous language relating to prior DUI convictions in a journal entry of judgment).

All that is necessary for the State to reserve a question for appeal is to make a proper objection or exception at the time a judgment is entered by the district court, laying the same foundation for appeal that a defendant is required to lay. *State v. Tremble*, 279 Kan. 391, 393–94, 109 P.3d 1188 (2005). “In so doing, the State must lodge proper and timely objections, advise the trial court of the basis for the objections, and properly perfect the appeal.” *State v. G.W.A.*, 258 Kan. 703, Syl. ¶ 2, 906 P.2d 657 (1995). See also *State v. Hurla*, 274 Kan. 725, 727-28, 56 P.3d 252 (2002); *City of Overland Park v. Cunningham*, 253 Kan. 765, Syl. ¶ 2, 861 P.2d 1316 (1993). No more is required

from the State than from a defendant to preserve an issue for appellate review. *State v. Pottoroff*, 32 Kan. App. 2d 1161, Syl. ¶ 2, 96 P.3d 280 (2004). “Although the better practice to preserve a question for appeal is for the State to object or take exception *after* the court’s ruling, an argument presented by the State *prior* to the ruling may be adequate to preserve the question for jurisdictional purposes.” *Pottoroff*, 32 Kan. App. 2d 1161, Syl. ¶ 3. In the absence of any timely, proper objection or exception, the issue is not properly before the appellate court. See also *State v. Berreth*, 294 Kan. 98, 113-15, 273 P.3d 752 (2012) (discussion of sufficiency of State’s notice of appeal to trigger appellate jurisdiction over a question reserved); *State v. Huff*, 278 Kan. 214, 217-19, 92 P.3d 604 (2004) (same).

**§ 5.10 Upon an Order Granting a New Trial in Any Case Involving an Off-Grid Crime: K.S.A. 22-3602(b)(4)**

The prosecution may appeal an order granting a new trial in any case involving an off-grid crime. K.S.A. 22-3602(b)(4). This statute also permits an appeal from an order granting a new trial for class A or B felonies prior to July 1993.

**§ 5.11 Interlocutory Appeals: K.S.A. 22-3603**

When a judge of the district court makes a pre-trial “order quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission an appeal may be taken by the prosecution ... if notice of appeal is filed within 14 days after entry of the order.” K.S.A. 22-3603. All interlocutory appeals in criminal cases must be taken to the Court of Appeals. K.S.A. 22-3601(a). The only interlocutory appeals that are permitted in criminal cases are set out in K.S.A. 22-3603. Under this statute, the prosecution can appeal from a pretrial order quashing a warrant, quashing a search warrant, suppressing evidence, or suppressing a confession or admission. See *State v. Unruh*, 263 Kan. 185, Syl. ¶ 5, 946 P.2d 1369 (1997). A criminal defendant has no right to take an interlocutory appeal. See *State v. Donahue*, 25 Kan. App. 2d 480, 483, 967 P.2d 335 (1998).



A threshold requirement of an appeal from a pretrial order suppressing evidence is that the order appealed from substantially impairs the State's ability to prosecute the case. *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984); *State v. Nuessen*, 23 Kan. App. 2d 456, Syl. ¶ 1, 933 P.2d 155 (1997). Suppression rulings which seriously impede but do not technically foreclose prosecution can be appealed under K.S.A. 22-3603. *State v. Bliss*, 28 Kan. App. 2d 591, 594, 18 P.3d 979 (2001). The prosecutor should be prepared to make a showing, on order of the appellate court, that the district court's pretrial order appealed from substantially impairs the State's ability to prosecute the case or when appellate jurisdiction is challenged by the defendant-appellee. *State v. Sales*, 290 Kan. 130, Syl. ¶ 5, 224 P.3d 546 (2010); *Newman*, 235 Kan. at 35. There is, however, no similar threshold requirement in an appeal from a pretrial order suppressing a confession or admission. *State v. Mooney*, 10 Kan. App. 2d 477, 479, 702 P.2d 328, (1985). In dicta, the *Mooney* court also indicated there was no such threshold requirement in an appeal from a pretrial order quashing a warrant or search warrant. *Mooney*, 10 Kan. App. 2d at 479.

**PRACTICE NOTE:** If the State does not prevail on an interlocutory appeal, and the suppression of evidence is affirmed, it cannot dismiss the case and refile the charges so that it can relitigate the motion to suppress and raise additional exceptions to the search warrant requirement. See *State v. Parry*, 305 Kan. 1189, 1196–98, 390 P.3d 879 (2017) (invoking the law of the case doctrine to uphold suppression of evidence; second prosecution amounted to a successive stage in the same criminal prosecution, in which the State had already litigated—and lost—the suppression issue). The State should raise all of its arguments in its response to the motion to suppress.

The State cannot appeal the denial of a motion to revoke diversion as an interlocutory appeal under K.S.A. 22-3603. There is no mechanism for the State to appeal from an order

denying revocation of a diversion agreement or probation. *State v. McDaniels*, 237 Kan. 767, 772, 703 P.2d 789 (1985). This does not mean, however, that the State can never question an order denying revocation of a diversion agreement. In *McDaniels*, the court stated, “Until the legislature chooses to create a right in the State to appeal from a pretrial order denying the State’s request to revoke diversion, the State may not appeal prior to the completion of the diversion and the dismissal of the case by the district court.” *McDaniels*, 237 Kan. at 772. The State may, however, “appeal after the dismissal, and if the appeal is sustained, the defendant may be tried.” *McDaniels*, 237 Kan. at 771.

Further proceedings in the trial court will be stayed pending determination of the interlocutory appeal. K.S.A. 22-3603. The time during which an interlocutory appeal is pending “shall not be counted for the purpose of determining whether a defendant is entitled to discharge” under the speedy trial statute, K.S.A. 22-3402. K.S.A. 22-3604(2). The general rule is that a defendant shall not be held in jail nor subject to an appearance bond during the pendency of an appeal by the prosecution. K.S.A. 22-3604(1). The exception to this general rule is that a defendant charged with an off-grid felony, a nondrug severity level 1 through 5 felony or a drug severity level 1 through 4 felony crime “shall not be released from jail or the conditions of such person’s appearance bond during the pendency of an appeal by the prosecution.” K.S.A. 22-3604(3). This rule also applies to a defendant charged with a class A, B or C felony prior to the enactment of the Kansas Sentencing Guidelines Act in 1993.

**PRACTICE NOTE:** Supreme Court Rule 4.02 governs the docketing and appellate procedure of interlocutory appeals, which are typically expedited. When an appeal is expedited, the appellant’s brief will be due 30 days following the completion of all necessary transcripts. The appellee’s brief will be due within 30 days of the filing of the appellant’s brief. In the absence of a showing of exceptional circumstances, no further extensions of time for filing briefs will be granted.

## C. Sentencing Guidelines Appeals

### § 5.12 Appeals Under the Kansas Sentencing Guidelines Act

On July 1, 1993, the Kansas Sentencing Guidelines Act went into effect for crimes committed on or after that date. The appeal rights of both the prosecution and defendant from sentences imposed pursuant to the Act are set by statute. See K.S.A. 22-3602(f); K.S.A. 21-6820 (formerly K.S.A. 21-4721); *State v. Ware*, 262 Kan. 180, Syl. ¶ 1, 938 P.2d 197 (1997).

For any felony committed on or after July 1, 1993, there is generally no appellate review of a sentence within the presumptive sentence range for the crime. K.S.A. 21-6820(c) (formerly K.S.A. 21-4721[c]). But see *State v. Barnes*, 278 Kan. 121, 92 P.3d 578 (2004) (defendant was entitled to remand for resentencing under *McAdam* rule; where she had been convicted under statutes containing identical elements but providing different penalties, defendant could only be sentenced to lesser penalty); *State v. Hodgden*, 29 Kan. App. 2d 36, 38, 25 P.3d 138 (2001) (appellate court may review claim that sentencing court erred in either including or excluding a prior conviction or juvenile adjudication in a defendant's criminal history); and *State v. Cisneros*, 42 Kan. App. 2d 376, 212 P.3d 246 (2009) (statute limiting appellate review of presumptive sentence did not serve as jurisdictional bar to defendant's appeal from order revoking defendant's probation and imposing original presumptive term of imprisonment based on incorrect finding that trial court lacked authority to impose a sentence shorter than the original sentence). An appellate court does not have jurisdiction to consider a challenge to a presumptive sentence, even if that sentence is to the highest term in a presumptive sentencing grid block. *State v. Schad*, 41 Kan. App. 2d 805, Syl. ¶ 12, 206 P.3d 22 (2009).

“The filing and denial of a motion requesting departure by either the defendant or the State has no effect on the rule that a sentence within the presumptive sentence grid block is not subject to review on appeal.” *State v. Graham*, 27 Kan. App. 2d 603, Syl. ¶ 6, 6 P.3d 928 (2000).

An appellate court's jurisdiction to consider an appeal challenging a sentence imposed pursuant to the Kansas Sentencing Guidelines Act is limited to the grounds set out in K.S.A. 21-4721(a) and (e) (currently K.S.A. 21-6820 [a] and [e]), and illegal sentences. *State v. McCallum*, 21 Kan. App. 2d 40, Syl. ¶ 4, 895 P.2d 1258 (1995). K.S.A. 21-6820(a) (formerly K.S.A. 21-4721[a]) states that a departure sentence is subject to appeal by the defendant or the prosecution. Accord *State v. Sampsel*, 268 Kan. 264, Syl. ¶ 3, 497 P.2d 664 (2000). "Only if the sentence imposed is inconsistent with the duration and disposition of the appropriate grid block can there be a departure." *State v. McCallum*, 21 Kan. App. 2d at 7. See also K.S.A. 21-6803(f) (defining "departure"); K.S.A. 21-6803(g) (defining "dispositional departure"); and K.S.A. 21-6803(i) (defining "durational departure"). By statute, a guideline sentence may be deemed not to be a departure and thus not subject to appeal. See, e.g., K.S.A. 21-6604(f).

"In an appeal from a departure sentence, an appellate court must determine pursuant to [K.S.A. 21-6820(d)] whether the sentencing court's findings of fact and reasons justifying departure (1) are supported by substantial competent evidence and (2) constitute substantial and compelling reasons for departure as a matter of law. The applicable standard of review is keyed to the language of the statute: [K.S.A. 21-6820(d)(1)] requires an evidentiary test –are the facts stated by the sentencing court in justification of departure supported by the record? [K.S.A. 21-6820(d)(2)] requires a law test –are the reasons stated on the record for departure adequate to justify a sentence outside the presumptive sentence?" *State v. Richardson*, 20 Kan. App. 2d 932, Syl. ¶ 1, 901 P.2d 1 (1995).

K.S.A. 21-6820(e)(1) gives the appellate courts jurisdiction to consider another issue in departure sentence appeals. It states, "In any appeal from a judgment of conviction, the appellate court may review a claim that: (1) a sentence that departs from the presumptive sentence resulted from partiality, prejudice, oppression or corrupt motive."

K.S.A. 21-6818(b)(1) (formerly K.S.A. 21-4719[b][1]) is interpreted to give appellate courts the authority to review the extent of a departure sentence. *State v. Spencer*, 291 Kan. 796, 807, 248 P.3d 256 (2011). Scope of review is limited to an abuse of discretion standard. *Spencer*, 291 Kan. at 807. The same standard applies to appellate review of the extent of an upward departure sentence. *State v. Tiffany*, 267 Kan. 495, 506-07, 986 P.2d 1064 (1999). Whether a particular mitigating factor constitutes a substantial and compelling reason for departure is also reviewed for an abuse of discretion. *State v. Bird*, 298 Kan. 393, 398, 312 P.3d 1265 (2013).

K.S.A. 21-6820(e)(2) and (3) (formerly K.S.A. 21-4721[e][2] and [3]) allow for appellate review of whether the sentencing court erred in either including or excluding recognition of a prior criminal conviction or juvenile adjudication for criminal history scoring purposes and whether the sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes. In *State v. Barnes*, 278 Kan. 121, 124, 92 P.3d 578 (2004), the Court held that it could consider a claim under K.S.A. 21-4721(e)(3) even though the sentence imposed resulted from a plea agreement. See also *State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015) (defendant may challenge classification of prior convictions and resulting criminal history score for first time on appeal). Apparently, both the State and the defendant can appeal these issues. See *State v. Hodgden*, 29 Kan. App. 2d 36, 25 P.3d 138 (2001) (State appealed district court's amendment of defendant's criminal history and court entertained appeal even though defendant had been given presumptive sentence).

It has been held that when a criminal defendant challenges a presumptive sentence on the ground that the running of multiple sentences consecutively constitutes an abuse of discretion, no ground for appeal authorized by K.S.A. 21-4721(a) or (e) (now K.S.A. 21-6820[a] and [e]) is asserted; therefore, there is no appellate jurisdiction to consider the issue. *State v. Ware*, 262 Kan. 180, Syl. ¶ 4, 938 P.2d 197 (1997); *State v. McCallum*, 21 Kan. App. 2d 40, Syl. ¶ 7, 895 P.2d 1258 (1995). See also *State v.*



*Flores*, 268 Kan. 657, Syl. ¶ 2, 999 P.2d 919 (2000) (a consecutive sentence is not a departure sentence). However, a life sentence for an off-grid crime is not a presumptive sentence. When a defendant is convicted of both an off-grid crime and an on-grid crime, and the district court orders consecutive sentences, the result is not entirely a “presumptive sentence,” and the defendant can challenge the district court’s decision to impose consecutive sentences in a multiple conviction case involving both off-grid and on-grid crimes. *State v. Ross*, 295 Kan. 1126, Syl. ¶ 12, 289 P.3d 76 (2012).

Regardless of whether a notice of appeal has been filed, the sentencing court retains jurisdiction to correct an illegal sentence or clerical error pursuant to K.S.A. 22-3504. K.S.A. 21-6820(i).

#### **IV. APPELLATE JURISDICTION IN JUVENILE OFFENDER CASES**

##### **§ 5.13 Appeals by the Juvenile Offender**

Appeals by a juvenile offender are taken to the appellate court having jurisdiction over the criminal charge. See K.S.A. 38-2380; *State v. Kunellis*, 276 Kan. 461, 78 P.3d 776 (2003) (convicted, in part, of felony murder; appeal including prosecution as an adult to Supreme Court); *In re B.M.B.*, 264 Kan. 417, 955 P.2d 1302 (1998) (appeal from adjudication of rape; case transferred from Court of Appeals to Supreme Court); *State v. Hartpence*, 30 Kan. App. 2d 486, 42 P.3d 1197 (2002) (juvenile pleaded to aggravated indecent liberties with a child; appeal including prosecution as adult to Court of Appeals).

Appeals from a district magistrate judge who is not regularly admitted to practice law in Kansas must be to a district judge. K.S.A. 38-2382(a). Appeals from a district judge, or a district magistrate judge who is regularly admitted to practice law in Kansas, shall be to the Court of Appeals. K.S.A. 38-2382(b).

**PRACTICE NOTE:** To find out whether a district magistrate judge is licensed to practice law in Kansas, check the online attorney directory at the Supreme Court’s website: [www.kscourts.org](http://www.kscourts.org)

A juvenile offender can appeal from:

- An order of adjudication as a juvenile offender, sentencing, or both. K.S.A. 38-2380(b);
- An order authorizing prosecution as an adult, if the juvenile offender did not consent to the order. K.S.A. 38-2380(a)(1). The juvenile raises the issue on appeal from his or her criminal conviction. A juvenile can also appeal an order authorizing prosecution as an adult following a plea of guilty or nolo contendere if the juvenile did not consent to the order. K.S.A. 38-2380(a)(1). See *State v. Ransom*, 268 Kan. 653, Syl. ¶ 1, 999 P.2d 272 (2000) (interpreting prior, similarly worded statute); and
- A departure sentence, although the sentence review is limited. See K.S.A. 38-2380(b)(3). See also § 5.15, *infra*.

In any appeal, an appellate court may review a claim that:

- An imposed departure sentence resulted from partiality, prejudice, oppression, or corrupt motive. K.S.A. 38-2380(b)(4)(A).
- The sentencing court erred in either including or excluding recognition of prior convictions or adjudications. K.S.A. 38-2380(b)(4)(B).
- The sentencing court erred in ranking the crime severity level or in scoring criminal history. K.S.A. 38-2380(b)(4)(C).

**PRACTICE NOTE:** Appeals under the Revised Kansas Juvenile Justice Code “shall have priority over other cases except those having statutory priority.” K.S.A. 38-2380(c). This means that

such appeals will be expedited. When an appeal is expedited, the appellant's brief will be due 30 days following the completion of all necessary transcripts. The appellee's brief will be due within 30 days of the filing of the appellant's brief. In the absence of a showing of exceptional circumstances, no further extensions of time for filing briefs will be granted.

### **§ 5.14 Appeals by the Prosecution**

Appeals by the prosecution are taken to the Court of Appeals. See K.S.A. 22-3602(b) (appeals by prosecution from order dismissing complaint, information or indictment and on question reserved go to the Court of Appeals); *In re J.D.J.*, 266 Kan. 211, 967 P.2d 751 (1998) (appeal from order denying prosecution as adult filed with Court of Appeals and transferred to Supreme Court under K.S.A. 20-3018[c]).

The Revised Kansas Juvenile Justice Code, K.S.A. 38-2301 *et seq.*, only permits a juvenile to appeal an order authorizing prosecution of the juvenile as an adult, an order of adjudication, or a sentencing order. *In re D.M.-T.*, 292 Kan. 31, Syl. ¶ 4, 249 P.3d 418 (2011). Under the Revised Kansas Juvenile Justice Code, the prosecution can appeal:

- From an order dismissing proceedings when jeopardy has not attached. K.S.A. 38-2381(a)(1);
- From an order denying authorization to prosecute a juvenile as an adult. K.S.A. 38-2381(a)(2);
- From an order quashing a warrant or search warrant. K.S.A. 38-2381(a)(3);
- From an order suppressing evidence or suppressing a confession or admission. K.S.A. 38-2381(a)(4); and
- Upon a question reserved by the prosecution. K.S.A. 38-2381(a)(5).



An appeal upon a question reserved must be taken by the prosecution within 14 days after the juvenile has been adjudged to be a juvenile offender. All other appeals by the prosecution must be taken within 14 days of the entry of the order being appealed. K.S.A. 38-2381(b). An appellate court hears a question reserved by the State only to address a matter of statewide importance, not merely to show that the district court was wrong in a particular case. The appellate court's ruling on a question reserved does not have any effect on the juvenile offender in that case. *State v. Pearce*, 51 Kan. App. 2d 116, Syl. ¶ 1, 342 P. 3d 963 (2015).

The Revised Kansas Juvenile Justice Code does not permit an appeal of the denial of a post-appeal motion that collaterally attacked the procedure employed to adjudicate the juvenile. *In re D.M.-T.*, 292 Kan. 31, Syl. ¶ 4.

### **§ 5.15 Sentencing Guideline Appeals - Juvenile**

In any appeal of a departure sentence, sentence review is limited to whether the sentencing court's findings of fact and reasons justifying the departure are supported by the evidence in the record and constitute "substantial and compelling reasons for departure." K.S.A. 38-2380(b)(3)(A) and (B). In addition, the appellate court may review a claim that the departure sentence was the result of partiality, prejudice or corrupt motive or that the sentencing court erred in including or excluding recognition of prior adjudications in determining criminal history or erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior adjudication. K.S.A. 38-2380(b)(4)(A) and (B).

An appellate court may not review a presumptive sentence or a sentence resulting from an agreement between the State and the juvenile that the sentencing court approves on the record. K.S.A. 38-2380(b)(2)(A) and (B). But see *State v. Duncan*, 291 Kan. 467, 470-71, 243 P.3d 338 (2010) (criminal sentences resulting from plea agreement can be appealed if illegal).

The Juvenile Justice Code does not authorize appeals from district court orders revoking probation or from presumptive sentences. *In re C.D.A.-C.*, 51 Kan. App. 2d 1007, Syl. ¶¶ 5-6, 360 P.3d 443 (2015). K.S.A. 38-2368(a) gives the district court the authority to revoke a juvenile's probation and enter a new sentence. "If the new sentence is within the presumptive sentencing range, an appellate court does not have jurisdiction to hear an appeal from the new sentence." *In re C.D.A.-C.*, 51 Kan. App. 2d 1007, Syl. ¶ 7.

**PRACTICE NOTE:** For a review of amendments to the Kansas Juvenile Justice Code since 1984, see *In re L.M.*, 286 Kan. 460, 186 P.3d 164 (2008) (holding that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments because the Code has become more akin to adult criminal prosecution).

## V. APPELLATE JURISDICTION IN CIVIL CASES

### § 5.16 Supreme Court

Direct appeal to the Supreme Court is required by law in the following cases. The following list is not intended to be all inclusive; therefore, the statutes should be consulted prior to taking an appeal.

- Appeals from final judgments of the district court in a civil action in which a statute of this state or of the United States has been held unconstitutional. K.S.A. 60-2101(b). This statute specifically requires the order appealed from to be a "final judgment." See *Flores Rentals v. Flores*, 283 Kan. 476, 481, 153 P.3d 523 (2007); *Plains Petroleum Co. v. First Nat. Bank of Lamar*, 274 Kan. 74, 81, 49 P.3d 432 (2002); *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, Syl. ¶ 1, 941 P.2d 371 (1997);

- Appeals from preliminary or final decisions finding a statute unconstitutional under Article 6 of the Kansas Constitution under K.S.A. 72-64b03. K.S.A. 60-2102(b)(1);
- Appeals from final decisions in any actions challenging the constitutionality of or arising out of any provision of the Kansas Expanded Lottery Act, or arising out of any lottery gaming facility or racetrack gaming facility management contract entered into under the Kansas Expanded Lottery Act. K.S.A. 60-2102(b)(2);
- Appeals from final orders under the provisions of the Eminent Domain Procedure Act. K.S.A. 26-504;
- Appeals from any action of the Kansas Corporation Commission under the Kansas Natural Gas Pricing Act. K.S.A. 55-1410;
- Appeals arising from the Mental Health Technician's Licensure Act. K.S.A. 65-4211(b);
- Appeals from any action of the Kansas Corporation Commission regarding site preparation or construction of electric generation facilities. K.S.A. 66-1,164;
- Appeals permitted by statute in election contests. K.S.A. 25-1450;
- Appeals from orders granting or denying an original organization license by the Kansas Racing Commission. K.S.A. 74-8813(v);
- Appeals from orders granting or denying an original facility owner license or facility manager license by the Kansas Racing Commission. K.S.A. 74-8815(n);
- Appeals from orders in the district court by a person or taxpayer aggrieved by airport zoning regulations. K.S.A. 3-709;
- Appeals from judgment or order regarding petitions for drainage. K.S.A. 24-702(f);
- Appeals from any action of the secretary of human resources concerning the regulation of labor and

industry are subject to review and enforcement by the Supreme Court in accordance with the Kansas Judicial Review Act. K.S.A. 44-612.

### **§ 5.17 Court of Appeals**

The Court of Appeals has jurisdiction to hear all appeals from district courts in civil proceedings, except in those cases reviewable by law in the district court and in those cases where direct appeal must be taken to the Supreme Court as required by law. K.S.A. 60-2101(a). In addition, the Court of Appeals has jurisdiction to hear appeals from administrative decisions where a statute specifically authorizes appeals directly to the Court of Appeals. K.S.A. 60-2101(a). See, e.g., K.S.A. 74-2426(c)(4) (appeals from final orders of the Court of Tax Appeals unless the taxpayer elects to file a petition for review in the district court); K.S.A. 66-118a(b) (orders of the Kansas Corporation Commission arising from a rate hearing requested by a public utility or requested by the State Corporation Commission when a public utility is a necessary party); K.S.A. 65-3008a (permits issued by the Secretary of Health and Environment with regard to air quality under the Kansas Air Quality Control Act, effective April 13, 2006); K.S.A. 44-556(a) (decisions of the Workers Compensation Board entered on or after October 1, 1993).

Court of Appeals jurisdiction includes appeals from all K.S.A. 60-1507 proceedings, regardless of the severity of the underlying criminal offense. *State v. Thomas*, 239 Kan. 457, 459, 720 P.2d 1059 (1986).

Appeals from actions of the district court in proceedings under the Code of Civil Procedure for Limited Actions are taken to the Court of Appeals. K.S.A. 61-3902(b).

## VI. APPEALABLE ORDERS IN CIVIL CASES

### § 5.18 Final Orders

Under K.S.A. 60-2102(a)(4), a final decision in a civil proceeding can be appealed. In an appeal from a final order, any act or ruling from the beginning of the proceeding is reviewable. However, under K.S.A. 60- 2103(h), an appellee must file a cross-appeal before he or she can present adverse rulings for review. *In re Tax Appeal of Fleet*, 293 Kan. 768, 775, 272 P.3d 583 (2012); *McCracken v. Kohl*, 286 Kan. 1114, 1120, 191 P.3d 313 (2008); *Chavez v. Markham*, 19 Kan. App. 2d 702, Syl. ¶ 4, 875 P.2d 997 (1994), *aff'd* 256 Kan. 859, 889 P.2d 122 (1995). See also *Butler County Water Dist. No. 8 v. Yates*, 275 Kan. 291, 299, 64 P.3d 357 (2003); *In re T.A.*, 30 Kan. App. 2d 30, 35, 38 P.3d 140 (2001).

A “final decision” is a decision “which finally decides and disposes of the entire merits of the controversy, and reserves no further questions or directions for the future or further action of the court.” *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 610, 244 P.3d 642 (2010) (quoting *Gulf Ins. Co. v. Bovee*, 217 Kan. 586, 587, 538 P.2d 724 [1975]). See also *Flores Rentals v. Flores*, 283 Kan. 476, 481-82, 153 P.3d 523 (2007); *Investcorp v. Simpson Investment Co.*, 277 Kan. 445, Syl. ¶ 3, 85 P.3d 1140 (2003); *Plains Petroleum Co. v. First National Bank of Lamar*, 274 Kan. 74, 82, 49 P.3d 432 (2002); *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, Syl. ¶ 2, 941 P.2d 371 (1997); *Honeycutt v. City of Wichita*, 251 Kan. 451, Syl. ¶ 1, 836 P.2d 1128 (1992). A final decision is one that determines all of the issues in the case, not just part of the issues. *Henderson v. Hassur*, 1 Kan. App. 2d 103, Syl. ¶ 2, 562 P.2d 108 (1977). See also *Winters v. GNB Battery Technologies*, 23 Kan. App. 2d 92, 95, 927 P.2d 512 (1996).

In recent years, the Kansas Supreme Court has made clear that the time to appeal begins to run immediately upon entry of judgment, subject only to an exception where the appellant shows good cause for not learning of the entry of judgment as set out in K.S.A. 60-2103(a). In *Board of Sedgwick County Comm’rs v.*

*City of Park City*, 293 Kan. 107, 120, 260 P.3d 387 (2011), the Kansas Supreme Court rejected any exception to the Kansas rule requiring a notice of appeal to be filed within 30 days of entry of judgment and expressly rejected the “unique circumstances” doctrine that it previously applied where an appellant may have been led to believe, erroneously, that the judgment so entered was not “final.” The court expressly overruled its prior decisions applying the “unique circumstances” exception to a jurisdictional deadline. 293 Kan. at 120. See also *Woods v. Unified Gov’t of Wyandotte County/KCK*, 294 Kan. 292, 298, 275 P.3d 467 (2012).

In a number of cases, the appellate courts have examined whether various rulings are final, appealable orders. The following list, which is certainly not all inclusive, is for the purpose of direction only. The specifics of the cases cited should be considered in determining their applicability to any given situation:

- Collateral Order Doctrine

An order conclusively determining a disputed question that resolves an important issue completely separate from the merits of the action and that will be effectively unreviewable on appeal from a final judgment is reviewable as a final decision under the collateral order doctrine. *In re T.S.W.*, 294 Kan. 423, 434-35, 276 P.3d 133 (2012); *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982). The Kansas Supreme Court has emphasized “the limited availability of the collateral order doctrine” in its decisions in recent years. See *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 616, 244 P.3d 642 (2010); *Harsch v. Miller*, 288 Kan. 280, 200 P.3d 467 (2009); *Flores Rentals v. Flores*, 283 Kan. 476, 491, 153 P.3d 523 (2007). However, the court recently found application of this doctrine proper in the unique factual circumstances presented by an appeal by the Cherokee Nation from an order granting a petition to deviate from the adoptive placement preferences set forth in the Indian Child Welfare Act. *In re T.S.W.*, 294 Kan. 423, 432-35, 276 P.3d 133 (2012). Nevertheless, the *T.S.W.* court emphasized it will continue to apply this narrow



doctrine sparingly to a small class of collateral rulings. 294 Kan. at 434.

Two years earlier, in *Svaty*, the Kansas Supreme Court rejected application of the doctrine to a collateral discovery ruling challenged by a non-party. 291 Kan. at 616. In so holding, it found guidance in the United States Supreme Court's recent decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 605, 175 L. Ed. 2d 458 (2009), where the Court rejected application of the doctrine to an order concluding that the defendant had waived its attorney-client privilege in another suit. The *Svaty* court noted that it generally has followed the United States Supreme Court's application of the collateral order doctrine and held the doctrine did not apply even though the appellant was not a party to the litigation below because it could seek a remedy through mandamus. 291 Kan. at 616.

- Discovery and Other Pretrial Motions

The denial of a motion to intervene is a final, appealable order. *State ex rel. Stephan v. Kansas Dept. of Revenue*, 253 Kan. 412, Syl. ¶ 1, 415, 856 P.2d 151 (1993); *In re S.C.*, 32 Kan. App. 2d 514, 516, 85 P.3d 224 (2004); *In re Marriage of Osborne*, 21 Kan. App. 2d 374, Syl. ¶ 1, 901 P.2d 12 (1995).

As a general rule, discovery orders and sanctions for violations concerning parties to the proceedings are not final, appealable orders. *Reed v. Hess*, 239 Kan. 46, Syl. ¶ 3, 716 P.2d 555 (1986). This is true even where the appellant was not a party to the proceedings below, at least if the district court did not impose sanctions or a penalty on appellant. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 616, 244 P.3d 642 (2010).

- Dispositive Motions

An order denying a motion to dismiss is not a final, appealable order. *Donaldson v. State Highway Commission*, 189 Kan. 483, Syl. ¶ 2, 485, 370 P.2d 83 (1962).

The denial of a motion for summary judgment is not usually a final, appealable decision. *NEA-Topeka v. U.S.D. No.*



501, 260 Kan. 838, 843, 925 P.2d 835 (1996). “Typically, a party can only appeal from a summary judgment if the trial court has granted the opposing party’s summary judgment motion.” *NEA-Topeka*, 260 Kan. at 843. An order granting partial summary judgment to one of several defendants is not a final, appealable order. *Vallejo v. BNSF Railway Company*, 46 Kan. App. 2d 498, 503-04, 263 P.3d 208 (2011); *Fredricks v. Foltz*, 221 Kan. 28, 31, 557 P.2d 1252 (1976).

Trial court’s order granting a motion for voluntary dismissal without prejudice is not a final order and, as such, an appellate court is without jurisdiction to consider an appeal of that order. *Bain v. Artzer*, 271 Kan. 578, Syl. ¶ 2, 25 P.3d 136 (2001). See also *Arnold v. Hewitt*, 32 Kan. App. 2d 500, 85 P.3d 220 (2004) (partial summary judgment was not an appealable “final decision” despite the plaintiff’s voluntary dismissal of the remaining claim).

- Judgment

An order vacating a default judgment is not a final, appealable order. *Bates & Son Construction Co. v. Berry*, 217 Kan. 322, Syl. ¶ 1, 537 P.2d 189 (1975).

Generally, a declaratory judgment has the effect of a final order and would normally be appealable. However, if the judgment does not resolve all of the issues, there is no final, appealable decision. *AMCO Ins. Co. v. Beck*, 258 Kan. 726, 728, 907 P.2d 137 (1995).

“A party is bound by a judgment entered on stipulation or consent and may not appeal from a judgment in which he or she has acquiesced.” *In re Care and Treatment of Saathoff*, 272 Kan. 219, 220, 32 P.3d 1173 (2001). An exception exists “when the party attacks the judgment because of lack of consent or because the judgment deviates from the stipulation or when the party’s attorney had no authority to settle the case and did so without the agreement and consent of his client.” *Reimer v. Davis*, 224 Kan. 225, Syl. ¶ 2, 580 P.2d 81 (1978).

- Post-trial Motions

An order granting a new trial is not a final, appealable order. *Oertel v. Phillips*, 197 Kan. 113, 116-17, 415 P.2d 223 (1966). See also *NEA-Topeka v. U.S.D. No. 501*, 260 Kan. at 843. An appellate court has no authority to create an exception to statutory jurisdictional requirements to allow an appeal from an order setting aside a final judgment in a civil case. *Wiechman v. Huddleston*, 304 Kan. 80, 370 P.3d 1194, 1195 (2016) (overruling common-law “jurisdictional exception” created by *Brown v. Fitzpatrick*, 224 Kan. 636, 585 P.2d 987 [1978]).

- Post-Judgment

An order overruling a motion to quash an order of garnishment is not a final, appealable order. *Gulf Ins. Co. v. Bovee*, 217 Kan. 586, Syl. ¶ 2, 538 P.2d 724 (1975). But see K.S.A. 61-3901(c), which authorizes an appeal from any order overruling a motion to discharge a garnishment under Chapter 61.

An order amending a sheriff’s return of service on an execution after satisfaction of a judgment in the action is a final, appealable order. *Transport Clearing House, Inc. v. Rostock*, 202 Kan. 72, Syl. ¶ 2, 447 P.2d 1 (1968).

- Foreclosure/Redemption

“An order extending a statutory redemption period is a final, appealable order.” *Federal Savings & Loan Ins. Corp. v. Treaster*, 13 Kan. App. 2d 305, Syl. ¶ 1, 770 P.2d 481 (1989). See also *L.P.P. Mortgage, Ltd. v. Hayse*, 32 Kan. App. 2d 579, 87 P.3d 976 (2004).

A judgment of mortgage foreclosure is a final, appealable order if it determines the rights of the parties, the amounts to be paid, and the priority of the claims. *Stauth v. Brown*, 241 Kan. 1, Syl. ¶ 1, 734 P.2d 1063 (1987). See also *L.P.P. Mortgage, Ltd.*, 32 Kan. App. 2d at 583-84.

An order of sale issued in a mortgage foreclosure action is not a final, appealable order; however, an order confirming a sheriff’s sale is a final, appealable order. See *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 748 P.2d 905 (1988).

- Miscellaneous

In the absence of exceptional circumstances, remand orders are not appealable. *Holton Transport, Inc. v. Kansas Corporation Comm'n*, 10 Kan. App. 2d 12, Syl. ¶ 1, 690 P.2d 399 (1984). See also *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 18, 81 P.3d 425 (2003); *NEA-Topeka*, 260 Kan. at 843; *Williams v. General Elec. Co.*, 27 Kan. App. 2d 792, 793, 9 P.3d 1267 (1999). In *Holton Transport*, the court held that absent exceptional circumstances, an order remanding a proceeding to the Kansas Corporation Commission for further findings is not a final, appealable order. *Holton Transport, Inc.*, 10 Kan. App. 2d at 13.

The denial of a motion to arbitrate is a final, appealable order. If, however, the court grants a motion to compel arbitration, the parties must submit to arbitration and challenge the arbitrator's decision before there is a final, appealable order. *NEA-Topeka*, 260 Kan. at 842-43.

Once there is a decision on the merits of an action, there is a final appealable order. Resolution of a motion or request for attorney fees is unnecessary before there is a final, appealable order. *Snodgrass v. State Farm Mut. Auto. Ins. Co.*, 246 Kan. 371, Syl. ¶ 1, 789 P.2d 211 (1990). However, if the trial court enters an order granting fees without determining the amount it has awarded, the notice of appeal from that judgment is premature and will lie dormant until the trial court determines the actual amount of the fee award. *Ohlmeier v. Jones*, 51 Kan. App. 2d 1014, Syl. ¶ 1, 360 P.3d 447 (2015). Sanctions under K.S.A. 60-211 must be determined, however, before a judgment is final for appeal purposes. *Smith v. Russell*, 274 Kan. 1076, 1081, 58 P.3d 698 (2002).

There is no statutory right to appeal from the denial of a motion to terminate parental rights. *In re T.S.*, 308 Kan. 306, 312, 419 P.3d 1159 (2018).

Trial court's order determining that ERISA did not preempt state regulation of stop-loss insurance policy for self-funded employee benefit plans but that state Insurance Commissioner

lacked statutory authority to regulate such insurance was a final order for purposes of appeal even though subsequent legislative amendment would alter ruling. *American Trust Administrators, Inc. v. Sebelius*, 267 Kan. 480, 981 P.2d 248 (1999).

**PRACTICE NOTE:** If there is any possibility that a final judgment has been entered, counsel should carefully comply with the 30-day deadline from entry of judgment set forth in K.S.A. 60-2103(a) and the deadlines that follow until it is clear that the time to appeal has not commenced. That course is far safer than the alternative that there will be no appellate jurisdiction after the 30 days have expired. This is true in part because Rule 2.03 provides that “advance filing shall have the same effect for purposes of the appeal as if the notice of appeal had been filed simultaneously with the actual entry of judgment, provided it complies with K.S.A. 60-2103(b).” Rule 2.03 has been extended to hold that “if a judgment is entered disposing of all claims against one of multiple parties, and a premature notice of appeal has been filed and has not been dismissed, then a final judgment disposing of all claims and all parties validates the premature notice of appeal concerning the matters from which the appellant appealed.” *Newcastle Homes v. Thye*, 44 Kan. App. 2d 774, 797, 241 P.3d 988 (2010) (quoting *Honeycutt v. City of Wichita*, 251 Kan. 451, 462, 836 P.2d 1128 [1992]). The Court of Appeals held jurisdiction proper in *Newcastle Homes* because the appellant had timely filed a second notice of appeal within 30 days of the entry of final judgment even though the district court had dismissed a premature notice of appeal for failure to file a docketing statement. 44 Kan. App. 2d at 797.

### § 5.19 Interlocutory Orders that are Appealable as a Matter of Right

In some instances, an appeal from a decision of a district court (except for a district magistrate judge who is not regularly admitted to practice law in Kansas) may be taken as a matter of right to the Court of Appeals even though the order appealed from is interlocutory in nature; *i.e.*, the entire controversy is not ended as a result of the order. Those orders are set out in K.S.A. 60-2102(a)(1)-(3) and include:

- An order that discharges, vacates, or modifies a provisional remedy;
- An order that grants, continues, modifies, refuses, or dissolves an injunction, or an order that grants or refuses relief in the form of mandamus, quo warranto, or habeas corpus; and
- An order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or an order involving the tax or revenue laws, the title to real estate, the constitution of this state or the constitution, laws or treaties of the United States.

Other statutes may also authorize interlocutory appeals. See, *e.g.*, K.S.A. 60-1305 (order refusing to appoint a receiver).

Appeals under K.S.A. 60-2102(a) are taken to the Court of Appeals, except where a direct appeal to the Supreme Court is required by law. K.S.A. 60-2102(a)(4). Even though an order may seemingly fall within one of these categories, the order itself must possess some semblance of finality before the appeal will be allowed. For instance, in *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 748 P.2d 905 (1988), the court held that an order of sale issued in a mortgage foreclosure action is not an appealable order under K.S.A. 60-2102(a)(3) because it has no semblance of being a final determination of the title to real estate. On the other hand, in *Smith v. Williams*, 3 Kan. App. 2d 205, 592 P.2d 129 (1979), the court found that an order establishing boundary

lines and quieting title did have the requisite semblance of finality even though other claims remained to be resolved.

Similarly, “K.S.A. 60-2102 does not provide for an appeal when a restraining order is granted.” *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 228, 689 P.2d 860 (1984). This is so because restraining orders are usually in effect for only a brief period pending issuance of a temporary injunction. 236 Kan. at 228.

### § 5.20 Interlocutory Orders that are Appealable in the Court’s Discretion

K.S.A. 60-2102(c) and Supreme Court Rule 4.01 provide that some interlocutory orders may be appealed in the discretion of the Court of Appeals. Under the statute and court rule, a district judge or a district magistrate judge who is regularly admitted to practice law in Kansas, issuing an order that is not otherwise appealable, may make written findings that the judge is of the opinion the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. See *Duarte v. DeBruce Grain, Inc.*, 276 Kan. 598, 599, 78 P.3d 428 (2003); *Cypress Media Inc. v. City of Overland Park*, 268 Kan. 407, 413-14, 997 P.2d 681 (2000).

If these findings are made, the Court of Appeals may, in its discretion, permit an appeal to be taken from the order if proper application for permission to take an appeal is made to the Court of Appeals, under Rule 4.01. See *Flores Rentals v. Flores*, 283 Kan. 476, 481, 153 P.3d 523 (2007); *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, 508-09, 941 P.2d 371 (1997). The application must be served within 14 days after filing of the order. K.S.A. 60-2102(c); Rule 4.01.

**PRACTICE NOTE:** Application to take a civil interlocutory appeal must be made to the Court of Appeals even though some, or all, of the issues lie within Supreme Court jurisdiction, e.g., a statute has been declared unconstitutional. If



permission to appeal is granted, the case will later be transferred to the Supreme Court.

The required findings are the first step. The district judge must make the findings required by the statute in the order from which the appeal is to be taken. *Anderson v. Beech Aircraft Corp.*, 237 Kan. 336, 337-38, 699 P.2d 1023 (1985). If, however, the order does not contain the findings required by the statute, the order can be amended to include the requisite findings, provided a motion to amend is filed and served within 14 days of the filing of the original order. In that case, the application for permission to take an appeal may be served within 14 days after filing of the amended order. Rule 4.01.

Rule 4.01 sets out what an application for permission to take an interlocutory appeal must contain. Further, the rule provides that an adverse party may respond to the application within the time limit set out in the rule. Finally, the rule sets out what procedure must be followed if permission to appeal is granted, *e.g.*, when the appeal is deemed docketed.

**PRACTICE NOTE:** Few applications to take civil interlocutory appeals are granted. Counsel should carefully consider whether their case meets the three statutory requirements: controlling question of law, substantial ground for difference of opinion, and material advancement of termination of litigation. If so, the application should be thorough with particular attention paid to the “substantial ground for difference of opinion.” Citation to authority is critical, but foreign jurisdictions cannot be cited to establish a difference of opinion if the question of law has been answered in Kansas.

An order of a district court granting or denying class action certification under K.S.A. 60-223 may be appealed, in the discretion of the Court of Appeals, if application is made to the court within 14 days after entry of the order. K.S.A. 60-223(f); Rule 4.01A. The proceedings in the district court are not stayed by an appeal unless requested and so ordered by the district court or the Court of Appeals. K.S.A. 60-223(f).



## § 5.21 K.S.A. 60-254(b) – Entry of Final Judgment as to One or More but Fewer than All Claims or Parties

When there is more than one claim for relief in an action or when multiple parties are involved, the court can direct entry of final judgment as to one or more but fewer than all of the claims or parties if the court expressly determines there is no just reason for delay. K.S.A. 60-254(b). The Supreme Court has endorsed the following test for determining whether multiple claims exist: ““The ultimate determination of multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced.’ [Citation omitted].”” *Gillespie v. Seymour*, 263 Kan. 650, 654-55, 952 P.2d 1313 (1998). Different theories involving separate facts do not necessarily involve distinct claims.

The 254(b) findings must affirmatively appear in the record, preferably using the statutory language. *City of Salina v. Star B., Inc.*, 241 Kan. 692, Syl. ¶ 1, 739 P.2d 933 (1987). See also *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, 510, 941 P.2d 371 (1977). The appellate court will not assume the court made these findings simply because it used the word “judgment.” *Crockett v. Medicalodges, Inc.*, 247 Kan. 433, 434, 799 P.2d 1022 (1990). Mere reference to K.S.A. 60-254(b) is insufficient. *Star B., Inc.*, 241 Kan. at 694-96.

After some uncertainty, the Kansas Supreme Court recently held that a trial court may enter an order granting the required 254(b) certification of an earlier otherwise non-final decision, and the “filing date of the district court order or journal entry memorializing that certification starts the 30-day appeal clock, and a timely notice of appeal endows the appellate court with jurisdiction to determine the merits.” *Ullery v. Othick*, 304 Kan. 405, 414, 372 P.3d 1135 (2016); see also *Jenkins v. Chicago Pacific Corp.*, 306 Kan. 1305, 1308-09, 403 P.3d 1213 (2017) (recognizing prematurity of notice of appeal filed from order later certified under 254[b] is cured by trial court certification before appellate court dismisses appeal).

When appropriate findings are made, there is a final appealable order, subject to appellate review of the legal propriety of those findings. *Patterson v. Missouri Valley Steel, Inc.*, 229 Kan. 481, Syl. ¶ 1, 625 P.2d 483 (1981); *Pioneer Operations Co. v. Brandeberry*, 14 Kan. App. 2d 289, Syl. ¶ 2, 789 P.2d 1182 (1990).

““Even if a section 254(b) certificate is issued, it is not binding on appeal; the trial court cannot thereby make an order final and therefore appealable, if it is not in fact final.” [Citation omitted.]” *Plains Petroleum Co. v. First Nat. Bank of Lamar*, 274 Kan. 74, 83, 49 P.3d 432 (2002), quoting *Gillespie*, 263 Kan. at 655. A trial court cannot split a single claim. See *Henderson v. Hassur*, 1 Kan. App. 2d 103, 562 P.2d 108 (1977). However, “the discretionary judgment of the district court should be given substantial deference, for that court is ‘the one most likely to be familiar with the case and with any justifiable reasons for delay.’ [Citation omitted.] The reviewing court should disturb the trial court’s assessment of the equities only if it can say that the judge’s conclusion was clearly unreasonable.” *St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 245 Kan. 258, 276, 777 P.2d 1259 (1989), quoting *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980).

Once a 254(b) certificate has been issued and final judgment has been entered, the time for appeal starts to run. *Pioneer Operations Co.*, 14 Kan. App. 2d at 293. If a timely appeal is not taken, the judgment that is the subject of the certificate cannot later be reviewed as an intermediate ruling when appeal from the final judgment disposing of the entire case is taken under K.S.A. 60-2102(a)(4). *Pioneer Operations Co.*, 14 Kan. App. 2d at 293. However, a party can attack the propriety of a 254(b) certificate in an appeal that finally disposes of all claims, *Pioneer Operations Co.*, 14 Kan. App. 2d at 292, and if the appellate court finds the district court erred in issuing the certificate, the rulings that were the subject of the 254(b) certificate can be considered in an appeal from the final judgment. *Pioneer Operations Co.*, 14 Kan. App. 2d at 297.

## **§ 5.22 Probate Proceedings**

Under K.S.A. 59-2401(a), an appeal from a district magistrate judge to a district judge may be taken no later than 30 days from the date of entry of any of the following orders, judgments, or decrees in any case involving a decedent's estate:

- An order admitting or refusing to admit a will to probate;
- An order finding or refusing to find that there is a valid consent to a will;
- An order appointing, refusing to appoint, removing or refusing to remove a fiduciary other than a special administrator;
- An order setting apart or refusing to set apart a homestead or other property, or making or refusing to make an allowance of exempt property to the spouse and minor children;
- An order determining, refusing to determine, transferring or refusing to transfer venue;
- An order allowing or disallowing a demand, in whole or in part, when the amount in controversy exceeds \$5,000;
- An order authorizing, refusing to authorize, confirming or refusing to confirm the sale, lease or mortgage of real estate;
- An order directing or refusing to direct a conveyance or lease of real estate under contract;
- Judgments for waste;
- An order directing or refusing to direct the payment of a legacy or distributive share;
- An order allowing or refusing to allow an account of a fiduciary or any part thereof;
- A judgment or decree of partial or final distribution;

- An order compelling or refusing to compel a legatee or distributee to refund;
- An order compelling or refusing to compel payments or contributions of property required to satisfy the elective share of a surviving spouse under K.S.A. 59-6a201 *et seq.*, and amendments thereto;
- An order directing or refusing to direct an allowance for the expenses of administration;
- An order vacating or refusing to vacate a previous appealable order, judgment, decree or decision;
- A decree determining or refusing to determine the heirs, devisees and legatees;
- An order adjudging a person in contempt under K.S.A. 59-6a201 *et seq.*, and amendments thereto;
- An order finding or refusing to find that there is a valid settlement agreement;
- An order granting or denying final discharge of a fiduciary; and
- Any other final order, decision or judgment in a proceeding involving a decedent's estate.

**PRACTICE NOTE:** K.S.A. 59-2402a sets forth circumstances under which an interested party can request the transfer of a petition from a district magistrate judge to a district judge for hearing.

Any appeal from a district judge to an appellate court in a case involving a decedent's estate is to be taken in the manner provided by chapter 60 of the Kansas Statutes Annotated for other civil cases. K.S.A. 59-2401(b). See § 5.18 through § 5.21, *supra*. An appeal as of right from a probate order deemed final in this context must be taken within 30 days to preserve any claim of error. *In re Estate of Butler*, 301 Kan. 385, 394. 343 P.3d 85 (2015) (father's failure to appeal from allocation order waived his right to claim error with respect to his rights in his son's estate). The order appealed from continues in force unless modified by temporary orders entered by the appellate court and

is not stayed by a supersedeas bond filed under K.S.A. 60-2103. K.S.A. 59-2401(c). However, the court from which the appeal is taken may require a party, other than the State of Kansas or any subdivision thereof or any city or county in this state, to file a bond of sufficient sum or surety “to ensure that the appeal will be prosecuted without unnecessary delay” and to ensure payment of all judgments, damages or costs. K.S.A. 59-2401(d).

K.S.A. 59-2401a allows an interested party to appeal from a district magistrate judge who is not regularly admitted to practice law in Kansas to a district judge no later than 14 days from any final order, judgment or decree entered in any proceeding under:

- The Kansas Adoption and Relinquishment Act (K.S.A. 59-2111 *et seq.*);
- The Care and Treatment Act for Mentally Ill Persons (K.S.A. 59-2945 *et seq.*);
- The Care and Treatment Act for Persons With an Alcohol or Substance Abuse Problem (K.S.A. 59-29b45 *et seq.*); and
- The Act for Obtaining a Guardian or Conservator, or Both (K.S.A. 59-3050 *et seq.*). K.S.A. 59-2401a(b).

An interested party may appeal from a decision of a district judge or a district magistrate judge who is regularly admitted to practice law in Kansas to an appellate court under article 21 of chapter 60 of the Kansas Statutes Annotated. K.S.A. 59-2401a(b); *In re Guardianship of Sokol*, 40 Kan. App. 57, 61-62, 189 P.3d 526 (2008). With the addition of the Sexually Violent Predator Act (K.S.A. 59-29a01 *et seq.*), the acts are the same as those for appeal under K.S.A. 59-2401a(a) above.

The interested parties who may appeal under K.S.A. 59-2401a include the following:

- The parent in a proceeding under the Kansas Adoption and Relinquishment Act (K.S.A. 59-2111 *et seq.*);
- The patient under the Care and Treatment Act for Mentally Ill Persons (K.S.A. 59-2945 *et seq.*);
- The patient under the Care and Treatment Act for Persons With an Alcohol or Substance Abuse Problem (K.S.A. 59-29b45 *et seq.*);
- The person adjudicated a sexually violent predator under the Sexually Violent Predator Act (K.S.A. 59-29a01 *et seq.*);
- The ward or conservatee under the Act for Obtaining a Guardian or Conservator, or Both (K.S.A. 59-3050 *et seq.*).
- The parent of a minor person adjudicated a ward or conservatee under the Act for Obtaining a Guardian or Conservator, or Both (K.S.A. 59-3050 *et seq.*);
- The petitioner in the case on appeal; and
- Any other person granted interested party status by the court from which the appeal is being taken. K.S.A. 59-2401a(e).

As in decedent's estate cases, the order appealed from continues in force unless modified by temporary orders entered by the appellate court and is not stayed by a supersedeas bond filed under K.S.A. 60-2103. K.S.A. 59-2401a(c). Also, the court from which the appeal is taken may require a party, other than the State of Kansas or any subdivision thereof or any city or county in this state, to file a bond of sufficient sum or surety "to ensure that the appeal will be prosecuted without unnecessary delay" and to ensure payment of all judgments, damages or costs. K.S.A. 59-2401a(d).



### **§ 5.23 Juvenile Proceedings**

Under the Revised Kansas Code for Care of Children, an appeal can be taken by any party or interested party from any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights. K.S.A. 38-2273(a). An appeal must be taken within thirty days of the date the order was filed. See *In re D.I.G.*, 34 Kan. App. 2d 34, 36, 114 P.3d 173 (2005). K.S.A. 38-2202(v) defines a party as “the state, the petitioner, the child, any parent of the child, and an Indian child’s tribe intervening pursuant to the Indian child welfare act.” K.S.A. 38-2202(m) defines an interested party as “the grandparent of the child, a person with whom the child has been living for a significant period of time when the child in need of care petition is filed, and any person made an interested party by the court under K.S.A. 38-2241 and amendments thereto, or Indian tribe seeking to intervene that is not a party.”

## **VII. TRANSFER OF CASES BETWEEN THE APPELLATE COURTS**

### **§ 5.24 General**

In both criminal and civil appellate proceedings, cases can be transferred from the Court of Appeals to the Supreme Court as provided in K.S.A. 20-3016 and 20-3017. See K.S.A. 22-3602(e); K.S.A. 60-2101(b). See also K.S.A. 20-3018 for other transfers.

### **§ 5.25 Upon Motion of a Party**

Within 30 days after notice of appeal has been served on the appellee, any party to the appeal can file a motion with the clerk of the appellate courts requesting that a case pending in the Court of Appeals be transferred to the Supreme Court for final determination. K.S.A. 20-3017; Rule 8.02. The motion should



be captioned in the Supreme Court even though the action is pending in the Court of Appeals. See § 12.27, *infra*.

**PRACTICE NOTE:** If a party misses the 30-day filing deadline, it may still be advisable to file the motion to call the Supreme Court's attention to the case. The motion of the party may be denied as untimely filed, but the court can then transfer the case on its own motion.

The motion must set forth the nature of the case, demonstrate that the case is within the Supreme Court's jurisdiction, and establish one or more of the grounds for transfer found in K.S.A. 20-3016(a). Such grounds include: an issue or issues are not within the jurisdiction of the Court of Appeals (citation must be made to controlling constitutional, statutory, or case authority); the subject matter of the case has significant public interest; the legal questions raised have major public significance; or, the Court of Appeals caseload requires a transfer for the expeditious administration of justice (the motion must contain sufficient data concerning the state of the docket to demonstrate this point). K.S.A. 20-3016(a); Rule 8.02.

**PRACTICE NOTE:** The caseload of the Court of Appeals is not usually persuasive unless combined with another ground.

The opposing party may respond within 7 days of service of the motion. Rule 5.01. The motion will be considered by the Supreme Court and granted or denied in that court's discretion. A party's failure to file a motion to transfer is deemed a waiver of objection to Court of Appeals jurisdiction. K.S.A. 20-3017.

## **§ 5.26 Upon Motion of the Supreme Court**

If a case within the jurisdiction of the Court of Appeals is erroneously docketed in the Supreme Court, the Supreme Court will transfer the case to the Court of Appeals. K.S.A. 20-3018(a). Likewise, if a case within the jurisdiction of the Supreme Court is erroneously docketed in the Court of Appeals, the Supreme

Court will transfer the case to the Supreme Court. K.S.A. 20-3018(a). In addition, any case within the jurisdiction of the Court of Appeals and properly docketed with that court can, at any time, be transferred to the Supreme Court for final determination on the Supreme Court's own motion. K.S.A. 20-3018(c).

**PRACTICE NOTE:** Transfer on the Supreme Court's own motion usually indicates the subject matter or legal questions are of public interest or legal significance.

### **§ 5.27 Upon Motion of the Court of Appeals**

Prior to final determination of any case before it, the Court of Appeals can request that a case be transferred to the Supreme Court by certifying the case is "within the jurisdiction of the Supreme Court" and the Court of Appeals has made one or more of the following findings: (1) one or more issues in the case are not within the jurisdiction of the Court of Appeals; (2) the subject matter of the case has significant public interest; (3) the case involves legal questions of major public significance; or (4) the caseload of the Court of Appeals is such that the expeditious administration of justice requires the transfer. K.S.A. 20-3016(a). The request will be considered by the Supreme Court and granted or denied in the court's discretion. K.S.A. 20-3016(b).

### **§ 5.28 Appeal of Right from Court of Appeals to Supreme Court**

In both criminal and civil appellate proceedings, a party can appeal from the Court of Appeals to the Supreme Court as a matter of right in any case in which a question under the constitution of either the United States or the State of Kansas arises for the first time as a result of the Court of Appeals decision. K.S.A. 22-3602(e); K.S.A. 60-2101(b). See § 7.47, *infra*.

## § 5.29 Petitions for Review by Supreme Court of Court of Appeals Decisions

In both criminal and civil appellate proceedings, a party can petition the Supreme Court to review any decision of the Court of Appeals as provided in K.S.A. 20-3018(b). K.S.A. 22-3602(e); K.S.A. 60-2101(b). See § 7.48, *infra*. “[D]ecision’ means any formal or memorandum opinion, order, or involuntary dismissal under [Supreme Court] Rule 5.05.” Rule 8.03(a).

A petition for review must be filed and served within 30 days after the date of the Court of Appeals decision. K.S.A. 20-3018(b); Rule 8.03(b)(1). This is a jurisdictional requirement. Rule 8.03(b)(1). Time limits for filing cross-petitions, conditional cross-petitions, responses and replies, as well as content and form requirements, are set out in Rule 8.03.

There is no requirement that a motion for rehearing by the Court of Appeals be filed before a petition for review is filed. K.S.A. 20-3018(b). Nor does the filing of a petition for review preclude filing a motion for rehearing or modification in the Court of Appeals. Rule 8.03(b)(2). If a motion for rehearing or modification is filed, the Supreme Court will not take action on the petition for review until the Court of Appeals has made a final determination of all motions for rehearing or modification. Rule 8.03(b)(2).

**PRACTICE NOTE:** A petition for review must be filed and served within 30 days after the date of the Court of Appeals decision even if a motion for rehearing or modification is filed in the Court of Appeals. A motion for rehearing or modification does not toll the time to file a petition for review. Note that the 3-day mailing rule does not apply to petitions for review or motions for rehearing or modification. The 30 days is counted from the date the decision is filed.

In cases where review is not granted as a matter of right, whether to grant a petition for review is a decision committed to the discretion of the Supreme Court. Rule 8.03(g)(2). Non-controlling, non-exclusive factors considered by the Supreme

Court include: (1) the importance of the question presented; (2) the existence of a conflict between the decision sought to be reviewed and prior decisions of the Supreme Court or another panel of the Court of Appeals; (3) the need for exercising the Supreme Court's supervisory authority; and (4) the final or interlocutory character of the judgment, order, or ruling sought to be reviewed. K.S.A. 20-3018(b).

**PRACTICE NOTE:** The Supreme Court website lists an additional consideration for deciding whether to grant a petition for review: "The original Court of Appeals decision demonstrates the need for update, clarification, or synthesis of case law." See [www.kscourts.org/Cases-and-Opinions/Petitions-for-Review/default.asp](http://www.kscourts.org/Cases-and-Opinions/Petitions-for-Review/default.asp).

## VIII. MULTI-LEVEL APPEALS

### § 5.30 General

In some instances, appeals involve multiple levels of review. Some examples are identified below. Reference should be made to the above discussion concerning appealable orders.

### § 5.31 Appeals from Decisions of Non-Law-Trained District Magistrate Judges in Criminal Cases

A defendant has the right to appeal any judgment of a district magistrate judge who is not regularly admitted to practice law in Kansas to a district judge. K.S.A. 22-3609a(1). A notice of appeal must be filed with the clerk of the district court within 14 days after the date the sentence is imposed. K.S.A. 22-3609a(2). Before a defendant can appeal a criminal judgment of a magistrate judge to a district judge for a trial de novo under 22-3609a, there must be both a conviction of guilt and a sentence imposed by the magistrate judge. *State v. Remlinger*, 266 Kan.

103, 107, 968 P.2d 671 (1998). A defendant who wishes to seek further review can appeal in accordance with the rules governing appeals from the district court to the appellate courts.

A defendant may appeal a conviction before a district magistrate judge even if the conviction was based upon a guilty plea. *State v. Gillen*, 39 Kan. App. 2d 461, 181 P.3d 564 (2008). K.S.A. 22-3609a has been held not to authorize an appeal to the district court by a defendant from an order of a district magistrate judge revoking the defendant's probation. *State v. Legero*, 278 Kan. 109, Syl. ¶ 5, 91 P.3d 1216 (2004).

The prosecution can appeal the following decisions of a district magistrate judge who is not regularly admitted to practice law in Kansas to a district judge: (1) an order dismissing a complaint, information, or indictment (see *State v. Kleen*, 257 Kan. 911, 896 P.2d 376 [1995]); (2) an order arresting judgment; (3) upon a question reserved; (4) upon an order granting a new trial in any case involving a class A or B felony or, for crimes committed on or after July 1, 1993, any case involving an off-grid crime; and (5) pretrial orders quashing a warrant or search warrant, suppressing evidence, or suppressing a confession or admission. K.S.A. 22-3602(d); K.S.A. 22-3603. Again, further review by the appellate courts is possible.

For appeals from orders of a district magistrate judge to a district judge in juvenile offender proceedings, see K.S.A. 38-2382. However, an appeal of a magistrate judge's decision to prosecute a juvenile as an adult is properly filed with the appellate courts, not the district court, after a conviction. *State v. Hartpence*, 30 Kan. App. 2d 486, 494, 42 P.3d 1197 (2002).

### **§ 5.32 Appeals from Decisions of Non-Law-Trained District Magistrate Judges in Civil Cases**

In a civil action, an appeal can be taken from an order or final decision of a district magistrate judge who is not regularly admitted to practice law in Kansas to a district judge. A notice of appeal must be filed with the clerk of the district court within 14 days after entry of the order or decision. K.S.A. 60-2103a(a). Failure

to file a timely appeal deprives the district court of jurisdiction. See *Explorer, Inc. v. Duranotic Door, Inc.*, No. 104,560, 2011 WL 5833351, \*3 (Kan. App. 2011) (unpublished opinion).

In limited actions, an appeal can be taken from “orders, rulings, decisions or judgments” of a district magistrate judge who is not regularly admitted to practice law in Kansas to a district judge. K.S.A. 61-3902(a). A notice of appeal must be filed with the clerk of the district court within 14 days after entry of the order or decision except that notice of appeal by the defendant from that portion of a judgment in a forcible detainer action granting restitution of the premises must be filed within 7 days after entry of judgment. See K.S.A. 61-3902(a).

Under the Revised Kansas Code for Care of Children, appeals can be taken from an order entered by a district magistrate judge who is not regularly admitted to practice law in Kansas to a district judge in accordance with K.S.A. 38-2273(b).

In all three instances, further review by the appellate courts is permissible in accordance with the rules governing appeals from the district court to the appellate courts.

For appeals from a district magistrate judge to a district judge in probate proceedings, see § 5.22, *supra*.

### **§ 5.33 Appeals from Municipal Court to District Court in Criminal Cases**

A defendant found guilty of violating a municipal ordinance can appeal the judgment to the district court in the county where the municipality is located. K.S.A. 22-3609(a); K.S.A. 12-4601(a). An appealable judgment requires both conviction and sentence. *State v. Remlinger*, 266 Kan. 103, 106, 968 P.2d 671 (1998); *City of Halstead v. Mayfield*, 19 Kan. App. 2d 186, 865 P.2d 222 (1993). A municipal court’s judgment is effective when announced. *Paletta v. City of Topeka*, 20 Kan. App. 2d 859, 860, 893 P.2d 280 (1995); *City of Lenexa v. Higgins*, 16 Kan. App. 2d 499, Syl. ¶ 1, 825 P.2d 1152 (1992).



A defendant in a municipal court proceeding has no right to appeal to the district court a decision of the municipal court revoking his probation. *City of Wichita v. Patterson*, 22 Kan. App. 2d 557, Syl. ¶ 3, 919 P.2d 1047 (1996). See also *State v. Legero*, 278 Kan. 109, 112, 91 P.3d 1216 (2004). “A defendant in municipal court may only appeal a judgment of that court which adjudges him or her guilty of a violation of a municipal ordinance.” *Patterson*, 22 Kan. App. 2d 557, Syl. ¶ 2. Additionally, an appeal under K.S.A. 22-3609 conditionally vacates a municipal court conviction, and if the appeal is not dismissed by the defendant, and is dismissed without prejudice, or is heard de novo by the district court, then the municipal court convictions are vacated. *City of Salina v. Amador*, 279 Kan. 266, Syl. ¶ 5, 106 P.3d 1139 (2005).

The procedural requirements for appeals from municipal court to the district court are set out in K.S.A. 22-3609. The municipal judge may require an appeal bond. K.S.A. 12-4602. While notice of appeal must be filed within 14 days of the date the sentence is imposed, K.S.A. 22-3609(b), the filing of a K.S.A. 12-4602 appeal bond within that time frame is not a jurisdictional requirement in perfecting an appeal from a municipal court conviction. See *City of Newton v. Kirkley*, 28 Kan. App. 2d 144, 146, 12 P.3d 908 (2000) (interpreting an earlier version of K.S.A. 22-3609).

The city can appeal to the district court “upon questions of law.” K.S.A. 12-4601(b). See also *City of Wichita v. Maddox*, 271 Kan. 445, 449, 24 P.3d 71 (2001). The “question must be one which calls for an answer which will aid in the correct and uniform administration of the criminal law, and the question will not be entertained on appeal merely to demonstrate errors of a trial court.” *City of Overland Park v. Travis*, 253 Kan. 149, Syl. ¶ 4, 853 P.2d 47 (1993).



### **§ 5.34 Appeals from Municipal Court to District Court in Civil Cases**

Under K.S.A. 60-2101(d), a “judgment rendered or final order made by a political or taxing subdivision, or any agency thereof, exercising judicial or quasi-judicial functions may be reversed, vacated or modified by the district court on appeal.” See *Kansas Board of Education v. Marsh*, 274 Kan. 245, 255, 50 P.3d 9 (2002). The appeal is taken in the county where the order was entered. For procedural requirements, see K.S.A. 60-2101(d).

### **§ 5.35 Appeals from Decisions in Small Claims Court**

An appeal may be taken from any judgment under the Small Claims Procedure Act. Judgments under the Small Claims Procedure Act are first appealed to a district judge other than the one who entered the disputed order for a trial de novo. K.S.A. 61-2709(a). A notice of appeal must be filed with the clerk of the district court within 14 days after entry of judgment. K.S.A. 61-2709(a). Further appeal may be taken as from any other decision of the district court. K.S.A. 61-2709(b). Procedural requirements are identified in K.S.A. 61-2709.

### **§ 5.36 Certified Questions**

Under the Uniform Certification of Questions of Law Act, K.S.A. 60-3201 *et seq.*, the Kansas Supreme Court can answer questions of law certified to it by the United States Supreme Court, a United States Court of Appeals, a United States District Court, or the highest appellate court, or the intermediate appellate court of any other state when requested, if in any proceeding before the certifying court there is involved a question of law of this state that may be determinative of the cause pending in the certifying court and it appears to the certifying court there is no controlling precedent in the decisions of the Kansas Supreme Court or the Kansas Court of Appeals. K.S.A. 60-3201.

The courts mentioned above may seek an answer to a question of law on their own motion or upon motion of a party to the cause. K.S.A. 60-3202. The certification order must set forth the question to be answered and a statement of all facts relevant to the question certified that fully shows the nature of the controversy in which the question arose. K.S.A. 60-3203. “If either party to a certified question from a federal court wants to add facts to those the certifying federal court furnishes [the Supreme Court], any changes must be made in the federal court. The same rule applies to evidentiary rulings made by the federal court.” *Ortega v. IBP*, 255 Kan. 513, Syl. ¶ 1, 874 P.2d 1188 (1994). The Supreme Court can obtain portions of the record from the certifying court if necessary. K.S.A. 60-3204. Under K.S.A. 60-3201, “certified questions may present only questions of law....” *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 890, 259 P.3d 676 (2011) (citing *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 207, 734 P.2d 1177 [1987]).

Briefs addressing the question and arguments on the briefs are considered by the Supreme Court. K.S.A. 60-3206. A written opinion is issued. K.S.A. 60-3207.

**PRACTICE NOTE:** Upon receipt of the certification order, the Kansas Supreme Court first determines whether it will answer the certified questions presented by granting or denying the certifying court’s order. If granted, the Kansas Supreme Court sets a briefing schedule, allowing 30 days per side for briefing. That schedule is subject to motions for extension of time by the parties, unless the order setting the briefing schedule provides otherwise.

Likewise, the Kansas Supreme Court or the Kansas Court of Appeals can, *sua sponte* or upon motion of a party, order certification of questions of law to the highest court of any state under the same circumstances. K.S.A. 60-3208.

# **CHAPTER 6**

## **Judicial Review of Agency Decisions**

### **§ 6.1 Introduction**

The Kansas Judicial Review Act (KJRA) was amended significantly in 2009. The changes do NOT apply retroactively, but instead apply only to agency decisions made after July 1, 2009. K.S.A. 77-621(a)(2); *Redd v. Kansas Truck Center*, 291 Kan. 176, Syl. ¶ 1, 239 P.3d 66 (2010). Given that fact, it is crucial to determine when the agency decision arose, so that the proper version of the statute may be applied. When citing appellate decisions, make sure the holding still applies in light of the 2009 amendments.

Prior to July 1, 2009, K.S.A. 77-621 allowed the appellate courts to review an agency's factual findings to make sure they were supported by "substantial evidence" in "light of the record as a whole." Appellate case law limited this review by directing courts to look at the evidence in the light most favorable to the agency's ruling. If courts found substantial evidence that would support the agency's decision, courts were not concerned about other evidence that may have led to a different result. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 553-54, 161 P.3d 695 (2007).

As amended in 2009, K.S.A. 77-621 defines "substantial evidence" "in light of the record as a whole" to include evidence both supporting and detracting from an agency's finding. Courts must now determine whether the evidence supporting the agency's factual findings is substantial when considered in light

of all of the evidence. *Redd v. Kansas Truck Center*, 291 Kan. at 183.

Appellate review of an agency's interpretation of a statute has also changed. Historically, Kansas courts have given substantial deference to an administrative agency's interpretation of a statute that the agency administers, especially when the agency is one of "special competence and experience." *Coma Corporation v. Kansas Dept. of Labor*, 283 Kan. 625, 629, 154 P.3d 1080 (2007). However, the Kansas Supreme Court no longer extends deference to an agency's statutory interpretation. Appellate review is now unlimited, and practitioners should not cite cases which rely on the doctrine of operative construction. *Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 559, 293 P.3d 723 (2013); *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012).

## **§ 6.2 Scope of KJRA**

Since 1984 the exclusive remedy for appealing state agency action has been the Kansas Judicial Review Act (KJRA), codified at K.S.A. 77-601 *et seq.* The KJRA provides the exclusive means of judicial review of action by a state agency. K.S.A. 77-606. *Midwest Crane & Rigging, Inc. v. Kansas Corporation Comm'n*, 38 Kan. App. 2d 269, 271, 163 P.3d 1244 (2007). The KJRA applies to all state agencies unless specifically exempt by statute. K.S.A. 77-603(a). See *State v. Ernesti*, 291 Kan. 54, 61, 239 P.3d 40 (2010). The first step in preparing to appeal an agency action is to check the agency's specific enabling legislation to determine if the agency or any of its discrete proceedings are exempt from the KJRA. The judicial and legislative branches of state government and political or taxing subdivisions of the state, or an agency of a subdivision, are specifically exempt from the KJRA. K.S.A. 77-602(k) ("state agency" defined). *Frick v. City of Salina*, 289 Kan. 1, 10-11, 208 P.3d 739 (2009).

Under the KJRA, any person who has standing and has exhausted administrative remedies may timely seek judicial review of "final agency action." K.S.A. 77-607. "Agency action" is defined in K.S.A. 77-602(b) as:

- The whole or a part of a rule and regulation or an order;
- The failure to issue a rule and regulation or an order; or
- An agency's performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise. See *Jones v. State*, 279 Kan. 364, 367-68, 109 P.3d 1166 (2005).

K.S.A. 77-607(b)(1) negatively defines "final agency action" as "other than nonfinal agency action." Agency action is "nonfinal" if the "agency intends or is reasonably believed to intend [such action] to be preliminary, preparatory, procedural or intermediate." K.S.A. 77-607(b)(2). For a good discussion on the difference between "final" and "nonfinal" agency action, see *Bartlett Grain Co. v. Kansas Corporation Comm'n*, 292 Kan. 723, 727, 256 P.3d 867 (2011).

K.S.A. 77-608 allows for judicial review of nonfinal agency action only if:

- It appears likely that the person seeking review will qualify for judicial review of the related final agency action; and
- Postponement of judicial review would result in an "inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement."

For a general discussion, see *Friedman v. Kansas State Bd. of Healing Arts*, 287 Kan. 749, 753-54, 199 P.3d 781 (2009).

### **§ 6.3 Persons Entitled to Review**

The next step in the process in preparing for judicial review of an administrative agency action is to be sure that the person requesting review is qualified to seek judicial review under the Act. K.S.A. 77-607.

## **§ 6.4 Standing**

To qualify for standing under K.S.A. 77-611, the person seeking review must:

- Be a person to whom the action is specifically directed;
- Have been a party to the agency proceedings that led to the agency action; see *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 751-761, 189 P.3d 494 (2008).
- Be a person subject to the rule or regulation being challenged; or
- Be a person authorized to challenge an agency action under another provision of law.

## **§ 6.5 Exhaustion of Remedies**

K.S.A. 77-612 establishes that a petition for judicial review may be filed only after all administrative remedies are exhausted. This includes remedies both within the agency whose action is being challenged and within any other agency authorized to exercise administrative review. See, generally, *Friedman v. Kansas State Bd. of Healing Arts*, 287 Kan. 749, 752, 199 P.3d 781 (2009). Exhaustion of remedies refers to administrative procedures and not to individual issues. *Rebel v. Kansas Dept. of Revenue*, 288 Kan. 419, 427, 204 P.3d 551 (2009).

After July 1, 2009, there are four exceptions to this rule:

- A petitioner for judicial review of a rule or regulation need not have participated in the rulemaking proceeding upon which that rule and regulation is based, or have petitioned for its amendment or repeal;
- A petitioner for judicial review need not exhaust administrative remedies to the extent that the KJRA or any other statute states that exhaustion is not required;



- A petitioner for judicial review need not seek reconsideration unless a statute makes the filing of a petition for reconsideration a prerequisite for seeking judicial review; and
- A court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm. K.S.A. 77-612.

If a statute requires that a petition for reconsideration by the agency must be filed as a prerequisite to the accrual of any cause of action in district court, administrative remedies are not exhausted until the petitioner files a petition for reconsideration and the agency files its order on reconsideration or fails to file an order within the prescribed time. See *United Steelworkers of America v. Kansas Comm'n on Civil Rights*, 253 Kan. 327, Syl. ¶¶ 2-3, 855 P.2d 905 (1993). In order to sufficiently exhaust administrative remedies, the petition for reconsideration must be filed by an aggrieved party. *In re Tax Exemption Application of Reno Township*, 27 Kan. App. 2d 794, 796, 10 P.3d 1 (1999).

Counsel should consult the enabling statutes of the applicable agency to determine if there is any deviation in the exhaustion requirement. See *Zarda v. State*, 250 Kan. 364, 826 P.2d 1365 (1992) (taxpayer can challenge constitutionality of regulations without exhausting administrative remedies but cannot seek tax relief without exhausting administrative remedies); *Expert Environmental Control, Inc. v. Walker*, 13 Kan. App. 2d 56, 761 P.2d 320 (1988).

## **§ 6.6 Primary Jurisdiction**

Although it has not been codified in the KJRA, Kansas courts will apply the concept of primary jurisdiction and refuse to act on a petition for judicial review until agency action is complete.

“The doctrine of primary jurisdiction applies only when an agency and a court have concurrent jurisdiction over an action



and is usually applied to isolated issues rather than to the entire proceeding. ‘The doctrine is invoked when the courts have initial jurisdiction over a claim but when it is likely that the action will require resolution of issues which, under a regulatory scheme, have been placed in the hands of the administrative body.’ [Citation omitted.]” *Grindsted Products, Inc. v. Kansas City Power & Light Co.*, 21 Kan. App. 2d 435, 446-47, 901 P.2d 20 (1995).

## **§ 6.7 Initiating Review – Where to File**

An action for judicial review is initiated by filing a petition for judicial review in the proper court, along with payment of the appropriate fee. K.S.A. 77-614(a). The fee schedule is established at K.S.A. 60-2001.

The type of relief available to a petitioning party is limited by K.S.A. 77-622. Damages or compensation are allowable only if authorized by another provision of law. K.S.A. 77-622(a). Other available remedies include declaratory or injunctive relief. K.S.A. 77-622(b).

Generally, jurisdiction for relief under the KJRA is in district court. But the enabling statutes of some agencies provide for appellate review directly by the Kansas Court of Appeals, the Kansas Supreme Court, or some different manner of review.

Some examples include:

- Orders from the Workers Compensation Board of Appeals. K.S.A. 44-556(a).
- Decisions of the Court of Tax Appeals. K.S.A. 74-2426(c)(4).
- Appeals of utility rate cases from the Kansas Corporation Commission. K.S.A. 66-118a(b).

Except as otherwise provided, venue under the KJRA is in the county in which the order or agency action is entered or effective, or where the rule is promulgated. K.S.A. 77-609(b). Venue may be proper in more than one county. See *Rhodenbaugh v. Kansas Employment Sec. Bd. of Review*, 52 Kan. App. 2d 621,

625-26, 372 P.3d 1252 (2016), *rev. denied* 306 Kan. 1319 (June 19, 2017).

## **§ 6.8 Timely Filing and Service**

The time frame within which a petition for judicial review must be filed is determined and dependent upon the type of action being challenged. Review of an agency rule or regulation may be filed at any time unless the agency's enabling statutes provide otherwise. K.S.A. 77- 613(a). If reconsideration has not been requested and is not a prerequisite for seeking judicial review, a petition seeking review of an agency order must be filed within 30 days after service of the order. K.S.A. 77-613(b). See also *In re Tax Appeal of Newton Country Club Co.*, 12 Kan. App. 2d 638, 753 P.2d 304 (1988).

If an agency, other than the Kansas Corporation Commission, fails to act in a timely manner as required by law, the aggrieved party is entitled to interlocutory review of the agency's failure to act. K.S.A. 77-631. If the Kansas Corporation Commission does not issue an order on a petition for reconsideration within 30 days, it is deemed denied. K.S.A. 77-529(b). If reconsideration has been requested or is a prerequisite for seeking judicial review, a petition for judicial review must be filed: (1) Within 30 days after service of the order rendered after reconsideration unless a further petition is required under K.S.A. 66-118b (relating to Kansas Corporation Commission); (2) within 30 days after the order denying the request for reconsideration; or (3) in proceedings before the Kansas Corporation Commission, within 30 days of the date the request for reconsideration is deemed to have been denied. K.S.A. 77-613(c).

Review of an agency action other than a final order, rule, or regulation must be requested within 30 days after such action occurs. K.S.A. 77-613(d). This deadline may be extended to include petitioner's attempts to exhaust administrative remedies. K.S.A. 77-613(d)(1). The deadline may also be extended to include any period where petitioner did not know and had no duty to discover, or had a duty to discover but could not reasonably

do so, that the agency had taken action or that the effect of the action was sufficient to confer standing on the petitioner to request review. K.S.A. 77-613(d)(2). See also *Jones v. State*, 279 Kan. 364, 369, 109 P.3d 1166 (2005).

Because the deadline for filing a petition for judicial review begins with service of the order, it is important to check service provisions in the Act. Service can be obtained by delivery, by mailing a copy of the order, or by transmitting a copy of the order by electronic means when authorized by supreme court or local rule. K.S.A. 77-613(e). As with traditional court service, proper delivery includes handing the order to the person to be served or leaving it at that person's place of business or residence with a person of suitable age. Unless reconsideration is a prerequisite for seeking judicial review, the final order must state the agency officer to receive service. K.S.A. 77-613(e). See *Heiland v. Dunnick*, 270 Kan. 663, 670-71, 19 P.3d 103 (2001).

Service by mail, for purposes of the KJRA, is deemed to be complete upon mailing consistent with provisions of the Kansas Administrative Procedure Act (KAPA). K.S.A. 77-531. Both the KJRA and the KAPA provide that, where service is completed by mail or electronic means, a 3-day extension period is added to the time calculation. K.S.A. 77-613(e); K.S.A. 77-531.

The party seeking review must provide notice and service to the head of the agency being challenged. The petitioner bears the burden of providing notice of the petition for judicial review to all other parties participating in any adjudicative proceeding that led to the challenged agency action. K.S.A. 77-614(d). See *Claus v. Kansas Dept. of Revenue*, 16 Kan. App. 2d 12, 825 P.2d 172 (1991).

Prior to July 1, 2009, the Kansas appellate courts held that the notice requirements of K.S.A. 77-613(e) require strict compliance. *Claus v. Kansas Dept. of Revenue*, 16 Kan. App. 2d 12, 825 P.2d 172 (1991). However, the July 1, 2009, changes to the KJRA included an amendment which provides that when using any method of serving process, "substantial compliance shall effect valid service of process" if the court finds that, notwithstanding

the service irregularity, the party served was “made aware that the petition or appeal” was filed. K.S.A. 77-614(e).

At all stages of this process, the three mail days allowed by K.S.A. 60-206(d) apply to most administrative appeals, but do NOT apply to cases involving the Workers Compensation Board of Appeals, *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996), or cases involving an appeal of unemployment benefits from the Department of Human Resources, K.S.A. 44-709(c).

### **§ 6.9 Pleading Requirements of Petition for Judicial Review**

As stated in K.S.A. 77-614(b), the KJRA requires that the petition for judicial review:

- (1) list name and mailing address of petitioner;
- (2) list name and mailing address of the agency whose actions are being challenged;
- (3) identify agency action being challenged and include a copy, summary, or brief description of the agency action;
- (4) identify all parties to any adjudicative proceedings that led to the agency action;
- (5) state facts demonstrating petitioner is entitled to judicial review;
- (6) state reasons petitioner believes relief should be granted; and
- (7) specify the type and extent of relief requested.

Because the KJRA is the exclusive remedy for seeking judicial review of state agency action akin to an appellate process, the Kansas Supreme Court has, in the past, applied a strict compliance standard to the pleading requirements enumerated in K.S.A. 77-614(b). See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 397, 204 P.3d 562 (2009).

Perhaps in response to *Kingsley* and its predecessors, the Kansas Legislature amended K.S.A. 77-614 in 2009 to add subsection (c), which now provides that the failure to include some of the information required by K.S.A. 77-614(b) “in the initial petition” does not deprive the reviewing court of jurisdiction. Rather, the reviewing court should “freely” give leave to supplement the petition with omitted information “when justice so requires.” A party responding to a petition for judicial review has 30 days after the agency has been served or other parties received notice in which to file an answer or other responsive pleading with the court. A party in a judicial review proceeding is not required to file an answer. K.S.A. 77-614(d).

## **§ 6.10 Stays and Other Remedies**

Unless precluded by other law, a state agency may grant a stay or other temporary remedy during the pendency of judicial review. K.S.A. 77-616(a). Interlocutory review of the agency’s disposition of an application for stay is permitted by K.S.A. 77-616(b). The KAPA likewise provides for a stay of the effectiveness of an agency order until the time to seek judicial review has run. K.S.A. 77-528.

A court may not grant an application for a stay or other temporary remedy where an agency has determined its action is justified to protect against a substantial threat to the public health, safety, or welfare, unless the court finds:

- The applicant is likely to prevail on final disposition of the case;
- In the absence of the relief sought the applicant will suffer irreparable injury;
- The granting of the relief sought will not substantially harm other parties; and
- The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action.

K.S.A. 77-616(c).

Where the court determines that such relief is justified, it may remand the matter back to the agency for action consistent with the determination or issue a stay itself. No court may issue an *ex parte* order granting a stay under the KJRA unless authorized by a rule of the Kansas Supreme Court. K.S.A. 77-616(f). See *Buchanan v. Kansas Dept. of Revenue*, 14 Kan. App. 2d 169, 172, 788 P.2d 285 (1989).

### § 6.11 Preserving Issues for Review Under the KJRA

In an appeal of a decision by an administrative agency, a party may only argue issues raised before the agency. The KJRA specifically forbids raising new or additional issues on review of an agency action. K.S.A. 77-617; *Sierra Club v. Mosier*, 305 Kan. 1090, 1122-24, 391 P.3d 667 (2017).

If a transcript of an administrative hearing is not available, the reviewing court will examine the record, including the administrative hearing notes, to determine the issues raised. *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 204 P.3d 562 (2009).

**PRACTICE NOTE:** If an administrative hearing is not transcribed, counsel must be sure all issues raised are reflected in the record, for example, listed in the hearing officer's notes. A better practice is for counsel to file a written list of challenges to be presented at the administrative hearing to ensure all issues are preserved for judicial review.

A party may obtain judicial review of a new issue only if:

- The agency lacked jurisdiction to grant an adequate remedy based on a determination of the issue;
- The action taken is a rule and regulation and the person seeking review has not been a party



to adjudicative proceedings in which the issues have been raised;

- The action challenged is an order and the party seeking review was not notified of the adjudicative proceeding; or
- The court determines that the interests of justice would be served through judicial resolution of an issue that arose from a change in controlling law after the agency action, or when the agency action occurred after the party had exhausted administrative remedies.

K.S.A. 77-617. See *In re Tax Appeal of Dillon Real Estate Co.*, 43 Kan. App. 2d 581, 589, 228 P.3d 1080 (2010) (if issue does not qualify as an exception in K.S.A. 77-617, court cannot review issue if it was not raised at administrative level).

## **§ 6.12 The Agency Record**

The only action required of an agency under the KJRA is the submission of the agency record. The original or a certified copy of the official record in the matter appealed from must be transmitted to the court within 30 days after service of the petition for judicial review unless the court or another statutory provision allows additional time for transmitting the record. K.S.A. 77-620(a). See *Pieren-Abbott v. Kansas Department of Revenue*, 279 Kan. 83, 95, 106 P.3d 492 (2005).

The record must contain any agency documents that evidence the action taken by the agency. In addition, the record must include any documents identified by the agency as having been considered before the action was taken or that served as a basis for the action. K.S.A. 77-620(a).

The list of documents that must be maintained as part of the “official record” of an agency adjudicative proceeding is found in the KAPA at K.S.A. 77-532. The statute was amended in 2009.

The parties to an action for judicial review may stipulate to a shortened, summarized, or organized record. K.S.A. 77-620(c).



Where a party unreasonably refuses such a stipulation, the court may impose the costs of preparing transcripts or copies of the record on that party. K.S.A. 77-620(d).

If part of the record has been preserved without a transcript, the agency has the duty to prepare a transcript to be included in the record transmitted to the court. The costs of preparing such a transcript, however, will be borne by the party challenging the agency action unless the court orders otherwise. K.S.A. 77-620(b).

### **§ 6.13 Scope of Review**

Unless a statute provides otherwise, the KJRA defines the scope of review of state agency action in K.S.A. 77-621. Enabling statutes may provide for the method of review of certain agency action:

- Review of decisions under the Workers Compensation Act is limited to questions of law. K.S.A. 44-556(a). The determination of whether the factual findings of the Workers Compensation Board are supported by substantial competent evidence is a question of law. See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 514, 154 P.3d 494 (2007). As amended in 2009, the KJRA requires the court to review the adequacy of the evidence “in light of the record as a whole,” by considering evidence that supports and contradicts the Board’s findings. K.S.A. 77-621(d);
- When reviewing decisions by the Kansas Human Rights Commission (formerly Kansas Commission on Civil Rights) under the Kansas Act Against Discrimination or the Kansas Age Discrimination in Employment Act, the district court must examine the record and make independent findings of fact and conclusions of law. K.S.A. 44-1011(b). See *Kansas State Univ. v. Kansas Comm’n on Civil Rights*, 14 Kan. App. 2d 428, 431-32, 796 P.2d 1046 (1990); and

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- Decisions other than under K.S.A. 8-254 made by the division of motor vehicles, including orders that deny, cancel, suspend, or revoke a driver's license are subject to de novo review by the district court, but administrative decisions are still reviewed under KJRA. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 396, 204 P.3d 562 (2009).

With a few exceptions limited to specific agencies, the KJRA provides that judicial review of disputed issues of fact must be confined to the agency record supplemented by any additional evidence taken pursuant to the Act. K.S.A. 77-618. The KJRA envisions only one circumstance where the court may receive additional evidence. K.S.A. 77-619. Supplemental evidence can be received only if the evidence relates to the validity of the agency's actions at the time they were taken and the evidence is necessary to assist the court in deciding issues concerning:

- Improper constitution of the decision-making body;
- Improper motives or grounds for disqualification of the individuals making the decision; or
- Unlawfulness of the procedure or decision-making process. K.S.A. 77-619(a). See *Doe v. Kansas Dept. of Human Resources*, 277 Kan. 795, 812-14, 90 P.3d 940 (2004).

If a court finds additional fact-finding and other proceedings are needed before the court can make a final disposition of the matter on review, the court may remand the matter to the agency to take action needed and to make those findings. A matter may be remanded to an agency if:

- The agency failed to prepare or preserve a record adequate for judicial review;
- The court finds new evidence has become available relating to the validity of agency action at the time it was taken, that the parties did not know and had no duty to or could not have reasonably discovered until after the agency action, and the interests of justice would be served by remand to the agency;

- The agency improperly excluded or omitted evidence from the record; or
- A relevant provision of the law changed after the agency action and the court has determined that the new provision may control the outcome of the proceeding. K.S.A. 77-619(b).

Under the KJRA, as at common law, the burden of proving the invalidity of an administrative agency action is on the challenging party. The validity of the agency action shall be determined by applying the standards of judicial review to the action at the time it was taken. K.S.A. 77-621(a). See also *Peck v. University Residence Committee of Kansas State Univ.*, 248 Kan. 450, 455-56, 807 P.2d 652 (1991); *Schneider v. The Kansas Securities Comm’r*, 54 Kan. App. 2d 122, 131, 397 P.3d 1227 (2017), *rev. denied* 307 Kan. \_\_ (Feb. 26, 2018).

The KJRA requires that the court conducting the review make a separate and distinct ruling on each material issue on which it bases its decision. K.S.A. 77-621(b). In K.S.A. 77-621(c), the Act requires relief to be granted when the court determines:

- The agency action was based on a facially unconstitutional action, statute, or rule and regulation;
- The agency acted outside its jurisdiction as provided by law;
- The agency has failed to decide an issue requiring resolution;
- The agency has erroneously interpreted or applied the law;
- The agency engaged in an unlawful procedure or otherwise failed to follow prescribed procedure;
- The agency was not properly constituted as a decision-making body or was subject to disqualification;

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- The agency action was based on a determination of fact not supported by substantial evidence when viewing the record as a whole; or
- The action is otherwise unreasonable, arbitrary, or capricious.

In contrast to prior practice, the courts no longer extend deference to an agency's statutory interpretation. *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012). The doctrine of operative construction should no longer be applied. *Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 559, 293 P.3d 723 (2013).

In July 2009, K.S.A. 77-621 was amended to add subsection (d), which reads:

“For purposes of this section, ‘in light of the record as a whole’ means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.”

The KJRA mandates the court use the harmless error rule in reviewing agency action. K.S.A. 77-621(e). Thus, even if the agency action is invalid or flawed, it will be upheld unless the action caused actual harm to a party. See *Frank v. Kansas Dept.*

*of Agriculture*, 40 Kan. App. 2d 1024, 1035, 198 P.3d 195 (2008). An appellate court reviews a district court decision on a petition for judicial review in the same manner as decisions in other civil cases. K.S.A. 77-623. When appellate courts review a district court decision under KJRA, the scope and method of review is the same as the district court's review. See *Jones v. Kansas State University*, 279 Kan. 128, 139, 106 P.3d 10 (2005).

## **§ 6.14 Remedies**

The remedy provision of the KJRA vests the court with considerable discretion in formulating a remedy when considering a petition for judicial review. K.S.A. 77-622. The only limitation placed on an available remedy is that damages or compensation for agency action will be available only to the extent they are expressly authorized by another statute. K.S.A. 77-622(a). Usually this will be the enabling statute or statutes for the specific agency. It is imperative that counsel refer to the organic law of the agency whose action is being challenged to determine the scope of remedies available.

Other than the limitation on damages, the KJRA allows the court to grant practically any relief that the court may deem appropriate whether it be mandatory, injunctive or declaratory; preliminary or final; temporary or permanent; equitable or legal. K.S.A. 77-622(b). In fashioning relief under K.S.A. 77-622(b), the court may:

- Order the administrative agency to take action or exercise discretion as required by law;
- Set aside or modify an action taken by the agency;
- Enjoin or stay an action of the agency;
- Remand a matter for further proceedings;
- Render a declaratory judgment; or
- Take any other action that is both authorized and appropriate.

See, e.g., *Manzano v. Kansas Dept of Revenue*, 50 Kan. App. 2d 263, 273-75, 324 P.3d 321 (2014) (district court did not abuse its discretion in setting aside license suspension where motorist's due process rights were violated by sham administrative hearing); *Kansas Industrial Consumers Group, Inc. v. Kansas Corporation Comm'n*, 36 Kan. App. 2d 83, 138 P.3d 338 (2006) (KCC orders reversed and remanded for further consideration); *Hallmark Cards, Inc. v. Kansas Dept. of Commerce & Housing*, 32 Kan. App. 2d 715, 729, 88 P.3d 250 (2004) (reversed and remanded with directions to agency to certify taxpayer as eligible for tax credit); *Kansas Sunset Assocs. v. Kansas Dept. of Health & Environment*, 16 Kan. App. 2d 1, 3, 818 P.2d 797 (1991) (declaratory relief possible under KJRA).

The KJRA allows a court to grant any ancillary relief necessary to compensate for the effects of official acts wrongfully taken or withheld. However, attorney fees may be awarded only to the extent they are expressly authorized by other law. K.S.A. 77-622(c). It is, therefore, imperative that counsel consult the enabling statutes of the specific agency to determine if and under what circumstances attorney fees are available.

## **§ 6.15 Appeals Outside of the KJRA**

As indicated earlier, some political or taxing subdivisions and even some agency actions are not governed by the KJRA. If the legislature has exempted a particular agency or agency action, such a provision will be controlling. For agencies falling outside of the KJRA and whose enabling statutes do not provide a method for seeking judicial review, K.S.A. 60-2101(d) is the statutory provision establishing judicial review of quasi-judicial action taken by administrative agencies. For a list of state agency actions exempted from the KJRA, see K.S.A. 77-603(c).

Administrative agencies and political subdivisions often have broad powers, and actions taken can be categorized as legislative, administrative, executive, or judicial/quasi-judicial. Only the latter can be appealed under K.S.A. 60-2101(d). True judicial functions are functions "with which a court might have



been charged in the first instance or functions courts have historically performed or did perform prior to the creation of the administrative body. A function that is not a true judicial function may nevertheless be quasi-judicial if it involves a discretionary act of a *judicial nature* taken by a body empowered to investigate facts, weigh evidence, and draw conclusions as a basis for official actions.” *Brown v. U.S.D. No. 333*, 261 Kan. 134, 135, Syl. ¶ 13, 928 P.2d 57 (1996). “A decision of a legislative body is quasi-judicial if a state or local law (1) requires notice to the community before the action, (2) requires a public hearing pursuant to notice, and (3) requires the application of criteria established by law to the specific facts of the case.” *Heckert Construction Co. v. City of Ft. Scott*, 278 Kan. 223, 224, 91 P.3d 1234 (2004).

Where no specific enabling statute provides for judicial review of an administrative action and K.S.A. 60-2101(d) is inapplicable, a party must resort to extraordinary remedies to gain access to judicial review. The extraordinary remedies available in Kansas are actions for mandamus, declaratory judgment, injunction, and quo warranto. See *Barnes v. Board of Cowley County Comm’rs*, 293 Kan. 11, 17, 259 P.3d 725 (2011).

The scope of review of a judicial or quasi-judicial administrative decision made outside of the KJRA is limited to determining whether the government body acted within the scope of its authority, whether the decision was substantially supported by evidence, or whether the decision was fraudulent, arbitrary, or capricious. *Robinson v. City of Wichita Retirement Bd. of Trustees*, 291 Kan. 266, 270, 241 P.3d 15 (2010).

## **§ 6.16 Workers Compensation Cases**

Under Supreme Court Rule 9.04, when an appeal is taken from the Workers Compensation Board to the Court of Appeals under K.S.A. 44-556, the appellant must file a petition for judicial review with the clerk of the appellate courts. See form at § 12.14, *infra*. The petition must be filed within 30 days of the date of the order. K.S.A. 44-556(a). The 3-day mail rule does not



apply to extend the petition filing date in workers compensation cases. *Jones v. Continental Can Co.*, 260 Kan. 547, 920 P.2d 939 (1996). An appellee may cross-petition within 20 days of service of the petition. K.S.A. 44-556(a).

The petition for judicial review, filed with the clerk of the appellate courts, must comply with K.S.A. 77-614. The petition must be accompanied by certified copies of the decision(s) of the administrative law judge, the request for Workers Compensation Board review, and the order of the Workers Compensation Board. The petition must be accompanied by the docket fee and a docketing statement required by Supreme Court Rule 2.04. The petition must be served upon the board and all parties. Rule 9.04.

Within 14 days of the filing of the petition, the appellant must request in writing to the board that it certify the record of proceedings. See form at § 12.15, *infra*. If a record was made of any hearing before the board, a transcript must be ordered by the appellant within 14 days of filing the petition. The transcript must otherwise be prepared and advance payment made in accordance with Rule 3.03. The appellant must file copies of the request(s) for transcript and certification of the record with the clerk of the appellate courts and serve copies upon all other parties at the time the request(s) are filed with the board. Rule 9.04.

**PRACTICE NOTE:** It is acceptable, even preferable, to file with the petition for judicial review and docketing statement any requests for transcripts and the request for the board to certify the record of proceedings to the clerk of the appellate courts.

After any transcript of a board hearing is completed, the board must transmit the record to the clerk of the appellate courts and send notice, with a copy of the table of contents, to the parties that the record is being transmitted. The brief of the appellant is due 30 days from the date the record is transmitted to the appellate courts. Rule 9.04.

All other procedures and matters not provided for above are governed by the Supreme Court Rules Relating to Appellate Practice and applicable statutes.

**§ 6.17 Checklist for Review of Agency Action**

- (1) Check the agency enabling legislation to determine whether state agency action is involved or if the agency action is exempt from the KJRA.
- (2) Make sure that the agency action being appealed is a “final agency action” or that a basis for appealing “nonfinal agency action” is established.
- (3) Ensure that the person seeking review meets all standing requirements.
- (4) Check the enabling statutes of the specific agency (a) to ensure that all available administrative remedies have been exhausted, (b) to determine whether a petition for reconsideration must be filed, and (c) to consider whether the doctrine of primary jurisdiction applies.
- (5) Check the enabling statutes of the specific agency to determine the appropriate court for review.
- (6) Be sure the petition for judicial review meets pleading requirements.
- (7) Review the service provisions and determine the filing deadline.
- (8) Serve the agency head and all participating parties in the original proceeding with notice of the petition.
- (9) Carefully review the specific agency enabling legislation to determine the appropriate scope of review.
- (10) Review the organic law of the specific agency to determine the scope of remedies available, including the possibility of attorney fees.



# CHAPTER 7

## Appellate Procedure

### I. NOTICE OF APPEAL

#### § 7.1 Generally

An appeal is initiated by filing a notice of appeal with the clerk of the district court. See §§ 12.1, 12.2, *infra*. Timely filing of a notice of appeal is jurisdictional. A notice of appeal must be served on all parties as provided in K.S.A. 60-205, but failure to do so does not affect the validity of the appeal. K.S.A. 60-2103(b).

#### § 7.2 Criminal Appeals

When a crime is committed on or after July 1, 1993, the defendant has 14 days from the oral pronouncement of sentence in the district court to file a notice of appeal. K.S.A. 22-3608(c). In addition, both the defendant and the State may appeal a departure sentence. K.S.A. 21-6820(a). Because there is no time limit provided by K.S.A. 21-6820, the State has 30 days to appeal a departure sentence. See *State v. Freeman*, 236 Kan. 274, 277, 689 P.2d 885 (1984).

An exception to the time limits has been recognized when an indigent defendant (1) was not informed of the right to appeal, (2) was not furnished an attorney to exercise that right, or (3) was furnished an attorney who failed to perfect and complete an appeal. *State v. Ortiz*, 230 Kan. 733, Syl. ¶ 3, 640 P.2d 1255 (1982). See also *State v. Patton*, 287 Kan. 200, 195 P.3d 753

(2008) (clarifying parameters of *Ortiz* exceptions); and *Albright v. State*, 292 Kan. 193, Syl. ¶ 5, 251 P.3d 52 (2011) (recognizing exception for out-of-time appeal of denial of 60-1507 motion where delay was due to ineffective assistance of counsel).

A notice of appeal must specify the parties taking the appeal, designate the judgment or part of the judgment appealed from, and name the appellate court to which the appeal is taken. K.S.A. 22-3606; K.S.A. 60-2103(b). Appellate review is limited to the rulings specified in the notice of appeal. *State v. Bogguess*, 293 Kan. 743, 756, 268 P.3d 481 (2012); *Anderson v. Scheffler*, 242 Kan. 857, Syl. ¶ 3, 752 P.2d 667 (1988). However, when “there is but one court to which an appeal may be taken, the failure to correctly name that court in the notice of appeal is a mere irregularity to be disregarded unless the appellee has been misled or otherwise prejudiced.” *City of Ottawa v. McMechan*, 17 Kan. App. 2d 31, Syl. ¶ 2, 829 P.2d 927 (1992).

**PRACTICE NOTE:** It is advisable to file an appeal generally from all adverse rulings. Also, remember that the time to appeal begins running at the oral pronouncement of sentence, not the date of the journal entry.

A criminal defendant may appeal to the district court any judgment of a municipal court that finds the defendant guilty of a violation of a municipal ordinance or any finding of contempt. K.S.A. 22-3609(a). The notice of appeal to district court is filed with either the municipal court or district court clerk and must be filed within 14 days of the imposition of sentence. K.S.A. 22-3609(b).

A criminal defendant also has the right to appeal a judgment of a district magistrate judge. If the district magistrate judge is not licensed to practice law in Kansas, the notice of appeal must be filed with the clerk of the district court within 14 days after the date the sentence is imposed. K.S.A. 22-3609a(2). A posttrial motion for new trial following a magistrate’s judgment does not extend the time for appeal. *State v. Wilson*, 15 Kan. App. 2d 308, 313, 808 P.2d 434 (1991).

Appeals by the State in situations other than those authorized by statute are not permitted. *State v. Mburu*, 51 Kan. App. 2d 266, 269-70, 346 P.3d 1086 (2015). The State may take an interlocutory appeal to the Court of Appeals from an order “quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission.” K.S.A. 22-3601(a) and K.S.A. 22-3603. In a case before a district magistrate judge who is not licensed to practice law in Kansas, the State may appeal any of the above orders to a district judge. K.S.A. 22-3602(d).

In *State v. Newman*, 235 Kan. 29, 34, 680 P.2d 257 (1984), the court construed the term “suppressing evidence” to include suppression of evidence that would “substantially impair the State’s ability to prosecute the case.” The *Newman* threshold test does not apply to “quashing a warrant or a search warrant” or “suppressing a confession or admission.” *State v. Mooney*, 10 Kan. App. 2d 477, 479, 702 P.2d 328 (1985).

**PRACTICE NOTE:** The *Newman* threshold test is jurisdictional. Therefore, in its brief, the State should argue how the suppression substantially impairs its ability to prosecute the case.

In an interlocutory appeal by the State, the notice of appeal must be filed within 14 days after entry of the order. K.S.A. 22-3603. The order may be entered by oral pronouncement if such entry is on the record and expressly states whether the announcement alone is intended to constitute entry of the order or whether the trial court expects the order to be journalized and approved by the court before it is deemed to have been formally entered. *State v. Michel*, 17 Kan. App. 2d 265, Syl. ¶ 3, 834 P.2d 1374 (1992); *State v. Bohannon*, 3 Kan. App. 2d 448, Syl. ¶ 1, 596 P.2d 190 (1979). The State may file a motion to reconsider.

The State also may appeal to the Court of Appeals from (1) an order dismissing a complaint, information, or indictment, (2) an order arresting judgment, (3) a question reserved, or (4) an order granting a new trial in any case involving an A or B felony or, for crimes committed on or after July 1, 1993, in any case involving an off-grid crime. K.S.A. 22-3602(b). The general rule is a notice of appeal must be filed within 30 days of entry of

the order. K.S.A. 22-3606 and K.S.A. 60-2103(a). See *State v. Freeman*, 236 Kan. 274, 277, 689 P.2d 885 (1984). The rule differs, however, on questions reserved. If the defendant is found not guilty, the appeal time begins to run when the defendant is found not guilty and discharged from custody and bond with the State's knowledge. See *City of Wichita v. Brown*, 253 Kan. 626, 627-28, 861 P.2d 789 (1993). If the defendant is found guilty, the appeal time begins to run when sentence is imposed. *State v. Freeman*, 236 Kan. at 276-78. Appeals to a district judge may be taken by the State as a matter of right from these same orders issued by a district magistrate judge who is not licensed to practice law in Kansas. K.S.A. 22-3602(d).

### § 7.3 Civil Appeals - Chapter 60

A notice of appeal must specify the parties taking the appeal, designate the judgment or part of the judgment appealed from, and name the appellate court to which the appeal is taken. K.S.A. 60-2103(b). The appellate court is without jurisdiction to hear arguments of a party not named either directly or by inference in the notice of appeal. *Anderson v. Scheffler*, 242 Kan. 857, Syl. ¶ 1, 752 P.2d 667 (1988). An appellate court only obtains jurisdiction over the rulings identified in the notice of appeal. *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, Syl. ¶ 1, 869 P.2d 598 (1994); *Anderson*, 242 Kan. 857 at Syl. ¶ 3; *Walker v. Regehr*, 41 Kan. App. 2d 352, 354, 202 P.3d 712 (2009).

**PRACTICE NOTE:** This is one area where too much specificity can cause problems later. It is advisable to file an appeal generally from all adverse rulings.

“When there is but one court to which an appeal may be taken, the failure to correctly name that court in the notice of appeal is a mere irregularity to be disregarded unless the appellee has been misled or otherwise prejudiced.” *City of Ottawa v. McMechan*, 17 Kan. App. 2d 31, Syl. ¶ 2, 829 P.2d 927 (1992).

With one exception, a notice of appeal must be filed within 30 days from “entry of the judgment.” K.S.A. 60-2103(a). The exception is found in K.S.A. 60-1305. An order appointing or



refusing to appoint a receiver must be filed within 14 days of the entry of judgment.

Entry of judgment occurs when a journal entry or judgment form is filed. K.S.A. 60-258. A judgment is effective only when a journal entry or judgment form is signed by the judge and filed with the clerk of the district court. *Valdez v. Emmis Communications*, 290 Kan. 472, 482, 229 P.3d 389 (2010). Trial docket minutes or judge's notes do not comply with K.S.A. 60-258 and do not constitute entry of judgment. See *In re Marriage of Wilson*, 245 Kan. 178, 180, 777 P.2d 773 (1989).

A notice of appeal filed after oral pronouncement of final judgment but before the filing of a journal entry is a premature notice of appeal that becomes effective upon the filing of the journal entry. A premature notice of appeal must identify the judgment appealed from with sufficient certainty to inform the parties of the rulings to be reviewed. Rule 2.03(a).

Rule 2.03 also validates a premature notice of appeal filed after a journal entry of final judgment but prior to the filing of a journal entry on a motion to alter or amend, or a motion to reconsider. See *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, Syl. ¶ 3, 836 P.2d 1142 (1992); *Cornett v. Roth*, 233 Kan. 936, 939-40, 666 P.2d 1182 (1983); *Hundley v. Pfuetze*, 18 Kan. App. 2d. 755, 756-757, 858 P.2d 1244 (1993).

Both case law and statute allow for certain premature notices of appeal. Case law allows that if a party filed a notice of appeal prior to the entry of a judgment covering all parties and all claims, that notice of appeal becomes effective once final judgment is entered. "If a judgment is entered disposing of all claims against one of multiple parties, and a premature notice of appeal is filed and has not been dismissed, then a final judgment disposing of all claims and all parties validates the premature notice of appeal concerning the matters from which the appellant appealed." *Honeycutt v. City of Wichita*, 251 Kan. 451, Syl. ¶ 6, 836 P.2d 1128 (1992).

There is also a statutory procedure for a premature appeal in this scenario. Under K.S.A. 60-254(b), a court may direct the entry of final judgment as to one or more but fewer than all of the

claims or parties. This can only occur after the court makes an express determination that no just reason exists for delay and an express direction for the entry of judgment. Ideally, the district court will use the statutory language. The language may be used in the initial journal entry or the journal entry can be amended at a later date. See *Ullery v. Othick*, 304 Kan. 405, 414, 372 P.3d 1135 (2016). If judgment is entered under K.S.A. 60-254(b) the decision is final, and the parties will waive the appeal if a notice of appeal is not timely filed. *Dennis v. Southeastern Kansas Gas Co.*, 227 Kan. 872, 877, 610 P.2d 627 (1980). For a more detailed discussion of the entry of judgment under K.S.A. 60-254(b), see § 5.21.

A premature notice of appeal only applies to judgments entered before the notice of appeal was filed. Therefore, if a party wishes to appeal any orders, including orders disposing of posttrial motions, or a final judgment occurring since the filing of the previous notice of appeal, another notice of appeal must be filed after entry of those orders or final judgment. Rule 2.03(b); *L.P.P. Mortgage, Ltd. v. Hayse*, 32 Kan. App. 2d 579, 587-88, 87 P.3d 976 (2004).

A district court may extend the time for filing a notice of appeal upon a showing of excusable neglect based on the failure of a party to learn of the entry of judgment. Such an extension may not exceed 30 days from the expiration of the original time for filing a notice of appeal. K.S.A. 60-2103(a); *Rowland v. Barb*, 40 Kan. App. 2d 493, 496-98, 193 P.3d 499 (2008). In addition, if a court enters judgment without notifying the parties as required by K.S.A. 60-258 and Rule 134, the time for filing a notice of appeal does not begin to run until such compliance occurs. *McDonald v. Hannigan*, 262 Kan. 156, Syl. ¶ 3, 936 P.2d 262 (1997); *Daniels v. Chaffee*, 230 Kan. 32, 38, 630 P.2d 1090 (1981).

In the past, appellate courts sometimes retained an untimely appeal because of the unique circumstances doctrine. See *Johnson v. American Cyanamid Co.*, 243 Kan. 291, Syl. ¶ 1, 758 P.2d 206 (1988), and *Schroeder v. Urban*, 242 Kan. 710, 750 P.2d 405 (1988). The unique circumstances doctrine allowed a jurisdictional time period, such as the time in which to file a notice of appeal, to be extended by judicial action.

However, in 2011 the Kansas Supreme Court overruled *Johnson and Schroeder*, holding that an appellate court has no authority to create equitable exceptions to jurisdictional requirements. *Board of Sedgwick County Comm'rs v. City of Park City*, 293 Kan. 107, Syl. ¶ 3, 260 P.3d 387 (2011). The court held that use of the unique circumstances doctrine is illegitimate to excuse an untimely appeal in the absence of infringement on a party's constitutional rights, such as the right to effective assistance of counsel in a criminal case. *Board of Sedgwick County Comm'rs*, 293 Kan. at 119-120.

Certain posttrial motions extend the time for filing a notice of appeal. If these posttrial motions are filed within 28 days of entry of judgment, the appeal time stops running and begins running in its entirety on the date of the entry of the order ruling on the posttrial motion. K.S.A. 60-2103(a). The following timely posttrial motions extend the time for appeal: motion for judgment notwithstanding the verdict (K.S.A. 60-250[b]); motion to amend or make additional findings of fact (K.S.A. 60-252[b]); motion for new trial (K.S.A. 60-259[b]); and motion to alter or amend the judgment (K.S.A. 60-259[f]). The 3-day mailing rule applies to posttrial motions if the entry of judgment is served on other parties via first-class mail. K.S.A. 60-206(d).

A K.S.A. 60-260 motion for relief from judgment or order for clerical mistakes and for mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other statutorily enumerated reasons does not extend the time for filing a notice of appeal. *Giles v. Russell*, 222 Kan. 629, Syl. ¶ 2, 567 P.2d 845 (1977); *Beal v. Rent-A-Center of America, Inc.*, 13 Kan. App. 2d 375, 377, 771 P.2d 553 (1989). A trial court does, however, retain broad discretion under K.S.A. 60-260(b) and 60-260(b)(6) to relieve a party from final judgment for any reason justifying relief from the operation of the judgment if that power is exercised prior to docketing. *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 11-12, 687 P.2d 603 (1984).

## § 7.4 Civil Appeals - Chapter 61 Limited Actions

The rules governing appeals in Chapter 61 cases depend on whether the case was heard by a district magistrate judge or a district judge and whether the district magistrate judge is licensed to practice law in Kansas. It is also important to know whether the case was initially filed in small claims court.

In limited actions, if the district magistrate judge is not licensed to practice law in Kansas, the notice of appeal from the district magistrate judge's decision must be filed in district court within 14 days of the entry of the order. K.S.A. 61-3902(a), K.S.A. 60-2103a. After a ruling by the district court, a notice of appeal to the Court of Appeals must be filed within 30 days of the entry of the district court's order, ruling, decision, or judgment. See K.S.A. 60-2103a(b). An exception exists if a defendant is appealing an action for forcible detainer granting restitution of the premises; that notice of appeal must be filed within 7 days of the entry of judgment. K.S.A. 61-3902(a).

If the district magistrate judge is licensed to practice law in Kansas, the notice of appeal is filed with the Court of Appeals using the procedure established by K.S.A. 60-2103(a) and (b). See K.S.A. 61-3902(a).

In either case, a timely posttrial motion will extend the time to appeal from a district court's orders. K.S.A. 61-2912(j); *Squires v. City of Salina*, 9 Kan. App. 2d 199, Syl. ¶ 1, 675 P.2d 926 (1984).

**PRACTICE NOTE:** To find out whether a district magistrate judge is licensed to practice law in Kansas, check the online attorney directory at the Supreme Court's website: [www.kscourts.org](http://www.kscourts.org)

Appeal from any judgment under the Small Claims Procedure Act, whether made by a district magistrate judge or the district court, may be taken by filing a notice of appeal with the clerk of the district court within 14 days after entry of judgment. Such appeals are tried de novo before a district court judge other than the judge from whom the appeal is taken. K.S.A. 61-2709(a). An appeal may be taken from the decision of the district court judge within 30 days of entry of that judgment. K.S.A. 61-2709(b).

## § 7.5 Juvenile Appeals

Any party or interested party (terms defined in K.S.A. 38-2202[v] and [m] respectively) may appeal from “any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights” under the Revised Kansas Code for Care of Children. K.S.A. 38-2273(a). If the order was entered by a district magistrate judge who is not licensed to practice law in Kansas, the appeal is to district court and the notice of appeal must be filed with the clerk of the district court within 14 days of entry of judgment. K.S.A. 38-2273(b) and (c); K.S.A. 60-2103a(a). The appeal must be heard de novo by the district court within 30 days of filing of the notice of appeal. 38-2273(b). The notice of appeal from district court must be filed within 30 days. K.S.A. 38-2273(c); K.S.A. 60-2103(a).

**PRACTICE NOTE:** An order must be appealed at the time when it first ripens for appeal purposes, or the right to appeal that order is waived, even if a subsequent order may be appealed. *In re L.B.*, 42 Kan. App. 2d 837, 838, 217 P.3d 1004 (2009). The appellate courts lack jurisdiction to review the denial of interested party status by a district court. *In re S.C.*, 32 Kan. App. 2d 514, 518, 85 P.3d 224 (2004). There is no statutory right to appeal from the denial of a motion to terminate parental rights. *In re T.S.*, 308 Kan. 306, 312, 419 P.3d 1159 (2018). Appellate courts do not have jurisdiction to consider a district court’s order changing placement of a child after termination of parental rights. *In re D.M.M.*, 38 Kan. App. 2d 394, 399-400, 166 P.3d 431 (2007).

Under the Revised Kansas Juvenile Justice Code, a juvenile offender may appeal from an order authorizing prosecution as an adult but only after conviction and in the same manner as criminal appeals. K.S.A. 38-2380(a)(1). An appeal from an order of adjudication or sentencing, or both must be taken within 30 days of entry of the order appealed from. K.S.A. 38-2380(b); K.S.A. 38-2382(c); K.S.A. 60-2103. An appeal may be taken



by the prosecution as provided in K.S.A. 38-2381(a) and (b). These appeals must be taken within 14 days of the order being appealed. Appeals from a district magistrate judge who is not licensed to practice law in Kansas are to the district court, while appeals from the district court or a district magistrate judge who is licensed to practice law in Kansas are to the Court of Appeals. K.S.A. 38-2382.

**PRACTICE NOTE:** K.S.A. 38-2380(a)(1) precludes an appeal of an order waiving juvenile status when the juvenile has consented to the waiver. *State v. Ellmaker*, 289 Kan. 1132, 1149, 221 P.3d 1105 (2009).

## § 7.6 Probate Appeals

An appeal from a district magistrate judge who is licensed to practice law in Kansas to a district judge must be filed within 30 days from the entry of judgment in any case involving a decedent's estate. K.S.A. 59-2401(a). A similar appeal from a district judge to the appellate courts is governed by Chapter 60, so it must also be filed within 30 days. K.S.A. 59-2401(b); K.S.A. 60-2103(a).

Appeals in other kinds of Chapter 59 proceedings, however, may have a different time limit. For example, an appeal from a district magistrate who is not licensed to practice law in Kansas to a district court must be filed within 14 days of the entry of judgment under the Kansas Adoption and Relinquishment Act (K.S.A. 59-2111 *et seq.*); the Care and Treatment Act for Mentally Ill Persons (K.S.A. 59-2945 *et seq.*); the Care and Treatment Act for Persons With an Alcohol or Substance Abuse Problem (K.S.A. 59-29b45 *et seq.*); and the Act for Obtaining a Guardian or Conservator, or Both (K.S.A. 59-3050 *et seq.*). K.S.A. 59-2401a(a). See also § 5.22, *supra*.

A timely posttrial motion extends the time to appeal from a Chapter 59 judgment. *In re Guardianship of Sokol*, 40 Kan. App. 2d 57, 62-64, 189 P.3d 526 (2008).

The court from which the appeal is taken may require a party, other than the state of Kansas or its subdivisions or any Kansas city or county, to file a bond of sufficient sum or surety “to ensure that the appeal will be prosecuted without unnecessary delay” and to ensure payment of all judgments, damages or costs. K.S.A. 59-2401(d); K.S.A. 59-2401a(d). See also § 5.22, *supra*.

**PRACTICE NOTE:** K.S.A. 59-2401(a) lists the kinds of orders that may be appealed from a district magistrate judge to the district court. For a discussion on appellate jurisdiction and the concept of finality, see *In re Estate of Butler*, 301 Kan. 385, 343 P.3d 85 (2015).

### § 7.7 Mortgage Foreclosure Appeals

A party must appeal within 30 days of the following specific orders or the issue may not be raised later:

- Order of foreclosure. *Stauth v. Brown*, 241 Kan. 1, 5-6, 734 P.2d 1063 (1987) (order of foreclosure is final for appeal purposes if it “determines the rights of the parties, the amounts to be paid, and the priority of claims”); *L.P.P. Mortgage, Ltd. v. Hayse*, 32 Kan. App. 2d 579, 586, 87 P.3d 976 (2004); and
- Confirmation of sheriff’s sale. *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 486, 748 P.2d 905 (1988) (order of sale cannot be appealed until after sale is confirmed); *L.P.P. Mortgage, Ltd.*, 32 Kan. App. 2d. at 586 (an order confirming a sheriff’s sale is not a repetition of the judgment of foreclosure).

### § 7.8 Cross-Appeals

If an appellee desires to have an appellate court review adverse rulings and decisions made by the lower court, the appellee must file a notice of cross-appeal to preserve that right. K.S.A. 60-2103(h). See § 12.3, *infra*. The absence of a notice of cross-appeal is a jurisdictional bar to review. *Lumry v. State*, 305 Kan. 545, 553-54, 385 P.3d 479 (2016).



Raising new issues in a docketing statement answer or brief is not sufficient to preserve them for appellate review. *143rd Street Investors v. Board of Johnson County Comm'rs*, 292 Kan. 690, 704, 259 P.3d 644 (2011). The rules on docketing and motions to docket out of time also apply to docketing a cross-appeal. See Rule 2.04(a)(2) and Rule 2.041.

A notice of cross-appeal must be filed within 21 days after the notice of appeal has been served and filed. K.S.A. 60-2103(h). Where a notice of appeal was filed prematurely, the time for filing the notice of cross-appeal runs from the entry of final judgment, not the filing of the premature notice of appeal. *In re Marriage of Shannon*, 20 Kan. App. 2d 460, 462, 889 P.2d 152 (1995). As with a notice of appeal, a notice of cross-appeal should specify the parties taking the appeal, designate the judgment or part of the judgment appealed from, and name the appellate court to which the appeal is taken. See K.S.A. 60-2103(b).

## II. FILING OR SERVICE OF PAPERS: TIME COMPUTATIONS

### § 7.9 Generally

Rule 1.05 governs the form and service of paper documents in the Kansas appellate courts. All petitions, briefs, motions, applications, and other papers brought to the court's attention must be typed on standard size (8 1/2" by 11") sheets with at least a one-inch margin on all sides. Rule 1.05(a). All such papers must include the name, address, telephone number, fax number, and e-mail address of the person filing the paper. If the paper is filed by counsel, the counsel's Kansas attorney registration number and an indication of the party represented must be included. If multiple attorneys appear on behalf of the same party, one must be designated lead counsel for purposes of subsequent filings and notices. Rule 1.05(b). For attorneys licensed to practice law in Kansas, no paper copies of electronic filings are required. Rule 1.05(c). Electronic filings are limited to 10 MB per transmission. Rule 1.05(g).

**PRACTICE NOTE:** All documents must be filed with the clerk of the appellate courts and not sent to individual justices or judges.

K.S.A. 60-206 contains the general rules on time computation and applies to all filings in the appellate courts. Rule 1.05(d). But see *Jones v. Continental Can Co.*, 260 Kan. 547, 920 P.2d 939 (1996) (Workers Compensation Act provides its own time limit for appeals of decisions of the Workers Compensation Board without reference to Chapter 60).

Effective July 1, 2010, all deadlines stated in days are computed the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. If the period ends on a day that the clerk’s office is inaccessible, such as for weather or other reasons, then the deadline falls on the next accessible day that is not a Saturday, Sunday or legal holiday. “Legal holiday” includes holidays designated by the president or congress of the United States or the legislature of this state, or observed as holidays by order of the Kansas Supreme Court. K.S.A. 60-206(a)(6).

K.S.A. 60-206(d) was amended effective July 1, 2017. After that date, documents that are served via first-class mail are allowed an additional three days for mailing. This rule also applies to notices of entry of judgment. *Danes v. St. David’s Episcopal Church*, 242 Kan. 822, 825-26, 752 P.2d 653 (1986). Documents that are served via e-mail, fax filing, or notice of electronic service do not receive mail days.

Note that the triggering event is *service*, not *filing*. A document that is electronically *filed* but *served* via first-class mail is entitled to receive mail days. Attorneys should closely watch whether an action requires service, paying special attention to things like petitions for review and motions for rehearing or modification. Rules 7.05 and 7.06.

**PRACTICE NOTE:** The 30-day time limit to file a petition for review is jurisdictional and cannot be extended. Rule 8.03(b)(1).

### **III. STAYS PENDING APPEAL**

#### **§ 7.10 Generally**

The filing of a notice of appeal does not automatically stay the effectiveness of the judgment from which the appeal is taken. An appellant may, however, seek a stay pending appeal.

#### **§ 7.11 Criminal Appeals**

A defendant who has been convicted of a crime may be released by the district court, under the same conditions as those available for release before conviction, while awaiting sentencing or after filing a notice of appeal. To grant the application, the district court must find that “the conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.” K.S.A. 22-2804(1). The application for release after conviction must be made to the district court even if an appeal has been docketed in an appellate court. 22-2804(2). If the district court denies the application or the court does not grant the relief sought, the defendant may file an application for release after conviction with the appellate court having jurisdiction over the appeal. K.S.A. 22-2804(2).

Rule 5.06 governs applications for release after conviction filed with the appellate courts under K.S.A. 22-2804(2) or K.S.A. 21-6820(b) (departure sentences). The application must include the following information:

- District court’s disposition of the application
- Nature of the offense and the sentence imposed;
- Amount of any appearance bond previously imposed in the case;
- Defendant’s family ties;

- Defendant's employment;
- Defendant's financial resources;
- Length of defendant's residence in the community;
- Any record of prior convictions;
- Defendant's record of appearance at court proceedings, including failure to appear; and
- Copy of the district court order stating the reason for its decision.

**PRACTICE NOTE:** A large number of applications for release after conviction do not include all the required information or a copy of the district court order. This failure usually results in denial of the application. Numbering each paragraph is the easiest way to ensure that all required information is contained in the application. See § 12.16, *infra*.

If the district court's order merely denies bond without reflecting the reason, the appellate court may remand the matter for the district court to make additional findings. The appellate court will then not review the merits of the application until the district court enters these additional findings. During the remand for additional findings, the status quo remains in effect. Therefore, to reduce the amount of time an application remains pending, counsel should seek a district court order that articulates specific reasons for the denial of the application for release.

## § 7.12 Civil Appeals - Chapter 60

The general rule is that a judgment may not be executed and proceedings may not be taken to enforce a judgment until 14 days after the entry of judgment. K.S.A. 60-262(a). To extend the temporary 14-day stay, the appellant may file an application for a supersedeas bond with the district court at the time of or after the filing of the notice of appeal. The stay becomes effective upon the district court's approval of the supersedeas bond. K.S.A. 60-262(d). Once an appeal is docketed, application for leave to file a bond may only be made in the appellate court.

K.S.A. 60-2103(e). However, once the appellate court grants permission to file a supersedeas bond, the bond itself normally is filed with the district court and approved by a judge of that court.

An exception to the general rule states that no automatic 14-day stay applies after judgment in actions for injunctions or receiverships. K.S.A. 60-262(a). However, when an order discharges, vacates, or modifies a provisional remedy, or modifies or dissolves an injunction, an aggrieved party may apply to the district court to suspend the operation of the order for up to 14 days in order to file a notice of appeal and obtain approval of a supersedeas bond. K.S.A. 60-2103(d). The granting of a stay in injunction actions and receivership actions is otherwise not a matter of right but is discretionary with the court. K.S.A. 60-262(a) and (c).

A supersedeas bond is generally required to be set at the full amount of the judgment, subject to a reduction if the appellant can prove an undue hardship or a denial of the right to appeal. K.S.A. 60-2103(d). The court must not require a bond or other security when granting a stay on an appeal by the State, its officers or agencies. K.S.A. 60-262(e).

### **§ 7.13 Civil Appeals - Chapter 61 Limited Actions**

K.S.A. 61-3901 *et seq.*, contain the general rules of procedure for appeals in limited actions, including a stay of proceedings on appeal. See K.S.A. 61-3905.

### **§ 7.14 Juvenile Appeals**

Any order appealed from continues in force unless modified by temporary orders by the appellate court. K.S.A. 38-2274(a); K.S.A. 38-2383(a). The appellate court, pending a hearing, may modify the order appealed from and make any temporary orders concerning the care and custody of the child. K.S.A. 38-2274(b); K.S.A. 38-2383(b).

### § 7.15 Probate Appeals

Orders appealed from in any case arising under the Probate Code continue in force unless modified by temporary orders entered by the appellate court and are not stayed by a supersedeas bond filed under K.S.A. 60-2103. K.S.A. 59-2401(c); 59-2401a(c). Also, the court from which the appeal is taken may require a party, other than the State of Kansas or its subdivisions or any Kansas city or county, to file a bond of sufficient sum or surety “to ensure that the appeal will be prosecuted without unnecessary delay” and to ensure payment of all judgments, damages or costs. K.S.A. 59-2401(d); K.S.A. 59-2401a(d). See also § 5.22, *supra*.

## IV. DOCKETING THE APPEAL

### § 7.16 Generally

The appellant must docket the appeal with the clerk of the appellate courts within 60 days after filing the notice of appeal in the district court. The address is:

Clerk of the Appellate Courts  
Kansas Judicial Center, Room 108  
301 SW Tenth Avenue  
Topeka, KS 66612-1507

An appeal is docketed when the following have been filed with the clerk of the appellate courts:

- the docketing statement (Rule 2.041);
- a file-stamped certified copy of the notice of appeal;
- a file-stamped certified copy of the journal entry, judgment form, or other appealable order or decision;
- a copy of any request for transcript or certificate of completion of transcript (or a statement that no transcript is requested);

- a file-stamped certified copy of any posttrial motion and any ruling on the motion;
- a file-stamped certified copy of any certification under K.S.A. 60-254(b); and
- the \$145 docket fee and any applicable surcharge. Rule 2.04(a)(1) and (d).

**PRACTICE NOTE:** When electronically docketing an appeal, the required documents must be uploaded as separate PDFs in the order listed by Rule 2.04(a)(1) or (a)(2) and must be sent in a single submission. Rule 2.04(a)(3).

If the appeal previously was taken to the district court from a decision of a municipal judge, district magistrate judge, or pro tem judge, file-stamped certified copies of that judge's order and the notice of appeal to district court must also be included. Rule 2.04(b). If the appeal is from an administrative tribunal, file-stamped certified copies of the agency decision, any motion for rehearing and the ruling on the motion, and the petition for judicial review must also be included. See Rule 2.04(c).

A cross-appeal must be docketed with the clerk of the appellate courts within 60 days after filing the notice of cross-appeal in the district court. A cross-appellant must file with the clerk of the appellate courts:

- the docketing statement;
- a file-stamped certified copy of the notice of cross-appeal; and
- a copy of any request for transcript or certificate of completion of transcript (or a statement that no transcript is requested). Rule 2.04(a)(2).



Fewer documents are required from a cross-appellant because documents already filed by the appellant are readily available to court staff. All other requirements relating to docketing and motions to docket out of time are the same for both appeals and cross-appeals.

Docketing statements are required in all appeals except appeals under Rule 10.01 (expedited appeal for waiver of parental consent requirement). Docketing statements and answers must be on the applicable Judicial Council forms. Rule 2.041(e). Forms appear at §§ 12.4-12.6, *infra*, and on the Judicial Council website at [www.kansasjudicialcouncil.org](http://www.kansasjudicialcouncil.org).

Since 2009, the Supreme Court has imposed a Judicial Branch Surcharge to appellate docket fees. The current surcharge is \$10. See Supreme Court Order 2019 SC 39. The total cost to docket an appeal is \$155.

The docket fee or excuse for nonpayment must accompany the documents. The docket fee is nonrefundable and is the only cost assessed by the clerk's office for each appeal. It covers the cost of docketing and processing the appeal through the clerk's office. A check in payment for the docket fee should be made payable to the clerk of the appellate courts. The docket fee will be excused when:

- The appellant has previously been determined to be indigent by the district court, and the attorney for appellant certifies to the clerk of the appellate courts that the appellant remains indigent. See § 12.10, *infra*.
- The district judge certifies that the judge believes the appellant to be indigent and it is in the interest of the party's right of appeal that an appeal should be docketed *in forma pauperis*; or
- Under K.S.A. 60-2005, the state of Kansas and its agencies and all Kansas cities and counties are exempt in any civil action from a docket fee. If on final determination costs are assessed against the

state, its agencies, or a city or county, the costs must include the docket fee. See Rule 2.04(d).

**PRACTICE NOTE:** An indigent individual proceeding *pro se* must have the district judge's certification as outlined above to have the docket fee waived. In original actions, an affidavit of indigency signed by the litigant is sufficient to waive the docket fee. In a habeas corpus action no docket fee is assessed, whether filed as an original action or filed as an appeal from district court. As a practical matter, the State does not have to pay docket fees in criminal matters.

Where unusual fees or expenses are anticipated, the appellate court may require a deposit in advance to secure the same. Rule 7.07(a).

When the appeal is docketed, notice is sent to the clerk of the district court and also to the attorneys of record for the parties stating that the appeal has been docketed, the date the appeal was docketed, the appellate court in which the appeal was docketed, the appellate case number assigned, and the district court case number. This notice is sent to the attorney who signed the docketing statement plus any attorney or individual who received service of the docketing statement.

**PRACTICE NOTE:** The clerk of the appellate courts does not monitor docketing statements to determine whether parties have been properly included as litigants. If an attorney receives notice of docketing, that attorney is officially a party of record with the appellate courts. If that docketing statement has been served in error, it is counsel's responsibility to file a motion to be dismissed from the appeal.

The clerk's office will prepare an appellate case file that is accessible to the attorneys of record. Files are generally also accessible to the public unless specifically closed by statute, rule, or order of the court.

**PRACTICE NOTE:** The appellate courts may close those files that would be closed in the district court, such as child in need of care proceedings and adoptions. The files do remain open to attorneys of record.

Timely docketing is not a jurisdictional requirement, but the appellant is required to file a motion to docket out of time stating good cause for the failure if beyond the 60-day period. See § 12.8, *infra*.

Failure to docket within 60 days may result in the appeal being dismissed by the district court. Failure to docket the appeal in compliance with Rule 2.04 is presumed to be an abandonment of the appeal, and the district court may enter an order dismissing the appeal. The order is final unless the appeal is reinstated by the appellate court. To have the appeal reinstated, an appellant must make an application to the appellate court having jurisdiction within 30 days after the order of dismissal was entered by the district court. See § 12.9, *infra*. The application must comply with Rules 5.01 and 2.04. Rule 5.051.

**PRACTICE NOTE:** A rush to the district court on the 61<sup>st</sup> day is not advisable because the appellate court will likely reinstate the appeal if the appropriate application is made. Also note that the filing of a motion with the appellate courts to docket an appeal out of time deprives the district court of jurisdiction to consider a pending motion to dismiss. *Sanders v. City of Kansas City*, 18 Kan. App. 2d 688, 692, 858 P.2d 833 (1993).

### § 7.17 Parental Notice Waiver Requirements — Rule 10.01

The only documents needed to docket an appeal by an unemancipated minor for waiver of parental notice (under Rule 173) are (1) the notice of appeal and (2) the district judge's decision. These documents should be certified by the district court clerk. No docketing statement is required.

The appeal process is expedited, and counsel for the minor must file the appellant's brief within 7 days of docketing. There is no appellee or appellee brief. Unless ordered by the Court

of Appeals, there is no oral argument. The Court of Appeals decision must be filed within 14 days after the appeal is docketed. In all appellate proceedings, the anonymity of the minor must be protected, and the minor is to be referred to at all times only as “Jane Doe.”

If the Court of Appeals affirms the district court’s decision, the appellant may petition for discretionary review by the Kansas Supreme Court under Rule 8.03. There is no motion for reconsideration or modification in the Court of Appeals. The petition for review is deemed denied if there is no action by the Supreme Court within 14 days after filing.

If the petition is granted, the Supreme Court will review the matter on the record and file its opinion within 14 days from granting the petition.

If the Court of Appeals reverses the decision of the district judge, there is no discretionary review by the Supreme Court, and the clerk of the appellate courts must issue the mandate immediately.

## **V. APPEARANCE AND WITHDRAWAL**

### **§ 7.18 Appearance**

The appearance of the attorney for the appellant will be entered as a matter of course upon the filing of the docketing statement containing the attorney’s name, address, telephone number, Kansas attorney registration number, and an indication of the party represented. The attorney or party on whom the docketing statement was served also will be entered. See Rule 2.04. An attorney entering a case for the first time during the appeal must file an entry of appearance with the clerk of the appellate courts. Rule 1.09(a).

**PRACTICE NOTE:** Entries of appearance, and withdrawal when appropriate, are critical to an orderly appellate process.

An attorney not admitted to practice law in Kansas may participate in any proceeding before a Kansas appellate court upon motion and payment of a \$100 fee to the clerk of the appellate courts. See Rule 1.10 and §§ 12.18 and 12.19, *infra*.

A motion *pro hac vice* must be filed not later than 15 days before the brief due date or oral argument date. Rule 1.10(d)(1).

To be admitted to practice in a case pending before an appellate court, the out-of-state attorney must be regularly engaged in the practice of law in another state or territory, must be in good standing under the rules of the highest appellate court of that state or territory, and must have professional business before the court. In addition, the attorney must associate with a Kansas attorney of record who is regularly engaged in the practice of law in Kansas and in good standing under all the applicable rules of the Kansas Supreme Court. The Kansas attorney of record must be actively engaged in the case, sign all pleadings, documents and briefs, and attend any prehearing conference or oral argument that is scheduled. Rule 1.10(a) and (b).

**PRACTICE NOTE:** Out-of-state counsel will receive notices as a courtesy, but that does not relieve the Kansas attorney of record of obligations under Rule 1.10(b). Attorneys admitted to practice *pro hac vice* are not allowed to use the Kansas electronic filing system.

## § 7.19 Withdrawal

Rule 1.09 governs when and how an attorney who has appeared of record in an appellate proceeding may withdraw. If the withdrawal of the attorney will leave the client without counsel, the attorney may withdraw only after filing a motion with the clerk of the appellate courts under Rule 5.01. The motion must state the reason for withdrawal, unless doing so would violate a standard of professional conduct; demonstrate that the attorney warned the client that the client is personally responsible for complying with court orders and time limits and notified the client of any pending hearing, conference or deadline; and state the client's

current mailing address and telephone number, if known. The motion must be served on the client and all parties, and a justice or judge of the appellate court must issue an order approving the withdrawal. Rule 1.09(b).

If the client will continue to be represented by other counsel of record or by substituted counsel, then the attorney may withdraw without a court order by filing a notice of withdrawal that identifies the other counsel of record or includes an entry of appearance of substituted counsel. The notice must be served on the client and all parties. Rule 1.09(c) and (d).

If an appointed attorney wishes to withdraw, the attorney must file a motion with the clerk of the appellate courts under Rule 5.01. The attorney must state the reason for the withdrawal, if the attorney may ethically do so, and serve the motion on the client and all parties. If a justice or judge of the appellate court approves the withdrawal, the case must then be remanded to the district court for appointment of new appellate counsel unless substitute counsel has already entered an appearance. The district court has 30 days to appoint new counsel. Rule 1.09(e).

**PRACTICE NOTE:** Motions to withdraw are among the most frequently rejected motions filed in the appellate courts. No matter what type of motion to withdraw or notice of withdrawal is being filed, serve a copy on the client and all parties.

## **VI. RECORD ON APPEAL**

### **§ 7.20 Record of Proceedings Before the Trial Court**

The entire record consists of all the original papers and exhibits filed in district court, the court reporter's notes and transcripts, any other authorized records of the proceedings, and the appearance docket. Rule 3.01(a). The record on appeal, however, only includes that portion of the entire record required by the rules or requested by a party. The appellate court may, of

course, order any or all additional parts of the entire record to be filed. Rule 3.01(b) and Rule 3.02.

**PRACTICE NOTE:** Rule 3.02 sets out what the clerk of the district court includes in the record on appeal. Note, in particular, that jury instructions and trial exhibits are not included in the record on appeal unless specifically requested.

An appendix to a brief is not a substitute for the record on appeal, and any appendix that is not part of the record on appeal will not be considered. See *Romkes v. University of Kansas*, 49 Kan. App. 2d 871, 886, 317 P.3d 124 (2014).

## § 7.21 Transcript of Proceedings

If the appellant considers a transcript of any hearing necessary to the appeal, a request must be served on the court reporter within 21 days of filing the notice of appeal in district court. Unless the parties stipulate as to specific portions that are not required for the appeal, the request must be for a complete transcript of any such hearing (except for jury voir dire, opening statements and closing arguments, which will not be transcribed unless specifically requested). However, counsel for both parties should make a good faith effort to stipulate when possible to avoid unnecessary expenses. A refusal to stipulate may be considered by the appellate court in apportioning costs under Rule 7.07(d). Rule 3.03(a).

**PRACTICE NOTE:** The request for transcript must be clearly designated “for appeal purposes.” Rule 3.03(a).

Within 14 days after service of appellant’s request for transcript, the appellee may request a transcript of any hearing not requested by the appellant. The appellee is responsible for payment for such additional transcripts, just as the appellant is responsible for payment of the main transcript. Rule 3.03(c).



**PRACTICE NOTE:** Additional transcripts may be requested outside these time frames; however, if a briefing schedule has been set, it will not be stayed automatically during transcript preparation. A party would need to file a motion to stay briefing.

The request for transcript(s) should reflect the judicial district case number, the division of the district court, the date(s) of the hearing, and the name of the court reporter. See § 12.22, *infra*. The request must be filed in the district court and served on the court reporter and all parties. A copy of the request and any agreed upon stipulations must be filed with the appellate court clerk when the appeal is docketed under Rule 2.04, as must any subsequent transcript requests that are made after docketing occurs. Rule 3.03(d).

**PRACTICE NOTE:** The original of any transcript request is filed with the district court, with service on the court reporter and all parties. Delay can occur if the wrong court reporter is served. If you are unsure who to serve, check with the clerk of the district court. Rule 354 requires the district court judge to have entered on the appearance/trial docket the name of the court reporter taking notes of any proceeding. Remember that a copy of the request for transcript must be filed with the appellate clerk at the time of docketing.

Within 14 days of receipt of a request for transcript, a court reporter may demand prepayment of the estimated cost of the transcript. (No advance payment may be required of the state or its agencies or subdivisions.) Failure to make the advance payment within 14 days of service of the demand is grounds for dismissal of the appeal. If, however, no demand is made within the 14-day period, the right to advance payment is waived. Rule 3.03(f). A court reporter may request permission to file a demand for payment out of time.

**PRACTICE NOTE:** If advance payment is not made within 14 days of service of the demand, the court reporter notifies the appropriate appellate court. That court will issue an order to counsel to show cause why the court should not deem the transcript request withdrawn.

An indigent criminal defendant may obtain a free transcript for purposes of an appeal upon request. Most such requests are made by the Kansas Appellate Defender's Office.

### **§ 7.22 Filing of Transcripts**

The transcript(s) must be completed within 40 days after the court reporter is served with a request. The court reporter may file for an extension of time with the appellate court under Rule 5.02. Upon completion of a transcript, the court reporter will file the original with the district court and mail to the appellate court clerk and all parties a certificate of completion of transcript, showing the date the transcript was filed in the district court, and the date and type of hearing transcribed. Rule 3.03(e).

**PRACTICE NOTE:** Service of the last certificate of completion starts the running of appellant's time to file a brief. Rule 6.01(b). There is no notice from the appellate clerk's office. The appellant counts time from service of the certificate of completion. To compare the appellate clerk's calculation, go to [kscourts.org](http://kscourts.org) "Appellate Case Inquiry System."

### **§ 7.23 Unavailability of Transcripts or Exhibits**

If a transcript is unavailable, a party to an appeal may prepare a statement of the evidence or proceedings by the best available means, including personal recollection. The statement must be served on the adverse parties, who have 14 days to serve objections or proposed amendments to the statement.

The statement with objections or amendments must then be submitted to the district court judge for settlement and approval.

The statement as approved must be included in the record on appeal by the district court clerk. Rule 3.04(a).

Rule 3.04(b) sets out a similar process to create a substitute for an unavailable exhibit.

### **§ 7.24 Appeal on Agreed Statement**

When the issues in an appeal can be determined without an examination of the evidence and proceedings in the district court, the parties may prepare and sign an agreed statement of the case. This statement must show how the questions arose, how they were decided in district court, and set out those facts essential to an appellate decision. This statement must be accompanied by copies of the judgment appealed from, the notice of appeal, and a concise statement of the issues raised.

This statement must be submitted to the district court judge for approval within 21 days after filing of the notice of appeal. If the statement is approved, it is then filed with the clerk of the district court. The approved statement and inclusions constitute the record on appeal. Rule 3.05.

**PRACTICE NOTE:** To comply with Rule 6.02(a) and Rule 6.03(a), which require citation to the record in briefs, counsel should cite to appropriate sections of the agreed statement. For this reason, numbered paragraphs are advisable in the agreed statement.

### **§ 7.25 District Court Clerk's Preparation of the Record on Appeal**

The clerk of the district court compiles the record in one or more volumes within 14 days after notice from the appellate clerk that the appeal has been docketed. It is vitally important that attorneys wait for this record to be compiled and not use their own copies of district court documents.

**PRACTICE NOTE:** Citations to the record on appeal must take the reader to the exact spot in the record that is being cited. If a discrepancy

is noticed between what an attorney sees and what has already been cited in another brief, the attorney should immediately contact the Clerk of the District Court for assistance.

Rule 3.02(c) sets out in detail a list of items that must be included in the record for civil and criminal cases. These documents will automatically be included in the record on appeal by the Clerk of the District Court. Documents are filed chronologically when possible, and transcripts are added when filed by the court reporter, always as separate volumes. The clerk of the district court also prepares a table of contents showing the volume and page number of each document contained in the record on appeal. A copy of the table of contents is included in the record and also furnished to each party. If additions are made to the record after the initial compilation, an amended table of contents is furnished.

**PRACTICE NOTE:** A party cannot submit a brief without reference to the table of contents for citation to the record. See Rules 6.02(a) and 6.03(a). If the table of contents is not furnished or if it is incomplete, contact the district court clerk.

Practitioners can expedite the creation of a complete record on appeal by requesting additions and ordering transcripts as soon as possible. They need not wait for the clerk to prepare the table of contents before requesting additions.

## **§ 7.26 Request for Additions to the Record on Appeal**

The appellate courts do not review every pleading and transcript from the lower court. But any document in the “entire record”, as that term is defined by Rule 3.01(a), even if not specifically listed for inclusion under Rule 3.02, may be included in the record on appeal by written request of a party, **specifying with particularity** what is to be added. Rule 3.02(d).

**PRACTICE NOTE:** Although the district court clerk bears the responsibility of compiling the record on appeal, each party bears the affirmative

obligation of designating evidence within the record that supports all claims made on appeal. See *Hill v. Farm Bur. Mut. Ins. Co.*, 263 Kan. 703, Syl. ¶ 3, 952 P.2d 1286 (1998). Without the designation of error upon the record, an appellate court generally presumes the action of the trial court was proper.

Additions to the record on appeal should be promptly requested and may be made in one of three ways:

- If the record on appeal has not been transmitted to the clerk of the appellate courts, the party requesting the addition must serve the request on the clerk of the district court and, if the requested addition is an exhibit that is in a court reporter's custody, on the reporter, who must promptly deliver the exhibit to the clerk of the district court. Service should also be made on opposing counsel and the clerk of the appellate courts. The clerk of the district court must add the requested documents to the record on appeal. No court order is required. Rule 3.02(d)(3).
- If the record on appeal has been transmitted to the clerk of the appellate courts, which occurs after briefing is completed, the party requesting the addition must file a motion with the proper appellate court. See § 12.25, *infra*. Additions to the record on appeal may be made only upon an order of the clerk of the appellate courts or a justice or judge of an appellate court. If the requested addition is an exhibit that is in a court reporter's custody, the order granting the motion must be served on the reporter, who must promptly deliver the exhibit to the clerk of the district court. Rule 3.02(d)(4).
- Upon its own motion, an appellate court may order any or all additional parts of the entire record to be filed in the record on appeal. Rule 3.01(b)(2).

**PRACTICE NOTE:** It is to a party's advantage to add to the record on appeal prior to transmission of the record to the appellate court. If the document to be added is part of the entire record as defined in Rule 3.01(a), the district court clerk must add the document to the record on appeal; no discretion is exercised. Once the record is transmitted to the clerk of the appellate courts, the appellate court has discretion whether to grant the addition. Many motions for additions to the record on appeal are improperly filed in the appellate courts before transmission of the record. If such a motion is improperly filed, the appellate court probably will deny the motion.

### **§ 7.27 Transmission of the Record on Appeal**

If the record on appeal is in paper form, an attorney is responsible for returning the record on appeal to the clerk of the district court once that attorney's brief is filed. Rule 3.06(a). Once the last brief is filed, or upon expiration of time for filing of briefs, the clerk of the appellate court will notify the clerk of the district court to transmit the record on appeal to the appellate clerk. The district court clerk has 7 days from notification in which to transmit the record to the appellate clerk. Rule 3.07(a). A district court may transmit to the clerk of the appellate courts exhibits that are documents, photographs, or electronically stored information. A party wishing to include any other exhibit must prepare a photograph, not to exceed 8 ½ inches by 11 ½ inches, that fairly and accurately depicts the exhibit. This photograph must be served on opposing parties. Any objection must be made no later than 14 days after service of the photograph. The photograph and any objection must be submitted to the district court for approval. After approval, the clerk of the district court must include the photograph in the record on appeal. Rule 3.07(b). Any documents, photographs, or electronically stored information that is of unusual bulk or weight may only be sent after counsel has made advance arrangements with the clerk of the district court.

**PRACTICE NOTE:** Many appellate records are transmitted electronically to the clerk of the appellate courts. If there is an exhibit that cannot be sent electronically, counsel must ensure that the table of contents reflects the existence of a paper exhibit. Without that notice, the court will have no idea that the exhibit exists.

Before a record is transmitted to the clerk of the appellate courts, a party may file a written request with the district court clerk that part or all of the record on appeal be duplicated, and such duplication be retained by the district court clerk. Upon advance payment for such duplication, the clerk of the district court must copy those portions requested and then transmit the originals. Rule 3.08.

### **§ 7.28 Pro Se Litigants**

A pro se litigant may review the record on appeal at the district court clerk's office during the time that has been allotted for briefing. If the pro se litigant is unable to travel to the district court clerk's office, the litigant should use the table to contents to establish volume and page numbers for citations. If the record on appeal is electronic, the litigant should contact the clerk of the district court to see if it is possible to access the record on appeal online.

## **VII. CONSOLIDATION OF APPEALS**

### **§ 7.29 Generally**

Under Rule 2.06, two or more appeals may be consolidated into one appellate proceeding if one or more issues common to the appeals are so nearly identical that a decision in one appeal would appear to be dispositive of all the appeals, or the interest of justice would otherwise be served by consolidation. See § 12.26, *infra*. An appellate court may order consolidation upon a party's motion under Rule 5.01, or on its own motion after notice to the parties to show cause why the appeals should not



be consolidated. If consolidation is ordered, further proceedings in the consolidated appeal are conducted under the lowest appellate case number.

**PRACTICE NOTE:** A motion to consolidate should state with specificity the grounds for consolidation. Some grounds to consider are any factual similarities, the types of issues, whether the same parties are involved, and whether judicial economy will be served by the consolidation. In addition, a party should consider the status of each case. For example, if one case is ready for hearing and the other case was recently docketed, the court may be reluctant to consolidate the appeals.

Rule 2.05(a) recognizes that cases may be consolidated in the district court. If the cases are consolidated in the district court prior to docketing the appeal, then only one docket fee is required in order to docket the appeal.

Any party may file a separate brief and be heard separately upon oral argument.

**PRACTICE NOTE:** Additional time will not be allotted for argument unless granted on motion of a party. The parties must agree among themselves how to divide the time allotted or motion the court to allocate the time. Rule 7.01(e) and 7.02(f). See §§ 7.40, 7.43, *infra*.

Rule 2.06(e) also provides an alternative to consolidation. The appellate court may stay all proceedings in an appeal until common issues in a separately pending appeal are determined.

**PRACTICE NOTE:** The appellate court is more likely to order consolidation than to order a stay.

## VIII. MOTIONS

### § 7.30 Generally

Any application to an appellate court must be made in a written motion and cannot be contained within a brief. Rule 5.01(a). See also *Muzingo v. Vaught*, 18 Kan. App. 2d 823, 829, 859 P.2d 977 (1993). Each motion may contain only one subject and must state with particularity the grounds for the motion and the relief or order sought. Rule 5.01(a). Although the Rules permit a motion to be made orally at a hearing, the practice is discouraged as it does not give the opposing party time to respond. Cf. *In re Sylvester*, 282 Kan. 391, 395, 144 P.3d 697 (2006). Oral arguments are held on motions only when ordered by an appellate court. Rule 5.01(c).

**PRACTICE NOTE:** Chapter 12 of this handbook contains forms for most of the commonly filed motions. Litigants are encouraged to consult these forms before crafting their motions because the forms demonstrate the proper format for motions and, more importantly, the information an appellate court or the clerk of the appellate courts likely will need to rule on various motions.

A Kansas-licensed attorney in good standing must electronically file with the clerk of the appellate courts any motion submitted to the appellate courts. Rule 1.14(a)(1). A pro se litigant who is not a Kansas-licensed attorney in good standing cannot electronically file a motion. Instead, a pro se litigant must file the original motion and one copy of the motion with the clerk of the appellate courts. Rule 1.14(c).

**PRACTICE NOTE:** Additional copies of a motion are not required if the motion is filed by fax with the clerk of the appellate courts. The fax-filed motion must not exceed 10 pages in length. Rule 1.08(b), (e). An attorney subject to the mandatory electronic filing requirement under Rule 1.14 cannot utilize fax filing. Rule 1.08(a).

A party must serve a motion on all parties. Rule 1.11(a); K.S.A. 60-205. Any party may respond to a motion. Rule 5.01(b). Responses to motions must be electronically filed by Kansas-licensed attorneys in good standing. Rule 1.14(a)(1). Pro se litigants must file the original response and one copy of any response. Rule 1.14(c). Responses to motions for involuntary dismissal or motions for summary disposition must be filed no later than 14 days after the party is served with the motion; responses to all other motions must be filed no later than 7 days after service of the motion. Rule 5.01(b); Rule 5.05(a); Rule 7.041.

**PRACTICE NOTE:** The 7 and 14 days for response are calendar days and are counted from the date of service indicated on the certificate of service. K.S.A. 60-206(a). If service is made under K.S.A. 60-205(b)(2)(C) (mail) or K.S.A. 60-205(b)(2)(D) (leaving with the clerk), three mail (calendar) days are added to the response time. K.S.A. 60-206(d). See § 7.9, *supra*. This mail rule applies only if service is made via mail or by leaving it with the clerk if the person has no known address; if service is made electronically or via fax, the three mail days are not added to the response time. If no provision is made for a reply, a party must file a motion with the appropriate appellate court seeking permission to file a reply.

After a party responds or the time to respond has passed, the appellate court or clerk of the appellate courts may rule on the motion. The clerk has authority to rule on unopposed motions: for an extension of time, to correct a brief, to substitute a party, or to withdraw a brief to make corrections. Rule 5.03(a). Additionally, either the clerk or the appellate court can grant a party's motion for extension of time not exceeding 20 days without waiting for the opposing party to respond. Rule 5.02(d).

**PRACTICE NOTE:** If all opposing parties do not object to a motion and wish to waive response time, the parties should file a joint motion. Even if the movant states in the motion that the opposing parties do not object to the motion, the appellate court or clerk will wait until the response time has run unless the parties file a joint motion.

### § 7.31 Motion for Additional Time

A party required or permitted to perform an action by a deadline, such as filing a brief or responding to a motion, may request additional time. Rule 5.02(a). A motion for extension of time must be filed before the original deadline to act has expired and state: the present due date, the number of extensions previously requested, the amount of additional time needed, and the reason for the request. Rule 5.02(a). See § 12.28, *infra*.

While the clerk may rule on an unopposed motion for additional time, only an appellate court may grant an untimely motion for extension of time. An untimely motion must state reasons constituting excusable neglect for filing the motion after the time to act expired. Rule 5.02(c); K.S.A. 60-206(b)(1)(B).

**PRACTICE NOTE:** Each appellate court limits the number of motions for extension of time on which the clerk may act. That number has never been higher than three.

Generally, the appellate courts or clerk grant an extension the length of time the rules originally allowed for filing a document. For example, an appellee's brief is due no later than 30 days after service of an appellant's brief. Any extension of this due date, absent exceptional circumstances, will be for 30 days.

### § 7.32 Motions Relating to Corrections in Briefs

If a party discovers its brief contains errors, the party may file a motion to substitute a corrected brief. See § 12.32, *infra*. The motion must be filed before the appeal is set for hearing or placed on summary calendar. If the motion is granted, the

movant must file a corrected brief by the date specified in the order.

### § 7.33 Motion to Substitute Parties

A motion to substitute parties must give the reasons why substitution is proper. See § 12.34, *infra*.

### § 7.34 Motion for Permission to File *Amicus Curiae* Brief

An individual or entity may seek to file a brief as an *amicus curiae* by filing a motion with the clerk of the appellate courts and serving it on all parties. Rule 6.06(a). See § 12.39, *infra*.

**PRACTICE NOTE:** An application for permission to file an *amicus curiae* brief should describe the individual or entity seeking to file the brief, the interest in the appeal, and the reason input would be helpful. Additionally, because an *amicus curiae* should not delay the appeal's resolution, the request should be filed as early in the appeal process as possible.

If an appellate court grants the motion, the brief must be filed no later than 30 days before oral argument and served on all parties. Rule 6.06(b). Parties are permitted to respond to an *amicus curiae* but must do so no later than 21 days after the brief is filed. Rule 6.06(c). An *amicus curiae* is not entitled to oral argument. Rule 6.06(d).

### § 7.35 Motion to Consolidate Appeals

A party may file a motion to consolidate multiple appeals when one or more common issues are so nearly identical that a decision in one appeal is dispositive of another appeal or when the interests of justice are served. Rule 2.06(a). See §§ 7.29, *supra*, and 12.26, *infra*.

### **§ 7.36 Motion to Transfer an Appeal to the Supreme Court**

A party may file a motion requesting transfer to the Supreme Court of an appeal pending in the Court of Appeals. The motion must be filed no less than 30 days after service of the notice of appeal. The motion must: state the nature of the appeal; demonstrate the appeal is within the Supreme Court's jurisdiction; and identify a ground for transfer. Grounds for transfer include: the Court of Appeals lacks jurisdiction; the appeal has significant public interest; the legal question presented is of major public significance; or expeditious administration of justice requires transfer due to the status of the Court of Appeals and Supreme Court dockets. See Rule 8.02. See also K.S.A. 20-3016(a); § 12.27, *infra*.

## **IX. VOLUNTARY AND INVOLUNTARY DISMISSALS**

### **§ 7.37 Voluntary Dismissal**

Before an opinion is filed in an appeal, the parties may agree to dismiss the appeal by stipulation. If the parties so agree, the appellant must file a notice of the stipulation of dismissal with the clerk of the appellate courts. Or, an appellant can unilaterally dismiss its appeal by filing a notice of voluntary dismissal with the clerk of the appellate courts and serving the notice on all parties. Rule 5.04(a). A dismissal may be either with or without prejudice and should be specified in the filing. See § 12.37, *infra*. If an appeal involves multiple appellants, a dismissal of one party's appeal does not affect any other party's appeal. Rule 5.04(a).

If an appellant unilaterally dismisses the appeal, after motion and reasonable notice, the court may assess against the appellant the appellee's costs and expenses if they could have been assessed had the appeal not been dismissed and the judgment or order affirmed. Rule 5.04(b).

### § 7.38 Involuntary Dismissal

An appellate court may dismiss an appeal due to a substantial failure to comply with the Supreme Court Rules or any other reason requiring dismissal by law. Rule 5.05(a); see *Vorhees v. Baltazar*, 283 Kan. 389, 393, 153 P.3d 1227 (2007). The most common reason for an involuntary dismissal is a party's failure to complete a required step in the appellate process, such as failing to file a brief or a motion for extension of time; failing to file a timely notice of appeal; appealing from a non-appealable order; appealing moot issues; or acquiescing to dismissal. See § 12.38, *infra*. A criminal appeal may be dismissed under the "fugitive disentitlement doctrine" if a defendant has absconded from the jurisdiction of the court. See *State v. Raiburn*, 289 Kan. 319, 331-33, 212 P.3d 1029 (2009).

The court may dismiss an appeal on its own motion no earlier than 14 days after it issues a show cause order to the appellant. Or a party may file a motion for involuntary dismissal with at least 14 days' notice to the appellant. Rule 5.05(a).

If the appeal is dismissed, after motion and reasonable notice, the court may assess against the appellant the appellee's costs and expenses if they could have been assessed had the appeal not been dismissed and the judgment or order had been affirmed. Rule 5.05(c).

## X. APPEALS PLACED ON SUMMARY CALENDAR

### § 7.39 Summary Calendar Screening and Procedure

After docketing, each appeal is screened. If the appeal does not present a new question of law and oral argument would be neither helpful nor essential to a decision, the appeal will be placed on summary calendar and the clerk will notify the parties. Rule 7.01(c); Rule 7.02(c). At least 30 days before the date of the docket, the clerk will mail each party a docket containing a list of the summary calendar appeals. Rule 7.01(d); Rule 7.02(e).



If, after receiving a summary calendar notice, a party believes oral argument would be helpful to the court, the party may file a motion for oral argument. The motion must be served on all parties and filed with the clerk no later than 14 days after the clerk mails notice of calendaring. The motion must state the reason oral argument would be helpful to the court. Rule 7.01(c)(4); Rule 7.02(c)(4). If the appellate court grants oral argument, ordinarily 15 minutes is allotted to each side unless there is reason to grant 20, 25, or 30 minutes. Rule 7.01(c)(4); Rule 7.02(c)(4).

## **XI. APPEALS SCHEDULED FOR ORAL ARGUMENT**

### **§ 7.40 Requesting Additional Oral Argument Time**

If an appeal is scheduled for oral argument, the appellant and appellee are traditionally allotted 15 minutes of argument per side. If a party believes additional time is warranted, it may request 20, 25, or 30 minutes by printing “oral argument” on the lower right portion of the front cover of the party’s initial brief, followed by the desired amount of time. Rule 7.01(e)(2); Rule 7.02(f)(2). See sample brief in Appendix B. If the parties are granted additional oral argument time, it will be indicated on the docket sheet.

### **§ 7.41 Suggesting a Hearing Location Before the Court of Appeals**

Because panels of the Court of Appeals hold oral arguments throughout the state, a party may file a suggestion requesting that its appeal be heard in a particular location. The suggestion should be filed no later than the deadline for filing the appellee’s brief. Rule 7.02(d)(3).

### **§ 7.42 Notice of Hearing Date**

At least 30 days before the hearing date, the clerk of the appellate courts must submit to all parties a docket sheet showing the time and location of the hearing. Rule 7.01(d); Rule 7.02(e). The docket sheet will be e-filed and will indicate the amount of time set for argument.

**PRACTICE NOTE:** The appellate courts assume attorneys will be available on the date and time an argument is scheduled. If a conflict cannot be resolved, contact the Chief Judge's Office for Court of Appeals dockets or the clerk of the appellate courts for Supreme Court dockets. The courts are more likely to agree to change a date or time than to remove an appeal from the docket. The best practice is to notify the clerk of the appellate courts in advance of known conflicts with scheduled hearing dates in either the Court of Appeals or the Supreme Court and avoid having a case set on a date when the attorney is not available.

### **§ 7.43 Procedure at Oral Argument**

In the Supreme Court, the clerk of the appellate courts or the clerk's designee calls the daily docket in open court at the beginning of each day's session. Failure of a party's counsel to be present at the call of the day's docket constitutes a waiver of oral argument. Rule 7.01(d).

**PRACTICE NOTE:** Although the docket is not called at the beginning of each day's session before panels of the Court of Appeals, counsel are expected to be present at the start of the docket.

The amount of oral argument time allotted to each side is indicated on the oral argument calendar. Rule 7.01(e)(1); Rule 7.02(f)(1). If there are multiple parties on either side that are not united in interest and are separately represented, the court on motion will allot time for separate arguments. Parties that are united in interest should divide the allotted time by mutual agreement. If the parties cannot agree on the division of time, such questions should be settled by motion prior to the hearing date. Rule 7.01(e)(5); Rule 7.02(f)(5).

**PRACTICE NOTE:** When the Supreme Court sits in its courtroom in Topeka, the clerk operates a timer that tracks the oral argument time remaining. The timer is located on the podium and is visible to the speaking party. Parties must keep track of their own time when appearing before a panel of the Court of Appeals.

The appellant may reserve for rebuttal a portion of the time granted by making an oral request at the time of the hearing. Rule 7.01(e)(3); Rule 7.02(f)(3).

**PRACTICE NOTE:** If an appellant wants to reserve rebuttal time, it should be requested at the start of appellant's oral argument, or it may be considered waived. A cross-appellant is not ordinarily permitted to reserve rebuttal time.

A party that does not file a brief will not be permitted oral argument. Rule 7.01(e)(1); Rule 7.02(f)(1). Out-of-state attorneys may be permitted to argue if the court grants a motion for admission *pro hac vice* prior to the argument date. See Rule 1.10.

During the hearing, the court on its own may extend the time for oral argument. Rule 7.01(e)(4); Rule 7.02(f)(4).

## **XII. APPELLATE COURT DECISIONS AND POST-DECISION PROCEDURE**

### **§ 7.44 Decisions of the Appellate Courts**

Decisions of the appellate courts are announced by the filing of the opinions with the clerk of the appellate courts. Decisions can be announced any time they are ready; however, decisions generally are filed each Friday. On the date of filing, the clerk will notify Kansas-licensed attorneys of opinions via the electronic filing system. The clerk will send one copy of the decision to any party that has appeared in the appellate court but has no counsel of record. In appeals from the district court, the clerk will

send a copy of the opinion to the judge of the district court from which the appeal arose. A certified copy of the opinion is mailed to the clerk of the district court when the mandate issues. Rule 7.03(a).

**PRACTICE NOTE:** Parties are notified of Supreme Court and Court of Appeals opinions at 9:30 a.m. on the day of filing. Parties may also contact the appellate clerk's office to inquire whether an opinion has been filed. Published appellate opinions are released to the public via posting at 10:30 on the day of filing on the Kansas Judicial Branch website <http://kscourts.org/Cases-and-Opinions/opinions/>.

Opinions of the appellate courts are released in the form of memorandum or formal opinions in accordance with K.S.A. 60-2106. Rule 7.04(b) sets out the standards for publication of an opinion in the official reports. Any interested person who believes that an unpublished opinion of either court meets those standards and should be published may file a motion for publication with the Supreme Court. The motion must state the grounds for such belief, be accompanied by a copy of the opinion, and be served on all parties. Rule 7.04(e).

All memorandum opinions (unless otherwise required to be published) are marked "Not Designated for Publication." Unpublished opinions are not favored for citation and may be cited only if the opinion has persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court and would assist the court in disposition of the issue. See Rule 7.04(g)(2)(B). See also *State v. Urban*, 291 Kan. 214, 223, 239 P.3d 837 (2010) (discussing Rule 7.04); *Casco v. Armour Swift-Eckrich*, 34 Kan. App. 2d 670, 680, 128 P.3d 401 (2005), *aff'd* 283 Kan. 508, 154 P.3d 494 (2007) (discussing and applying Rule 7.04).

**PRACTICE NOTE:** When citing an unpublished opinion, a party must attach the opinion to any document, pleading, or brief that cites the opinion. Rule 7.04(g)(2)(C). When citing an unpublished opinion from another jurisdiction, a party should include that jurisdiction's rule allowing citation.

### § 7.45 Summary Disposition

By citing Rule 7.041 and the controlling decision, an appellate court may summarily dispose of an appeal that appears to be controlled by a prior appellate decision. The court may do this on its own motion or upon the motion of a party. When the court decides on its own to issue an order summarily disposing of an appeal, the court must give the parties 14 days to show cause why the order should not be filed. Rule 7.041(a). If a party moves for summary disposition under Rule 7.041(b), the motion must be served on all parties, and the nonmoving parties may file a response no later than 14 days after being served. Rule 7.041(b).

An appellate court may also affirm by summary opinion if it determines after arguments or submission on the briefs that no reversible error of law appears and one of the six conditions under Rule 7.042(b) applies.

### § 7.46 Motion for Rehearing or Modification

A motion for rehearing or modification of a Court of Appeals decision may be served and filed no later than 14 days after the decision is filed. Rule 7.05(a). A motion for rehearing or modification of a Supreme Court case may be served and filed no later than 21 days after the decision is filed. Rule 7.06(a). The motion for rehearing or modification should be concise and clearly identify how the court erred or the points of law or fact that the movant feels the court overlooked or misunderstood. See § 12.41, *infra*. A copy of the appellate court's opinion must be attached to the motion. Rule 7.05(a); Rule 7.06(a).

The timely filing and service of a motion for rehearing or modification in an appellate court stays the issuance of the mandate until the appellate court rules on the motion. Rule 7.05(b); Rule 7.06(b). An order granting rehearing suspends the effect of the original decision until the matter is decided on rehearing. Rule 7.05(c); Rule 7.06(c). See *Martinez v. Milburn Enterprises, Inc.*, 290 Kan. 572, 614-15, 233 P.3d 205 (2010) (Johnson, J., concurring) (discussing effect of Rule 7.06 when rehearing is granted).

**PRACTICE NOTE:** Filing a motion for rehearing or modification from a decision of the Court of Appeals is not a prerequisite for review of that decision by the Supreme Court and does not extend the time for filing a petition for review. See K.S.A. 20-3018(b); Rule 7.05(b). See also Rule 8.03(b)(2)(A) (noting that if a petition for review is filed, the Court of Appeals retains jurisdiction over the appeal and the Supreme Court will take no action on the petition for review until the Court of Appeals has made a final determination of all motions filed under Rule 7.05).

### § 7.47 Appeal as a Matter of Right from Court of Appeals

Any party may appeal as a matter of right to the Supreme Court from a final Court of Appeals decision when a question involving the federal or state constitution arises for the first time as a result of such decision. K.S.A. 60-2101(b); K.S.A. 22-3602(e); Rule 8.03(g)(1). The party appealing as a matter of right must file a petition for review, in accordance with Rule 8.03, within 30 days of the Court of Appeals decision. The 30-day period is jurisdictional and cannot be extended. Rule 8.03(b)(1).

**PRACTICE NOTE:** When petitioning to the Supreme Court as a matter of right from a final decision of the Court of Appeals, the petition should be identical in format to a petition for discretionary review under Rule 8.03(g)(2), but the cover title should read Petition for Review as a Matter of Right.

### § 7.48 Petition for Review

Any party aggrieved by a Court of Appeals decision may petition the Supreme Court for review under K.S.A. 20-3018(b) and Rule 8.03. See K.S.A. 60-2101(b) (providing supreme court with jurisdiction to review court of appeals decisions). The granting of review is discretionary, and the vote of three justices is required to grant the petition. Rule 8.03(g)(2).

### § 7.49 Timing of Petition for Review

The petition for review must be filed no later than 30 days after the filing of the Court of Appeals decision. This 30-day period is jurisdictional and cannot be extended. K.S.A. 20-3018(b); Rule 8.03(b)(1); *Kargus v. State*, 284 Kan. 908, 925, 169 P.3d 307 (2007). The 3-day mail rule does not apply to the deadline for filing a petition for review. The petitioner must file the petition with the clerk of the appellate courts and attach a copy of the Court of Appeals decision to the petition. Rule 8.03(b)(1).

**PRACTICE NOTE:** The filing of a motion for rehearing in the Court of Appeals under Rule 7.05 does not extend the 30-day jurisdictional time period for filing a petition for review.

### § 7.50 Content of Petition for Review

The petition for review, cross-petition, or conditional cross-petition must contain the following items in order: a prayer for review explaining why review is warranted; the date of the Court of Appeals decision; a statement of the issues the petitioner wishes to be decided by the Supreme Court; a short statement of relevant facts; a short argument, including authority, stating the reason review is warranted; and an appendix containing a copy of the Court of Appeals decision. Rule 8.03(b)(6). The appendix also should include copies of other documents from the appellate record that are relevant to the issues presented for review. See Rule 8.03(b)(6)(F).



The statement of the issues in a petition for review, cross-petition, or conditional cross-petition should not merely repeat the issues raised in the Court of Appeals brief; rather, the issues must be tailored to address why review is warranted. Rule 8.03(b)(6)(C). The court will not consider issues not raised before the Court of Appeals or issues not presented or fairly included in the petition for review, cross-petition, or conditional cross-petition. Rule 8.03(b)(6)(C)(i); *Russell v. May*, 306 Kan. 1058, 1066, 400 P.3d 647 (2017).

Rule 8.03(b)(6)(E) provides a nonexhaustive list of reasons the court may grant review. Petitioners should build arguments around these reasons. Failure to include an argument in a petition for review showing how the Court of Appeals erred or why review is warranted may result in the summary denial of a petition for review. Rule 8.03(b)(6)(E).

**PRACTICE NOTE:** The purpose of the petition, cross-petition, conditional cross-petition, response, and reply is to identify the reason the Supreme Court should exercise its discretion to grant or deny review. Rule 8.03(a)(1). That purpose is not served if the filings merely repeat arguments made to the Court of Appeals.

A helpful checklist and sample petition for review can be found in Appendix B.

## § 7.51 Grant or Denial of Review

The Supreme Court considers several factors in determining whether to grant review: the public importance of the question presented; the existence of a conflict between the Court of Appeals decision and prior appellate decisions; the need for exercising Supreme Court supervisory authority; and the final or interlocutory character of the opinion to be reviewed. K.S.A. 20-3018(b).

## § 7.52 Cross-Petitions and Responses

A cross-petition or conditional cross-petition must be filed no later than 30 days from the date the petition for review is filed. Rule 8.03(c)(1). The 3-day mail rule does not apply to this deadline. Responses to a petition or cross-petition must be filed no later than 30 days after the petition, cross-petition, or conditional cross-petition is filed. The adverse party is not required to respond. Rule 8.03(d).

**PRACTICE NOTE:** The decision not to file a response to a petition for review is not an admission that the petition should be granted. Rule 8.03(d)(4). The purpose of a cross-petition is to seek review of holdings the Court of Appeals decided adversely to the cross-petitioner. Rule 8.03(c)(3). The purpose of a conditional cross-petition is to seek review of specific claims or issues only if the court grants the petition for review. Rule 8.03(c)(4). Rule 8.03(c)(3) and (4) detail when the cross-petitioner and conditional cross-petitioner must raise issues to preserve them for review. Failure to file a cross-petition or conditional cross-petition challenging a holding or ruling decided adversely by the Court of Appeals results in waiver of that challenge. *State v. McBride*, 307 Kan. 60, 62-63, 405 P.3d 1196, 1199 (2017) (State waived review of Court of Appeals' finding of prosecutorial error by failing to file cross-petition); *State v. Gray*, 306 Kan. 1287, 1292-93, 403 P.3d 1220 (2017) (preservation issue decided by Court of Appeals waived by not filing a cross-petition); *State v. Keenan*, 304 Kan. 986, 992-93, 377 P.3d 439 (2016) (preservation issue waived).

### **§ 7.53 Page Limits**

The petition for review, cross-petition, conditional cross-petition, and response must not exceed 15 pages in length (excluding the cover, table of contents, appendix, and certificate of service) and must conform to applicable format provisions of Rule 6.07. See Rule 8.03(b)(3), (c)(2), and (d)(2).

### **§ 7.54 Procedures Following Granting of Review**

If review is granted, the Supreme Court may limit the issues to be considered. Rule 8.03(i). Unless the court orders otherwise, the case will be considered on the basis of the record before the Court of Appeals, the petition for review, and any cross-petition, conditional cross-petition, response, or reply. Within 14 days of the date of the order granting review, the parties must file with the clerk of the appellate courts a copy of the paper briefs, if any, originally filed with the Court of Appeals. Rule 8.03(i)(2).

No later than 30 days after the order granting review, any party may file a supplemental brief. Any opposing party then has 30 days to file a response brief. Supplemental briefs are limited to one-half the page limits set out in Rule 6.07. Rule 8.03(i)(3).

### **§ 7.55 Oral Argument**

The party whose petition for review was granted argues first in the Supreme Court and may reserve time for rebuttal. Rule 8.03(i)(4). When the Supreme Court has granted both parties' petitions for review, the party who argues first and gets rebuttal time will be the same party who argued first before the Court of Appeals.

### **§ 7.56 Effect on Mandate**

The timely filing of a petition for review stays the issuance of the mandate by the Court of Appeals. Rule 8.03(k). During the period for filing a petition for review and while the petition for review is pending, the Court of Appeals opinion has no force or effect and the mandate will not issue until disposition of the appeal

on review. If a petition for review is granted in part, a combined mandate will issue when appellate review is concluded, unless otherwise directed by the Supreme Court. Rule 8.03(k).

**PRACTICE NOTE:** Care should be taken when citing a Court of Appeals opinion for persuasive authority before the mandate has issued. The citation to any such decision must note that the decision is not final and may be subject to review or rehearing. See Rule 8.03(k)(1).

### **§ 7.57 Other Dispositions**

Even after review is granted, the Supreme Court may dispose of the appeal in a manner other than issuing a decision. See Rule 8.03(j). After a decision is issued in an appeal in which review has been granted, the parties may petition for rehearing in accordance with Rule 7.06.

### **§ 7.58 Denial of Review**

If review is denied, the decision of the Court of Appeals is final as of the date the petition is denied, and the clerk of the appellate courts must issue the mandate under Rule 7.03(b). Rule 8.03(h) and (k). The denial of a petition for review imports no opinion on the merits of the appeal, and the denial is not subject to a motion for reconsideration. Rule 8.03(h).

### **§ 7.59 Summary Petition for Review**

When controlling authority is dispositive of an entire appeal or no substantial question is presented by the appeal, a party may file a summary petition for review under Rule 8.03A in lieu of a petition for review under Rule 8.03. Rule 8.03A(a). A summary petition for review is due no later than 30 days after the date of the decision of the Court of Appeals. Rule 8.03A(b)(1). As with a petition for review filed under Rule 8.03, the 30-day deadline to file a summary petition for review is jurisdictional and cannot be extended. Rule 8.03A(b)(1). The summary petition for review must include citation to the controlling authority that

is dispositive of the issues raised or an explanation of why no substantial question is presented. Rule 8.03A(b)(4)(E).

If controlling case law is dispositive of only one issue in a multiple-issue petition for review, a petitioner may not file a summary petition for review under Rule 8.03A. Rule 8.03(b)(5).

A party opposing a summary petition for review may file a response. Rule 8.03A(c).

### **§ 7.60 Exhaustion**

In all appeals from criminal convictions or post-conviction relief on or after July 1, 2018, a party is not required to petition for Supreme Court review from an adverse Court of Appeals decision to exhaust all available state remedies. Rather, when a claim has been presented to the Court of Appeals and relief has been denied, the party is deemed to have exhausted all available state remedies. Rule 8.03B(a).

Rule 8.03B(b) provides a savings clause for the dismissal or denial of a federal habeas corpus petition based on a finding that Rule 8.03B is ineffective. Rule 8.03B(b).

## **XIII. COSTS AND ATTORNEY FEES**

### **§ 7.61 Costs**

In any appeal in which they are applicable, all fees for service of process, witness fees, reporter's fees, fees and expenses of a master or commissioner appointed by the appellate court, and any other proper fees and expenses will be separately assessed. Rule 7.07(a)(1). When any such fees and expenses are anticipated in an appeal, the appellate court may require the parties to make advance deposits. Rule 7.07(a)(3).

Unless fixed by statute, an appellate court must approve the fees and expenses assessed. Rule 7.07(a)(2). Further, an appellate court may apportion and assess any part of the original docket fee, transcript expense, and any additional fees

and expenses allowed in the appeal against any party as justice may require. Rule 7.07(a)(4).

When a district court's decision is reversed, the mandate will direct that the appellant recover the original docket fee and any expenses for transcripts. Rule 7.07(a)(5).

## § 7.62 Attorney Fees

Appellate courts may award attorney fees for services on appeal in any case in which the district court had authority to award attorney fees. See Rule 7.07(b)(1). See also *In re Estate of Strader*, 301 Kan. 50, 61, 339 P.3d 769 (2014) (attorney fees cannot be awarded absent statutory authority or agreement); *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 167-68, 298 P.3d 1120 (2013) (holding that, if a prevailing party on appeal would be entitled to appellate attorney fees under a statute or contract, the party must file a motion for appellate attorney fees with the appellate court under Rule 7.07(b) in order to preserve the right to those fees). Any motion for attorney fees on appeal must be made under Rules 5.01 and 7.07(b). An affidavit must be attached to the motion and must specify the nature and extent of the services rendered, the time expended on the appeal, and the factors considered in determining the reasonableness of the fee under Kansas Rule of Professional Conduct 1.5. Rule 7.07(b)(2). See also § 12.42, *infra*.

**PRACTICE NOTE:** Many motions for attorney fees do not include the affidavit required under Rule 7.07(b). Without it, the appellate court has no information by which to evaluate the motion and grant an award. See *Fisher v. Kansas Crime Victims Comp. Bd.*, 280 Kan. 601, 617, 124 P.3d 74 (2005) (failure to file motion in compliance with Rules 5.01 and 7.07 prevents appellate court from awarding attorney fees). Failure to include the affidavit required by Rule 7.07(b) could lead to the summary denial of the motion.

A motion for attorney fees must be filed with the clerk of the appellate courts no later than 14 days after oral argument. If

oral argument is waived, the motion must be filed no later than 14 days after either the date of the waiver or the date of the *letter* assigning the appeal to a non-argument calendar, whichever is later. Rule 7.07(b)(2).

**PRACTICE NOTE:** If a party intends to petition for review of a Court of Appeals decision by the Supreme Court, the party must file a timely motion under Rule 7.07(b) following oral argument in the Court of Appeals to preserve a right to fees incurred before the Court of Appeals. *In re Estate of Strader*, 301 Kan. 50, 62-63, 339 P.3d 769 (2014); *Thoroughbred Assocs. L.L.C. v. Kansas City Royalty Co.*, 297 Kan. 1193, 1215, 308 P.3d 1238 (2013).

If the appellate court finds that an appeal has been taken frivolously or only for purposes of harassment or delay, it may assess against an appellant or appellant's counsel, or both, a reasonable attorney fee for appellee's counsel. A motion for attorney fees due to a frivolous appeal, harassment, or delay must comply with Rule 7.07(b). The mandate will include a statement of any such assessment, or in an original matter, the clerk of the appellate courts may issue an execution of assessment. Rule 7.07(c).

On its own motion, or on the motion of an aggrieved party filed no later than 14 days after an assessment of costs under Rule 7.07, the appellate court may assess against a party or the party's counsel, or both, all or part of the cost of the trial transcript. To do so, the court must find the transcript was prepared as the result of an unreasonable refusal to stipulate under Rule 3.03 to the preparation of less than a complete transcript of the proceedings in the district court. Rule 7.07(d).



## **XIV. MANDATE**

### **§ 7.63 Generally**

The mandate is the final, formal order of the appellate court to the district court, disposing of the judgment of the district court and assessing costs. It is the judgment of the appellate court but is enforced through the district court. The clerk of the appellate courts issues the mandate to the clerk of the district court for filing, accompanied by a certified copy of the opinion. See K.S.A. 60-2106(c); Rule 7.03. Copies of the mandate are not sent to counsel.

### **§ 7.64 Supreme Court**

Mandates from the Supreme Court are issued 7 days after the 21-day time period to file a motion for rehearing or modification passes; the entry of an order denying a motion for rehearing or modification; or any other event that finally disposes of an appeal. See Rule 7.03(b)(1)(A). If a motion for rehearing or modification is granted, the mandate is issued in conjunction with the decision on the rehearing.

### **§ 7.65 Court of Appeals**

Mandates from the Court of Appeals are held for 30 days to allow for the filing of a motion for rehearing (14-day time limit under Rule 7.05) or a petition for review (30-day time limit under Rule 8.03). If a rehearing is granted, the mandate is held 30 days after the new opinion is filed to allow for a petition for review. Filing a timely petition for review stays the issuance of a mandate. Rule 8.03(k). If review is denied, the mandate issues on the date of denial. Rule 8.03(k). If the petition for review is granted, the mandate is stayed until the Supreme Court files its opinion and the time for a motion for rehearing by that court has passed.

## **§ 7.66 Stays After Decision**

In criminal appeals and appeals from post-conviction actions in criminal cases, the issuance of the appellate mandate is automatically stayed when a party files a notice with the appellate court that it intends to file a petition for writ of certiorari to the United States Supreme Court and the time for filing such a petition has not expired. K.S.A. 22-3605(b)(1). The notice must be filed in the appellate court that issued the decision. If the appellate mandate has already been issued when a party files its notice of intent to file a petition for writ of certiorari to the United States Supreme Court, the appellate court must withdraw its mandate and stay issuance. K.S.A. 22-3605(b)(2). In civil cases, a party should file a motion to stay the issuance of the mandate in the court that issued the decision if the party intends to seek review in the United States Supreme Court. When the Supreme Court denies a petition for review of a Court of Appeals decision, the notice of intent or motion for stay should be filed in the Court of Appeals.

Ordinarily, a party must seek a stay from the state court before the United States Supreme Court will entertain an application for a stay. See United States Supreme Court Rule 23(3).



# CHAPTER 8

## Standards and Scope of Appellate Review

### I. INTRODUCTION

Whether drafting a brief or analyzing the best issues to raise in an appeal, it is helpful to walk through the issue in the same way that an appellate court analyzes a case. An appellate court’s analysis typically follows a three-step process: “(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.” *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012). Courts refer to these three steps as reviewability, standard of review, and reversibility. See *Williams*, 295 Kan. at 515-16.

This chapter provides a brief discussion of each step. However, it does not cover the gamut of all their exceptions or nuances. Instead, this chapter seeks to provide practitioners with a basic understanding of each step. Naturally, the chapter begins with a discussion of the first step—reviewability.

## II. REVIEWABILITY

Before an appellate court can consider the merits of an appeal, it must first determine that it may review the issues raised by the appellant. Typically, the reviewability inquiry concerns whether the appellate court has jurisdiction to hear the appeal and whether the issues raised were properly preserved in the trial court. *Williams*, 295 Kan. at 510, 515. This Part focuses on the latter question, and also notes a few common mistakes that can render reviewable and potentially meritorious arguments unsuccessful.

**PRACTICE NOTE:** It is important to remember that jurisdiction and preservation are distinct concepts. Often, the two are blurred together. Nonetheless, they remain distinct concepts and should be treated as such.

### § 8.1 Error Preservation

Under Kansas Supreme Court Rule 6.02(a)(5), an appellant must point to the specific location in the record where she raised the issue being appealed and where the court ruled on that issue. In requiring these citations, the court has codified a standard prudential rule: if an issue was not raised in the trial court, it cannot be raised on appeal. See *Ruhland v. Elliot*, 302 Kan. 405, 417, 353 P.3d 1124 (2015); *State v. Williams*, 298 Kan. 1075, 1085-86, 319 P.3d 528 (2014). This rule is often referred to as preservation or, more specifically, error preservation. The rationale behind error preservation is simple: a trial court cannot wrongly decide an issue that was never before it. See *State v. Williams*, 275 Kan. 284, 288, 64 P.3d 353 (2003).

Still, like any other legal tenet, this rule has exceptions. For instance, appellate courts may consider an issue that was not properly preserved when: (1) the newly asserted claim involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong

reason. *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008); see also *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015) (holding that these three exceptions apply to constitutional issues not raised before the trial court in criminal cases).

But practitioners should beware. If they intend to raise an issue for the first time on appeal, they must discuss why the court should hear it. Failure to identify an applicable exception likely will result in the appellate court refusing to hear the issue. *Godfrey*, 301 Kan. at 1043-44.

Also, some issues that are not properly preserved may be considered on appeal without falling into one of the three categories just mentioned. For example, an appellant may raise the issue of a trial court's failure to give a jury instruction for the first time on appeal if that failure constitutes clear error. K.S.A. 22-3414(3); *State v. Williams*, 295 Kan. 506, 515, 286 P.3d 195 (2012). As always, researching each appeal's particular issues is wise.

One final note on preservation: at times, it is debatable whether an issue was actually raised in the trial court. In such circumstances, a lower court's decision on whether an issue was properly preserved is subject to unlimited review. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018).

## **§ 8.2 Other Mistakes Affecting Reviewability**

Though failure to preserve an issue is a leading reason many issues are not heard on appeal, a few other scenarios can lead an appellate court to refuse to entertain a potentially meritorious issue or argument. Four of the most common scenarios are discussed here.

### Acquiescence

If a party "voluntarily complies with a judgment by assuming the burdens or accepting the benefits of the judgment contested on appeal," then the doctrine of acquiescence holds that the appellate court does not have jurisdiction to hear her appeal. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1271, 136 P.3d

457 (2006). However, exceptions to this rule exist and should be consulted before rejecting a potentially viable appellate issue.

Whether a party has acquiesced to a judgment is subject to unlimited review. *Alliance Mortgage Co. v. Pastine*, 281 Kan. at 1271.

### Invited Error

Typically, a party “cannot complain on appeal about a claimed error that was invited.” *State v. Sasser*, 305 Kan. 1231, 1235, 391 P.3d 698 (2017); see also *Water Dist. No. 1 of Johnson Co. v. Prairie Center Dev.*, 304 Kan. 603, 618, 375 P.3d 304 (2016). This rule is often called the invited error doctrine. When it applies, appellate courts will refuse to consider the party’s claim of error. *State v. Brown*, 306 Kan. 1145, 1166, 401 P.3d 611 (2017). But, the invited error doctrine will not prevent a court from hearing claims of structural, constitutional error, *Sasser*, 305 Kan. at 1235, or jurisdictional error, *In re Tax Appeal of Professional Engineering Consultants*, 281 Kan. 633, 639, 134 P.3d 661 (2006). See also *State v. McCarley*, 287 Kan. 167, 174-76, 195 P.3d 230 (2008) (holding that the invited error doctrine does not apply to the question of whether a criminal sentence is illegal).

What exactly constitutes inviting an error is open to some debate. There is no bright-line rule that clearly defines what actions constitute inviting an error. *Sasser*, 305 Kan. at 1235. But a few rules of thumb exist, though their usefulness may be questionable. For instance, courts agree that, in the context of jury instructions, the doctrine only applies “when the party fails to object and invites the error, unless the error is structural.” *State v. Logsdon*, 304 Kan. 3, 31, 371 P.3d 836 (2016). And courts also agree that the doctrine applies when a party “actively pursues what is later argued to be an error.” *Sasser*, 305 Kan. at 1235. What that means will vary case by case. Beyond these two rules, however, little definition or guidance exists. Looking for a case featuring similar facts is likely the best method for arguing that the invited error doctrine does not apply.

Whether the invited error doctrine applies is subject to unlimited review. *Sasser*, 305 Kan. at 1235.



### Abandoned Points

Even if properly preserved in the trial court, an “issue not briefed by an appellant is deemed waived and abandoned.” *State v. Arnett*, 307 Kan. 648, Syl. ¶ 1, 413 P.3d 787 (2018); see also *Bd. of Cherokee County Comm’rs v. Kansas Racing & Gaming Comm’n*, 306 Kan. 298, 323, 393 P.3d 601 (2017). This includes issues or points raised “‘only incidentally in a brief but not argued there.’ [Citation omitted.]” *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017). So, “an argument that is not supported with pertinent authority is deemed waived and abandoned.” *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013). For example, in *Russell*, the Kansas Supreme Court held that “conclusory statements, unsupported by legal citation, are inadequately briefed” and therefore considered abandoned. *Russell*, 306 Kan. at 1089.

### Failure to Designate a Record

Appellate courts may decline to consider an issue or argument if the party asserting it fails to designate a record. *Friedman*, 296 Kan. at 644; *State v. Kettler*, 299 Kan. 448, 465, 325 P.3d 1075 (2014). Put more plainly, when “facts are necessary to an argument, the record must supply those facts and a party relying on those facts must provide an appellate court with a specific citation to the point in the record where the fact can be verified.” *Friedman*, 296 Kan. at 644 (citing Rule 6.02[a][4]).

## **III. STANDARD OF REVIEW GENERALLY**

In step two of their analytical process, appellate courts consider the appeal’s merits. Their decision “is driven by the applicable standard of review.” *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012). The applicable standard of review thus is crucial to any appeal.

The Kansas Supreme Court Rules highlight the standard of review’s importance by requiring both parties to include it in their briefs. Under Rule 6.02(a)(5), an appellant must begin

each issue with a citation to the appropriate standard of review. And under Rule 6.03(a)(4), an appellee must either concur in the appellant's citation or offer additional authority.

This Part explains what a standard of review is, conceptually, then provides a brief discussion of how the standard of review may (or should) impact appellate strategy.

### **§ 8.3 What is a “Standard of Review”?**

The phrase “standard of review” references the standard used by appellate courts to determine the deference due a lower court, jury, or agency. The applicable standard of review thus “establishes the ‘framework by which a reviewing court determines whether the trial court erred.’ [Citation omitted.]” *Williams*, 295 Kan. at 510.

Though it may seem a bit unnecessary to include this definition, understanding what a standard of review is will assist in the important task of separating it from the reversibility standard when analyzing a case for appeal, drafting an appellate brief, or arguing before an appellate court. After all, the standard of review and the reversibility standard are two separate concepts. *State v. Plummer*, 295 Kan. 156, 160, 283 P.3d 202 (2012). An appellate court only considers whether an error warrants reversal *after* it determines that error occurred under the applicable standard of review. *Williams*, 295 Kan. at 510-11 (discussing the blurred distinction between standard of review and harmless error).

### **§ 8.4 Strategic and Practical Considerations**

In appellate courts, “the resolution of many cases turns not so much on the facts of the case as the standard of review.” Patrick Hughes, *Kansas Appellate Advocacy: An Inside View of Common-Sense Strategy*, 66 J.K.B.A. 26, 30 (February/March 1997). Indeed, “failure to properly address the applicable standard of review may cause an advocate to lose an otherwise winnable case.” 66 J.K.B.A. at 30. As a result, “the rules prescribing the appropriate standard of review are of critical importance in selecting the issues to be appealed.” 66 J.K.B.A. at 30. “Similarly, the rules prescribing when an error that has been identified under

the standard of review requires reversal must also be considered in selecting the issues worth appealing.” 66 J.K.B.A. at 30.

When thinking through these important issues, a few general principles apply. First, appellants are more likely to succeed and obtain relief when the issues on appeal present purely legal questions than when they concern questions left to the trial court’s discretion. 66 J.K.B.A. at 30. This is so because—as explained more fully in Part IV—appellate courts owe the trial court less deference when reviewing legal questions than they do when reviewing discretionary questions. Second, the converse, naturally, is true for appellees. Appellees are more likely to be successful if they can frame the issues in a way that affords the greatest amount of deference possible to the trial court.

Finally, where a standard of reversibility applies, appellants should steer clear of issues that fall under the harmless error test. 66 J.K.B.A. at 30. Under this test, as explained in Part VI, appellate courts will disregard merely “technical errors” that do not appear to have prejudicially affected the substantial rights of the complaining party if the record as a whole shows that “substantial justice” has been done by the judgment. *State v. Gilliland*, 294 Kan. 519, 541, 276 P.3d 165 (2012). Satisfying this standard is often difficult to achieve, especially where the claimed error does not implicate the federal constitution. See *State v. Moyer*, 306 Kan. 342, 359, 410 P.3d 71 (2017).

In practice, these general principles serve as a useful tool but often the lines between the different standards of review are blurred and overlaid with reversibility standards that serve to further complicate the analysis. It is not uncommon to see several layers of review applied to a single issue or to see a case where it is unclear whether the appellate court is reviewing a question of law or a question of fact. This fluidity requires practitioners to make strategic decisions about how to frame the standard of review.

Understanding the building blocks of the various standards of review will enable practitioners to make these strategic decisions more easily.

## **IV. BASIC STANDARDS OF REVIEW**

There are three categories around which the basic standards of review are built: (1) questions of law, (2) questions left to the trial court's discretion, and (3) questions of fact. Andrea Cataland and Kip Nelson, *Shaping Appellate Practice: Using Standards of Review to Prevail on Appeal*, 59 DRI for the Defense 35 (2017). Each of these categories is considered, in turn, below.

### **§ 8.5 Legal Questions: Unlimited Review**

Questions of law are subject to unlimited review. *State v. Moyer*, 306 Kan. 342, 359, 410 P.3d 71 (2017). Under this standard, the appellate court is not bound by the lower court's decision. See *Prairie Land Elec. Co-op v. Kansas Elec. Power Co-op*, 299 Kan. 360, 366, 323 P.3d 1270 (2014). The standard is also referred to as “de novo review” or “plenary review.”

Examples of when the unlimited review standard applies include:

- statutory interpretation, *Lozano v. Alvarez*, 306 Kan. 421, 423, 394 P.3d 862 (2017);
- contract interpretation, *Prairie Land Elec. Co-op*, 299 Kan. at 366;
- whether a legal duty exists, *Russell v. May*, 306 Kan. 1058, 1069, 400 P.3d 647 (2017);
- whether a criminal sentence is illegal within the meaning of K.S.A. 22-3504, *State v. Cotton*, 306 Kan. 156, 158, 392 P.3d 116 (2017); and
- whether jurisdiction exists, *Graham v. Herring*, 297 Kan. 847, 855, 305 P.3d 585 (2013).

### **§ 8.6 Questions Left to the Trial Court's Discretion: Abuse of Discretion Review**

Certain questions are within the trial court's discretion. For example, the decision whether to run sentences concurrently “fall[s] within the sound discretion of sentencing courts.” *State*

*v. Brune*, 307 Kan. 370, 371, 409 P.3d 862 (2018). The same is true of motions for new trial. *State v. DeWeese*, 305 Kan. 699, 709, 387 P.3d 809 (2017); *Miller v. Johnson*, 295 Kan. 636, 684, 289 P.3d 1098 (2012). Such decisions are typically reviewed under the abuse of discretion standard. Under this standard, an appellate court will reverse the trial court's decision only if its decision was an abuse of discretion. *Brune*, 307 Kan. at 372.

A trial court "abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *Brune*, 307 Kan. at 372. This standard can be met in many ways. A trial court bases its decision on an error of law when it fails to properly consider the factors of a test meant to guide its discretionary decision. *In re Adoption of B.G.J.*, 281 Kan. 552, 563-64, 133 P.3d 1 (2006). And its decision is fanciful or unreasonable where no reasonable person would adopt the trial court's position. *Consolver v. Hotze*, 306 Kan. 561, 568-69, 395 P.3d 405 (2017).

When deciding whether a trial court abused its discretion, appellate courts do not reweigh the evidence or assess witness credibility. *State v. DeAnda*, 307 Kan. 500, 503, 411 P.3d 330 (2018). And, the party claiming an abuse of discretion bears the burden to establish that the abuse occurred. *DeWeese*, 305 Kan. at 710.

Examples of when the abuse of discretion standard applies include:

- whether hearsay is admissible under a statutory exception, *State v. Jones*, 306 Kan. 948, 957, 398 P.3d 856 (2017); and
- whether to allow or disallow a claim for punitive damages, *McElhaney v. Thomas*, 307 Kan. 45, 57, 405 P.3d 1214 (2017).

Whether to admit evidence used to be part of this list. However, as discussed in § 8.10, Kansas appellate courts now review some evidentiary rulings under a multi-step standard of review where the abuse of discretion standard applies to some steps of the analysis and a de novo standard applies to others. *State v. Shadden*, 290 Kan. 803, 817, 235 P.3d 436 (2010).

## **§ 8.7 Questions of Fact**

Appellate courts review fact questions under different standards depending on who the factfinder was. When the trial court acts as factfinder, appellate courts generally apply the substantial competent evidence standard. When a jury acts as factfinder, appellate courts apply a sufficiency of the evidence standard. These standards are very similar, but just different enough to warrant separate discussion. Accordingly, they are discussed, in turn, below.

### The Court as Factfinder: Substantial Competent Evidence

When a court's factual findings are challenged, appellate courts apply the substantial competent evidence standard. *Gannon v. State*, 305 Kan. 850, 881, 390 P.3d 461 (2017); *Schoenholz v. Hinzman*, 295 Kan. 786, 792, 289 P.3d 1155 (2012). “Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion.’ [Citation omitted.]” *Gannon*, 305 Kan. at 881. In determining whether substantial competent evidence supports the district court's findings, appellate courts disregard any conflicting evidence or other inferences that might be drawn from the evidence. And, they do not reweigh the evidence or assess the credibility of witnesses. *Gannon*, 305 Kan. at 881.

Often, the appellate court is asked to review not just the trial court's factual findings, but also its legal conclusions based on those findings. In such cases, courts apply the substantial competent evidence standard to the trial court's factual findings, and review the conclusions of law based on those findings under the de novo standard. *Gannon*, 305 Kan. at 1176.

This two-part inquiry is often used to review mixed questions of law and fact. For example, when “asked to review the violation of a defendant's Fifth Amendment right against self-incrimination, [the appellate] court reviews the district court's factual findings using a substantial competent evidence standard, but the ultimate legal conclusion is reviewed as a question of law using an unlimited standard of review.’ [Citations omitted.]” *State v. Delacruz*, 307 Kan. 523, 533, 411 P.3d 1207 (2018). The same



is true of a trial court's decision to suppress evidence. *State v. Lewis*, 54 Kan. App. 2d 263, 270, 399 P.3d 250 (2017), *rev. denied* 307 Kan. \_\_\_ (Dec. 22, 2017).

However, whether a conviction resulting from a bench trial should be affirmed is reviewed under the same standard as if the conviction had resulted from a jury trial. The conviction thus is reviewed under the sufficiency of the evidence standard, discussed below. *State v. Frye*, 294 Kan. 364, 374-75, 277 P.3d 1091 (2012).

### The Jury as Factfinder: Sufficiency of the Evidence

The sufficiency of the evidence standard is applied in cases resolved by a jury trial. Though the standard is the same regardless of the type of case, it is stated differently in civil and criminal cases.

In civil cases, when the sufficiency of evidence is challenged, “an appellate court does not reweigh the evidence or pass on the credibility of the witnesses. If the evidence, when considered in the light most favorable to the prevailing party, supports the verdict, the appellate court should not intervene.” *Unruh v. Purina Mills*, 289 Kan. 1185, 1195, 221 P.3d 1130 (2009).

In criminal cases, when the sufficiency of evidence is challenged, the appellate court looks “‘at all the evidence in a light most favorable to the prosecution and [determines] whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.’ In doing so, the appellate court generally will ‘not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.’ [Citations omitted.]” *State v. Gonzalez*, 307 Kan. 575, 586, 412 P.3d 968 (2018). This standard also applies to juvenile offender adjudications, *In re B.M.B.*, 264 Kan. 417, 433, 955 P.2d 1302 (1998), and civil commitment proceedings, *In re Care & Treatment of Hay*, 263 Kan. 822, 842, 953 P.2d 666 (1998).



## **V. STANDARD OF REVIEW: SPECIFIC EXAMPLES**

This Part provides a few examples of how the basic standards of review are applied in practice and identifies a few areas of law where other, less common standards are used, such as when an appellate court reviews negative factual findings. The list presented here is far from exhaustive. It is only meant to provide a helpful starting place for case-specific research.

### **§ 8.8 When a Party Failed to Meet Its Burden of Proof: Arbitrary Disregard or Extrinsic Consideration**

When a trial court finds that a party has not met her burden of proof, a special standard of review applies. This is so because the court's decision is considered to be a negative factual finding (or a negative finding of fact). *Wiles v. American Family Life Assurance Co.*, 302 Kan. 66, 79, 350 P.3d 1071 (2015). Appellate courts review negative factual findings "to determine whether there was an 'arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice.'" *Wiles*, 302 Kan. at 79-80 (quoting *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 [2008]). If so, then the trial court erred.

Examples of cases utilizing this standard include:

- an insurance company failed to prove that a loss fell within its policy's exclusionary clause, *Wiles*, 302 Kan. at 79-80;
- a party failed to prove that his ex-wife was cohabitating with another man, *In re Marriage of Kuzanek*, 279 Kan. 156, 160, 105 P.3d 1253 (2005); and
- a party failed to prove that it was entitled to attorney fees following trial, *Midwest Asphalt Coating v. Chelsea Plaza Homes*, 45 Kan. App. 2d 119, 125, 243 P.3d 1106 (2010).

### § 8.9 Facts Undisputed or Decided on Documents Only

When the trial court decided the issues on appeal based only on documents and stipulated facts, the appellate court exercises unlimited review. *In re Marriage of Stephenson & Papineau*, 302 Kan. 851, 854, 358 P.3d 86 (2015); *State v. Darrow*, 304 Kan. 710, 715, 374 P.3d 673 (2016); *Heiman v. Parrish*, 262 Kan. 926, 927, 942 P.2d 631 (1997). However, if there is “conflicting written testimony and the [appellate] court is called upon to disregard the testimony of one witness and accept as true the testimony of the other,” unlimited review is improper and, instead, the appropriate standard of review is “whether the findings of the district court are supported by substantial competent evidence.” *In re Adoption of Baby Boy B.*, 254 Kan. 454, Syl. ¶ 2, 866 P.2d 1029 (1994).

### § 8.10 Admissibility of Evidence

“Appellate courts apply a multistep analysis of decisions to admit or exclude evidence. Under this multistep analysis, the first question is relevance.” *State v. Robinson*, 306 Kan. 431, 435, 394 P.3d 868 (2017). That is, whether the evidence is probative and material. “On appeal, the question of whether evidence is probative is judged under an abuse of discretion standard; materiality is judged under a de novo standard.” *Robinson*, 306 Kan. at 435 (citing *State v. Shadden*, 290 Kan. 803, 817, 235 P.3d 436 [2010]).

This multi-step analysis does not apply to every evidentiary ruling. As mentioned in § 8.6, whether to admit hearsay under a statutory exception remains subject to the abuse of discretion standard. So, it is imperative that practitioners research the standard applicable to their particular evidence issues when preparing an appeal.

### § 8.11 Jury Instructions

The standard of review for jury instruction issues varies depending on whether the instruction in question was requested or objected to during trial. However, thanks to a quirky criminal procedure rule (K.S.A. 22-3414) that has been applied to civil cases, the same three-step analysis applies regardless of whether

the issue was preserved. Some cases refer to this analysis as including four steps. The analysis is nonetheless the same.

In the first step, appellate courts “consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review.” *State v. Dominguez*, 299 Kan. 567, 573, 328 P.3d 1094 (2014) (quoting *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 [2012]); see also *Siruta v. Siruta*, 301 Kan. 757, 771-72, 348 P.3d 549 (2015) (applying criminal jury instruction appeal rules in a civil appeal). If the appellate court has jurisdiction, then in the first step it simply notes whether the jury instruction issue on appeal was preserved. *Dominguez*, 299 Kan. at 573. Whether the issue was preserved does not impact the first step because K.S.A. 22-3414 provides appellate review for certain jury instruction issues even if they are not preserved. See *State v. Williams*, 295 Kan. 506, 515-16, 286 P.3d 195 (2012). So, if it has jurisdiction, the appellate court simply moves on to the second step.

In the second step, the appellate court determines whether the trial court erred. “In determining if there was error in giving or failing to give a jury instruction, an appellate court must examine whether the instruction was legally and factually appropriate. The appellate court utilizes an unlimited standard of review to analyze the legal question of whether the instruction fairly and accurately states the applicable law.” *Dominguez*, 299 Kan. at 573-74. To determine whether the instruction was factually appropriate, the appellate court considers whether “there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, to support a factual basis for the instruction.” *Dominguez*, 299 Kan. at 574. Where the challenged instruction was actually given by the trial court, the appellate court must view the instructions as a whole when determining whether error occurred. *Siruta v. Siruta*, 301 Kan. 757, 775, 348 P.3d 549 (2015). If, under these standards, the appellate court finds that the trial court erred, it moves on to the third step.

In the third and final step, the appellate court conducts a reversibility inquiry. Here is where preservation, or the lack

thereof, impacts the appellate court's analysis. If the issue was preserved—*i.e.*, the complaining party objected at trial—the appellate court conducts a harmless error inquiry. If the issue was not preserved—*i.e.*, the complaining party did not object at trial—the appellate court conducts a clear error inquiry. *Dominguez*, 299 Kan. at 574.

Under the harmless error standard, discussed in § 8.20 below, the appellate court will reverse the trial court's decision “if there is a reasonable probability that the error will or did affect the outcome of the trial in light of the entire record.” [Citation omitted.]” *Siruta*, 301 Kan. at 772.

Under the clear error standard, discussed in § 8.19 below, the appellate court “will only reverse the district court if an error occurred” and it is “firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.” [Citations omitted.]” *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018). “The assessment of whether an instructional error is clearly erroneous requires a review of the entire record and a *de novo* determination.” *Dominguez*, 299 Kan. at 574. The burden to meet this standard remains on the complaining party; whereas, the burden would shift to the party benefiting from the error when the harmless error inquiry applies. *Dominguez*, 299 Kan. at 574.

### **§ 8.12 Ineffective Assistance of Counsel**

“Allegations of ineffective assistance of counsel, whether based on claims of deficient performance or on a conflict of interest, involve mixed questions of fact and law.” [Citation omitted.]” *State v. Williams*, 299 Kan. 1039, 1047-48, 329 P.3d 420 (2014). Thus, appellate courts review the trial court's factual findings for substantial competent evidence and the legal conclusions based on those facts *de novo*. *Williams*, 299 Kan. at 1047-48.

### **§ 8.13 Motions to Dismiss – Civil**

A “district court's decision to grant a motion to dismiss is reviewed *de novo*.” *Lozano v. Alvarez*, 306 Kan. 421, 423, 394

P.3d 862 (2017). When conducting this review, appellate courts apply the same dismissal standard as the trial court. Specifically, “an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom” and, if “those facts and inferences state a claim based on [the] plaintiff’s theory or any other possible theory, [a] dismissal by the district court must be reversed. [Citation omitted.]” *Platt v. Kansas State University*, 305 Kan. 122, 126, 379 P.3d 362 (2016).

### **§ 8.14 Summary Judgment**

Appellate courts “review the district court’s denial of a motion for summary judgment de novo, viewing the facts in the light most favorable to the party opposing summary judgment.” *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015). In doing so, they apply the same summary judgment standard as the trial court. *Patterson v. Cowley Co.*, 307 Kan. 616, 621, 413 P.3d 432 (2018).

This familiar standard provides: “Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.’ [Citation omitted.]” *O’Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 330, 277 P.3d 1062 (2012).

On appeal, as in the trial court, where “reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.” *Patterson*, 307 Kan. at 621.

### § 8.15 Motions for Judgment as a Matter of Law

“On appeal from a motion for judgment as a matter of law, appellate courts apply the same standard as did the district court and review the motion de novo.” *Russell v. May*, 306 Kan. 1058, 1067, 400 P.3d 647 (2017). “[A] motion for judgment as a matter of law must be denied when evidence exists upon which a jury could properly find a verdict for the nonmoving party.” *Smith v. Kansas Gas Service Co.*, 285 Kan. 33, 40, 169 P.3d 1052 (2007). In evaluating whether the appellant has met this standard, the court must “resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought. Where reasonable minds could reach different conclusions based on the evidence, the motion must be denied.’ [Citation omitted.]” *Russell*, 306 Kan. at 1067.

### § 8.16 Motions to Dismiss – Criminal

In the rare scenario where the State appeals a trial court’s decision to dismiss an indictment, appellate courts will most likely exercise unlimited review. This is so because the State’s appeal of the dismissal “involves the construction of a written instrument, which is a question of law over which [appellate courts] have unlimited review.” *State v. Wright*, 259 Kan. 117, 121, 911 P.2d 166 (1996).

### § 8.17 Motions to Arrest Judgment

Under K.S.A. 22-3502, a criminal defendant may challenge the sufficiency of the charging document or the court’s jurisdiction to issue the charging document after trial. In 2016, the Kansas Supreme Court issued its opinion in *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016) and overruled years’ of precedent about how appellate courts should handle appeals of motions to arrest judgment.

In *Dunn*, the court explained that “charging documents do not bestow or confer subject matter jurisdiction on state courts to adjudicate criminal cases.” *Dunn*, 304 Kan. at 811. Thus, to ward off a jurisdictional challenge under K.S.A. 22-3502, the charging documents “need only show that a case has been filed in the



correct court,” that “the court has territorial jurisdiction over the crime alleged,” and allege facts that would constitute a Kansas crime. *Dunn*, 304 Kan. at 811. But truly jurisdictional challenges to a charging document are rare. Instead, most challenges are to the document’s sufficiency.

To be sufficient, a charging document must allege “facts that would establish the defendant’s commission of a crime recognized in Kansas.” *Dunn*, 304 Kan. at 811-12. “Because all crimes are statutorily defined, this is a statute-informed inquiry. The legislature’s definition of the crime charged must be compared to the State’s factual allegations of the defendant’s intention and action. If those factual allegations, proved beyond a reasonable doubt, would justify a verdict of guilty, then the charging document is statutorily sufficient.” *Dunn*, 304 Kan. at 812.

In light of these holdings in *Dunn*, the following rules now apply to appeals concerning the sufficiency of a charging document:

- *Reviewability* — The usual preservation rules apply, meaning challenges to a charging document’s sufficiency “should be raised in the district court in the first instance” and if they are not, then “defendants will be tasked with demonstrating on appeal that an exception to the usual preservation rule should be applied.” *Dunn*, 304 Kan. at 819.
- *Standard of Review* — Appellate courts exercise unlimited review when evaluating assertions of charging document error. *Dunn*, 304 Kan. at 819.
- *Reversibility* — If the charging document fails to charge a crime as defined by Kansas statute, then the statutory error is subject to a harmlessness inquiry. If the charging document is insufficient on constitutional grounds, then the constitutional harmless error standard likely applies. See *Dunn*, 304 Kan. at 821.



## § 8.18 Prosecutorial Error

In 2016, the Kansas Supreme Court “revisited the framework for considering claims of prosecutorial misconduct and relabeled that issue as ‘prosecutorial error.’” *State v. Sturgis*, 307 Kan. 565, 568, 412 P.3d 997 (2018) (citing *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 [2016]). In doing so, the court did away with issue-specific factors and emphasized that “appellate courts should resist the temptation to articulate categorical pigeonholed factors that purportedly impact whether the State has met its *Chapman* burden.” *Sherman*, 305 Kan. at 110-11.

Now, regardless of the conduct complained of, appellate courts “must first determine whether prosecutorial error has occurred by deciding whether the prosecutor’s actions fall outside the wide latitude afforded prosecutors to conduct the State’s case and attempt to obtain a conviction in a manner that does not offend the defendant’s constitutional right to a fair trial.” *Sturgis*, 307 Kan. at 568. As of yet, it appears the court has not stated, explicitly, whether this review is unlimited or subject to another standard.

If the appellate court finds that error existed, it “moves to the prejudice step and applies the traditional constitutional harmlessness inquiry demanded by *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *i.e.*, whether the State can show there is no reasonable possibility that the error affected the verdict.” *Sturgis*, 307 Kan. at 568.

## VI. REVERSIBILITY

If the appellate court finds that an error occurred under the applicable standard of review, it moves to the third step of its analysis: reversibility. In this step, the appellate court asks whether the error requires reversal. *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012). Where the applicable test is met, the error requires reversal.

This Part discusses the three most common reversibility tests: clear error, harmless error, and cumulative error.

### **§ 8.19 Clear Error**

The clear error test is most often found in cases discussing jury instruction challenges. The language of the test thus presumes the existence of a trial: clear error exists only where the appellate court is firmly convinced the jury would have reached a different verdict without the error. *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018). “The party claiming a clear error has the burden to demonstrate the necessary prejudice.” *McLinn*, 307 Kan. at 318.

### **§ 8.20 Harmless Error**

Two harmless error tests exist: the statutory harmless error test and the constitutional harmless error test. *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011). The Kansas Supreme Court has expressed dissatisfaction with practitioners’ and courts’ tendency to use this terminology, instead preferring that they do not view the harmless error inquiry as two tests but as one test with two different levels of certainty. *Ward*, 292 Kan. at 566.

The main reason behind the court’s preference is the fact that both tests utilize the same benchmark. That is, they both start with the question whether the error affected “a party’s substantial rights, meaning it will not or did not affect the trial’s outcome.” *Ward*, 292 Kan. at 565. The tests differ only in the level of certainty required to find an error harmless. *Ward*, 292 Kan. at 566. Still, for the sake of clarity, this Section discusses the harmless error inquiry as consisting of two separate tests.

If the error implicates a right guaranteed by the United States Constitution, then the appellate court “must be persuaded beyond a reasonable doubt that there was no impact on the trial’s outcome.” *Ward*, 292 Kan. at 565. In other words, the error is only harmless if the court is persuaded beyond a reasonable doubt that “there is no reasonable possibility that the error contributed to the verdict.” *Ward*, 292 Kan. at 565. This degree of certainty is often referred to as the “constitutional harmless error test.”

If the error does not implicate a federal constitutional right, then the appellate court “must be persuaded that there is no reasonable probability that the error will or did affect the outcome.” *Ward*, 292 Kan. at 565. This degree of certainty is sometimes referred to as the “statutory harmless error test” in part because it arises from K.S.A. 60-261 and K.S.A. 60-2105’s prohibition against reversing a trial court’s decision for harmless error. In more recent Kansas cases, the standard has also been referred to as the “nonconstitutional error standard.” *Russell v. May*, 306 Kan. 1058, 1082, 400 P.3d 647 (2017).

### **§ 8.21 Cumulative Error**

“The reversibility test for cumulative error is ‘whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found under this cumulative effect rule, however, if the evidence is overwhelming against the defendant.’ [Citations omitted.]” *State v. Williams*, 299 Kan. 1039, 1050, 329 P.3d 420 (2014); see also *Cessna Aircraft Co. v. Metropolitan Topeka Airport Authority*, 23 Kan. App. 2d 1038, 1058, 940 P.2d 84 (1997).

Because the cumulative-error rule does not apply where only one error, or no error, occurred, the court’s first step is “to count up the errors.” *Williams*, 299 Kan. at 1050. Where multiple errors exist, courts are still reluctant to find cumulative error because “the touchstone is whether the defendant received a fair trial, not whether he received a perfect trial.” *State v. Kahler*, 307 Kan. 374, 405, 410 P.3d 105 (2018).



# CHAPTER 9

## Brief Writing

This chapter addresses the rules governing the filing of briefs with the appellate courts and provides suggestions for crafting an effective brief.

Always consult the appropriate Kansas Supreme Court appellate rules before writing and formatting your brief. The rules on appellate practice are found in the Kansas Court Rules Annotated, an annual publication of the Kansas Supreme Court commonly called the blue book.

The rules are also available online at: [http://www.kscourts.org/rules/Appellate\\_Court.asp](http://www.kscourts.org/rules/Appellate_Court.asp) To find out whether there have been any recent amendments, check [http://www.kscourts.org/rules/New\\_Rules\\_and\\_Amendments/](http://www.kscourts.org/rules/New_Rules_and_Amendments/) for updated or amended versions of the rules since the most recent publication.

The Briefing Checklist in Appendix B provides further assistance with brief writing. A sample brief is also included in Appendix B to illustrate how many of the briefing rules are put into practice.

### § 9.1 Time Schedule for Briefs—Rule 6.01

#### Computation of Time

K.S.A. 60-206(a) and (d) address how to compute time for the purpose of determining a brief due date. For a more detailed discussion of time computation, see § 7.9, *supra*.

**PRACTICE NOTE:** Until recently, when briefs were still primarily filed by mail, it was common for the three-day mail rule in K.S.A. 60-206(d)

to affect the calculation of a brief due date that was triggered by the service of a previous brief or pleading. As a practical matter, the three-day mail rule will no longer apply in most cases, because parties using the E-filing system will serve briefs by electronic means rather than by mail. If you have questions about how to calculate your brief due date, contact the clerk of the appellate courts.

### **Appellant's Brief**

If no transcripts were ordered, or if all transcripts ordered were filed with the clerk of the district court before docketing, an appellant's brief is due within 40 days of the date of docketing. Rule 6.01(b)(1)(A).

If a transcript was ordered but was not filed before docketing, then an appellant's brief is due within 30 days of service of the certificate of filing of the requested transcript. Rule 6.01(b)(1)(B).

If the record on appeal includes a statement of proceedings under Rule 3.04 or an agreed statement under Rule 3.05, an appellant's brief is due within 30 days after the filing of the statement with the district court. Rule 6.01(b)(1)(C).

**PRACTICE NOTE:** Although the clerk's office will enter an initial brief due date in the Case Inquiry System on the [www.kscourts.org](http://www.kscourts.org) website, that due date is primarily intended as a convenience to the clerk's office, and it will NOT result in a Notice of Electronic Filing (NEF) to the parties. Appellants must keep a close eye on the Case Inquiry System and track when transcripts are completed, because it is up to the appellant to know when the final transcript is filed and then, from that date, calculate the initial brief due date.

However, if the court grants a motion for an extension of time, it will issue an order setting

the next brief due date and that order will be distributed to the parties by an NEF through the E-filing system.

### **Appellee's Brief or Appellee/Cross-Appellant's Brief**

The brief of an appellee or an appellee/cross-appellant is due within 30 days after service of the appellant's brief. Rule 6.01(b)(2).

### **Cross-Appellee's Brief**

The brief of a cross-appellee is due within 21 days after service of the cross-appellant's brief. Rule 6.01(b)(3).

### **Appellee/Cross-Appellee's Brief**

The brief of an appellee/cross-appellee is due within 21 days after service of the appellee/cross-appellant's brief. Rule 6.01(b)(4).

### **Reply Brief**

A reply brief is due within 14 days after service of the brief to which the reply is made. Rule 6.01(b)(5).

Rule 6.05 explains when a reply brief may be submitted and what a reply brief must contain.

**PRACTICE NOTE:** A reply brief that is combined with a cross-appellee brief would be due 21 days after service of the appellee/cross-appellant's brief.

### **Extensions of Time**

K.S.A. 60-206(b) controls when the court may extend the time to file a brief. See also Rule 5.02 and § 7.31, *supra*. Motions for extension of time to file a brief must be filed before the original deadline to act has expired and state: the present due date, the number of extensions previously requested, the amount of additional time needed, and the reason for the request. Rule 5.02(a).

**PRACTICE NOTE:** Generally, after three extensions of time (totaling no more than 30 days each) have been granted, the court will issue a



warning that no additional extensions of time will be granted absent “exceptional circumstances.” Extensions of time are not limitless, so plan accordingly.

## § 9.2 Content of Appellant’s Brief—Rule 6.02

### Required Elements of the Brief

An appellant’s brief *must* contain:

- A **TABLE OF CONTENTS** that includes page references to each division and subdivision in the brief and the authorities relied upon. Rule 6.02(a)(1).
- A brief **STATEMENT OF THE NATURE OF THE CASE** which should detail the nature of the judgment or order from which the appeal is taken. Rule 6.02(a)(2).
- A brief **STATEMENT OF THE ISSUES** to be decided on appeal. Rule 6.02(a)(3).  

**PRACTICE NOTE:** Rule 6.02(a)(3) specifies that the statement of the issues must be brief and without elaboration. Some practitioners prefer a longer, more detailed issue statement, but that approach may not comply with Rule 6.02(a)(3).
- A concise but complete **STATEMENT OF THE FACTS** that are material to deciding the issues must be presented without argument. They must be keyed to the record on appeal by volume and page number. Rule 6.02(a)(4).
- For example, a pleading found in Record Volume I on page 23 could be cited as: (R. I, 23). The citation should be to the specific page or limited number of pages where the particular fact may be found.
- The court may presume that any factual statement made without such a reference has no support in the record on appeal. Rule 6.02(a)(4). See *Friedman v.*

*Kansas State Bd. of Healing Arts*, 296 Kan. 636, ¶ 3, 294 P.3d 287 (2013).

- Occasionally, a record on appeal will include both electronic and non-electronic, physical exhibits or documents. When citing to a non-electronic record document, it is helpful to the court to point out that the particular exhibit or document is a non-electronic document.

**PRACTICE NOTE:** Under Rule 3.02, the clerk of the district court furnishes a copy of the table of contents of the record on appeal to each party. That table of contents shows the volume and page number of each document in the record; all parties should cite to it. Contact the district court clerk if you are writing a brief and have not received a copy of the table of contents.

The facts section of the brief must include *all* of the material facts and *only* the material facts. Avoid statements such as, “Further facts will be developed as necessary.” Avoid referring to issues that will not be raised on appeal. For instance, if the brief does not argue that the district court erred in denying a motion to suppress, including facts about the motion and the hearing on the motion in the statement of facts serves only as a distraction. To avoid including unnecessary or extraneous facts in a brief, try writing the argument section first and the facts section next. Doing so helps the writer pinpoint which facts are important.

Finally, a party should include – but can minimize – negative critical facts. Rambo and Pflaum, *Legal Writing by Design* § 21.6, p. 371 (2001). Do not, however, attempt to “hide the ball” on bad facts. It adds to the credibility of an appellate practitioner to admit when facts may not be entirely favorable. Furthermore, the court will have to deal with those bad facts anyway if they are important to the issues.

- The brief must include an **ARGUMENTS AND AUTHORITIES** section, indicating what case law, statutes and other authorities the party relies on, separated by issue. Within that section, each issue *must begin* with a citation to the appropriate **Standard of Review**. Also each issue *must begin* with a **Preservation** section with a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on or, if the issue was not raised below, an explanation why the issue is properly before the court. Rule 6.02(a)(5).

Generally, issues not raised before the district court cannot be raised for the first time on appeal. *State v. Ortega-Cadelan*, 287 Kan. 157, 159, 194 P.3d 1195 (2008). Exceptions may be granted if: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; or (3) the district court's judgment may be upheld on appeal despite its reliance on the wrong ground. *State v. Foster*, 290 Kan. 696, 702, 233 P.3d 265 (2010). Before the Court can address the issue for the first time on appeal, the appellant must explicitly identify *which* of these exceptions applies *and provide a detailed explanation why* it is applicable. *State v. J.D.H.*, 48 Kan. App. 2d 454, 459, 294 P.3d 343 (2013).

**PRACTICE NOTE:** When it comes to authorities included in your brief, choose quality over quantity. String cites are almost always unnecessary. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, p. 122 (4th ed. 2009).

Also remember that, separate from the appellate briefing rules, an attorney has an ethical duty under Kansas Rule of Professional Conduct 3.3(a)(2) to provide the court with adverse

controlling authority not otherwise disclosed by an opposing party.

### Optional Elements of the Brief

An appellant's brief *may* contain:

- An **APPENDIX** – without comment – consisting of limited extracts from the record on appeal that are critical to the issues to be decided. The appendix is for the court's convenience and is not a substitute for the record itself. It is inappropriate to attach as an appendix any item that is not a part of the record on appeal. See *Haddock v. State*, 282 Kan. 475, Syl. ¶ 21, 146 P.3d 187 (2006) (“An appendix to an appellate brief is not a substitute for the record on appeal, and material so attached will not be considered by this court.”) The brief may make reference to the appendix, but must also include the required reference to the volume and page number of the record on appeal. Rule 6.02(b).

**PRACTICE NOTE:** A party may cite to an unpublished case in a brief as non-controlling, but persuasive authority. Rule 7.04(g)(2)(B). However, if cited in the brief, a copy of the unpublished opinion must be attached to the brief as either a separate attachment or as part of the appendix. Rule 7.04(g)(2)(C).

## § 9.3 Content of Appellee's Brief—Rule 6.03

### Required Elements of the Brief

An appellee's brief *must* contain:

- A **TABLE OF CONTENTS** that includes page references to each division and subdivision and the authorities relied upon. Rule 6.03(a)(1).
- A statement either concurring in the appellant's **STATEMENT OF THE ISSUES** involved or stating

the issues the appellee considers necessary to disposition of the appeal. Rule 6.03(a)(2).

**PRACTICE NOTE:** Rather than automatically ceding the framing of issues to your opponent, consider whether the issues can be reframed from your client's point of view.

- **A STATEMENT OF FACTS**, without argument, or a statement concurring with the appellant's statement of facts, including corrections or additions if necessary. The facts must be keyed to the record on appeal by volume and page number. The court may presume that any factual statement made without such a reference has no support in the record on appeal. Rule 6.02(a)(4); Rule 6.03(a)(3).
- The **ARGUMENTS AND AUTHORITIES** relied on, separated by issue if applicable. Each issue *must begin* with a citation to the appropriate **Standard of Review**. The Appellee must either explicitly concur with the appellant's suggested standard of review or cite authority to the contrary. Rule 6.03(a)(4).

If the appellee is also a cross-appellant, the brief must also contain:

- A separate section for the **CROSS-APPEAL**, including content similar to the content required for an appellant's brief under Rule 6.02. This section should avoid duplicating statements, arguments, or authorities contained elsewhere in appellee's brief. To avoid such duplication, the appellee may make references to the appropriate portions of its brief. Rule 6.03(a)(5).

### Optional Elements of the Brief

An appellee's brief *may* contain:

- An **APPENDIX** – without comment – consisting of limited extracts from the record on appeal that are critical to the issues to be decided. The appendix is

for the court's convenience and is not a substitute for the record itself. It is inappropriate to attach as an appendix any item that is not a part of the record on appeal. The brief may make reference to the appendix but must also include the required reference to the volume and page number of the record on appeal. Rule 6.02(b); Rule 6.03(b).

**PRACTICE NOTE:** Just like an appellant, an appellee may cite to an unpublished case as non-controlling, but persuasive authority. Rule 7.04(g)(2)(B). A copy of the unpublished opinion must be attached to the brief as either a separate attachment or as part of the appendix. Rule 7.04(g)(2)(C).

#### § 9.4 Content of Cross-Appellee's Brief—Rule 6.04

A cross-appellee's brief *must* contain:

- Material similar to the content required for an appellee's brief under Rule 6.03. The brief should avoid duplicating statements, arguments, or authorities contained in the brief of the appellant or cross-appellant. To avoid such duplication, the cross-appellee may make references to the appropriate portions of the opposing brief. Rule 6.04.

#### § 9.5 Reply Brief—Rule 6.05

Rule 6.05 allows a reply brief to be filed *only when necessary because of new material* contained in the brief of the appellee or the cross-appellee.

A reply brief *must* include a specific reference to the new material being rebutted and be combined with the cross-appellee's brief in a separate section if filed by a cross-appellee. Rule 6.05.

A reply brief *may not* include any statements, arguments, or authorities already included in a preceding brief, except by reference. Rule 6.05.

**PRACTICE NOTE:** The party filing the reply brief may not use the reply brief to raise additional issues. *State v. McCullough*, 293 Kan. 970, 984-85, 270 P. 3d 1142 (2012).

A reply brief is not usually the appropriate avenue for submitting new or additional case law to the court. Instead, consider filing a letter notifying the court of additional authority under Rule 6.09. But beware that letters of additional authority under Rule 6.09 have shorter time and word limits than reply briefs. See also § 9.9.

### § 9.6 Brief of *Amicus Curiae*—Rule 6.06

A brief of an *amicus curiae* (friend of the court) may only be filed when an application to file the brief has been served on all parties and filed with the clerk of the appellate courts *and* the appellate court enters an order granting that application. Rule 6.06(a).

**PRACTICE NOTE:** The application to file an *amicus* brief should state substantial reasons supporting the request and be filed as early in the appellate process as possible.

The brief must be filed at least 30 days before oral argument and served on all parties. Rule 6.06(b). A party may respond to the brief within 21 days of the filing of the brief. Rule 6.06(c).

An *amicus curiae* is not entitled to oral argument. Rule 6.06(d).

### § 9.7 Format for Briefs--Rule 6.07

A brief that does not conform substantially with the provisions of Rule 6.07 will not be accepted for filing. Rule 6.07(f). See Appendix B for a sample brief.

**PRACTICE NOTE:** Due to the implementation of the E-filing system, the Kansas Supreme Court has recently substantially changed Rule 6.07 regarding the formatting of briefs. All practitioners



should review these changes to avoid rejection of a brief.

- Text, Footnotes, and Reproduction

Text: The text of a brief must be printed in a conventional style font but that font must comply with these measurements: no smaller than 12 point font with no more than 12 characters per inch.

**PRACTICE NOTES:** The font rule is deceptively simple, but is more complicated in practice. For example, the typical legal font among many practitioners is Times New Roman 12 point. But Times New Roman 12 point does not comply with the Court's font rule under Rule 6.07(a)(1).

Rule 6.07(a)(1) contains a list of suggested (but not required) fonts. Those include: 13 point in Times New Roman, Book Antigua, Century Schoolbook, and Palatino Linotype. Other fonts may also meet the font rule in 6.07(a)(1), but if a practitioner is unsure, double check with the appellate court clerk.

A practitioner should spend time contemplating font choices. Particularly in light of the increased use of electronic briefing, serif fonts may not appear as readable on electronic devices as sans serif fonts. As a result, a move away from serif fonts, including the strangely beloved ancient legal standby of Times New Roman, is probably overdue. "Times New Roman is not a font choice so much as the absence of a font choice, like the blackness of deep space is not a color. To look at Times New Roman is to gaze into the void." Butterick, *Typography for Lawyers*, pg. 110 (2013).

Text, excluding pagination, must not exceed 6.5 inches by 9 inches. Rule 6.07(a)(1). All text must be double-spaced, except block quotations and footnotes which may be single spaced. Rule 6.07(a)(1).

Footnotes: Footnotes are generally discouraged. However, if a footnote is absolutely necessary, it must commence on the same page as the text to which it relates. Rule 6.07(a)(2).

**PRACTICE NOTE:** Footnotes should be avoided. This is particularly true as the parties and the courts move towards reading briefs electronically. When a brief is viewed electronically, it is rare for full pages of text to be viewed in their entirety. As a result, footnotes can be lost in the dead space at the bottom of the page just outside of the view of the reader.

Reproduction: A brief may be reproduced by any process that yields a clear black image on white paper. The paper must be opaque and unglazed. Only one side of the paper may be used. Rule 6.07(a)(3).

**PRACTICE NOTE:** When preparing briefs in PDF form for E-filing, keep in mind that manual scanning will result in a larger electronic file than converting directly from Word to a PDF.

- Brief Cover, Color, and Content

The cover of any brief must be white. Rule 6.07(b)(1).

The cover of the brief must include:

- The appellate court docket number. Rule 6.07(b)(2)(A).
- The phrase “IN THE COURT OF APPEALS OF THE STATE OF KANSAS” or “IN THE SUPREME COURT OF THE STATE OF KANSAS,” as appropriate. Rule 6.07(b)(2)(B).

- The caption of the case as it appeared in the district court, except that a party must be identified not only as a plaintiff or defendant but also as an appellant or appellee. Rule 6.07(b)(2)(C).
- The title of the document, *e.g.*, “Brief of Appellant” or “Brief of Appellee,” etc. Rule 6.07(b)(2)(D).
- The words “Appeal from the District Court of \_\_\_\_\_ County, Honorable \_\_\_\_\_, Judge, District Court Case No. \_\_\_\_.” Rule 6.07(b)(2)(E).
- The name, address, telephone number, fax number, e-mail address, and attorney registration number of *one* attorney for each party on whose behalf the brief is submitted. An attorney may be shown as being of a named firm. Additional attorneys joining in the brief *must not be shown* on the cover but may be added at the conclusion of the brief. Rule 6.07(b)(2)(F).
- The words “oral argument” on the lower right portion of the brief cover, followed by the desired amount of time if additional time for oral argument is requested in the Supreme Court under Rule 7.01(e) or in the Court of Appeals under Rule 7.02(f). Rule 6.07(b)(2)(G).
- If the brief includes an issue that contests or calls into doubt the validity of any Kansas statute or constitutional provision on the grounds that the law violates the state constitution, federal constitution, or any provision of federal law, the brief *must* be served on the attorney general along with a notice stating that the attorney general is being served under K.S.A. 75-764. See § 12.31, *infra*. Rule 11.01(a). The brief itself *must* also include these specific words, **in bold**, 12 point font, under the case caption on the first page: “Served on the attorney general as

required by K.S.A. 75-764.” See Rule 11.01(b); K.S.A. 75-764.

- Page Limits: The brief must not exceed the following page limits (excluding the cover, table of contents, appendix, and certificate of service, unless the court orders otherwise):
  - Brief of an appellant — 50 pages.
  - Brief of an appellee — 50 pages.
  - Brief of an appellee and cross-appellant — 60 pages.
  - Brief of an appellee and cross-appellee — 60 pages.
  - Brief of a cross-appellee — 25 pages.
  - Reply brief — 15 pages.
  - Brief of an *amicus curiae* — 15 pages. Rule 6.07(d).

A motion to exceed these page limits must be submitted *before* submission of the brief and must include a specific total page request. The court may rule on the motion without waiting for a response from any other party. Rule 6.07(d).

The appellate court hearing a matter may order briefs to be abbreviated in content or format. Rule 6.07(e).

**PRACTICE NOTE:** Cheating on font size and spacing in order to comply with the page limits “tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority.” Rambo and Pflaum, *Legal Writing by Design* § 20.3, p. 344 (2001) (quoting Judge Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325 at 327).

Although many word processing programs include a variety of helpful tools when creating

electronic briefs, at the time of the publication of this handbook, the appellate E-filing system does not allow many of those features to maintain their integrity once the brief is filed. For example, items such as embedded hyperlinks within the brief text are automatically disabled and will not be seen or used by the court.

Accordingly, when including a link to an online source, make sure to include the entire written link so that the judge can manually search for the source in a separate browser.

Specific questions regarding the courts' ability to accept and utilize enriched briefs should be directed to the appellate clerk's office.

### § 9.8 Reference within Brief—Rule 6.08

Unless the context particularly requires a distinction between parties as appellant or appellee, refer to the parties in the body of a brief by their status in the district court, *e.g.*, plaintiff, defendant, etc., or by name. Rule 6.08.

References to certain persons such as children, victims of sex crimes, and jurors are subject to special rules. See Rule 7.043.

**PRACTICE NOTE:** Referring to a client by name can help humanize him or her. But be consistent. It is acceptable to refer to a party by full name the first time and by either first or last name thereafter, but do not switch back and forth.

Citation of a court decision must be by the official citation followed by any generally recognized reporter system citation. Rule 6.08.

**PRACTICE NOTE:** Include a pin cite to a specific page or pages of an opinion. Rule 7.04(g) allows the citation of unpublished opinions in specific circumstances, but requires attachment of a printed copy of the opinion.

## § 9.9 Service of Brief

A party agrees to service by electronic means under K.S.A. 60-205(b)(2)(F) when an attorney who is registered as an E-filing user has entered their appearance on behalf of the party. Transmission of the “Notice of Electronic Filing” (NEF) to a registered attorney appearing as a case participant on behalf of a party is an acceptable form of service by electronic means. Rule 1.11(b).

The party filing the brief must include a certificate of service on the last page of the brief. Rule 1.11(c). The certificate of service must include the manner in which service is made, must comply with the signature requirements in Rule 1.12, and must include a date of service. Rule 1.11(c) and (d).

When a brief contests or calls into doubt the validity of any Kansas statute or constitutional provision on grounds that the law violates the state constitution, federal constitution, or any provision of federal law, the party filing the brief *must* serve a copy of the brief, along with a separate notice under Rule 11.01(c), on the attorney general under K.S.A. 75-764. Rule 11.01(a).

**PRACTICE NOTE:** Even with E-filing, a party may serve its brief on the opposing party by whatever means is preferred; *i.e.*, by fax, e-mail, mail through the U.S. Postal Service, or other delivery service such as FedEx or UPS. The certificate of service must state how the opposing party was served and the date upon which service was made. If electronic service is relied upon through the Notice of Electronic Filing, that should be explicitly noted in the certificate of service.

## § 9.10 Notification Letter of Additional Authority Under Rule 6.09

A party may advise the court by letter of additional persuasive or controlling authority that has come to the party’s attention since filing its brief. See § 12.33, *infra*. The party must file the letter at

least 14 days before oral argument or before the first day of the docket on which a no-argument case is set. Rule 6.09(a)(1).

If the authority is published or filed less than 14 days before oral argument or less than 14 days before the first day of the docket on which a no-argument case is set, the party may promptly advise the court, by letter, of the citation. Rule 6.09(a)(1).

If the authority was published or filed after oral argument or after the first day of the docket on which a no-argument case was set, a party may advise the court by letter of the citation before the court's decision. Rule 6.09(a)(2).

The letter must not exceed 350 words. The letter may not be split into multiple filings to avoid the word limitation. The letter *must* contain a reference to the page(s) of the brief the letter supplements *or* a point argued orally to which the citation pertains. The letter *may* contain a brief statement concerning application of the citation. Rule 6.09(b).

The party filing the letter must serve all adverse parties united in interest with a copy. The letter, with proof of service, must be filed with the clerk of the appellate courts. Rule 6.09(c).

A party may respond to a letter notifying the court of additional authority. The party must file the response with the clerk of the appellate courts within 7 days after service of the letter; limit the response to the reference, brief statement, and 350-word limit under Rule 6.09(b); *and* serve the response on all adverse parties united in interest under Rule 6.09(c). Rule 6.09(d).

## § 9.11 Some Tips for Crafting an Effective Brief

### Selecting and Organizing Issues:

Include only the issues most likely to succeed; “[w]eak points dilute strong ones.” Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, p. 85 (4th ed. 2009).

Organize the issues in a way that makes sense. For instance, begin with the strongest argument, or arrange the issues in the order in which the errors occurred below if the relative strength of the arguments is similar.



Separating issues into sub-issues and sub sub-issues is a helpful way of organizing the arguments section. For instance, each issue might have five main subheadings: Introduction, Standard of Review, Preservation of the Issue, Analysis, and Conclusion. The “Analysis” section might have several subsections addressing the different parts of a multi-part test or separately addressing (1) why an action constituted error, and (2) why the error requires reversal.

**Writing the Statement of Facts:**

“The facts must be scrupulously accurate.” Berry at p. 109.

It may be helpful to write the Arguments and Authorities section first. Then include any and all facts necessary to support the arguments made in that section in the Statement of Facts.

Organize the facts in a way that makes sense, *i.e.*, chronologically or in the same order as the issues to which they relate.

Use subheadings where necessary, *i.e.*, “The Crime,” “Pre-Trial Motions,” “Trial,” “Sentencing.”

**PRACTICE TIP:** Avoid simply relaying each witness’s testimony in the order in which the witnesses appeared. Garner, *The Winning Brief* pp. 365-67 (2nd ed. 2004). Make sure the testimony fits together to tell a story. Highlight inconsistencies between different witnesses’ testimony using words like “however” and “although.” Highlight corroborating testimony with words like “similarly.”

While the statement of facts may not include argument, the tone of this section can lay the groundwork for the argument that follows. For instance, rather than simply stating, “The district court denied the defendant’s request to proceed pro se,” consider writing, “The district court mocked the defendant’s request to proceed pro se and chastised him for ‘wasting everyone’s time.’” Rambo and Pflaum, *Legal Writing by Design* § 21.6, p. 368 (2001). Within the confines of the rule, this section is an opportunity to soften the ground for, and plant the seeds of, the argument that

will follow. Avoid overreaching, however; including statements in the statement of facts section that have no support in the record on appeal erodes the court's credibility in the writer. "We never, either through act or omission, misrepresent the truth." Rambo and Pflaum at 359.

While active voice is generally preferable to passive voice, passive voice may be appropriate where it minimizes a client's misdeeds. For example, rather than writing, "Mr. Jones beheaded Smith," consider writing, "Smith was beheaded." Rambo and Pflaum at 368.

### **Standard of Review and Preservation of the Issue:**

Argue for the most favorable standard of review the law supports, but cite authority to the contrary if it exists.

**PRACTICE NOTE:** Do not be afraid to argue what the standard of review *ought* to be if it should be changed, but also note what the standard of review currently *is*.

The preservation section may not be as sexy as the argument section of the brief, but it is one of the most important. If an issue is not properly preserved, or if there is not a proper avenue for the appellate courts to consider the issue for the first time on appeal, then the rest of the brilliance contained in the argument section is for naught. Include a clear reference to where the issue was raised and ruled upon below. If the issue was not raised and ruled upon below, explain why the court can and should reach the issue anyway.

**PRACTICE NOTE:** Simply citing the exceptions to the general rule is insufficient; explain which of those exceptions allows the court to reach the issue. *State v. J.D.H.*, 48 Kan. App. 2d 454, 459, 294 P.3d 343 (2013).

### **Arguments and Authorities:**

If an issue requires the application of a multi-step test, apply each step separately and clearly.

Support arguments with quality citations *or* with compelling arguments if no existing authority supports the argument. Focus on quality, rather than quantity; “[t]here is little or no reason to string cite.” Berry at p. 122.

Do not be afraid to look outside the jurisdiction, especially if there is no Kansas authority on point.

Avoid long block quotes, which a reader is likely to skip. Avoid using “Id.”

Be upfront and address unfavorable authority head on.

Anticipate and refute potential counter-arguments. Garner at p. 410.

### **Formatting:**

Do not be afraid to use visual devices to aid the reader in identifying particularly important information. The appellate courts have recently begun to embrace visual devices within their own opinions, such as comparative tables when illustrating a point. See, *e.g.*, *State v. Wetrich*, 307 Kan. 552, 563, 412 P.3d 984 (2018). If there is a need to highlight or compare two competing sources (for instance an old versus a new version of a statute), doing so in a table embedded within the brief may make your point more clearly than a paragraph explaining the differences.

When writing an appellee or reply brief, examine the initial brief for weaknesses and identify them for the court. Look for errors of fact, errors of law, errors of logic or reasoning, inconsistent arguments, and accidental concessions. Berry at pp. 136-37.

### **The Conclusion:**

Ask the Court for the *specific* relief requested. If the relief requested is atypical, make sure to cite authority for the relief requested or provide an explanation for why the court can and should act differently in your case than it has in others.

# CHAPTER 10

## Oral Argument

### § 10.1 Introduction

Oral argument invigorates some and intimidates others. However you view it, when you receive notice that your case has been placed on the oral argument calendar, there are a few steps you should take to ensure your effectiveness.

This chapter suggests methods of preparing for your argument, provides information as to the hearing procedures followed by both the Kansas Supreme Court and Kansas Court of Appeals, and discusses tips and practices you might use in argument.

### § 10.2 Preparation

Preparation for oral argument is at least as important as the argument itself. Several weeks ahead of time, check for supplemental authority and any developments that have occurred since the filing of your brief. Inform the court and your opponent of any new developments by filing and serving a letter under Rule 6.09. Your letter should include the relevant citations, the page or pages of the brief intended to be supplemented, and a short, minimally argumentative statement concerning application of the citations. A day or two before argument, check again and be prepared to address any additional authority at argument. Do not ever cite authority at oral argument which has not been

presented to the court and opposing counsel in a brief or letter of additional authority.

**PRACTICE NOTE:** Pay particular attention to time frames and the word limitation in Rule 6.09. Until fourteen days before oral argument, there is wide discretion to cite persuasive or controlling authority discovered after the party's last brief was filed. Within the fourteen days before oral argument, only persuasive or controlling authority published or filed in that time frame may be cited. In all instances, the body of the 6.09 letter is limited to 350 words.

Review and study all significant cases cited in the briefs, and be prepared to discuss factual distinctions between your case and the cases cited.

Read and re-read the record on appeal. One of the most common and least excusable mistakes in oral argument is lack of familiarity with the record. This is equally true whether you were the attorney of record in the trial court or appellate counsel only. Perhaps the most crucial point on appeal is to identify and apply the appropriate standard of review. Failure to do so is the best downpayment on a failed appeal. The briefing rules, 6.02(a)(5) and 6.03(a)(4), require a statement of those standards of review, and as former Chief Judge McKay of the Tenth Circuit once noted, it's not because the court needs to know, it's to direct counsel to the straight and narrow.

Develop an outline of your argument in a form and on a medium that is comfortable for you. Large index cards work well, as shuffling papers can be distracting. Some attorneys prefer to work from a laptop or iPad. In preparing the outline, determine the issues you want to focus on and develop your key points with respect to those issues. Some attorneys find it works well to develop two outlines of their argument—one long and one short. Then, if you are lucky enough to be asked multiple questions by the court, you can resort to “Plan B” and utilize the short version of your argument in the time remaining. If you type these outlines, use a large font, because at the podium your

eyes will be much farther from the text than your normal reading distance.

In developing your outline, consider developing a theme or story line that will engage the court, hold the judges' attention, and hopefully provoke questions. This is the time to look at the big picture and ask yourself what the case is really all about and consider how it fits into a particular area of the law.

While understandable, it is a mistake to try to touch on every issue and argument covered in your brief (initial restraint in the number of issues raised in the brief is also recommended). Consider which crucial issues would benefit from clarification and exploration, and develop your argument around those issues. Anticipate your weakest arguments and plan how you might respond to questions from the court.

Avoid taking shots at the district court judge. There are more former trial judges on the appeals court than appellate lawyers. If it is truly necessary, this can be done subtly but effectively in the briefs. Often, a simple transcript excerpt is vastly more effective than a page of misguided invective.

The bottom line in preparing your argument outline is to be a minimalist—*i.e.*, be prepared to say all that you need to say in the shortest time period, thus allowing for maximum flexibility during argument.

You should also prepare for argument by anticipating questions the court will ask. The best way to do this is to know the weaknesses—or what *look* like weaknesses—of your case.

Consider conducting a moot court. It doesn't require a large time commitment but can yield great results. Ask a few friends or colleagues to read your brief, and then present your argument to them. Encourage questions. Following your presentation, ask your "judges" for comments about your demeanor and presentation style, as well as the substantive aspects of your argument. Their questions may be indicative of those by your panel.

Last, if there is a complexity of parties and cross-appeals, determine ahead of time how you want the argument structured and seek agreement of other counsel.

### § 10.3 Format of Hearings in the Supreme Court

Oral arguments before the Kansas Supreme Court are held before the full court in the Supreme Court Courtroom. Counsel are notified at least 30 days in advance of the date and time they are to appear for oral argument. Rule 7.01(d). The Supreme Court holds a formal docket call at the commencement of the morning and afternoon sessions; if counsel fails to appear at the appropriate docket call, oral argument is waived. Rule 7.01(d). The clerk of the appellate courts normally provides very helpful guidance at that time, to which you should pay close attention.

Oral argument is limited to 15 minutes for each party. Rule 7.01(e). However, either party can request 20, 25, or 30 minutes simply by printing “oral argument:,” followed by the desired amount of time on the lower right portion of the front of the brief cover. Rule 7.01(e). See sample brief at Appendix B. The court may also designate larger amounts of time for unusually complex appeals or those involving issues of great public significance. The oral argument calendar will indicate the amount of time granted for oral argument, with both sides receiving an equal amount of time. Rule 7.01(e).

If there are multiple parties on either side who are not united in interest as to the issues on appeal and who are separately represented, the court will, on motion, allot time for separate arguments. However, if the parties are united in interest as to the issues, they must divide the allotted time among themselves by mutual agreement. If a party does not file a brief, that party may not argue before the court. Rule 7.01(e). *Amici curiae* are not permitted to argue absent a special order. Rule 6.06(d).

In the Supreme Court, a digital timer is displayed on the podium, so counsel knows at all times how many minutes remain in that portion of the argument. Appellant’s counsel must advise the court at the start of the argument how many minutes, if any,



are requested for rebuttal. The court may occasionally allow a short additional time when questioning has been extensive, but it is never safe to count on this. Arguments taking less than the full allocated time are seldom criticized on that basis.

## § 10.4 Format of Hearings Before the Court of Appeals

The Kansas Court of Appeals may hear argument *en banc*, but generally sits in panels of three judges, as designated by the Chief Judge, at varying locations throughout the State. Rule 7.02(a) and (d). Generally, four to five panels are scheduled each month, and each panel hears approximately 12 to 15 arguments over a 2-day period. The number of *en banc* hearings in the court's nearly 40-year history can be counted on one hand.

As in the Supreme Court, oral argument before the Court of Appeals is limited to 15 minutes for each party. Either party may request 20, 25, or 30 minute arguments by printing "oral argument:," followed by the desired amount of time, on the lower right portion of the front of the brief's cover. Rule 7.02(f)(2). See sample brief at Appendix B.

Not less than 30 days prior to argument, the Court of Appeals issues an oral argument calendar that indicates the amount of time granted for argument. Both parties are granted the same amount of time. Rule 7.02(f)(1).

Like the Supreme Court, the Court of Appeals will permit parties on the same side, who are not united in interest as to the issues on appeal and who are separately represented, to request separate arguments. However, if the parties are united in interest, they must divide the allotted time among themselves by mutual agreement. Rule 7.02(f)(5).

The Court of Appeals places many cases on the summary calendar. Appeals placed on the summary calendar are deemed submitted without oral argument. Rule 7.01(c)(4). Any party seeking argument on a summary calendar case must file a motion within 14 days after notice of the calendaring was mailed by the clerk setting forth the reasons why oral argument would

be helpful. Rule 7.01(c)(4). The court tends to be liberal with such requests if good cause is shown.

Unlike the Supreme Court, there is no formal docket call in the Court of Appeals. However, all attorneys are expected to be present at the beginning of the morning or afternoon session in which their arguments are scheduled, as the court sometimes makes last minute changes in the schedule to accommodate the parties or to reflect a change in the court's schedule. Absence of counsel tends to send a counter-productive message.

Keep in mind that, in the Court of Appeals, there is no timer on the podium. Although the presiding judge will advise counsel when the time for argument has ended, counsel must keep track of how much time has been used. Consider placing your watch or timer on the podium, where it is visible to you.

## § 10.5 Introductory Phase of Argument

If you are the appellant, introduce yourself and your argument clearly and assertively. Tell the court what action you want the court to take and why the court should take the action you seek. The introductory portion of your argument is your opportunity to provide the court with a “hook,”—*i.e.*, something memorable that will jog the court's memory when your case is conferenced. Keep in mind that your case is competing with several others on that docket for the panel's attention and recollection.

Give the court a brief description or road map of where you will go in your argument. It is entirely acceptable to let the court know that some issues will not be covered in argument but that you do not concede those issues. The introduction is your opportunity to narrow the playing field and make sure the court is in the same ballpark on the issues.

As appellee, you can use the introductory portion of your argument to introduce the court to your point of view of the case and to frame the issues as the appellee sees them. Your focus should be on quickly bringing the court back to where it should be — *i.e.*, emphasize what the case is *not*. Briefly discuss the

appropriate standard of review and remind the court that appellant fails to establish any material flaws in the trial court's action.

## **§ 10.6 Body of Argument**

Whether you are the appellant or appellee, keep in mind that your goal is to educate the court about what it doesn't already know or understand. You want the court to think about the result you wish to achieve, as well as the consequences of your adversary's proposed result. You must convince the court that your proposed result is fair, just, and correct – not merely a technical requirement. Point out the practical consequences of each side's suggested result, but avoid the common fault of hyperbole here.

Limit your presentation of the facts, as the court is generally familiar with the case from the bench memo prepared by its research attorneys. If you need to discuss facts, try to discuss them conversationally, as they pertain to the issues, rather than in a chronological and detailed fashion. The latter approach holds a real danger of diminished attention and tangential questions. Account for unfavorable facts, as you will most certainly be asked about them. It is important that you don't rely on or reference facts not in the record on appeal or that weren't before the district court.

The court may interrupt your argument with questions almost immediately or within a few moments of your introduction. If that happens, view it as a positive circumstance, rather than an interruption. Questions from the court indicate interest from at least one judge and may prove helpful in getting the other judges to talk about that aspect of the case, as well as other aspects. So be entirely flexible throughout your argument, and understand that you may be required to vary partially, if not entirely, from your prepared outline or text. Prioritize your outline for the most crucial points in case questions consume much of your time.

Never use the fact that you were not the attorney of record in the trial court as an excuse for lack of familiarity with the record. That excuse is usually about as welcome as telling the court

that you don't practice in the area of substantive law at issue. Neither have the judges probably, and they are often resentful about sharing their time with lawyers who use it as an excuse. Similarly, if you are asked a question that requires you to discuss information that was not before the trial court and thus is not before the appellate court, you should respond to the question if you can, but advise the court that the information the court seeks is not part of the record on appeal and thus not pertinent to the issues on appeal.

When asked a question by the court, it is essential that you fully and directly answer the question asked and that you answer the question *when* asked, rather than putting it off until it comes up in your outline. Moreover, the court appreciates candor. If you do not know the answer to the question, consider offering to research the answer and provide a letter to the court following argument. The court may then allow opposing counsel to respond.

You may be pressed to concede a point or issue, thus providing you with the opportunity to implement what has been referred to as the "Kenny Rogers' rule"—*i.e.*, "you got to know when to hold 'em, know when to fold 'em." To refuse to concede an obviously negative point risks your credibility and may indicate to the court that you are not as familiar with the case or the case law as you should be. On the other hand, the court may extend a concession you make in argument and, in the subsequent opinion, take your concession to a place you never meant it to go. This is often not a helpful occurrence in client relations, so try to anticipate what you can and cannot concede ahead of time. The bottom line is that when you make a concession, limit it as much as possible, and explain why the concession you have made does not hurt your argument. A good limiting technique is often to begin any reply with "In the context of this case...."

Avoid citing cases in your argument, unless you are citing a case that has not been included in your brief. Otherwise, you risk breaking the rapport you have developed with the court. If you must discuss a specific case, simply refer to it by all or part of its caption, not the legal citation. Keep in mind that oral argument

is an opportunity to develop your position conceptually; you must rely on your brief to provide the in-depth support for your argument.

## **§ 10.7 Delivery and Style**

Speak clearly and at a pace that the court can understand and follow. Predictable nervousness often manifests in rapid speech, and this must be recognized and resisted. While it may be tempting to get as much information to the court as quickly as possible, the court cannot process the information as quickly as you can speak it. So slow down, and make sure the court understands the points you are trying to make. Be conversational, rather than preachy, and try to avoid using legalese. Don't challenge the court to ask "counsel, could you mumble a little louder please."

Make eye contact with each of the judges throughout your argument, even if only one judge is asking most of the questions. It is a mistake to focus on a single judge who you feel is sympathetic.

Use direct language and avoid using language that indicates a lack of confidence—"I may be wrong, but..." or "it is our position that..." Avoid sarcasm and overly emotional appeals to the court. Remember, you are not speaking to a jury but to an appellate court. It is likely that righteous indignation will not have the effect you desire, and subtle wit is often missed as badly as strong humor is unappreciated.

Similarly, if you receive questions from members of the court that you perceive as hostile or personal in tone, try to stay focused. Take the high road, and respond professionally and courteously. Hopefully, you will make points with the remaining members of the court, regardless of the seemingly hostile or inappropriate questions of one judge.

Along that same line, it is essential that you pay attention to the judges' demeanor. If the court is looking bored, dazed, or confused, consider the possibility that your argument is not

keeping their attention or is not being comprehended. This might be the time to move on to a different issue or vary your delivery.

Humor works less often than many lawyers expect and should seldom be attempted before judges who are not personally familiar with counsel. It can be misinterpreted as impertinence or undue familiarity and will be unsettling if there is no favorable response. Above all, keep the need for personal credibility foremost in your mind.

## **§ 10.8 Conclusion**

Counsel often forget a simple rule—know when to sit down. If you have made all the points you intended to make but still have a few minutes of time, don't feel compelled to continue. Just conclude, and sit down. Random repetition eats away at your reputation and detracts from the points you have made. Concise, interesting argument is always more effective. Some panels will advise in advance that failure to use all allocated time is not prejudicial.

On the other hand, if a “hot” court has taken up most of your time, consider asking for one or two minutes to sum up the key points you planned to make in your argument. The worst that can happen is the court can reject your request, in which case, you can simply refer the court to the arguments in your brief.

Your conclusion, like your introduction, should be memorable and should leave the court with the “hook” the judges can remember when they are conferencing your case. You should very briefly highlight the strengths of your argument, how they fit the standard of review, and remind the court of the action you want the court to take. It is shocking how many counsel fail to do so, and occasional eccentric remand orders can result.

You might consider developing a concise and dispositive paragraph that you would like to read if you were writing the opinion. Make that your exit line.



## § 10.9 Rebuttal

If you are the appellant, it is a good idea to reserve a few minutes for rebuttal. The mere prospect of it may caution the appellee against trying to overreach. Also realize, in making your request for rebuttal time, that it is common for counsel to use more time than planned in the opening portion of argument. Rebuttal offers a chance to regroup and make any crucial points previously overlooked (although, strictly speaking, rebuttal should respond only to appellee's argument). Do not feel compelled to use the reserved time, however, because unless you have a forceful point to make, you could lose more than you might gain. This is especially true if the appellee has not successfully responded to your argument.

If you do utilize your reserved rebuttal time, keep your rebuttal very short and to the point. Don't repeat your initial argument.

## § 10.10 Final Thoughts

As you walk or drive back to your office following your argument, take the time to really listen to yourself. You are your own best critic. If your argument was before the Kansas Supreme Court, you can review and analyze the archived argument at <http://www.kscourts.org/kansas-courts/supreme-court/arguments.asp>. If you listen to your own mental feedback and self-analysis, your next argument will be easier, more effective, and more enjoyable than the last. There is also great value for younger or inexperienced counsel in hearing many recorded arguments to gain a feel for the tone and temperament of the court and individual justices. Pay particular attention to the subject of standards of review in their questions. The justices don't ask these questions because they need to learn the answers. They want you to learn the answers.



**§ 10.11 Suggestions for Further Reading**

Aldisert, *Winning on Appeal: Better Briefs and Oral Argument*, Ch. 22-25 (2nd ed. 2003).

Garner, *The Winning Oral Argument: Enduring Principles with Supporting Comments from the Literature* (2007).

ABA, Council of Appellate Lawyers, *Appellate Practice Compendium* (D. Livingston Ed.), Ch. 32 (ABA Press, 2012).

# **CHAPTER 11**

## **Disciplinary Proceedings**

### **I. ATTORNEY DISCIPLINE**

#### **§ 11.1 History**

The Rules Relating to Discipline of Attorneys, which provide substantive conduct standards and procedural rules in attorney discipline cases, can be found in the Rules adopted by the Kansas Supreme Court, beginning at Rule 200. In 1988, the Supreme Court adopted the Model Rules of Professional Conduct to replace the Model Code of Professional Responsibility, providing the substantive rules in attorney discipline cases. Then, in 1999, the Supreme Court changed the name of the substantive rules to the Kansas Rules of Professional Conduct. The substantive rules can be found in Rule 240.

#### **§ 11.2 Jurisdiction**

Original actions before the Supreme Court include disciplinary proceedings relating to attorneys. The disciplinary process is conducted under the authority of the Supreme Court under K.S.A. 7-103.

### **§ 11.3 Kansas Disciplinary Administrator**

The disciplinary administrator is appointed by the Supreme Court and serves at the pleasure of the Supreme Court. The disciplinary administrator is charged with investigating and prosecuting cases of attorney misconduct, among other duties. See Rule 205.

### **§ 11.4 Kansas Board for Discipline of Attorneys**

The Kansas Board for Discipline of Attorneys (“Board”) consists of 20 attorneys appointed by the Supreme Court. The Board members serve staggered four-year terms. Board members may serve three consecutive four-year terms. See Rule 204(a)(1). The chair and the vice-chair of the Board serve on the review committee, together with a third attorney who is not a member of the Board.

The Supreme Court authorized the Board to adopt procedural rules consistent with the rules of the Supreme Court. See Rule 204(f). Accordingly, the Board adopted the Internal Operating Rules of the Board. The Internal Operating Rules include sections regarding general rules, the review committee, the appointment of hearing panels, pre-hearing and formal hearing procedures, the panel report, and reinstatement. The rules govern proceedings before the review committee and hearing panels. The internal operating rules are published in the Rules adopted by the Kansas Supreme Court, following Rule 239, and can be found on the Supreme Court’s website: [www.kscourts.org/Rules-Orders/Rules/Internal-Operating-Rules-of-the-Kansas-Board-for-D](http://www.kscourts.org/Rules-Orders/Rules/Internal-Operating-Rules-of-the-Kansas-Board-for-D).

### **§ 11.5 Complaints**

All complaints must be in writing and filed with the disciplinary administrator. Approximately 50% of the complaints filed with the disciplinary administrator come from clients, another 45% or so come from lawyers and judges, including self-reported violations, and the final 5% come from the general public. Typically, the disciplinary administrator receives approximately 900 to 1,000 complaints every year. Of those complaints, approximately three-fourths are handled informally with correspondence to the complainant and the complained-of attorney. Approximately one-fourth are docketed and investigated annually.

A public information brochure published by the disciplinary administrator, *If a Complaint Arises about Lawyer Services*, is available at the disciplinary administrator's office for consumers of legal services and others considering filing a complaint. The information in the brochure can also be found on the disciplinary administrator's website:

<https://www.kscourts.org/Attorneys/Office-of-Disciplinary-Administration>.

The disciplinary administrator has made a six-page complaint form available for use by anyone wishing to file a complaint against an attorney. The form is designed so that the complainant can provide all the necessary information, *e.g.*, contact information, case number, court of jurisdiction, and basis of the complaint, in one form. Complainants are encouraged to provide a detailed narrative description of the basis of the complaint and documentation to support the facts alleged.

**PRACTICE NOTE:** You may request the complaint form by contacting the disciplinary administrator's office or by downloading it from the disciplinary administrator's website. See also § 12.43, *infra*.

## § 11.6 Disciplinary Investigations – Duties of the Bar and Judiciary

Rule 210 requires all members of the bar to assist the disciplinary administrator. The duty includes reporting violations as well as aiding the Supreme Court, the Board, and the disciplinary administrator in investigations and prosecutions.

**PRACTICE NOTE:** Rule 210 contains no exception regarding confidential information.

In addition, the Kansas Rules of Professional Conduct require all members of the bar to report violations whenever the attorney has “knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules.” KRPC 8.3(a). KRPC 8.3 does not require disclosure of information subject to an attorney's duty of confidentiality under KRPC 1.6 or information discovered through participation

in a lawyer assistance program or other organization such as Alcoholics Anonymous “through which aid is rendered to another lawyer who may be impaired in the practice of law.” See Rule 233. Violations by attorneys must be reported to the disciplinary administrator. Attorneys who find themselves charged with a felony or a class A or B misdemeanor or comparable offense have an affirmative duty to inform the disciplinary administrator in writing of the charge within 14 days of such charge being filed. Rule 219(c). Attorneys who are convicted of a felony crime or class A or B misdemeanor or comparable offense must inform the disciplinary administrator in writing within 14 days of the conviction. See Rule 219(d).

**PRACTICE NOTE:** “Conviction” includes “entry by a person into a diversion agreement or other comparable disposition for a felony or misdemeanor charge.” See Rule 219(a)(1).

When an attorney has knowledge that a judge has violated the rules governing judicial conduct in a manner that raises a substantial question regarding the judge’s fitness for office, the attorney must report the judicial misconduct. KRPC 8.3(b). Judicial misconduct must be reported to the Commission on Judicial Conduct by contacting the clerk of the appellate courts.

The disciplinary administrator sends a letter to the attorney accused of misconduct and requests a response to the initial complaint. The disciplinary administrator provides the attorney with a time limit within which to respond to the initial complaint. Failure to assist the disciplinary administrator is a separate violation of the Supreme Court rules. See Rule 210; KRPC 8.1; *In re Sweet*, 314 Kan. 602, 610, 501 P.3d 890 (2022); *In re Lober*, 276 Kan. 633, 638-40, 78 P.3d 458 (2003); and *State v. Savaiano*, 234 Kan. 268, 670 P.2d 1359 (1983).

Ethics and grievance committees located across the state investigate allegations of attorney misconduct. The disciplinary administrator may request that an investigator from the ethics and grievance committee investigate a complaint, or the disciplinary administrator may assign the investigation to one of the investigators on staff at the disciplinary administrator’s

office. Finally, under Rule 210, an attorney who is not a member of an ethics committee may be requested by the disciplinary administrator to investigate a complaint or to testify at a disciplinary hearing as a fact or expert witness. Once the investigation is completed, the investigator files an investigative report with the disciplinary administrator's office.

During investigations, it can become apparent that the lawyer is impaired because of an addiction or mental illness. To assist lawyers and protect the public, the Supreme Court, in 2002, created the Kansas Lawyers Assistance Program. See Rule 233. All records and information relating to the services provided by the Kansas Lawyers Assistance Program are confidential and not subject to discovery or subpoena. See Rule 233(i)(1). The reporting requirements of Rule 210 and KRPC 8.3 do not apply to lawyers working for or in conjunction with the Kansas Lawyers Assistance Program. See Rule 233(i)(3).

In addition to the Kansas Lawyers Assistance Program, some local bar associations also have their own lawyers' assistance committees. Lawyers working for these committees have similar responsibilities and immunities as lawyers working for or in conjunction with the Kansas Lawyers Assistance Program. See Rule 233(k). Some local bar associations likewise have fee dispute resolution committees. The ethics and grievance committees, the lawyer assistance committees, and the fee dispute resolution committees play an important role in assisting lawyers and clients and are an integral part of the disciplinary process.

## **§ 11.7 Disciplinary Procedure**

Throughout the formal disciplinary proceedings, an attorney accused of misconduct is referred to as the respondent. After an investigation, the investigative report and associated materials are forwarded by the disciplinary administrator to the review committee. See § 11.4, *supra*. The disciplinary administrator must provide a copy of the investigative report and evidence in the disciplinary administrator's possession to the respondent upon request. See Rule 237(d).

If the review committee determines, after reviewing the materials provided, that probable cause exists to believe that an attorney has violated the rules, the review committee may place an attorney in the attorney diversion program, direct that the attorney be informally admonished by the disciplinary administrator, or direct that a hearing panel from the Board conduct a formal hearing. See Rule 211(a).

If the review committee determines that probable cause does not exist, the review committee will dismiss the case. See Rule 211(a)(1). The review committee may also dismiss a docketed complaint for lack of clear and convincing evidence of a violation and may direct the issuance of a letter of caution to the respondent. The review committee dismisses approximately 65% of all docketed complaints.

All complaints filed with the disciplinary administrator's office remain confidential during the investigation. See Rule 237(a). There are a few specific exceptions to this rule, such as disclosure of the disciplinary file to the Kansas Lawyers Assistance Program and certain government agencies for specified purposes. See Rule 237(e)(5).

**PRACTICE NOTE:** Confidentiality applies to all persons connected with the disciplinary process except the complainant and the respondent. See Rule 237(c); *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d (1992).

If the review committee dismisses the complaint, the complaint will always be confidential. If the review committee finds probable cause to believe that the attorney has violated one or more rules, the matter becomes one of public record. See Rule 237(e).

**PRACTICE NOTE:** Once the review committee has found probable cause to believe that a violation has occurred, the disciplinary administrator may disclose certain information to third parties. See Rule 237.

The disciplinary administrator or the respondent may request that the review committee reconsider a probable cause



determination. If the review committee chooses to reconsider and, on reconsideration, again concludes that probable cause exists to believe that the respondent violated a rule, the case proceeds as it would otherwise. If the review committee reconsiders and finds no probable cause, the case is dismissed.

**PRACTICE NOTE:** Attorneys responding to a complaint should retain counsel familiar with disciplinary proceedings. Disciplinary proceedings involve special procedural rules with which many attorneys are unfamiliar. Objective and experienced counsel can assist respondents in considering and presenting their position throughout the disciplinary proceedings.

### **§ 11.8 Temporary Suspension**

On motion of the disciplinary administrator, the Supreme Court for good cause shown may temporarily suspend a respondent's license to practice law. See Rule 213. Good cause exists if the respondent fails to file an answer to the formal complaint or when "the respondent poses a substantial threat of harm to clients, the public, or the administration of justice." Rule 213(b). Typically, the disciplinary administrator reserves that remedy for extreme cases.

The Supreme Court will also temporarily suspend an attorney's license when the attorney has been convicted of a felony or a crime mandating registration as an offender. See Rule 219(g).

### **§ 11.9 Attorney Diversion Program**

In 2001, the Supreme Court created the attorney diversion program. Rule 212 governs the attorney diversion program. The program is an alternative to traditional disciplinary procedures. It is designed for attorneys who have not previously been disciplined and whose participation in the program can be expected to remedy the attorney's behavior. Attorneys will be disqualified from diversion if the conduct complained of involved "self-dealing, dishonesty, or a breach of fiduciary duty." See Rule 212(b).

In determining whether an attorney should be allowed to participate in the attorney diversion program, the review committee determines “whether participation in the program will prevent future misconduct and protect the public by improving the respondent’s professional competency and by providing educational, remedial, and rehabilitative programs for the respondent.” Rule 212(d)(2).

The diversion agreement should include provisions uniquely designed to correct the misconduct. The agreement may include provisions that require the attorney to pay restitution, participate in treatment, cooperate with a practice supervisor, or complete additional continuing legal education.

If an attorney fails to complete the terms and conditions of diversion, the review committee will determine whether to terminate the respondent’s participation in the diversion program. If the respondent’s participation in the program is terminated, traditional disciplinary proceedings will resume. See Rule 212(i). The diversion agreement is admissible evidence during a formal hearing under these circumstances and is conclusive evidence of the facts therein and the agreed violations.

Successful completion of the diversion agreement will be reported to the review committee, and the pending disciplinary case will be dismissed. The fact that an attorney successfully participated in the diversion program will remain confidential and not available to the public. However, if the attorney engages in misconduct following the successful completion of the diversion program, the attorney’s participation in the diversion program can be considered prior discipline in future disciplinary proceedings. See Rule 212(h).

### **§ 11.10 Informal Admonition**

If the review committee directs that the attorney be informally admonished by the disciplinary administrator, the attorney may accept the informal admonition or within 21 days may serve the disciplinary administrator with notice of the respondent’s demand for a formal hearing. See Rule 211(d). If the attorney accepts the informal admonition, the disciplinary administrator’s office and

the respondent will come to an agreement regarding whether the informal admonition will occur at an in-person meeting, by Zoom, by telephone, or by letter. Likely, the informal admonition will include a discussion of the misconduct, any remedial action already taken by the attorney, and any remedial action that needs to be taken.

If the attorney serves the disciplinary administrator with notice of demand for a formal hearing within 21 days, the Board Chair appoints a hearing panel and the case proceeds to a hearing under Rule 222. See Rule 211(d).

### **§ 11.11 Formal Hearing and Procedural Rules of the Kansas Board for Discipline of Attorneys**

If the review committee directs that a hearing panel conduct a formal hearing or if an attorney demands a formal hearing instead of informal admonishment, a hearing panel is appointed. The chair of the Board appoints the hearing panel. Hearing panels consist of two members of the Board, one of whom serves as presiding officer of the hearing, and one member from attorneys at large. See Internal Operating Rules C.1. and C.2. However, members of the review committee who initially reviewed the case may not serve on the hearing panel. See Internal Operating Rule C.1.

**PRACTICE NOTE:** The chair tries to appoint attorneys to the hearing panel who practice in the same area of law, but not in the same location in Kansas, as the respondent.

The disciplinary administrator's office files a formal complaint in cases set for a formal hearing. The "facts in connection with the charge" must be "clearly set out in the complaint" so that the "respondent is put on notice as to what ethical violations may arise therefrom." *State v. Caenen*, 235 Kan. 451, 459, 681 P.2d 639 (1984); quoting *State v. Turner*, 217 Kan. 574, 579-80, 538 P.2d 966 (1975). The disciplinary administrator is required to serve a copy of the formal complaint and notice of the hearing on the respondent and hearing panel members no later than 45 days before the formal hearing. See Rule 215(a)(2). The formal

complaint and notice of hearing may be personally served on the respondent, sent by certified mail to the respondent's last registration address, or served on the respondent's counsel via personal service, first-class mail, or email. See Rule 215(a)(3). The respondent is required to file a written answer to the formal complaint within 21 days of service of the formal complaint. See Rule 215(b)(2).

The respondent and the respondent's counsel should carefully review the Rules Relating to the Discipline of Attorneys, the Internal Operating Rules of the Board, and the Kansas Rules of Professional Conduct to fully understand their rights and obligations.

**PRACTICE NOTE:** Rule 216(c) requires all pre-hearing motions, including requests to continue a hearing, be filed no later than 14 days before the formal hearing.

Except for the rules of evidence, the code of civil procedure does not apply to disciplinary proceedings. See Rule 222(d). At the hearing, witnesses are sworn and all proceedings are transcribed. See Rule 222(e)(2) and (e)(3).

The disciplinary administrator may introduce evidence that the respondent engaged in criminal activity. A certified copy of a judgment of criminal conviction is conclusive evidence of the commission of the crime, and a respondent may not present evidence that the respondent is not guilty of the crime. See Rule 219(f). Additionally, participation in a diversion program for a criminal offense is deemed, for disciplinary purposes, a conviction. See Rule 219(a)(1)(B).

A certified copy of a civil judgment that is based upon clear and convincing evidence is "conclusive evidence of the commission of the conduct that formed the basis of the judgment or ruling." Rule 220(c). A certified copy of a civil judgment, based upon less than clear and convincing evidence, is prima facie evidence of the underlying conduct. The respondent may put on evidence to disprove the findings. See Rule 220(b).

Following the submission of evidence, the hearing panel will file a report setting forth its findings of fact, conclusions of law, and recommendation for discipline. See Rule 226(a)(1). “Each finding of fact must be established by clear and convincing evidence.” See Rule 226(a)(1)(A). The hearing panel’s report also includes any relevant mitigating and aggravating circumstances. See § 11.13, *infra* (ABA Standards).

**PRACTICE NOTE:** Discipline imposed in another jurisdiction on an attorney with dual licenses is not binding in Kansas. However, provided the other jurisdiction’s decision is based on clear and convincing evidence, the Supreme Court will accept the findings of fact and the conclusions of law of the other jurisdiction. The only issue before the hearing panel and the Supreme Court, in that situation, is the sanction to be imposed. See Rule 220(c). If the other jurisdiction’s decision is based on a standard less than clear and convincing evidence, a certified copy of the decision is *prima facie* evidence of the underlying conduct. The respondent may put on evidence to disprove the findings. See Rule 220(b).

The hearing panel may recommend disbarment, suspension for an indefinite period, suspension for a definite period, published or nonpublished censure, informal admonition, or any other form of discipline or conditions, including probation. See Rule 225(a) and § 11.12, *infra*.

If the hearing panel finds a violation of the rules and recommends that the respondent be informally admonished, the disciplinary administrator’s office or the respondent may file a written objection with the panel no later than 21 days after service of the final hearing report. See Rule 226(c). If the hearing panel recommends no discipline or if the hearing panel dismisses the complaint, the disciplinary administrator may file a written objection with the panel no later than 21 days after service of the final hearing report. See Rule 226(d). If a written objection is timely filed pursuant to Rule 226(c) or (d), the matter is docketed with the Supreme Court and proceeds according to Rule 228.

If the hearing panel recommends that the attorney be disbarred, suspended, placed on probation, or censured, the disciplinary administrator will prepare and file the case and transfer the record to the clerk of the appellate courts. See Rule 226(b). Nothing may be filed with the clerk of the appellate courts until after the case is docketed. But see § 11.8, *supra* (temporary suspension).

### **§ 11.12 Probation**

If the respondent intends to request probation, the respondent must “file and serve each hearing panel member and the disciplinary administrator with a copy of a probation plan at least 14 days before the hearing on the formal complaint.” Rule 227(a). The hearing panel is prohibited from recommending that the respondent be placed on probation unless each of the following conditions is present:

- The respondent filed and served each member of the hearing panel and disciplinary administrator with a copy of the probation plan at least 14 days prior to the hearing.
- The respondent put the plan of probation into effect by establishing compliance with the conditions of the probation plan at least 14 days prior to the hearing.
- The misconduct can be corrected by probation.
- Placing the respondent on probation is in the best interests of the legal profession and the public. See Rule 227(d).

The probation rule also sets forth a specific procedure to be followed in the event the respondent successfully completes or fails to comply with the terms and conditions of probation. See Rule 227(g) and (i).

### **§ 11.13 ABA Standards for Imposing Lawyer Sanctions**

In 1986, the American Bar Association House of Delegates approved a set of Standards compiled and proposed by the ABA



Joint Committee on Professional Sanctions. Disciplinary systems in many jurisdictions, including Kansas, employ the Standards as guidelines for imposing lawyer discipline in individual cases. The disciplinary administrator and the respondent may refer to the Standards when recommending discipline to be imposed. Internal Operating Rule E.3 provides that the hearing panel may apply the Standards in its determination and may reference and discuss the Standards in the final hearing report.

The Standards suggest that the hearing panel, in making a recommendation regarding the imposition of discipline, and the Supreme Court, in imposing discipline, answer the following four questions:

1. What ethical duty did the lawyer violate?
2. What was the lawyer's mental state? In other words, did the lawyer act intentionally, knowingly, or negligently?
3. What was the extent of the actual or potential injury caused by the lawyer's misconduct?
4. Are there any aggravating or mitigating circumstances? See ABA Standards for Imposing Lawyer Sanctions, 3.0.

Aggravating circumstances are "any considerations or factors that may justify an increase in the degree of discipline to be imposed." See ABA Standards for Imposing Lawyer Sanctions, 9.21. Factors that may be considered in aggravation by the hearing panel include:

- Prior disciplinary offenses;
- Dishonest or selfish motive;
- A pattern of misconduct;
- Multiple offenses;
- Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;



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- Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- Refusal to acknowledge wrongful nature of conduct;
- Vulnerability of victim;
- Substantial experience in the practice of law;
- Indifference to making restitution; and
- Illegal conduct, including that involving the use of controlled substances. ABA Standards for Imposing Lawyer Sanctions, 9.22.

Mitigating circumstances are “any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” See ABA Standards for Imposing Lawyer Sanctions, 9.31. Mitigating factors do not excuse a violation and are to be considered only when determining the nature and extent of discipline to be administered. Factors that may be considered in mitigation by the hearing panel include:

- Absence of a prior disciplinary record;
- Absence of a dishonest or selfish motive;
- Personal or emotional problems if such misfortunes have contributed to violation of the Kansas Rules of Professional Conduct;
- Timely good faith effort to make restitution or to rectify consequences of misconduct;
- The present and past attitude of the attorney as shown by cooperation during the hearing and by the full and free acknowledgment of the transgressions;
- Inexperience in the practice of law;
- Previous good character and reputation in the community including any letters from clients, friends, and lawyers in support of the character and general reputation of the attorney;
- Physical disability;

- Mental disability or chemical dependency including alcoholism or drug abuse when: a) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; b) the chemical dependency or mental disability caused the misconduct; c) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and d) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;
- Delay in disciplinary proceedings;
- Imposition of other penalties or sanctions;
- Remorse; and
- Remoteness of prior offenses.

The Standards are organized based upon the duty violated by the attorney. Each section includes the language of the Standard as well as commentary that often includes case citations.

Recognizing the importance of consistency in imposing sanctions, the Supreme Court and the Board have cited the Standards with approval in their decisions and reports, respectively. See *In re Buckner*, 308 Kan. 427, 451, 421 P.3d 226 (2018); *In re Ware*, 279 Kan. 884, 892-93, 112 P.3d 155 (2005); *In re Price*, 241 Kan. 836, 837, 739 P.2d 938 (1987)

#### **§ 11.14 Summary Submission**

As an alternative to a formal hearing, the disciplinary administrator and respondent may decide to resolve the Board proceeding by summary submission. To do so, the parties must enter into a written agreement that contains:

- an admission that the respondent engaged in misconduct;
- a stipulation to the contents of the record, the findings of fact, the conclusions of law, including each violation of the Kansas Rules of Professional

Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office, and any applicable aggravating and mitigating factors;

- a recommendation for discipline;
- a waiver of the hearing on the formal complaint; and
- a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken. See Rule 223(b).

The agreement for summary submission must be entered into at least 30 days prior to the formal hearing. The complainant is provided notice of the agreement and may provide the complainant's position on the agreement within 21 days. See Rule 223(c)-(d).

The agreement is then forwarded to the Chair of the Board for Discipline of Attorneys for consideration. If the Board Chair approves the agreement, the matter proceeds to the Supreme Court pursuant to Rule 228. If the Board Chair rejects the agreement, the case proceeds to a formal hearing. See Rule 223(e).

The agreement is advisory only and the Supreme Court retains the ability to reach its own conclusions and impose discipline greater or lesser than the agreed recommendation. See Rule 223(f).

### **§ 11.15 Disabled Attorneys**

An attorney is "disabled" under Rule 234 if the attorney is "unable to continue the practice of law due to a mental or physical limitation." Rule 234(a). If an attorney wishes to voluntarily register as a disabled attorney, and there are no pending disciplinary complaints against the attorney, the attorney may do so by submitting evidence that the attorney is disabled to the disciplinary administrator. See Rule 234(d). If there is a complaint pending against an attorney who wishes to transfer to disabled status, the respondent must stop practicing law, serve evidence of the disability on the disciplinary administrator, and either file a motion with the Supreme Court or request that the

disciplinary administrator file a motion to transfer the attorney to disabled status. See Rule 234(e). An attorney whose license is transferred to disabled status may not engage in the practice of law until the attorney's license is reinstated by the Supreme Court. See Rule 234(g).

The disciplinary administrator may file a motion with the Supreme Court requesting an order requiring that an attorney be examined by a qualified medical expert. The attorney may file a response to this motion within 14 days. If the Supreme Court grants the motion, the attorney must submit to examination. Refusal or failure to submit to examination will result in the Supreme Court issuing an order temporarily suspending the attorney's license to practice law. See Rule 234(b).

While investigation of a docketed disciplinary complaint is pending, the disciplinary administrator may file a motion with the Supreme Court to transfer a respondent to disabled status. The Supreme Court may appoint counsel to represent the respondent and the disciplinary administrator must file with the Supreme Court and serve the respondent with a report obtained pursuant to Rule 234(b). The disciplinary administrator must prove the respondent is disabled by clear and convincing evidence before the Supreme Court will transfer the attorney to disabled status. See Rule 234(e)(2).

After an attorney has been transferred to disabled inactive status, if it appears that the attorney has disappeared or died, if affairs of an attorney's clients are being neglected, or if a disbarred or suspended attorney has not complied with Rule 231, the chief judge of the judicial district in which the attorney practiced may appoint an attorney to inventory the attorney's client files, access the attorney's trust account, and take such action as may be necessary to protect the interests of the attorney and the attorney's clients. See Rule 235(a).

**PRACTICE NOTE:** Participants in disciplinary proceedings who file a complaint or report, provide testimony, or act within the scope of their duties under the Rules Relating to Discipline of Attorneys are entitled to absolute immunity. See Rule 238 and *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d 23 (1992).

### **§ 11.16 Proceedings Before the Supreme Court**

At the time a case is docketed with the Supreme Court, the clerk of the appellate courts notifies the respondent by certified mail. Within 21 days, the respondent must file exceptions to the report or a statement that the respondent will not file an exception. See Rule 228(e). If the respondent files no exception or a statement that the respondent will not file an exception, all findings of fact and conclusions of law are deemed admitted. See Rule 228(g)(1). The same requirements apply to the disciplinary administrator. See Rule 228(e) and (g). The disciplinary administrator and the respondent may contest the discipline recommended by the hearing panel without filing an exception. See Rule 228(f)(1).

If an exception is filed, the clerk of the appellate courts provides a copy of the hearing transcript to the respondent. The party who filed an exception has 30 days from service of the transcript to file a brief. The responding party has 30 days from the service of the opening brief to file a response brief, and the party who filed the opening brief then has 14 days to file a reply brief. See Rule 228(h).

In addition to the Rules Relating to Discipline of Attorneys, all Supreme Court rules relating to civil appellate practice apply to original disciplinary proceedings. Failure of a party to file a brief in a timely manner is considered admission of the findings of fact and conclusions of law in the final hearing report. See Rule 228(h)(2)(E). When the filing of briefs is complete, the matter is set for oral argument. See Rule 228(i).

**PRACTICE NOTE:** Regardless of whether the respondent filed exceptions, the respondent must appear in person before the Supreme Court on the date set for oral argument.

The record available to the Supreme Court includes the formal complaint, the attorney's answer, other pleadings filed, the hearing transcript, the exhibits offered for admission into evidence, and the hearing panel's final hearing report or the parties' summary submission agreement. See Rule 228(b) and (c). Because the Supreme Court operates from a closed evidentiary record, it is essential that all material facts be included in the record at the hearing level.

### **§ 11.17 Scope of Review and Standard of Review**

Appellate briefs must contain discussion of each issue with a citation to the appropriate standard of appellate review. See Rules 6.02(a)(5) and 6.03(a)(4). In disciplinary matters where exceptions and briefs are filed, the Supreme Court's scope of review is a complete de novo review of the challenged factual findings and the legal conclusions. The Supreme Court has a "duty in disciplinary proceeding[s] to examine the evidence and determine for [themselves] the judgment to be entered." *State v. Klassen*, 207 Kan. 414, 415, 485 P.2d 1295 (1971).

### **§ 11.18 Oral Argument**

The parties are each given 15 minutes to argue the case. Either side may request additional time beyond the 15-minute time limit at the time the brief is filed. If the request is granted, both sides will receive the additional time.

The Supreme Court is a hot court and is familiar with the findings of fact, conclusions of law, and recommendations regarding discipline.

Regardless of whether the disciplinary administrator or the respondent files exceptions to the final hearing report, the disciplinary administrator argues first because the disciplinary

administrator has the burden of proof. Additionally, the disciplinary administrator may reserve rebuttal time.

While oral argument before the Supreme Court by competent counsel for the respondent is most effective, the respondent should personally address the Court to establish that the respondent has taken responsibility for the misconduct.

**PRACTICE NOTE:** The hearing panel is the fact finder and the facts found by the hearing panel have rarely been set aside by the Supreme Court. Thus, the respondent is well-advised to focus on the appropriate discipline to be imposed rather than to hope for a factual substitution by the Supreme Court.

As to the level of discipline to be imposed, the Supreme Court is not bound by the recommendation of the hearing panel. See Rule 226(a)(1)(D); *In re Hodge*, 307 Kan. 170, 230, 407 P.3d 613 (2017); and *In re Gershater*, 270 Kan. 620, 625, 17 P.3d 929 (2001).

The sanctions recommended by the hearing panel and the disciplinary administrator are only recommendations. The parties are free to argue the appropriate discipline even when no exceptions have been taken. In arguing for a lesser sanction, the respondent should discuss any compelling mitigating circumstances.

When arguing for a particular sanction, the respondent should be aware that the Court has held that “[c]omparison of past sanctions imposed in disciplinary cases is of little guidance. Each case is evaluated individually considering its particular facts and circumstances and in light of protecting the public.” See *In re Jones*, 252 Kan. 236, 843 P.2d 709 (1992).

### **§ 11.19 Supreme Court Opinions**

Discipline ordered by the Supreme Court is effective immediately upon the filing of the order with the clerk of the appellate courts unless otherwise ordered by the Supreme Court. See Rule 228(j). The respondent may file a motion for rehearing



or modification under Rule 7.06 within 21 days. The filing of a motion for rehearing or modification does not stay the effect of the order unless the Supreme Court rules otherwise. See Rule 228(k).

The final judgment of the Supreme Court cannot be challenged in a United States District Court. The only available appeal is a direct petition for writ of certiorari to the United States Supreme Court. No petition for a writ of certiorari to the United States Supreme Court has ever been granted regarding a Kansas attorney disciplinary case.

Upon final resolution of each disciplinary complaint, the disciplinary administrator provides the outcome to the complainant, the respondent, the ethics and grievance committee assigned to investigate the complaint, and the investigator assigned to investigate the complaint.

Typically, the Supreme Court's opinion imposing discipline on an attorney is published in the *Kansas Reports*. However, Rule 225(a)(5) provides that censure may or may not be published in the *Kansas Reports*.

In cases where discipline of suspension or disbarment is ordered by the Supreme Court, the clerk of the appellate courts notifies the chief judge of the district where the attorney resides and the clerks of all other state and federal courts in which the respondent is known to be licensed. See Rule 231(c). Any discipline imposed by the Supreme Court is also reported to the National Discipline Data Bank for dissemination to other jurisdictions.

Upon suspension or disbarment, within 14 days of the order, the attorney must notify each client in writing of the attorney's inability to continue representation or to undertake further representation. Additionally, the attorney must inform all clients of their need to retain other counsel. Within 14 days the attorney must also provide written notification to opposing counsel and to all courts and administrative bodies before whom the attorney is counsel of record in pending proceedings of the inability to proceed in the matter(s). Appropriate notices of withdrawal as counsel of record must also be filed within 14 days. See Rule 231(a).

Costs of the disciplinary proceedings, as certified by the disciplinary administrator, may be assessed by the Supreme Court against a respondent. See Rule 229.

### **§ 11.20 Additional Procedural Rules**

Rule 239 contains additional procedural rules that are worth noting. First, subsection (a) provides that time limitations included in the rules are directory and not jurisdictional. Second, subsection (b) provides that any deviation from the rules is not a defense to the disciplinary proceedings unless it causes prejudice to the respondent.

### **§ 11.21 Voluntary Surrender of License to Practice Law**

Under Rule 230(b), an attorney facing charges of ethical misconduct may voluntarily surrender the attorney's license to practice law. When a respondent in a pending disciplinary matter voluntarily surrenders, the Supreme Court issues an order of disbarment and the attorney's name is stricken from the roll of licensed Kansas attorneys. See Rule 230(b)(1) and *In re Rock*, 279 Kan. 257, 262-63, 105 P.3d 1290 (2005). Any pending disciplinary proceeding terminates, but the disciplinary administrator may direct the completion of a pending investigation to preserve evidence. See Rule 230(b)(1)(C). Thereafter, the clerk of the appellate courts notifies the chief judge of the district court where the attorney resides and other jurisdictions where the attorney is licensed as in other cases of suspension or disbarment. See Rule 231(c).

An example of a surrender letter appears at § 12.44, *infra*. Along with the surrender letter, the attorney must send to the clerk of the appellate courts the attorney's original bar certificate and the most recent annual registration card. See Rule 230(a).

An attorney who is not under investigation and who does not anticipate an investigation may also surrender if the attorney is in good standing. When an attorney surrenders the attorney's license when the attorney is not under investigation and when an investigation is not anticipated, the attorney's name is stricken from the roll of attorneys. See Rule 230(c).

## § 11.22 Reinstatement

Five years after the date of disbarment, three years after the date of an indefinite suspension, or after a definite period of suspension has passed, an attorney may file a verified petition to apply for an order of reinstatement. The petition must bear the original case caption and number. The attorney is required to file with the clerk of the appellate courts the original, along with a \$1,250 filing fee, and serve the disciplinary administrator with a copy of the petition. See Rule 232(b)(2).

The petition must contain evidence that the attorney is eligible to petition for reinstatement, has complied with Rule 231 and Supreme Court orders, has paid costs assessed under Rule 229, and should be reinstated to the practice of law. See Rule 232(b)(1). While the attorney is referred to as the respondent during disciplinary proceedings, in reinstatement proceedings, the attorney is considered the petitioner.

After a petition for reinstatement is filed, the Supreme Court determines whether a sufficient period has elapsed since the discipline was imposed, considering the gravity of the misconduct. If insufficient time has elapsed, the Court will dismiss the petition. See Rule 232(e)(1)(A) and *In re Russo*, 244 Kan. 3, 765 P.2d 166 (1988).

If the Supreme Court finds sufficient time has elapsed, then the clerk of the appellate courts forwards the petition to the disciplinary administrator for investigation and hearing before a hearing panel of the Board. See Rule 232(e)(1)(B) and (e)(2).

The petitioner must establish that the factors in Rule 232(e)(4) weigh in favor of reinstatement and that the petitioner is fit to practice law by clear and convincing evidence. See Rule 232(e)(3).

**PRACTICE NOTE:** Hearing panels that hear reinstatement petitions typically consist of review committee members. Following the hearing on the reinstatement petition, the hearing panel files a final hearing report.

If the report recommends denial of the petition, the petitioner may file exceptions within 21 days. See Rule 232(g)(4)(A). At that point, or if the report recommends approval of the petition, the matter stands submitted to the Supreme Court. See Rule 232(g)(3) and (4)(C). No briefs or oral arguments are permitted unless requested by the Supreme Court. See Rule 232(g)(4)(D). In reaching its decision, the Supreme Court considers the petition, all exhibits admitted into evidence, the transcript of the hearing, the report, and any exceptions filed. The Supreme Court may order reinstatement with or without conditions or may deny the petition. See Rule 232(h).

### **§ 11.23 Lawyers' Fund for Client Protection**

In 1993, the Kansas Supreme Court established the Lawyers' Fund for Client Protection to compensate clients who suffer economic loss because of dishonest actions by active members of the Kansas bar. The fund covers most cases in which lawyers have taken for their own use or otherwise misappropriated clients' money or other property entrusted to them. The fund does not cover losses resulting from lawyers' negligence, fee disputes, or cases of legal malpractice. Claimants for reimbursement from the fund are also required to report the misconduct of the attorney to the disciplinary administrator as a condition precedent to filing a claim. See Rule 241. Information about the fund and the claim form is available on the disciplinary administrator's webpage.

## **II. JUDICIAL DISCIPLINE**

### **§ 11.24 History**

Under authority granted by Article 3, §§ 1 and 15 of the Kansas Constitution, the Commission on Judicial Conduct (formerly known as the Commission on Judicial Qualifications) was created on January 1, 1974. The Commission is subject to the Supreme Court's direction and approval and assists the Court in the exercise of its responsibility in judicial disciplinary matters.

The Commission consists of fourteen members, including six active or retired judges, four lawyers, and four non-lawyers. All members are appointed by the Supreme Court and may serve no more than three consecutive four-year terms. See Rule 602(b). The fourteen members are divided into two seven-person panels, consisting of three judges, two lawyers, and two non-lawyers. See Rule 602(c). Each panel meets every other month, alternating with the other panel. The full Commission meets in June and upon call of the chair. See Rule 602(d).

### **§ 11.25 Jurisdiction/Governing Rules**

The Commission's jurisdiction extends to approximately 500 judicial positions including Supreme Court justices, Court of Appeals judges, district court judges, district magistrate judges, and municipal judges. This number does not include judges *pro tempore* and others who, from time to time, may be subject to the Code of Judicial Conduct.

The Supreme Court Rules governing the operation of the Commission and standards of conduct are found in the Kansas Court Rules Annotated, Rules 602 through 622, which were updated on May 1, 2019.

### **§ 11.26 Staff**

The Clerk of the Appellate Courts serves as secretary to the Commission under Rule 605. The secretary is the custodian of the official files and records of the Commission and directs the operation of the office. The administrator for Judicial Conduct manages the daily operation of the office.

The Commission also retains an examiner, a member of the Kansas Bar who acts in a dual capacity by assisting an Inquiry Panel, when requested, in investigating a complaint and by prosecuting a formal complaint before a Hearing Panel, including any judicial discipline proceedings before the Supreme Court. See Rule 606.

### **§ 11.27 Initiating a Complaint**

Any person may file a complaint with the Commission concerning the actions of a judge. Initial inquiries may be made and complaint packets obtained by telephone, letter, email, by visiting the Appellate Clerk's Office personally, or by visiting the Kansas Judicial Branch website. Under Rule 607, a complaint must be submitted on a form provided by the Commission, signed by the complainant, and contain a complaint against only one judge. The complaint should identify the conduct or action believed to be improper and provide specific details and facts. Very often, the opportunity to voice the grievance is sufficient and the Commission never receives a formal complaint.

In addition to citizen complaints, the Commission may investigate matters of judicial misconduct on its own motion. Referrals are also made to the Commission through the Office of Judicial Administration and the Office of the Disciplinary Administrator.

Referrals are made through the Office of Judicial Administration on personnel matters involving sexual harassment. The Kansas Court Personnel Rules provide that, if upon investigation the Judicial Administrator finds probable cause to believe an incident of sexual harassment has occurred involving a judge, the Judicial Administrator will refer the matter to the Commission on Judicial Conduct. See Kansas Court Personnel Rules 9.1(b).

The Disciplinary Administrator refers complaints to the Commission if investigation into attorney misconduct implicates a judge.

### **§ 11.28 Complaint Receipt; Initial Review**

Under Rule 607, the secretary of the Commission will assign each complaint a number used to identify the complaint at all steps in the Commission process. The secretary will send a written acknowledgment of receipt to the complainant and make an initial review of the complaint. A complaint that is illegible or does not conform to the requirements of Rule 607(a) will



be returned. If the complaint fails to state a violation of the Code of Judicial Conduct or does not state a matter within the Commission's jurisdiction, the complainant will be notified. The secretary's decision will be reviewed by the next sitting Inquiry Panel. Rule 607(d). Any complaint not resolved by the initial review process will be assigned to an Inquiry Panel.

**PRACTICE NOTE:** Appealable matters constitute the majority of the complaints received by the Commission and arise from a public misconception of the Commission's function. The Commission does not function as an appellate court. Examples of appealable matters that are outside the Commission's jurisdiction include: matters involving the exercise of judicial discretion, particularly in domestic cases; disagreements with the judge's application of the law; and evidentiary or procedural matters, particularly in criminal cases.

### **§ 11.29 Procedures of an Inquiry Panel**

A complaint assigned to an Inquiry Panel by the secretary will be considered at its next monthly meeting to determine whether the complaint states sufficient credible facts that cause a reasonable person to believe a violation of the Code of Judicial Conduct has occurred. Under Rule 613, an Inquiry Panel may obtain additional documents, direct the secretary to request a response from the judge, refer the matter to the Examiner, or stay a complaint.

After investigation, if an Inquiry Panel finds no violation it may dismiss the complaint or dismiss the complaint and issue a letter of informal advice to the judge. Rule 614(b)(1). If an Inquiry Panel finds a violation of the Judicial Code, it may issue a letter of caution to the judge; issue a cease-and-desist order as set forth in Rule 614(c); or refer the matter for formal proceedings. Rule 614(b)(2).

The complainant will be notified of the Inquiry Panel's action upon disposition of a complaint. If there is a finding of a violation,



the judge or other interested persons will be notified. If there is a finding of no violation, the judge or other interested persons may be notified within the Inquiry Panel's discretion. Rule 607(h).

### **§ 11.30 Confidentiality**

The Inquiry Panel assigned a complaint will conduct an investigation, often contacting the judge involved as well as witnesses. The Commission and its staff are bound by a rule of confidentiality unless public disclosure is permitted by the Rules Relating to Judicial Conduct or by order of the Supreme Court. See Rule 611(a). An exception to the confidentiality rule exists if the panel issues a public cease and desist order. Rule 614(c).

Other narrowly delineated exceptions to the rule of confidentiality exist. Rule 611(c)(3) provides a specific exception to the rule of confidentiality regarding any information that the Commission or a panel considers relevant to current or future criminal prosecutions or ouster proceedings against a judge. Rule 611(d) further permits a waiver of confidentiality in the Commission's or panel's discretion to the Disciplinary Administrator and the Judges Assistance Committee. Rule 611(e) permits a waiver of confidentiality, upon written request, to disclose complaint dispositions that find a violation of the Judicial Code to the Supreme Court Nominating Commission, District Court Nominating Commissions, and the Governor regarding nominees for judicial appointments.

The rule of confidentiality does not prohibit the complainant or the judge from disclosing the existence of a complaint or from disclosing any documents or correspondence filed by, served on, or provided to that person. See Rule 611(b)(3).

### **§ 11.31 Formal Proceedings**

If an Inquiry Panel concludes that formal proceedings should be instituted, the examiner is directed to prepare a formal complaint. After the formal complaint is approved by the Inquiry Panel and served on all parties, all matters relating to the formal proceedings are referred to the Hearing Panel. Rule 615. The Hearing Panel proceeding is not a continuation of the Inquiry

Panel's process, but instead is a new separate proceeding based on the formal complaint. The judge has an opportunity to answer. A prehearing conference is set to conduct preliminary matters and to establish the time, place, and duration of the formal hearing. Rule 616(e). At the formal hearing, the judge has the right to defend against the charges and to be represented by a lawyer. See Rule 617.

The hearing on a notice of formal proceedings is a public hearing on the record. See Rule 611(c). The judge is entitled to be represented by counsel at all stages of the proceedings, including the investigative phase prior to the filing of the notice of formal proceedings if the judge so chooses. The rules of evidence applicable to civil cases apply at formal hearings. Rule 618(e). Procedural rulings are made by the chair and consented to by other members unless one or more calls for a vote. Any difference of opinion with the chair is controlled by a majority vote of those panel members present.

The examiner for the Commission presents the case in support of the charges in the formal complaint. At least five members of the panel must be present when evidence is introduced. Rule 618. A vote of four members of the panel is required before a finding may be entered that any charges have been proven. The charges must be proven by clear and convincing evidence. Rule 619(b); Rule 619A(a); *In re Rome*, 218 Kan. 198, Syl. ¶ 9, 542 P.2d 676 (1975).

If the Hearing Panel finds the charges have been proven, it must make one of the following dispositions: admonishment, issue a cease-and-desist order; recommend to the Supreme Court a discipline of public censure, suspension, or removal; or recommend to the Supreme Court compulsory retirement. Rule 619(b).

If the Hearing Panel finds the charges have not been proven or its disposition is admonishment or issuance of a cease-and-desist order, the proceedings will terminate and the examiner, the respondent or the respondent's attorney, and any complainant will be notified. Rule 619(c).

In all proceedings resulting in a recommendation to the Supreme Court for discipline or compulsory retirement, a Hearing Panel must submit written findings of fact, conclusions of law, and the basis for the recommendation. Rule 619(f). The written findings will be filed and docketed by the Clerk of the Supreme Court as a case. Rule 620. The respondent can file written exceptions to the panel's report within 20 days after receipt of the clerk's citation directing a response. A respondent who does not wish to file exceptions may reserve the right to address the Supreme Court with respect to the disposition of the case. Rule 620.

If exceptions are not taken, the panel's findings of fact and conclusions of law are conclusive and may not later be challenged by respondent. The matter is set for hearing before the Supreme Court, at which time the respondent appears in person and may be accompanied by counsel, but only for the limited purpose of making a statement with respect to the discipline to be imposed.

If exceptions are taken, a briefing schedule is set, and the rules of appellate procedure apply. After briefs are filed, argument is scheduled before the Supreme Court at which time the respondent must appear in person and may be accompanied by counsel.

In its resolution of the disciplinary matter, the Supreme Court may refer the matter back to a Hearing Panel for any further proceedings as directed by the Court; reject the Hearing Panel's recommendations; dismiss the proceedings; order discipline; order compulsory retirement; or make any other disposition as justice requires. Rule 620.

# CHAPTER 12

## Forms

### § 12.1 Notice of Appeal—Supreme Court

IN THE [Insert Number] JUDICIAL DISTRICT DISTRICT COURT OF [Insert Name]  
COUNTY, KANSAS (CRIMINAL)(CIVIL) DEPARTMENT

[Insert Name],

Plaintiffs-Appellees,

vs.

[Insert District Court Case Number]

[Insert Name],

Defendant-Appellant.

---

#### NOTICE OF APPEAL

[Name the appealing party or parties] appeal(s) from [designate the judgment or part of the judgment or other appealable order] to the Supreme Court of the State of Kansas.

This appeal is directly to the Supreme Court on the ground that [state the ground on which direct appeal is permitted, including citation to statutory authority. For example, that the district court declared K.S.A. 60-3701 *et seq.*, unconstitutional. See K.S.A. 60-2101(b)].

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Notice of Appeal was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** The notice of appeal to the Supreme Court, unlike the Court of Appeals, must state the ground on which appeal to the Supreme Court is permitted, including citation to the statutory authority which permits the direct appeal. See §§ 5.2 and 5.16, *supra*, for a discussion of the appellate jurisdiction of the Supreme Court.

Because appellate review is limited to the rulings specified in the notice of appeal, it is good practice to appeal from all adverse rulings. See Chapter 7, Part I, *supra*.

**§ 12.2 Notice of Appeal—Court of Appeals**

**IN THE [Insert Number] JUDICIAL DISTRICT DISTRICT COURT OF [Insert Name]  
COUNTY, KANSAS (CRIMINAL)(CIVIL) DEPARTMENT**

[Insert Name],

Plaintiffs-Appellees,

vs.

[Insert District Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**NOTICE OF APPEAL**

[Name the appealing party or parties] appeal(s) from [designate the judgment or part of the judgment or other appealable order] to the Court of Appeals of the State of Kansas.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Notice of Appeal was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
\_\_\_\_\_  
Attorney's Name and Registration Number

**PRACTICE NOTE:** See §§ 5.3 and 5.17, *supra*, for a discussion of the appellate jurisdiction of the Court of Appeals.

Because appellate review is limited to the rulings specified in the notice of appeal, it is good practice to appeal from all adverse rulings. See Chapter 7, Part I, *supra*.



**§ 12.3 Notice of Cross-Appeal**

**IN THE [Insert Number] JUDICIAL DISTRICT DISTRICT COURT OF [Insert Name]  
COUNTY, KANSAS (CRIMINAL)(CIVIL) DEPARTMENT**

[Insert Name],

Plaintiffs-Appellees,

vs.

[Insert District Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**NOTICE OF CROSS-APPEAL**

[Name the cross-appealing party or parties] cross-appeal(s) from [designate the judgment or part of the judgment or other appealable order] to the Court of Appeals of the State of Kansas.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Notice of Cross-Appeal was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
Attorney's Name and Registration Number

## § 12.4 Docketing Statement—Civil

### IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS

Case Caption: County Appealed From \_\_\_\_\_  
 District Court Case No(s): \_\_\_\_\_  
 Proceeding Under Chapter: \_\_\_\_\_  
 Party Filing Appeal: \_\_\_\_\_  
 Party or Parties who will Appear as Appellees:  
 \_\_\_\_\_

#### DOCKETING STATEMENT—CIVIL

The docketing statement is used by the court to determine jurisdiction and to make calendar assignments under Rules 7.01(c) and 7.02(c). This is not a brief and should not contain argument or procedural motions.

1. **Civil Classification:** From the list of civil topic sub-types listed at the end of this form, choose the **one** which best describes the **primary** issue in this appeal.
  
2. **Proceedings in the District Court:**
  - a. Trial Judge from whose decision this appeal is taken: \_\_\_\_\_
  
  - b. List any other judge who has signed orders or conducted hearings in this matter: \_\_\_\_\_
  
  - c. Was this case disposed of in the district court by:
 

_____	Jury trial
_____	Bench trial

\_\_\_\_\_ Summary Judgment

\_\_\_\_\_ Dismissal

\_\_\_\_\_ Other

d. Length of trial, measured in days (if applicable): \_\_\_\_\_

e. State the name of each court reporter or transcriptionist who has reported or transcribed any or all of the record for the case on appeal. (This is not a substitute for a request for transcript served on the individual reporter or transcriptionist under Rule 3.03.)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

f. State the legal name of all entities that are NOT listed in the case caption (including corporations, associations, parent, subsidiary, or affiliate business entities) but are parties or have a direct involvement in the case on appeal:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

g. State the name, address, telephone number, fax number, and e-mail address of every attorney who represented a party in district court if that attorney's name does NOT appear on the certificate of service attached to this docketing statement. Clearly identify each party represented.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. Jurisdiction:
- a. Date journal entry, judgment form, or other appealable order filed: \_\_\_\_\_
  - b. Is the order appealed from a final order, *i.e.*, does it dispose of the action as to all claims by all parties? \_\_\_\_\_
  - c. If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment under K.S.A. 60-254(b)? If not, state the basis on which the order is appealable. \_\_\_\_\_
  - d. Date any posttrial motion filed \_\_\_\_\_
  - e. Date disposition of any posttrial motion filed: \_\_\_\_\_
  - f. Date notice of appeal filed in district court: \_\_\_\_\_
  - g. Other relevant dates necessary to establish this court's jurisdiction to hear the appeal, *i.e.*, decisions of administrative agencies or municipal courts and appeals therefrom:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
  - h. Statutory authority for appeal: \_\_\_\_\_
  - i. Are there any proceedings in any other court or administrative agency, state or federal, which might impact this case or this court having jurisdiction (yes or no)?  
 If "yes," identify the court or agency in which the related proceeding is pending. List the case captions and the case or docket numbers.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
4. **Constitutional Challenges to Statutes or Ordinances:**  
 Was any statute or ordinance found to be unconstitutional by the district court (yes or no)? \_\_\_\_\_  
 If "yes," what statute or ordinance? \_\_\_\_\_

5. Related Cases/Prior Appeals:
- a. Is there any case now pending or about to be filed in the Kansas appellate courts which:
- (1) Arises from substantially the same case as this appeal (yes or no)? \_\_\_\_\_  
If "yes," give case caption and docket number.  
\_\_\_\_\_
- (2) Involves an issue that is substantially the same as, similar to, or related to an issue in this appeal (yes or no)? \_\_\_\_\_  
If "yes," give case caption and docket number.  
\_\_\_\_\_
- b. Has there been a prior appeal involving this case or controversy (yes or no)? \_\_\_\_\_  
If "yes," give case caption and docket number.  
\_\_\_\_\_
6. Brief statement (less than one page), without argument, of the material facts. This is not intended to be a substitute for the factual statement that will appear in the brief.
7. Concise statement of the issues proposed to be raised. You will not be bound by this statement but should include issues now contemplated. Avoid general statements such as "the judgment is not supported by the law."

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Docketing Statement was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of all persons served and whom they represent.]

/s/  
Attorney's Name and Registration Number

CIVIL TOPIC SUB-TYPES: Select the one sub-type which best describes this appeal.

See Question 1 above.

Administrative — KS Corporation Commission	Governmental Immunity
Administrative — Licensing	Habeas — appeal from district court
Administrative — Public Utility Rate Case	Insurance
Administrative — Taxation	Jurisdiction
Administrative — Workers Compensation	Juvenile Offenders Code
Administrative — Other	K.S.A. 60-1507
Certified Question	Libel and Slander
Children — Adoption	Mandamus — appeal from district court
Children — CINC	Negligence
Children — Termination of Parental Rights	Oil and Gas
Conservators/Conservatorships	Personal Property
Constitutional Law	Probate
Contracts	Procedure
Creditors and Debtors	Quo Warranto — appeal from district court
Damages — Personal Injury	Real Property
Damages — Property	Statutory Interpretation or Construction
Damages — Punitive	Teacher Employment/Due Process
Divorce	Torts (specify sub-type)



## Forms

Election Contest

Eminent Domain

Employment

Wrongful Death

Zoning

Other (please specify):

**PRACTICE NOTE:** Docketing statement forms are available in a fillable pdf format in the online version of this handbook.

Remember that references to names of certain persons such as children and victims of sex crimes are subject to special rules. See Rule 7.043.

Although a docketing statement can be filed electronically, it cannot be served through the electronic filing system. Rather, it must be served by traditional means, including e-mail and fax. If the docketing statement is being served on someone as a courtesy, that should be noted in the certificate of service. Otherwise, any person mentioned in the certificate of service will be considered an appellee in the case.

## § 12.5 Docketing Statement—Civil Cross-Appeal

### IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS

Case Caption: County Appealed From \_\_\_\_\_  
 District Court Case No(s): \_\_\_\_\_  
 Proceeding Under Chapter: \_\_\_\_\_  
 Party Filing Appeal: \_\_\_\_\_  
 Party or Parties who will Appear as Appellees:  
 \_\_\_\_\_

#### DOCKETING STATEMENT—CIVIL—CROSS-APPEAL

The docketing statement is used by the court to make calendar assignments under Rules 7.01(c) and 7.02(c). This is not a brief and should not contain argument or procedural motions.

1. Date notice of cross-appeal filed in district court: \_\_\_\_\_
2. Brief statement (less than one page), without argument, of the facts material to the cross-appeal. This is not intended to be a substitute for the factual statement which will appear in the brief.
3. Concise statement of the issues proposed to be raised. You will not be bound by this statement but should include issues now contemplated. Avoid general statements such as “the judgment is not supported by the law.”

Attorney’s Signature

/s/ \_\_\_\_\_

Attorney’s Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Docketing Statement was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of all persons served and whom they represent.]

/s/  
Attorney's Name and Registration Number

**PRACTICE NOTE:** Docketing statement forms are available in a fillable pdf format in the online version of this handbook.

Remember that references to names of certain persons such as children and victims of sex crimes are subject to special rules. See Rule 7.043.

Although a docketing statement can be filed electronically, it cannot be served through the electronic filing system. Rather, it must be served by traditional means, including e-mail and fax. If the docketing statement is being served on someone only as a courtesy, that should be noted in the certificate of service.

## § 12.6 Docketing Statement—Criminal

### IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS

Case Caption: \_\_\_\_\_  
 County Appealed From \_\_\_\_\_  
 District Court Case No(s).: \_\_\_\_\_  
 Proceeding Under Chapter: \_\_\_\_\_  
 Party Filing Appeal: \_\_\_\_\_  
 Party or Parties who will Appear as Appellees:  
 \_\_\_\_\_

### DOCKETING STATEMENT—CRIMINAL

The docketing statement is used by the court to determine jurisdiction and to make calendar assignments under Rules 7.01(c) and 7.02(c). This is not a brief and should not contain argument or procedural motions.

1. **Criminal Classification:**
  - a. Conviction of (offense[s], statute[s], and classification[s] of crime[s]):  
 \_\_\_\_\_
  - b. Date of offense(s) committed: \_\_\_\_\_
  
2. **Proceedings in the District Court:**
  - a. Trial judge from whose decision this appeal is taken:
  - b. List any other judge who has signed orders or conducted hearings in this matter:  
 \_\_\_\_\_

- c. Was this case disposed of in the district court by:
  - \_\_\_\_\_ Jury trial
  - \_\_\_\_\_ Bench trial
  - \_\_\_\_\_ Plea
  - \_\_\_\_\_ Dismissal
- d. Length of trial, measured in days (if applicable): \_\_\_\_\_
- e. State the name of each court reporter or transcriptionist who has reported or transcribed any or all of the record for the case on appeal. (This is not a substitute for a request for transcript served on the individual reporter or transcriptionist under Rule 3.03.)  
\_\_\_\_\_  
\_\_\_\_\_
- f. State the name, address, telephone number, fax number, and e-mail address of any attorney who represented a party in the district court if that attorney's name does NOT appear on the certificate of service attached to this docketing statement. Clearly identify each party represented.  
\_\_\_\_\_  
\_\_\_\_\_

3. **Jurisdiction:**

- a. Date sentence was pronounced from the bench: \_\_\_\_\_
- b. Date notice of appeal filed in district court: \_\_\_\_\_
- c. Custodial status:
  - (1) Is the defendant subject to appeal bond or incarcerated? \_\_\_\_\_
  - (2) Earliest possible release date, if incarcerated: If sentencing is challenged on appeal, it is the State's obligation to notify the clerk of the appellate courts in writing of any change in the custodial status of the defendant during the pendency of the appeal. See Rule 2.042. \_\_\_\_\_
- d. Statutory authority for appeal: \_\_\_\_\_
- e. Are there any co-defendants (yes or no): \_\_\_\_\_  
If "yes," what are their names? \_\_\_\_\_  
\_\_\_\_\_

- f. Are there any proceedings in any other court or administrative agency, state or federal, which might impact this case or this court having jurisdiction (yes or no)? \_\_\_\_\_

If "yes," identify the court or agency in which the related proceeding is pending.

List the case captions and the case or docket numbers.

---



---

4. **Constitutional Challenges to Statutes or Ordinances:**

Was any statute or ordinance found to be unconstitutional by the district court (yes or no)? \_\_\_\_\_

If "yes," what statute or ordinance? \_\_\_\_\_

5. **Related Cases/Prior Appeals:**

- a. Is there any case now pending or about to be filed in the Kansas appellate courts which:

(1) Arises from substantially the same case as this appeal (yes or no)? \_\_\_\_\_

If "yes," give case caption and docket number.

---

(2) Involves an issue that is substantially the same as, similar to, or related to an issue in this appeal (yes or no)? \_\_\_\_\_

If "yes," give case caption and docket number.

---

- b. Has there been a prior appeal involving this case or controversy (yes or no)? \_\_\_\_\_

If "yes," give caption and docket number.

---

6. Brief statement (less than one page), without argument, of the material facts. This is not intended to be a substitute for the factual statement which will appear in the brief.

7. Concise statement of the issues proposed to be raised. You will not be bound by this statement but should include issues now contemplated. Avoid general statements such as "the judgment is not supported by the law."

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Docketing Statement was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of all persons served and whom they represent.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** Docketing statement forms are available in a fillable pdf format in the online version of this handbook.

Remember that references to names of certain persons such as children and victims of sex crimes are subject to special rules. See Rule 7.043.

Although a docketing statement can be filed electronically, it cannot be served through the electronic filing system. Rather, it must be served by traditional means, including e-mail and fax. If the docketing statement is being served on someone only as a courtesy, that should be noted in the certificate of service.



**§ 12.7 Answer to Docketing Statement****IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS**

Case Caption:

Appellate Court No.: \_\_\_\_\_

**DOCKETING STATEMENT—ANSWER**

The docketing statement is used by the court to determine jurisdiction and to make calendar assignments under Rules 7.01(c) and 7.02(c). The docketing statement and answer are not briefs. The answer to the docketing statement should consist only of a concise statement of additional facts or clarification of issues which the appellee or cross-appellee believes are necessary to provide the court a fair summary of the case. If the statement of facts and issues in the docketing statement is sufficient, there is no need to file an answer. **THE ANSWER SHOULD NOT CONTAIN ARGUMENT OR PROCEDURAL MOTIONS.**

1. Brief statement (less than one page), without argument, of any material facts not set forth in the docketing statement. This is not intended to be a substitute for the factual statement that will appear in the brief.
2. Concise statement of clarification of any issues set forth in the docketing statement.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Docketing Statement – Answer was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of all persons served and whom they represent.]

/s/  
Attorney's Name and Registration Number

## § 12.8 Motion to Docket Appeal Out of Time

### IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],

Plaintiffs-Appellees,

vs.

[Insert District Court Case Number]

[Insert Name],

Defendant-Appellant.

---

#### MOTION TO DOCKET APPEAL OUT OF TIME

**Appellant asks to docket this appeal out of time because she has now secured all supporting documents that are needed to accompany the docketing statement.**

1. *Background.* Jane Pleader is the appellant in this appeal from the trial and jury verdict in the District Court of [Insert Name] County, Kansas. Notice of Appeal of this matter was filed in that court on [Insert Date.] More than 60 days have expired since the filing of the Notice of Appeal.
2. *Authority.* Supreme Court Rule 2.04.
3. *Reasons.* Appellant's counsel has received a telephone call from a clerk in the office of the clerk of the appellate courts advising her that she failed to include file-stamped, certified copies of the journal entries of judgment and the notice of appeal, as required by the appellate rules. Counsel has now obtained certified copies of the journal entries of judgment and the notice of appeal. These are included with this submission for filing with the remainder of the materials required for docketing this appeal. These combined documents complete the requirements for docketing the appeal.

For these reasons, appellant asks permission to docket the appeal today.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion to Docket Appeal Out of Time was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** This motion should accompany the docketing statement and certified file-stamped copies of all documents required under Rule 2.04. The motion should cite specific reasons that constitute good cause for late docketing. A mere allegation of "excusable neglect" is insufficient. If counsel believes excusable neglect exists, the basis for that belief should be stated in the motion.

A motion to docket an appeal out of time can be filed electronically but cannot be served through the electronic filing system; rather, it must be served by traditional means, including e-mail and fax.

**§ 12.9 Application to Reinstate Appeal**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiffs-Appellees,

vs.

[Insert District Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**APPLICATION TO REINSTATE APPEAL**

**Appellant asks the Court to reinstate her appeal.**

1. *Background.* Jane Pleader is the appellant in this appeal from the jury verdict and sentence in the District Court of [Insert Name] County, Kansas. Notice of Appeal of this matter was timely filed in that court on [Insert Date.] When the appeal was not docketed in a timely manner, the district court dismissed the appeal on [Insert Date.]
2. *Authority.* Supreme Court Rule 5.051.
3. *Reasons.* Jane Pleader was represented by different counsel at trial. Because of a delay in the appointment of appellate counsel, appellate counsel did not become aware of the appointment until after the deadline for timely docketing the appeal had passed.
4. Appellant is submitting the necessary documents to docket the appeal and the docket fee along with this motion.

For these reasons, appellant asks that her appeal be reinstated.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Application to Reinstate Appeal was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**§ 12.10 Attorney's Certification of Indigency**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiffs-Appellees,

vs.

[Insert District Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**ATTORNEY'S CERTIFICATION OF INDIGENCY**

[Insert name], appointed counsel for the appellant, certifies that the appellant is indigent and unable to pay the docketing fee. Counsel was appointed for the appellant by the District Court due to indigency, and the appellant remains indigent. Appellant asks that the docketing fee be excused pursuant to Supreme Court Rule 2.04(d)(2)(A).

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented



**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Attorney's Certification of Indigency was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
Attorney's Name and Registration Number

§ 12.11 Appellant’s Verification in a CINC case

VERIFICATION

STATE OF KANSAS )

) ss:

COUNTY OF \_\_\_\_\_ )

I, [Insert name], am the appellant in this case. I swear or affirm that the statements made in this [notice of appeal, docketing statement, brief] are true.

Signed and sworn to (or affirmed) before me on [Insert date] by [Insert name].

\_\_\_\_\_  
Appellant’s Signature

\_\_\_\_\_  
(Signature of notarial officer)

(Seal, if any)

\_\_\_\_\_  
Title (and Rank)

[My appointment expires: \_\_\_\_\_]

**PRACTICE NOTE:** K.S.A. 38-2273(e) requires that any notice of appeal, docketing statement or brief filed in a CINC case be verified by the appellant if the appellant has been personally served at any time during the proceedings.



## § 12.12 Application to Take a Civil Interlocutory Appeal Under K.S.A. 60-2102(c)

### IN THE COURT OF APPEALS OF THE STATE OF KANSAS

[Insert Name],

Plaintiffs,

vs.

[Insert District Court Case Number]

[Insert Name],

Defendants.

---

### APPLICATION TO TAKE A CIVIL INTERLOCUTORY APPEAL UNDER K.S.A. 60-2102(c)

**The defendant in this action, arising from an automobile collision, seeks an interlocutory appeal because the district court misinterpreted the statute of limitations.**

1. *Background.* An automobile accident occurred between the plaintiff, Wilma Driver, and the defendant, Betty B. Good. Driver has sued Good in the district court of [Insert Name] County, Kansas.
2. *Authority.* Supreme Court Rule 4.01 and K.S.A. 60-2102(c).
3. *Argument.*

The defendant Good moved to dismiss Driver's claim for failure to state a claim upon which relief could be granted, alleging Driver failed to file her claim within the two-year statute of limitations of K.S.A. 60-513. Driver alleged that K.S.A. 60-206(a) controlled and that she had filed her petition within the statute of limitations.

The Court on [Insert Date] denied Good's Motion to Dismiss. The Court held that K.S.A. 60-206(a) controlled the calculation of the statute of limitations under K.S.A. 60-513 and found the plaintiff had filed her petition within the allowed time.

The Court made all findings required by K.S.A. 60-2102(b) and stayed the proceedings until such time as the Kansas Court of Appeals accepts or denies an interlocutory appeal. A certified, file-stamped copy of the Journal Entry is attached as Exhibit "A".

4. The controlling questions of law are:
  - A. Whether K.S.A. 60-206(a) applies in calculating the statute of limitations under K.S.A. 60-513?
  - B. Whether a calendar year, an anniversary year, or a 365-day period is used in calculating the statute of limitations under K.S.A. 60-513?
5. Good contends that K.S.A. 60-206(a) does not apply to calculating the statute of limitations under K.S.A. 60-513.
6. Driver contends that K.S.A. 60-206(a) controls and that an anniversary year must be used in calculating the statute of limitations under K.S.A. 60-513.
7. Resolution of the controlling questions of law would determine whether Driver's claims were barred by the statute of limitations under K.S.A. 60-513 and, therefore, an immediate appeal would materially advance the ultimate termination of the litigation.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Application was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** Most applications will be more factually complex than the form and require citation to case law as well as statutory authority, but the format remains the same. The application must be accompanied by a certified copy of the district court order from which appeal is sought to be taken, and that order must include the findings required by K.S.A. 60-2102(c). See Rule 4.01. If the person seeking an interlocutory appeal filed a motion with the district court to include the findings required by K.S.A.

60-2102(c), the application must be accompanied by certified copies of the initial order, the motion, and the order containing the findings.

A similar format should be adopted for the civil interlocutory appeal under Rule 4.01A.





## § 12.13 Petition for Judicial Review of an Order of the Board of Tax Appeals

### IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Application of

XYZ Corp. for Exemption from

[Insert BOTD Docket Number]

Ad Valorem Taxation.

### PETITION FOR JUDICIAL REVIEW OF AN ORDER OF THE BOARD OF TAX APPEALS

**XYZ Corporation asks the Court of Appeals for judicial review of all adverse rulings made by the Board of Tax Appeals in that Board's order, dated [Insert Date], and that Board's subsequent order denying reconsideration, dated [Insert Date].**

The petitioner states:

1. Name and mailing address of the petitioner.  
[Insert information]
2. Name and mailing address of the agency whose action is at issue.  
[Insert information]
3. *Authority.* K.S.A. 74-2426, K.S.A. 77-614, and Kansas Supreme Court Rule 9.03.
4. *Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action.*

XYZ Corp. requested ad valorem taxation exemption for certain real property under K.S.A. 79-201b Sixth. XYZ Corp. claimed that the subject property satisfied the statutory requirements, which require the operator to be a not-for-profit corporation and that the property be used exclusively for the housing of mentally ill, retarded, or other handicapped persons.

On [Insert Date], the Board of Tax Appeals ruled that the operator of the subject property could not meet the statutory requirement of being a not-for-profit corporation and that the subject property was not being used exclusively for an exempt purpose because XYX Corp. was receiving a benefit in the form of Internal Revenue Code Section 42 low income housing tax credits. XYZ Corp. moved for reconsideration

on [Insert Date]. The Board of Tax Appeals on [Insert Date] denied the motion for reconsideration. The Board of Tax Appeals reversed the ruling as to the operator, determining the project was operated by a not-for-profit entity as contemplated by K.S.A. 79-201b Sixth. However, the Board of Tax Appeals reaffirmed its prior decision that the subject property was not being used exclusively for an exempt purpose.

Certified copies of the order of the Board of Tax Appeals, the petition for reconsideration, and the Board's order on the petition for reconsideration are attached.

5. *Identification of persons who were parties in any adjudicative proceedings that led to the agency action.*

[Insert Information]

6. *Facts to demonstrate that the petitioner is entitled to obtain judicial review.*

This is a final order of the Board of Tax Appeals and constitutes final agency action. Any party choosing to appeal this order must do so by filing a petition for judicial review within 30 days from the date of certification of this order. See K.S.A. 77-613(c). The petition for judicial review must be filed with the Kansas Court of Appeals. K.S.A. 7426(c)(2).

7. *Reasons why relief should be granted.*

The Board of Tax Appeals erroneously ruled, as a matter of law, that the subject property was not entitled to exemption under K.S.A. 79-201b Sixth by virtue of the property owner receiving Internal Revenue Code Section 42 low income housing tax credits in respect of certain construction and other acquisition costs attached to the property.

8. *The type and extent of relief petitioner requests.*

A determination that the subject property is entitled to exemption under K.S.A. 79-201b Sixth.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Petition for Judicial Review was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
Attorney's Name and Registration Number

**PRACTICE NOTE:** See § 12.15, *infra*, to request certification of the record.

The petition for judicial review must be in compliance with K.S.A. 77-614. Some petitions may be more factually complex than the form and require citation to case law as well as statutory authority, but the format remains the same.



**§ 12.14 Petition for Judicial Review—Workers Compensation Cases**

**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**

[Insert Name],

Claimant/  
[ Insert Appellate Designation],

vs. [Insert Workers Comp Docket Number]

[Insert Name],

Respondent/  
[Insert Appellate Designation],

and

[Insert Name],

Insurance Carrier/[Insert Appellate Designation].

---

**PETITION FOR JUDICIAL REVIEW OF A DECISION OF THE WORKERS  
COMPENSATION APPEALS BOARD**

**[Insert Name of Petitioner] asks the Court of Appeals for judicial review of  
the decision of the Workers Compensation Appeals Board.**

The petitioner states:

1. *Name and mailing address of the petitioner.*

[Insert information]

2. *Name and mailing address of the agency whose action is at issue.*

[Insert information]

3. *Authority.* K.S.A. 44-556, K.S.A. 77-614, and Supreme Court Rule 9.04.
4. *Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action.*

The Workers Compensation Appeals Board on [Insert date] awarded workers compensation benefits to claimant, finding that his injury on [Insert date] while riding a go-cart at a recreational event fell within the course and scope of his employment with respondent.

Certified copies of the order of the administrative law judge, the request for Board review, and the order of the Board are attached.

5. *Identification of persons who were parties in any adjudicative proceedings that led to the agency action.*

[Insert information]

6. *Facts to demonstrate that the petitioner is entitled to obtain judicial review.*

The administrative law judge on [Insert date] granted claimant benefits and ruled that his injury did fall within the scope of employment as an exception to K.S.A. 44-508(f). Thereafter, petitioner filed a notice of appeal dated [Insert date] with the Workers Compensation Appeals Board, completed briefs, and orally argued the matter. The Board affirmed the ruling of the administrative law judge on [Insert date]. Under K.S.A. 44-556, petitioner is allowed to appeal the decision of the Board to the Court of Appeals.

7. *Reasons why relief should be granted.*

Petitioner states that the Workers Compensation Appeals Board erred in finding that the injury of claimant was compensable. Among other things, the Board failed to follow the strict statutory language of K.S.A. 44-508(f). The Board considered other factors in making its determination not included in the language of K.S.A. 44-508(f). The Board found an implied duty where the greater and overwhelming weight of the evidence would not allow such conclusion. In addition, there was insufficient evidence to support the finding of the Board that an implied duty existed for claimant to attend the recreational/social event where he was injured.

8. *The type and extent of relief petitioner requests.*

Petitioner requests the Court of Appeals enter an order finding that the Workers Compensation Appeals Board erred as a matter of law in finding that the injury to claimant was work-related and that benefits should be awarded for the injury.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Petition for Judicial Review was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** See § 12.15, *infra*, to request certification of the record.

The petition for judicial review in workers compensation cases is filed in the Court of Appeals. See K.S.A. 44-556(a) and Rule 9.04.

The petition for judicial review must be in compliance with K.S.A. 77-614. Some petitions may be more factually complex than the form and require citation to case law as well as statutory authority, but the format remains the same.





**§ 12.15 Request for Certification of Record—Workers Compensation Cases**

**BEFORE THE DIVISION OF WORKERS COMPENSATION FOR THE STATE OF KANSAS**

[Insert Name],

Claimant/ [ Insert Appellate Designation],

vs.

Docket No. [Insert Number]

[Insert Name],

Respondent/ [Insert Appellate Designation],

and

[Insert Name],

Insurance Carrier/[Insert Appellate Designation].

---

**REQUEST FOR CERTIFICATION OF RECORD**

[Insert Name], Petitioner, requests the Workers Compensation Appeals Board to certify the record of the proceedings in this matter and transmit the record to the clerk of the appellate courts.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Request for Certification of Record was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/

\_\_\_\_\_  
Attorney's Name and Registration Number

**PRACTICE NOTE:** A separate request should be made for preparation of a transcript of any hearing before the Board. The Board will not transmit the record to the clerk of the appellate courts until all transcripts are complete.

When appeals are taken from the Board of Tax Appeals to the Court of Appeals under Rule 9.03, a similar procedure applies, and this form can be adapted to those appeals.

**§ 12.16 Motion for Release After Conviction**

**IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS**

STATE OF KANSAS,

Plaintiff/Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

**MOTION FOR RELEASE AFTER CONVICTION**

The defendant seeks an order setting an appeal bond.

1. *Background.* Defendant was convicted of: Aggravated robbery, K.S.A. 21-3427. Defendant was sentenced to: 61 months in prison with 36 months' postrelease supervision.
2. *Authority.* K.S.A. 22-2804 and Supreme Court Rule 5.06.
3. The district court has denied defendant's request for an appeal bond (see attached journal entry filed [Insert Date]). [Briefly describe the district court's reasons for denying the bond.]
4. The Court should consider the defendant's family ties, employment possibilities, financial resources, length of residence in the community, prior convictions, and record of appearance during trial (including failure to appear). [Give specific information about this defendant for each factor mentioned.]
5. [Note whether any previous bonds have been set in the case, including the amount.]

The Defendant asks the Court to set an appropriate appeal bond pending a decision in this case.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion for Release After Conviction was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** The district court's order denying the defendant's request for an appeal bond should be attached to the motion.

§ 12.17 Fax Transmission Sheet

FAX TRANSMISSION SHEET

DATE: \_\_\_\_\_

TO: Clerk of the Appellate Courts  
FAX Number: (785 ) 296-1028

FROM: Attorney or Party Without Attorney (Name and Address)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Kansas Attorney Registration Number: \_\_\_\_\_

Telephone Number: (     ) \_\_\_\_\_ - \_\_\_\_\_

FAX Number: (     ) \_\_\_\_\_ - \_\_\_\_\_

E-mail Address: \_\_\_\_\_

Attorney for (Name): \_\_\_\_\_

RE: Appellate Case Number:

Caption: \_\_\_\_\_

vs

\_\_\_\_\_  
Name of the Document Being Transmitted:

\_\_\_\_\_  
Number of fax pages excluding this cover page:

\_\_\_\_\_  
OTHER INSTRUCTIONS:

**PRACTICE NOTE:** A Kansas licensed attorney in good standing must file documents electronically and may not use fax filing. Rules 1.08 and 1.14. Thus, this fax filing cover sheet will be used primarily by pro se litigants.

Routine motions, pleadings, or correspondence that do not require a filing fee will be accepted by the appellate courts for filing by fax if the document, together with any supporting documentation, does not exceed ten (10) pages. Briefs and petitions for review may not be filed by fax. The fax transmission sheet and the certificate of service are not included in the 10-page limitation.

Fax only one copy; the clerk of the appellate courts will provide any additional copies required. Do not mail the original or any additional copies. See Rule 1.08.



**§ 12.18 Admission *Pro Hac Vice* of Out-of-State Attorney:  
Kansas Attorney's Motion**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**MOTION FOR ADMISSION  
*PRO HAC VICE***

**A Kansas attorney of record seeks the admission of an out-of-state attorney to practice law in this appeal.**

1. *Background.* Jane Pleader, an attorney in this case, admitted to practice law in Kansas, and in good standing, asks this court to admit [Insert name of out-of-state attorney] to practice law in Kansas for this particular appeal.
2. *Authority.* Supreme Court Rule 1.10.
3. *Reasons.* [Insert name of out-of-state attorney], already admitted to practice law in Washington, D.C., Virginia, Maryland, and the D.C. United States Circuit Court of Appeals is needed to assist in this case. She is in good standing under the rules of the highest appellate courts in all of the jurisdictions in which she regularly appears.
4. Jane Pleader will remain actively engaged in this case, will sign all pleadings, documents, motions and briefs, and will be present during oral argument if scheduled.

5. The verified application of [Insert name of out-of-state attorney] and the \$100 non-refundable fee are being submitted electronically.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion For Admission *Pro Hac Vice* was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** The Kansas attorney is required to be in good standing and "regularly engaged in the practice of law in Kansas." Effective July 1, 2005, the Kansas attorney is, however, not required to be a Kansas resident.

The Kansas attorney's motion and the out-of-state attorney's verified application are required to be served on all counsel of record and on the out-of-state attorney's client. See Rule 1.10.

**§ 12.19 Admission *Pro Hac Vice* of Out-of-State Attorney:  
Out-of-State Attorney's Verified Application**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**VERIFIED APPLICATION FOR ADMISSION *PRO HAC VICE***

**An out-of-state attorney seeks admission to practice law in Kansas in this particular appeal.**

1. *Background.* My name is: [Insert Name]. I am regularly engaged in the practice of law and in good standing in [Insert name of all states, territories of the United States, or the District of Columbia] according to the rules of the highest appellate court in that jurisdiction.
2. *Authority.* Supreme Court Rule 1.10(e).

I am aware that, if this application is granted, I will be subject to the order of, and amenable to disciplinary action by, the Kansas appellate courts. In support of my application I state the following:

1. [Identify the party or parties represented]
2. The Kansas attorney of record is [Insert name of Kansas attorney], Supreme Court registration [Insert number], and conducts business from [Insert business address, email address, phone number, and fax number].
3. My residential address is [Insert residential address], my business address is [Insert business address]. My business phone number, fax

Forms

number and e-mail address are [Insert business phone number, fax number, and e-mail address].

4. I am admitted to the following bar(s): [Insert bar(s), date(s) of admission, registration number(s)]
5. I am a member in good standing of each of the above bar(s).
6. I have not been the subject of prior public discipline, including but not limited to suspension or disbarment, in any jurisdiction.
7. No disciplinary action or investigation is currently pending against me in any jurisdiction [or if an action is pending, so state, and provide a detailed description of the nature and status of the action/investigation as well as the address of the disciplinary authority in charge].
8. Within the preceding 12 months, I have been admitted pro hac vice in Kansas in the following case(s): [Insert case name(s), case number(s), and court(s) in which admitted].
9. I understand that I remain under a continuing obligation to notify the clerk of the appellate courts if a change occurs in any of the information provided.
10. The required non-refundable \$100 fee, payable to the clerk of the appellate courts is included with this application.

I swear or affirm that all of this information is true and correct to the best of my knowledge.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

~seal~

Notary:

Expiration Date of Notary:

County & State:

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Verified Application was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
\_\_\_\_\_  
Attorney's Name and Registration Number

**PRACTICE NOTE:** The out-of-state attorney's verified application and the Kansas attorney's motion are required to be served on all counsel of record and on the out-of-state attorney's client. See Rule 1.10(d)(1)(D).



**§ 12.20 Entry of Appearance**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**ENTRY OF APPEARANCE**

Jane Pleader now represents [name of client as well as party designation] as counsel of record in this appeal.

Attorney's Signature

/s/

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Entry of Appearance was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]



/s/  
Attorney's Name and Registration Number

**PRACTICE NOTE:** The most important part of an entry of appearance is the clear statement by name and party designation of the client on whose behalf the attorney enters an appearance. If a party is represented by only one attorney, it is sufficient to enter an appearance as “counsel of record.” If a party is represented by more than one attorney, the entry of appearance must also indicate whether the attorney is entering the case as lead counsel or as co-counsel.

**§ 12.21 Motion to Withdraw as Appointed Counsel**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**MOTION TO WITHDRAW AS APPOINTED COUNSEL**

**Appointed appellate counsel asks to withdraw because of a conflict of interest.**

1. *Background.* This is an appeal from the district court's denial of relief sought in a K.S.A. 60-1507 motion. Notice of Appeal was filed on [Insert Date]; the case was docketed on [Insert Date].
2. *Authority.* Kansas Rule of Professional Conduct 1.7(a) and Supreme Court Rule 1.09.
3. *Reasons.* Counsel has just learned that [Insert Name] is a co-defendant in this case. Counsel has in the past and does currently represent [Insert Name]. If counsel continues to represent the appellant, she will be required to argue a position, stemming from the same set of facts and circumstances that is in conflict with the interests of [Insert Name.] Thus, a conflict of interest has arisen, and counsel cannot ethically represent both.
4. Counsel also requests this court to remand to the district court for appointment of new appellate counsel. [In the alternative, if substitute counsel has already entered an appearance, give the name of substitute counsel.]

For these reasons, counsel asks the court to allow her to withdraw.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion to Withdraw was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** A motion to withdraw should be accompanied by an entry of appearance filed by new counsel if possible.

The motion to withdraw must be served on the client, even when the client has requested the attorney to withdraw from the case. The motion must also be served on opposing counsel.

Rule 1.09 sets out separate procedures for withdrawal, depending on the client's circumstances:

- Withdrawal of Attorney When Client Will Be Left Without Counsel
- Withdrawal of Attorney When Client Continues to Be Represented by Other Counsel of Record
- Withdrawal of Attorney When Client Will Be Represented by Substituted Counsel
- Withdrawal of Attorney When Client is Represented by Appointed Counsel

The motion should be drafted to address the specific requirements for the type of withdrawal.

**§ 12.22 Request for Transcript**

**IN THE [Insert Number] JUDICIAL DISTRICT DISTRICT COURT OF [Insert Name]  
COUNTY, KANSAS (CRIMINAL)(CIVIL) DEPARTMENT**

[Insert Name],

Plaintiff-Appellees,

vs.

[Insert District Court Case Number  
and Division Number, if applicable]

[Insert Name],

Defendant-Appellant.

---

**REQUEST FOR TRANSCRIPT**

**[Insert Name] asks for the following transcripts to be prepared for the appeal of this case: [Insert a list of the specific transcripts or portions of transcripts needed, including the date of the hearing.]**

1. Transcript of Jury Trial [Insert Date] through [Insert Date] except this request does not include the jury voir dire.
2. Transcript of hearing on defendant's motion to suppress. [Insert Date].
3. *Authority.* Supreme Court Rule 3.03.

Attorney's Signature

/s/

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Request for Transcript was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.

The court reporter who took the transcript MUST be served.]

/s/  
\_\_\_\_\_  
Attorney's Name and Registration Number

**PRACTICE NOTE:** If you are unsure which court reporter should be served, contact the district court clerk. Rule 354 requires the trial judge to enter on the appearance/trial docket the name of the court reporter taking proceedings. If the proceedings were electronically recorded, service is made on the clerk of the district court and the managing court reporter or court reporter designated by the clerk. Rule 365.

It is critical that the request state the transcript is for appeal because the court reporter's time begins to run upon service of the request. See Rule 3.03(e).

Court reporters cannot be served through the electronic filing system; rather, they must be served by traditional means. When serving more than one court reporter, the attorney should upload this request once for each court reporter served, i.e., if three court reporters are served, the request should be uploaded three times.

**§ 12.23 Notice of Service of Order for Transcript**

**IN THE [Insert Number] JUDICIAL DISTRICT DISTRICT COURT OF [Insert Name]  
COUNTY, KANSAS (CRIMINAL)(CIVIL) DEPARTMENT**

[Insert Name],

Plaintiff,

vs.

[Insert District Court Case Number  
and Division Number, if applicable]

[Insert Name],

Defendant.

---

**NOTICE OF SERVICE OF ORDER FOR TRANSCRIPT**

[Insert Name] gives notice that the attached Order for Transcript was served on [Insert name of court reporter and any other party or attorney on whom service was made] on [Insert date] by [Insert method of service].

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Notice of Service of Order for Transcript was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
Attorney's Name and Registration Number

**PRACTICE NOTE:** This form is for use when an Order for Transcript was not served on the court reporter.



**§ 12.24 Notice That No Transcript Is Required**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**NOTICE THAT NO TRANSCRIPT IS REQUIRED**

The appellant notifies the Court that no transcript has been or will be requested in this appeal.

Attorney's Signature

/s/

\_\_\_\_\_  
Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Notice was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
Attorney's Name and Registration Number

**§ 12.25 Request for Additions to the Record on Appeal After the Record has been Transmitted**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**REQUEST FOR ADDITIONS TO THE RECORD ON APPEAL**

**Appellant asks that several documents be added to the record on appeal.**

1. *Background.* The record on appeal in this case is now in the possession of the clerk of the appellate courts.
2. *Authority.* Supreme Court Rule 3.02(d)(4).
3. The following exhibits, depositions, and transcripts must be added to the record on appeal: [Enumerate and describe each exhibit, deposition, instruction, or transcript.] [Briefly explain the reason for the addition.]

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Request was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made, including the court reporter if he or she has custody of the requested exhibits.]

/s/  
Attorney's Name and Registration Number

**PRACTICE NOTE:** This form should be used when the record has been transmitted to the clerk of the appellate courts.

If the record is still in the district court, a request simply listing the additions can be served on the clerk of the district court if the additions are part of the entire record in this case. No court order is required. See Rule 3.02. A court order will be required if the additions are not part of the entire record in this case. For example, they are part of the record in another case.

A request for additions to the record is not a substitute for a request for transcript under Rule 3.03. See § 12.22, *supra*.

§ 12.26 Motion to Consolidate Appeals

IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**MOTION TO CONSOLIDATE APPEALS**

**[Name of Party] asks the court to consolidate this case with Appellate Case No. \_\_\_\_\_.**

1. *Background.* The issues on appeal in this case are: [Give a brief synopsis of all issues.]
2. *Authority.* Supreme Court Rule 2.06.
3. *Reasons.* The parties, the facts, the issues, and the law pertaining to both cases are identical.
4. Both cases pertain to [briefly describe the facts underlying the appeals].
5. A ruling from this Court in either case would dispose of the other.

[Briefly explain.] Because of this, [name of party] asks the court to consolidate the two cases for appeal.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion to Consolidate Appeals was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** Motions to consolidate appeals should be filed early in the appellate process before briefing occurs.

A separate motion to consolidate must be filed in each of the cases suggested for consolidation. A motion to consolidate may request consolidation of two or more appeals.

## § 12.27 Motion to Transfer to Supreme Court

### IN THE SUPREME COURT OF THE STATE OF KANSAS

[Insert Name],

Plaintiff-Appellants,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellees.

### MOTION TO TRANSFER TO SUPREME COURT

Appellant asks that this appeal be transferred to the Supreme Court because the subject matter of the case has significant public interest.

1. *Background.* This motion to transfer has been filed with the clerk of the appellate courts within 30 days after the service of the appellant's notice of appeal.
2. *Authority.* Supreme Court Rule 8.02 and K.S.A. 20-3017.
3. *Nature of the case:* This is an appeal [insert the full nature of the case.]
4. This case is within the authority of the Supreme Court according to [demonstrate how the case is within the jurisdiction of the Supreme Court.]
5. *Reasons for transfer.* [Specify grounds found in Supreme Court Rule 8.02(b)(3)(A) through (D).]

For these reasons, appellant asks the Supreme Court to transfer this case for determination.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion to Transfer was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** Even though the statutory thirty days from service of the notice of appeal may have passed [See K.S.A. 20-3017 and Rule 8.02], a party who files a motion to transfer will have called the case to the attention of the Supreme Court which may exercise its discretion and transfer the case on its own motion. K.S.A. 20-3018(c). The motion is filed in the Supreme Court, not the Court of Appeals.



## § 12.28 Motion for Extension of Time to File Brief

### IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

#### MOTION FOR EXTENSION OF TIME TO FILE BRIEF

**[Insert name] asks for an additional 30 days to file the [state type of brief- e.g. appellant, appellee] brief.**

1. *Background.* The appellant's brief is now due on July 5, 2018. Two prior extensions of time have been requested and granted.
2. *Authority.* Supreme Court Rule 5.02.
3. *Reasons.* [State with particularity the reason for the extension. For example: the appellant's counsel has just received the last volume of the 2,000 page trial transcript and needs more time to read, analyze and make cross-references from this large record in the brief.]

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion for Extension of Time was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/

\_\_\_\_\_  
Attorney's Name and Registration Number

**PRACTICE NOTE:** A motion for extension of time will be held seven business days, plus three calendar days depending on how service was made, for response from opposing counsel. Rule 5.01(b). A motion which requests twenty days or less will be acted upon immediately. See Rule 5.02(d). An adverse party's consent will be considered but is not controlling. See Rule 5.02(b).

Motions for extension of time to file brief are perhaps the most common motion received by the clerk of the appellate courts. Even though they are common, there are still pitfalls to avoid when requesting a little bit more time to finish up a brief. First, every effort should be made to proofread the document for internal consistency. If the motion requests 30 days at the beginning, it should also request 30 days at the end. Second, it is a good idea to check Supreme Court Rule 5.02 to see if additional information is required; for example, the attorney must give "reasons constituting excusable neglect" if the motion is filed after the expiration of the existing brief due date. And finally, practitioners should know that motions for time are generally given in 30-day increments. An attorney is free to request fewer than 30 days. However, he or she should be aware that the request will still count as an extension given by the court, even if all 30 days were not used.

**§ 12.29 Motion to Immediately File Out-of-Time Brief**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**MOTION TO IMMEDIATELY FILE OUT-OF-TIME BRIEF**

1. *Background.* The appellee's brief was due on July 5, 2018, and that day has passed. The appellee has asked for and received one prior extension of time to file the brief.
2. *Authority.* Supreme Court Rule 5.02.
3. *Reasons.* [State with particularity the reasons constituting excusable neglect. For example: A portion of a transcript of a pretrial hearing, needed to support appellee's argument on one issue, has recently been found. Briefing was delayed while steps were taken to add the transcript to the record on appeal.]

Because of this, appellee asks for permission to file the brief immediately.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion to Immediately File Out-of-Time Brief was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** A motion to efile a brief out-of-time should not be accompanied by the completed brief in a single submission; rather, the motion and the brief should be transmitted separately. If a pro se litigant is filing the motion, the paper brief should accompany the motion.

**§ 12.30 Motion to Exceed Page Limitations**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiffs-Appellants,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendants-Appellees.

---

**MOTION TO EXCEED PAGE LIMITATIONS**

**The Appellant asks permission to file a brief that is 60 pages in length.**

1. *Background.* The appellant's brief is due July 5, 2018.
2. *Authority.* Supreme Court Rule 6.07(d).
3. *Reasons:*
  - a. The record on appeal in this case consists of 30 volumes and several thousand pages of exhibits;
  - b. The trial lasted nearly a month and there were several other hearings on motions and other matters which are the subjects of this appeal;
  - c. This case involves numerous complex and significant legal issues, including the constitutionality of K.S.A. 60-3701 *et seq.* and the interpretation of the wrongful death statute, K.S.A. 60-1901;
  - d. Because of the complex facts and issues, it has been impossible for counsel to condense the brief to the 50-page limit and still address properly all the issues before this Court;
  - e. Counsel was able to condense the brief to 60 pages, not counting the table of contents and appendices.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** A motion to exceed page limitations must be submitted prior to submission of the brief and must include a specific total page request. See Rule 6.07(d).

§ 12.31 Notice of Filing Under K.S.A. 75-764

IN THE APPELLATE COURTS OF KANSAS

SUPREME COURT     COURT OF APPEALS

\_\_\_\_\_  
Appellee

v.

Appellate Court Case No.: \_\_\_\_\_

District Court Case. No.: \_\_\_\_\_

County Appealed From: \_\_\_\_\_

\_\_\_\_\_  
Appellant

**NOTICE OF FILING UNDER K.S.A. 75-764**

TO THE ATTORNEY GENERAL OF THE STATE OF KANSAS:

Please be advised that I am serving you with (PETITION/MOTION/BRIEF/OTHER PAPER), which contests or calls into doubt the validity of a Kansas statute or constitutional provision on grounds that the law violates the state constitution, federal constitution, or a federal law. The law I am challenging is \_\_\_\_\_. This notice is served as required by K.S.A. 75-764 and Kansas Supreme Court Rule 11.01.

\_\_\_\_\_  
Party or Party's Attorney

Name (Print): \_\_\_\_\_

[Supreme Court Number]: \_\_\_\_\_

Address 1: \_\_\_\_\_

Address 2: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_

[Fax Number]: \_\_\_\_\_

[E-mail Address]: \_\_\_\_\_

(Attach certificate of service in compliance with K.S.A. 60-205 listing all parties served, including name, address, and who they represent. The petition/motion/brief/ other paper referenced in this notice should only be filed once with the appellate court. See Supreme Court Rule 11.01. The Office of the Attorney General will accept electronic service of this notice at the following email address: Solicitors@ag.ks.gov.)



## § 12.32 Motion to Substitute Corrected Brief

### IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],

Plaintiffs-Appellants,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellee.

---

### MOTION TO SUBSTITUTE CORRECTED BRIEF

**Appellant asks permission to withdraw a brief containing errors and replace it with a corrected brief.**

1. *Background.* The appellant timely filed a brief on [Insert Date]. This case has not yet been set for argument.
2. *Reasons.* After the brief was filed, appellant's counsel discovered errors in two case citations on pages 2 and 14 of the brief. In addition, counsel discovered that pages 7 through 27 of the brief are in random, nonsequential order. Appellant's counsel discovered this mistake after the original brief had been filed with the clerk of the appellate courts.

Attorney's Signature

/s/

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Motion to Substitute Corrected Brief was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
Attorney's Name and Registration Number

**PRACTICE NOTE:** This motion addresses technical corrections only, and the established briefing schedule is not affected by the motion.

**§ 12.33 Notice of Additional Authority**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiffs-Appellants,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendants-Appellees.

---

**NOTICE OF ADDITIONAL AUTHORITY**

To the Court:

This letter is notice of additional (persuasive/controlling) authority that has come to the appellee's attention after our brief has been filed.

In our brief, on page 22 in our discussion of the requirements to obtain a search warrant, we criticize *State v. Smith*, 123 Kan. App. 2d 123, 456, 789 P.3d 123 (2015). The Kansas Supreme Court, in its opinion *State v. Smith*, 456 Kan. 789, 79, has recently expressly *overturned* the ruling of the Court of Appeals.

In our view, this is controlling authority that supports our argument that the appellant has failed to show any legal authority for its position on this issue.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Notice of Additional Authority was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
Attorney's Name and Registration Number

**PRACTICE NOTE:** Supreme Court Rule 6.09 sets out how and when additional authority may be cited to an appellate court. Attorneys should pay close attention to the timing, service, and content restrictions found in the rule. The notice may not exceed 350 words.

## § 12.34 Motion to Substitute Parties

### IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],

Plaintiffs-Appellants,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellee.

---

#### MOTION TO SUBSTITUTE PARTIES

**A special administrator of a probate estate brought this appeal on behalf of the estate. She has now died and her daughter, who has been appointed by the district court as the special administrator of the estate, asks to be substituted as the named appellant.**

1. *Background.* Jane Pleader, was appointed by the District Court of [insert name] County as Special Administrator of the Estate of John Pleader, her husband. As special administrator she was to investigate and possibly pursue a claim against Dr. Richard Roe and others for medical malpractice.
2. *Authority.* K.S.A. 60-225(a).
3. *Reasons.* Jane Pleader filed a medical malpractice lawsuit against defendant Roe on [insert date], in the [insert name] County District Court.
4. Ultimately, by summary judgment and directed verdict, the district court dismissed the various claims of negligence the estate made against Dr. Richard Roe.
5. Jane Pleader brought this appeal on behalf of the probate estate.
6. Jane Pleader died on [insert date]. At that time, this appeal was still pending.

7. After the death of Jane Pleader, the [insert name] District Court appointed Betty Pleader as Special Administrator of the Estate of John Pleader to continue this lawsuit and other purposes. Betty Pleader, Special Administrator of the Estate of John Pleader now asks this court to substitute her as the appellant in this appeal in the place of Jane Pleader, so she can continue with this appeal.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion to Substitute Parties was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** A motion to substitute parties should contain enough detail to demonstrate that the substitution is proper.

**§ 12.35 Notice of Change in Custodial Status Under Rule 2.042**

**IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS**

State of Kansas,

Appellee,

vs.

[Insert Appellate Court Case Number]

John Pleader,

Appellant.

---

**NOTICE OF CHANGE IN CUSTODIAL STATUS**

The State of Kansas, through \_\_\_\_\_ (district/county attorney/assistant attorney general), hereby notifies the appellate courts that John Pleader has been released from custody [and is now subject to post-release supervision].

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Notice of Change of Custodial Status was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
\_\_\_\_\_  
Attorney's Name and Registration Number

**PRACTICE NOTE:** This notice should only be filed when the change in the defendant's custodial status raises a question about mootness of the appeal. It is not necessary to notify the court of a defendant's transfer between facilities.



§ 12.36 Notice of Death

IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

State of Kansas,

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

J.B. Good

Defendant-Appellant.

---

**NOTICE OF DEATH OF THE DEFENDANT-APPELLANT**

1. *Background.* J.B. Good, the defendant-appellant in this appeal died on May 1, 2020, in Lansing, Kansas. He is represented in this matter by Jane Pleader, his attorney. The appeal should continue.
2. *Authority.* K.S.A. 60–225.
3. *Reasons.* Both parties have briefed the issues raised in this case and argued their cause before the court. They await the court’s opinion resolving them. The controversy raised in these issues survives the appellant. Several of the issues are unique and would serve as precedents for future appeals. The interests of the law would be well served by not dismissing this case and allowing the court to rule.

For these reasons, counsel asks that this case not be dismissed.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Notice of Death of the Defendant-Appellant was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**§ 12.37 Notice of Voluntary Dismissal**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiffs-Appellants,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellee.

---

**NOTICE OF VOLUNTARY DISMISSAL**

**The parties have settled and ask the court to dismiss this appeal.**

1. *Background.* During the pendency of this appeal, the parties entered into negotiations regarding the possible settlement of all claims in this case.
2. *Authority.* Supreme Court Rule 5.04.
3. *Reasons.* The parties arrived at a settlement of all claims in this case and have agreed to dismiss this appeal as a condition of their settlement agreement. Each party has agreed to bear their own costs and expenses, including costs of this appeal.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Notice of Voluntary Dismissal was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/

\_\_\_\_\_  
Attorney's Name and Registration Number

**PRACTICE NOTE:** Only an appellant or cross-appellant can file a voluntary dismissal. If there is more than one appellant, the notice should clearly state if one or all of the appellants are dismissing the appeal. The notice should also indicate whether it is intended to dismiss any cross-appeals. If so, the notice must be signed by both parties. The notice should also indicate whether dismissal is with or without prejudice and should allocate costs.

## § 12.38 Motion for Involuntary Dismissal

### IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],

Plaintiff-Appellant,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendants-Appellees.

---

#### MOTION FOR INVOLUNTARY DISMISSAL

**[Insert name] asks the Court to dismiss this appeal without prejudice so the parties can obtain a district court order certifying this case is a controlling question of law.**

1. *Background.* James Doe commenced an action against John Doe and ABC, Inc., claiming that John Doe committed tortious acts and demanding compensation for his injury and damages.
2. *Authority.* Supreme Court Rule 4.01 and K.S.A. 60-2102(c).
3. *Reasons.* Defendant, John Doe, notified his insurance carrier and demanded the insurance carrier, under the terms of its policy, provide a defense and pay any lawful claims.
4. Plaintiff agreed to provide a defense and then commenced a declaratory judgment action requesting the trial court to interpret a policy of insurance issued to the defendant, John Doe.
5. Plaintiff in this action attempted to discover facts in controversy in the underlying tort suit between James Roe and John Doe and further requested the trial court in this declaratory judgment action to construe the underlying facts and interpret the subject insurance policy.

6. The trial court entered an order staying this action until the facts in the underlying tort action were determined or until the underlying tort action was concluded based upon the legal principle enunciated in *State Farm Fire & Casualty Company v. Finney*, 244 Kan. 545, 770 P.2d 460 (1989); *State Farm Fire & Casualty Company v. T.G.B., Inc.*, 760 F. Supp. 178 (D. Kan. 1991); and *U.S. Fidelity and Guaranty Co. v. Continental Insurance Company*, 216 Kan. 5, 531 Pac. 9 (1975).
7. The plaintiff appeals from the Stay Order which is not a final Order, and the plaintiff did not secure an Order from the district judge under K.S.A. 60-2102(c) to enable the Court of Appeals to exercise its discretion whether or not to permit the appeal herein. Accordingly, plaintiff's appeal is premature.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Motion for Involuntary Dismissal was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

§ 12.39 Application to File *Amicus* Brief

IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],

Plaintiffs-Appellants,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendants-Appellees.

---

**APPLICATION TO FILE *AMICUS* BRIEF**

**A trade association seeks to file a friend of the court brief because this appeal deals with a subject that could profoundly affect the business of the entire association.**

1. *Background.* This appeal involves the interpretation and application of K.S.A. 16-205 concerning interest rates on promissory notes. It also presents the question of whether the parties to a commercial transaction may agree to an increased interest rate upon occurrence of a non-monetary event of default.
2. *Authority.* Supreme Court Rule 6.06.
3. *Reasons.* The Kansas Bankers Association is a Kansas not-for-profit corporation and the primary trade association for the Kansas Commercial Banking Industry; 360 of the 362 state and national commercial banks in the State are members of the association.
4. Both of the issues in this appeal are subjects of profound interest to Kansas banks. The decision in this appeal will affect not only the parties to this action, but most commercial loans of all Kansas banks.
5. All parties have been served with a copy of this application.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Application to File *Amicus* Brief was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** An *amicus* brief must be filed not less than thirty days prior to oral argument. The application should be filed as early in the appeal as possible. See Rule 6.06.

An application to file an *amicus* brief must be filed with each appellate court separately, *i.e.*, just because an application to file an *amicus* brief was granted by the Court of Appeals does not mean that an *amicus* brief will automatically be permitted in the Supreme Court.



§ 12.40 Suggestion for Place of Hearing

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

[Insert Name],

Plaintiffs-Appellants,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellee.

---

SUGGESTION FOR PLACE OF HEARING

**Jane Pleader, appellant, suggests that the oral arguments in this case be held in Hays, Kansas.**

1. *Authority.* Supreme Court Rule 7.02(d)(3).
2. *Reasons.* All parties to this civil appeal live in Ellis County, Kansas. If the oral arguments in this case were held in Hays, all parties would be able to attend the hearing.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Suggestion for Place of Hearing was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/  
Attorney's Name and Registration Number

**§ 12.41 Motion for Rehearing or Modification**

**IN THE [COURT OF APPEALS] [SUPREME COURT] OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**MOTION FOR REHEARING OR MODIFICATION**

**The appellee asks the court to rehear this case or modify its holding because of an incorrect interpretation of the applicable statute.**

1. *Background.* The court filed its opinion on [Insert Date.] This motion has been filed within [14 days for Court of Appeals, 21 days for Supreme Court] of the court filing its decision.
2. *Authority.* Supreme Court Rule 7.05 for Court of Appeals, 7.06 for Supreme Court.
3. *Reasons.* The court has ignored precedent and misinterpreted the statute that controls the issue of this case. [Insert specific argument in support of modification.]

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion for Rehearing or Modification was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** A copy of the Court's opinion must be attached to the motion. Note that the time to file is calculated from the date of decision, not a service date.

**§ 12.42 Motion for Attorney Fees and Costs**

**IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS**

[Insert Name],

Plaintiff-Appellee,

vs.

[Insert Appellate Court Case Number]

[Insert Name],

Defendant-Appellant.

---

**MOTION FOR ATTORNEY FEES AND COSTS**

**Appellee asks for attorney fees and costs because (the district court had authority to award fees) (this appeal is frivolous).**

1. *Background.* This appeal was argued to the court on [Insert Date]. This motion was filed within 14 days of the date of oral argument.
2. *Authority.* Supreme Court Rules 5.01, 7.07(b) and 7.07(c).
3. *Reasons.* [Insert Argument]
4. *Amount requested.* Appellee has incurred attorney fees in the amount of \$12,005.25 and costs in the amount of \$599.29 as evidenced by Exhibits A and B. The affidavit of counsel is Exhibit A. The itemization of fees and costs incurred in conjunction with the appeal is attached as Exhibit B.

For these reasons, Appellee asks this court to award attorney fees and direct the mandate from this court to reflect this assessment so that execution can issue according to law.

Attorney's Signature

/s/ \_\_\_\_\_

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion for Attorney Fees and Costs was sent by [Insert Method] on [Insert Date] to:

[Insert names and addresses of those on whom service is made.]

/s/ \_\_\_\_\_

Attorney's Name and Registration Number

**PRACTICE NOTE:** If oral argument is waived, this motion must be filed not later than 14 days after the day argument is waived or the date of the letter assigning the case to a non-argument calendar, whichever is later. An affidavit must be attached to the motion specifying: (A) the nature and extent of the services rendered; (B) the time expended on the appeal; and (C) the factors considered in determining the reasonableness of the fee. Kansas Rule of Professional Conduct 1.5 regarding fees should be followed. According to Supreme Court Rule 7.07(b)(1), an appellate court can award attorney fees for the appeal in a case in which the district court had authority to award attorney fees. Attorney fees may also be awarded in a frivolous appeal. Rule 7.07(c). Costs for preparation of unnecessary transcripts may be recovered under Rule 7.07(d).

## § 12.43 Complaint Form: Attorney Discipline

OFFICE OF THE DISCIPLINARY ADMINISTRATOR  
 701 SW Jackson Street, First Floor  
 Topeka, Kansas 66603-3729  
 Telephone: (785) 435-8200  
 Fax: (785) 783-8385

### COMPLAINT FORM

**Requirements.** A complaint must be in writing, contain the complainant's name and address, and be signed by the complainant. Each complaint must be against only one attorney. If you wish to file a complaint against more than one attorney, fully complete separate complaint forms for each attorney. Each applicable question must be completed in detail.

**Fee Disputes.** Please be advised that we do not settle fee disputes. Currently, there are two fee dispute committees which assist attorneys and clients in resolving fee disputes which arise only in their respective locations. There is no state-wide fee dispute committee.

- Sedgwick County Fee Dispute Committee (316) 263-2251 (Sedgwick Co. only)
- Topeka Bar Association Fee Dispute Committee (785)-233-3945 (Shawnee Co. only)

**Procedure.** After the materials are received by the Office of the Disciplinary Administrator, an attorney will be assigned to review the documents and supervise the investigation of the complaint. You will be kept informed when action occurs regarding your complaint.

1. **Who is filing the complaint?**

Your Full Name: \_\_\_\_\_

Your Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Home Phone: \_\_\_\_\_ Cell Phone: \_\_\_\_\_

Work Phone: \_\_\_\_\_ Fax No.: \_\_\_\_\_

E-mail: \_\_\_\_\_

2. **Who are you complaining about?**

Attorney's Full Name: \_\_\_\_\_

Attorney's Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Work Phone: \_\_\_\_\_ Cell Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

3. **Did you hire the attorney (or did someone hire the attorney on your behalf)?**

Yes \_\_\_\_\_ No \_\_\_\_\_

a. If no, explain your connection with the attorney.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

b. If yes, proceed to question 4.

4. **When was the attorney hired?** \_\_\_\_\_

5. **What was the attorney to do?**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. **When did you first meet with the attorney?** \_\_\_\_\_

7. **Did you (or someone on your behalf) enter an agreement with the attorney regarding the attorney's fee?**

Yes \_\_\_\_\_ No \_\_\_\_\_

a. If yes, please attach a copy of the fee agreement or engagement letter as well as a copy of all receipts, cancelled checks, and other proof of payment to the attorney.

b. If no, what was your understanding of what you were to pay the attorney?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. **How much did you (or someone on your behalf) pay the attorney in total for attorney fees, expenses, and courts costs?**

\_\_\_\_\_

9. **If someone else hired the attorney or paid the attorney on your behalf, please provide:**

Full Name: \_\_\_\_\_

Address, City, State, Zip: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_



10. When was the last time you met with or heard from the attorney?

\_\_\_\_\_  
\_\_\_\_\_

11. Does your complaint involve a civil or criminal case? Yes \_\_\_\_\_ No \_\_\_\_\_

If no, what does your complaint involve? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

a. If yes, provide the following information:

i) The name of the court. For example: *the District Court of Shawnee County, Kansas or the Municipal Court of Topeka, Kansas*

\_\_\_\_\_

ii) The title of the case. For example: *Jane Smith v. John Doe or State v. John Doe*

\_\_\_\_\_

iii) Case number \_\_\_\_\_

iv) Approximately when the case was filed \_\_\_\_\_

v) What court settings have happened so far in the case? For example: *initial appearance, pretrial, documents filed with the court etc.*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

vi) If you are not a party to the lawsuit or the defendant in the criminal case, explain your connection with it. \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

12. **Did you hire a new attorney to replace the attorney against whom this complaint is made?**

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please provide:

New Attorney's Name: \_\_\_\_\_

Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail Address: \_\_\_\_\_

13. **List persons who have personal knowledge and information/facts relevant to your complaint and provide a brief description of what you think they would say.**

Full Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

What would they say: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Full Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

What would they say: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Full Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

What would they say: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**14. What is your complaint with this attorney?**

Please describe the attorney's misconduct by providing a detailed factual statement. If you believe that the attorney engaged in misconduct in more than one way, please describe all the misconduct. State the facts as you understand them.

Our authority is limited to investigating and prosecuting violations of the Kansas Rules of Professional Conduct. Thus, please detail only the facts that establish the attorney's misconduct. Do not include opinions, arguments, or broad general statements of wrongdoing.

If you decide to attach a document relevant to your complaint, please reference and cite the relevant portion of the document in your response. Be sure and identify the portion of the document that is relevant and describe how the document is relevant to your complaint of misconduct. (For example: "this is the quoted part from the document," found on page 2, paragraph 3 of the document I have attached as Exhibit A.)

It may not be necessary to attach the entire document. Please do not attach documents that are not referenced in this section. As noted, it is critically important to state facts. **If your complaint fails to state sufficient facts concerning a rules violation your complaint may be dismissed without further investigation.**

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If you need additional space to complete your factual statement, feel free to add additional pages after this page. **Please retain all original documents and a copy of what you submit to this office. We cannot return documents submitted to this office.** Additional information from you may be requested later.

Please review the information you included in the complaint form, if the information is true and correct, date, sign, and send the complaint form and attachments to:

Office of the Disciplinary Administrator  
701 Southwest Jackson, First Floor  
Topeka, Kansas 66603

The information provided in this complaint is true and correct to the best of my knowledge and belief.

Date \_\_\_\_\_ Complainant's Signature \_\_\_\_\_

**§ 12.44 Surrender Letter—Voluntary Surrender of License to Practice Law when Attorney is under Disciplinary Investigation**

[Insert Date]

Mr. Douglas T. Shima  
Clerk of the Appellate Courts  
Kansas Judicial Center  
301 SW 10th Avenue  
Topeka, Kansas 66612

Dear Mr. Shima:

Pursuant to Rule 230 of the Kansas Supreme Court Rules relating to the Discipline of Attorneys, I hereby voluntarily surrender my license to practice law in Kansas. Enclosed please find my license together with my annual certificate of attorney registration.\*

I am fully aware of Rule 230 and understand that by surrendering my license the court will duly enter an order disbarring me and terminating all pending disciplinary matters. I understand that other jurisdictions will be notified of the court's action.

I have read Rule 231 and have or will appropriately and timely comply with court's directions contained therein.

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Respondent	Kansas Bar Number	Date
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Respondent's Attorney	Date
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cc: Gayle B. Larkin  
Disciplinary Administrator

*Forms*

\*If unable to produce either the attorney’s certificate of admission to the bar and/or your current bar registration card, please fully explain the reasons why the documents cannot be produced.

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## § 12.45 Complaint Form: Judicial Discipline

### KANSAS COMMISSION ON JUDICIAL CONDUCT



KANSAS JUDICIAL CENTER  
301 SW 10<sup>TH</sup> AVE., ROOM 115  
TOPEKA, KANSAS 66612  
785-296-2913 ♦ judgeconduct@kscourts.org

### ◆ COMPLAINT AGAINST A JUDGE ◆

The Commission only has authority to investigate allegations of judicial misconduct or disability by persons holding state judicial positions. The Commission has no jurisdiction over and does not consider complaints against federal judges, lawyers, law enforcement and detention center officers, district court clerks, and court personnel.

The Commission does not act as an appellate court and cannot review, reverse, or modify a legal decision made by a judge in a court proceeding. Please review the accompanying brochure which describes the functions of the Commission. Note in particular the examples of functions which the Commission cannot perform.

Please Note: Complaint form must be typed or legibly hand-printed, dated, and signed before it will be considered. Complaint forms may be submitted by U.S. Mail or scanned and submitted by e-mail.

#### I. PERSON MAKING THE COMPLAINT

\_\_\_\_\_  
Full Name Inmate Number, if applicable

\_\_\_\_\_  
Mailing Address

\_\_\_\_\_  
City, State Zip Code Telephone Number

\_\_\_\_\_  
E-mail address Preferred Method of Communication:  U.S. Mail  E-Mail

#### II. JUDGE AGAINST WHOM COMPLAINT IS MADE

\_\_\_\_\_  
Full Name County or City

Type of Judge<sub>(check one)</sub>:  Supreme Court Justice  Court of Appeals Judge  
 District  District Magistrate  Municipal  
 Pro Tempore  Other \_\_\_\_\_

### III. COURT CASE INFORMATION

If the complaint involves a court case, please provide:

- Case Title: \_\_\_\_\_ Case Number: \_\_\_\_\_
- Your Relationship to the Case: \_\_\_\_\_ Plaintiff/Petitioner \_\_\_\_\_ Defendant/Respondent  
\_\_\_\_\_ Other \_\_\_\_\_

### IV. STATEMENT OF FACTS

In the following section, please provide all specific facts and circumstances which you believe constitute judicial misconduct or disability. Include names, dates and places which may assist the Commission in its evaluation and investigation of this complaint.

If additional space is required, attach and number additional pages.



## V. ATTACHMENTS

Relevant documents: Please attach any relevant documents which you believe directly support your claim that the judge has engaged in judicial misconduct or has a disability. Highlight or otherwise identify those sections that you rely on to support your claim. Do not include documents which do not directly support your complaint, for example, a copy of your complete court case.

\*Keep a copy of all documents submitted for your records as they become the property of the Commission and will not be returned.\*

**In filing this complaint, I understand that:**

- **The Commission's rules provide that all proceedings of the Commission, including complaints filed with the Commission, shall be kept confidential unless formal proceedings are filed. The confidentiality rule does not apply to the complainant or the judge against whom a complaint is filed.**
- **The Commission may find it necessary to disclose my identity and the existence of this complaint to the involved judge. By filing this complaint, I expressly consent to any such disclosure.**

## VI. SIGNATURE

I declare that to the best of my knowledge and belief, the above information is true, correct and complete and submitted of my own free will.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature



# **APPENDIX A**

## **Justices and Judges of the Appellate Courts**

### **Justices of the Supreme Court**

Thomas Ewing, Jr., Leavenworth.....	1861-1862 (C.J.)
Samuel A. Kingman, Hiawatha .....	1861-1865 (C.J.)
Lawrence D. Bailey, Emporia.....	1861-1869
Nelson Cobb, Lawrence.....	1862-1864 (C.J.)
Robert Crozier, Leavenworth .....	1864-1867 (C.J.)
Jacob Safford, Topeka .....	1865-1871
Daniel M. Valentine, Ottawa.....	1869-1893
David J. Brewer, Leavenworth .....	1871-1884
Albert H. Horton, Atchison.....	1876-1895 (C.J.)
Theodore A. Hurd, Leavenworth.....	1884
William A. Johnston, Minneapolis .....	1884-1935 (C.J.)
Stephen H. Allen, Pleasanton .....	1893-1899
David Martin, Atchison .....	1895-1897 (C.J.)
Frank Doster, Marion .....	1897-1903 (C.J.)
William R. Smith, Kansas City .....	1899-1905
Edwin W. Cunningham, Emporia.....	1901-1905
Adrian L. Greene, Newton .....	1901-1907
Abram H. Ellis, Beloit.....	1901-1902
John C. Pollock, Winfield .....	1901-1903
Rousseau A. Burch, Salina .....	1902-1937 (C.J.)
Henry F. Mason, Garden City.....	1903-1927
William D. Atkinson, Parsons .....	1904
Clark A. Smith, Cawker City.....	1904-1915
Silas W. Porter, Kansas City.....	1905-1923
Charles B. Graves, Emporia .....	1905-1911
Alfred W. Benson, Ottawa.....	1907-1915
Judson S. West, Kansas City.....	1911-1923
John S. Dawson, Hill City.....	1915-1945 (C.J.)
John Marshall, Topeka.....	1915-1931

## *Justices and Judges of the Appellate Courts*

Richard J. Hopkins, Garden City.....	1923-1929
W. W. Harvey, Ashland.....	1923-1956 (C.J.)
William E. Hutchinson, Garden City.....	1927-1939
William D. Jochems, Wichita.....	1930
William A. Smith, Valley Falls.....	1930-1957 (C.J.)
Edward R. Sloan, Holton.....	1931-1933
Walter G. Thiele, Lawrence.....	1933-1957 (C.J.)
Hugo T. Wedell, Chanute.....	1935-1955
Harry K. Allen, Topeka.....	1937-1946
Homer Hoch, Marion.....	1939-1949
Jay S. Parker, Hill City.....	1943-1966 (C.J.)
Allen B. Burch, Wichita.....	1945-1948
Austin M. Cowan, Wichita.....	1948
Robert T. Price, Topeka.....	1948-1971 (C.J.)
Edward F. Arn, Wichita.....	1949-1950
William J. Wertz, Wichita.....	1950-1965
Lloyd M. Kagey, Wichita.....	1950-1951
Clair E. Robb, Wichita.....	1955-1965
Harold R. Fatzer, Kinsley.....	1956-1977 (C.J.)
Fred Hall, Dodge City.....	1956-1958
Alfred G. Schroeder, Newton.....	1957-1987 (C.J.)
Schuyler W. Jackson, Topeka.....	1958-1964
John F. Fontron, Hutchinson.....	1964-1975
Robert H. Kaul, Wamego.....	1965-1977
Earl E. O'Connor, Overland Park.....	1965-1971
Alex M. Fromme, Hoxie.....	1966-1982
Perry L. Owsley, Pittsburg.....	1971-1978
David Prager, Topeka.....	1971-1988 (C.J.)
Robert H. Miller, Overland Park.....	1975-1990 (C.J.)
Richard W. Holmes, Wichita.....	1977-1995 (C.J.)
Kay McFarland, Topeka.....	1977-2009 (C.J.)
Harold S. Herd, Coldwater.....	1979-1993
Tyler C. Lockett, Wichita.....	1983-2002
Donald L. Allegrucci, Pittsburg.....	1987-2007
Fred N. Six, Lawrence.....	1988-2002
Bob Abbott, Junction City.....	1990-2003
Robert E. Davis, Leavenworth.....	1993-2010 (C.J.)
Edward Larson, Hays.....	1995-2002
Lawton R. Nuss, Salina.....	2002-2019 (C.J.)
Marla J. Luckert, Goodland.....	2003- (C.J.)
Robert L. Gernon, Hiawatha.....	2003-2005
Carol A. Beier, Wichita.....	2003-2020
Eric S. Rosen, Topeka.....	2005-
Lee A. Johnson, Caldwell.....	2007-2019
W. Daniel Biles, El Dorado.....	2009-

Nancy L. Moritz, Topeka .....	2011- 2014
Caleb Stegall, Lawrence .....	2014-
Evelyn Z. Wilson, Smith Center .....	2020-
Keynen “KJ” Wall Jr., Scott City .....	2020-
Melissa Taylor Standridge, Kansas City.....	2020-

**Supreme Court Commissioners**

B. F. Simpson, Topeka .....	1887-1893
J. B. Clogston, Eureka .....	1887-1890
Joel Holt, Beloit.....	1887-1890
George S. Green, Manhattan.....	1890-1893
J. C. Strang, Larned.....	1890-1893
Earl H. Hatcher, Topeka .....	1963-1971
Jerome Harman, Columbus .....	1965-1977
J. Richard Foth, Topeka .....	1971-1977

**Judges of the Court of Appeals—Northern Department**

A. D. Gilkeson, Hays City.....	1895-1897 (P.J.)
T. F. Garver, Salina.....	1895-1897
George W. Clark, Topeka.....	1895-1897
John H. Mahan, Abilene.....	1897-1901 (P.J.)
Abijah Wells, Seneca .....	1897-1901
Samuel W. McElroy, Oberlin .....	1897-1901

**Judges of the Court of Appeals—Southern Department**

W. A. Johnson, Garnett .....	1895-1897 (P.J.)
A. W. Dennison, El Dorado .....	1895-1901 (P.J.)
Elrick C. Cole, Great Bend.....	1895-1897
B. F. Milton, Dodge City .....	1897-1901
M. Schoonover, Garnett.....	1897-1901

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# APPENDIX B

## Timetable, Checklists and Examples

### Timetable for Steps in an Appeal

STEP	TIME
1. Appellant serves, files notice of appeal with clerk of district court.  (Appellant may seek a stay of the judgment pending appeal.)	30 days from date journal entry is filed in Chapter 60 and Chapter 61 appeals. K.S.A. 60-2103(a). 14 days from sentencing in criminal appeals under Sentencing Guidelines. K.S.A. 22-3608(c).
2. Appellant requests transcript if an evidentiary hearing was held.	21 days from notice of appeal. Rule 3.03.
3. Appellant files docketing statement, certified copies of notice of appeal, journal entry of judgment, any post-trial motions, journal entry ruling on such motions, request for transcript.	60 days from notice of appeal. Rules 2.04, 2.041.

*Timetable, Checklists and Examples*

<b>STEP</b>	<b>TIME</b>
4. District clerk compiles record then available	14 days from notice that the appeal has been docketed. Rule 3.02.
5. Notice of cross-appeal.	21 days from notice of appeal. K.S.A. 60-2103(h). Docketing statement to be filed with clerk of appellate courts within 60 days of notice of cross-appeal. Rule 2.04(a)(2), 2.041(a).
6. Either party may move for transfer to Supreme Court for final determination.	30 days from notice of appeal. K.S.A. 20-3017; Rule 8.02.
7. Reporter files transcript.	40 days from service of order. Rule 3.03.
8. Written requests to clerk of the district court to add to the record on appeal.	Any time before record is sent to appellate court. Rule 3.02.
9. Appellant's brief.	30 days from completion of transcript (or 40 days from docketing if no transcript or if transcript has been completed prior to docketing). Rule 6.01.



<b>STEP</b>	<b>TIME</b>
10. Counsel may suggest place of hearing by Court of Appeals.	Before appellee's brief due. Rule 7.02(d)(3).
11. Appellee's brief (including cross-appellant's brief).	30 days from appellant's brief. Rule 6.01(b)(2).
12. Cross-appellee's brief.	21 days from cross-appellant's brief. Rule 6.01(b)(3).
13. Reply brief.	14 days from brief to which addressed. Rule 6.01(b)(5).
14. Clerk of appellate courts calls for record from clerk of district court.	After time for briefs has expired, usually when case is set for hearing. Rule 3.07.
15. Clerk notifies parties of time and place of hearing.	30 days before hearing. Rule 7.01(d), 7.02(e).
16. Oral arguments.	Rule 7.01(e), Rule 7.02(f).

<b>STEP</b>	<b>TIME</b>
17. Motion for rehearing or modification.	14 days from decision of Court of Appeals. Rule 7.05.  21 days from decision of Supreme Court. Rule 7.06.
18. Motion for assessment of appellate costs and attorney fees.	14 days from oral argument or assignment to summary calendar. Rule 7.07(b).
19. Petition for review or summary petition for review by Supreme Court.	30 days from Court of Appeals decision, regardless of a motion for rehearing by Court of Appeals unless rehearing is granted. Rule 7.05, 8.03(b), 8.03A(b).
20. Cross-petition or conditional cross-petition for review.	30 days from petition for review. Rule 8.03(c).
21. Response to petition for review, cross-petition, or conditional cross-petition.	30 days from petition for review, cross-petition or conditional cross-petition. Rule 8.03(d).
22. Reply to response.	14 days from response. Rule 8.03(e).

<b>STEP</b>	<b>TIME</b>
23. Additional copies of paper briefs, if any, originally filed with the Court of Appeals.	14 days after review is granted. Rule 8.03(i)(2).
24. Supplemental briefs for Supreme Court by either party.	30 days after review is granted. Rule 8.03(i)(3).
25. Responses to supplemental briefs.	30 days after supplemental briefs are filed. Rule 8.03(i)(3).
26. Reply to response brief.	14 days after response brief is filed. Rule 8.03(i)(3).



## **Briefing Checklist**

This checklist is designed to help a brief writer comply with the Kansas Supreme Court Rules. It begins at the cover page and moves through the major sections of a brief. For an example of how an appellate brief looks in practice, please refer to the sample brief contained in this appendix. If you have questions, contact the appellate clerk's office at 785.296.3229 or [appellateclerk@kscourts.org](mailto:appellateclerk@kscourts.org).

- Is the cover page of the brief white? Rule 6.07(b)(1).
- Does the following information appear on the cover of the brief? Rule 6.07(b)(2).

\_\_\_\_\_ The appellate court case number. Rule 6.07(b)(2)(A).

\_\_\_\_\_ The words IN THE COURT OF APPEALS OF THE STATE OF KANSAS or IN THE SUPREME COURT OF THE STATE OF KANSAS. Rule 6.07(b)(2)(B).

\_\_\_\_\_ The caption of the case as it appeared in the district court, except that a party must be identified not only as a plaintiff or defendant but also as an appellant or appellee. Rule 6.07(b)(2)(C).

\_\_\_\_\_ The title of the document, e.g., "Brief of Appellant" or "Brief of Appellee," etc. Rule 6.07(b)(2)(D).

\_\_\_\_\_ The words "Appeal from the District Court of \_\_\_\_\_, County, Honorable \_\_\_\_\_ Judge, District Court Case No. \_\_\_\_\_". Rule 6.07(b)(2)(E).

\_\_\_\_\_ The name, address, telephone number, fax number, e-mail address, and attorney registration number of one attorney for each party on whose behalf the brief is submitted. An attorney may be shown as being of a named firm. Additional attorneys joining in the brief must not be shown on the cover but may be added at the conclusion of the brief. Rule 6.07(b)(2)(F).

\_\_\_\_\_ The words “oral argument” printed on the lower right portion of the brief cover, followed by the desired amount of time, if additional time for oral argument is requested. Rule 6.07(b)(2)(G).

\_\_\_\_\_ If the brief contains an issue that calls into doubt the validity of any Kansas statute or constitutional provision on grounds that the law violates the state constitution, federal constitution, or any provision of federal law then the words “Served on the attorney general as required by K.S.A. 75-764” must be included on the front page of the brief in bold, 12-point font. Rule 11.01(b).

- Is the text printed in a conventional style font not smaller than 12 point with no more than 12 characters per inch? Rule 6.07(a)(1).
- Is the text double-spaced, except block quotations and footnotes? Rule 6.07(a)(1).
- Is only one side of the paper used? Rule 6.07(a)(3).
- Is the length of the brief, excluding the cover, table of contents, appendix, and certificate of service, within the page limitation allowed? Rule 6.07(c).

- Does the brief contain a table of contents that includes page references to each division and subdivision in the brief, including each issue presented, and the authorities relied on in support of each issue? Rule 6.02(a)(1).
- Does the brief contain a brief statement of the nature of the case, *e.g.*, whether it is a personal injury suit, injunction, quiet title, etc., and a brief statement of the nature of the judgment or order from which the appeal was taken? Rule 6.02(a)(2).
- Does the brief contain a brief statement, without elaboration, of the issues to be decided in the appeal? Rule 6.02(a)(3).
- Does the brief contain a concise but complete statement, without argument, of the facts that are material to determining the issues to be decided in the appeal? Rule 6.02(a)(4).
- Are the facts keyed to the record on appeal by volume and page number? Rule 6.02(a)(4).
- Have the parties been referred to in the body of the brief by their status in the district court, *e.g.*, plaintiff, defendant, etc., or by name? Rule 6.08.
- If the appeal involves a child, the victim of a sex crime, or a juror or venire member, have their identities been protected by using initials only or given name and last initial? Rule 7.043.
- Does each issue begin with citation to the appropriate standard of appellate review and a pinpoint reference to the location in the record on appeal (volume and page number) where the issue was raised and ruled on? Rule 6.02(a)(5).
- Does the appendix, if one is included, consist only of limited extracts from the record on appeal and/or copies of unpublished opinions cited for persuasive authority? Rule 6.02(b); 7.04(g)(2)(C).

## *Timetable, Checklists and Examples*

- Does the brief cite an unpublished opinion? If so, a copy of the opinion must be attached. Rule 7.04(g)(2)(C).
- Is there a certificate of service included as the last page of the brief? Rule 1.11(c).
- Have the brief and certificate of service been signed? If the signature is electronic, is it preceded by “/s/”? Rule 1.12.
- Is this a CINC case? If so, does the brief include a verification by the appellant? K.S.A. 38-2273(e).
- Has a copy of the brief been served on all parties? Rule 1.11(a); K.S.A. 60-205.
- If this is a criminal or postconviction case, has a copy of the brief been served on the attorney general? K.S.A. 75-768.
- Is this a case where one of the issues contained in the brief contests or calls into doubt the validity of any Kansas statute or constitutional provision on grounds that the law violates the state constitution, federal constitution, or any provision of federal law? If so, then the party filing the brief must serve a copy of the brief (along with a separate notice under Rule 11.01[c]) on the attorney general under K.S.A. 75-764. See Rule 11.01(a).



## Petition for Review Checklist

This checklist is designed to help a party draft a petition for review that complies with the Supreme Court Rules. It covers the major sections of a petition for review. For an example, please refer to the sample petition for review contained in this appendix. If you have questions, contact the appellate clerk's office at 785.296.3229 or [appellateclerk@kscourts.org](mailto:appellateclerk@kscourts.org).

- Is the petition for review filed no later than 30 days after the date of the Court of Appeals' decision? The 30-day period for filing a petition for review is jurisdictional and cannot be extended. Rule 8.03(b)(1). Filing a motion for rehearing or modification in the Court of Appeals does not toll the deadline for filing a petition for review.
- Does the format of the petition for review comply with the applicable provisions of Rule 6.07? Rule 8.03(b)(3). (See the Briefing Checklist, §12.38, *supra*, for the key requirements under Rule 6.07.)
- Is the length of the petition for review, exclusive of the cover, table of contents, appendix, and certificate of service, 15 pages or less? Rule 8.03(b)(3).
- If the petition for review is filed in a case expedited by the Court of Appeals or expedited by statute, is it titled "Expedited Petition for Review"? Rule 8.03(b)(4).
- Does the petition for review contain a prayer for review clearly stating the nature of the relief sought and why review is warranted? Rule 8.03(b)(6)(A).
- Does the petition for review state the date of the Court of Appeals decision the party is asking the Supreme Court to review? Rule 8.03(b)(6)(B).
- Does the petition for review contain a statement of issues the petitioner wishes to be decided by the Supreme Court? The statement of the issues must be tailored to address why review is warranted; it should not merely be identical

to the statement of the issues contained in the party's Court of Appeals brief. Rule 8.03(b)(6)(C).

- Does the petition for review contain a short statement of relevant facts keyed to the record or a statement that the facts provided in the Court of Appeals decision are correct? Rule 8.03(b)(6)(D).
- Does the petition for review contain a short argument, including appropriate authority, stating for each issue why review is warranted? Rule 8.03(b)(6)(E). Supreme Court Rule 8.08(b)(6)(E) provides a nonexhaustive list of reasons for review by the Supreme Court. Failure to include an argument showing how the Court of Appeals erred or why review is warranted may result in denial of a petition for review. Rule 8.03(b)(6)(E).
- Does the petition for review include an appendix containing the Court of Appeals decision? Rule 8.03(b)(6)(F).
- Is there a certificate of service included as the last page of the brief? Rule 1.11(c).
- Has the brief and certificate of service been signed? Rule 1.12.
- Has a copy of the petition for review been served on all parties? Rule 1.11(a); K.S.A. 60-205.
- Is this a case where one of the issues contests or calls into doubt the validity of any Kansas statute or constitutional provision on the grounds that the law violates the state constitution, federal constitution, or any provision of federal law?
  - If so, the party filing the petition for review must serve a copy of the petition for review (along with a separate notice under Rule 11.01[c]) on the attorney general under K.S.A. 75-764 if the party did not satisfy these requirements before the Court of Appeals. Rule 11.01(a).
  - The party filing the petition for review must also include these words in bold, 12-point font under

the case caption on the first page: “Served on the attorney general as required by K.S.A. 75-764.” Rule 11.01(b).

- If the appeal involves a child, the victim of a sex crime, or a juror or venire member, has the individual’s identity been protected by using initials only or given name and last initial? Rule 7.043.



No. 00-00000-A

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**IN THE  
COURT OF APPEALS OF THE  
STATE OF KANSAS**

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**STATE OF KANSAS**  
Plaintiff-Appellee

vs.

**JOHN DOE**  
Defendant-Appellant

---

**BRIEF OF APPELLANT**

---

Appeal from the District Court of XXXXX County, Kansas  
Honorable XXXX XXXX, Judge  
District Court Case No. 00-CR-000

---

Attorney Name, Bar Number  
Name of Firm or Agency  
Firm Address  
City, State, Zip  
Firm Phone Number  
Firm Fax Number  
Firm/ Attorney Service Email  
Attorney for the Appellant

Oral Argument: 15 minutes

**Notice to the Attorney General Pursuant to K.S.A. 2016 Supp. 75-764**

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### Nature of the Case

A jury convicted John Doe of attempted second degree murder, aggravated assault of a law enforcement officer, and criminal threat. Subsequently, the district court imposed a 102 month prison sentence. This is an appeal from Mr. Doe's convictions.

### Statement of the Issues

- Issue I: The district court erred by admitting evidence indicating that Mr. Doe had a prior taser-altercation with law enforcement.**
- Issue II: The district court erred by not instructing the jury on lesser-included offenses of attempted voluntary manslaughter.**
- Issue III: The reckless form of criminal threat is unconstitutionally overbroad because the true threat exception to the First Amendment only extends to intentional threats.**

### Statement of Facts

On February 20, 2015, the State charged John Doe with two counts of attempted second degree murder. (R. I 39-40). Subsequently, the State added two alternative charges of aggravated assault of a law enforcement officer and a charge of criminal threat. (R. I, 364-65). On September 12, 2016, Mr. Doe went to trial on those charges. (R. XVII, 1).

*Mr. Doe walks home from Walmart.*

On January 31, 2015, Mr. Doe was walking with a pronounced limp. (R. XX, 61, 69, 94). A few days prior, he sustained a knee injury that required a



visit to a doctor. (R. XX, 69, 99; XXII, 114). To get around, Mr. Doe was using an axe handle as a cane. (R. XX, 69, 93, 99).

That evening, Mr. Doe's neighbors, Brenda and Bob, drove Mr. Doe to Walmart. (R. XX, 88). At Walmart, Mr. Doe became separated from his neighbors. (R. XX, 89). Eventually, Brenda and Bob drove back to their apartment, without Mr. Doe. (R. XX, 89).

After Brenda and Bob drove away, Mr. Doe began a one mile trek back to his apartment. (R. XX, 38, 78). Outside, it was near freezing and drizzling. (R. XVIII, 131-32; XIX, 147; XX, 91).

On the way back home, Mr. Doe stopped at multiple businesses, including a Dollar Store. (R. XX, 60). There, he purchased a bottle of Gatorade. (R. XX, 60). Subsequently, Mr. Doe seems to have mixed liquor into his Gatorade. (R. XXII, 52-53). During his walk home, he called Brenda and left a voicemail message saying,

“Bitch, if I’m going to be on the streets, then you’re going to be on the streets because I’m going to burn your shit up. Then I’m going to be back tomorrow and you ain’t going to like what I’m bringing for you.” (R. VIII, 84.)

By the time Mr. Doe got to his apartment, he was scared, agitated, and intoxicated. (R. XX, 92, 169-70, 203; XXII, 7).

*Counsel pauses to note facts not in trial evidence.*

Mr. Doe suffers from schizoaffective disorder. (R. III, 15). This mental illness causes him to have paranoid and delusional thoughts. (R. III, 14). This, in turn, resulted in authorities committing Mr. Doe to State Hospital 34 times prior to charges being filed in this case. (R. III, 9, 71-72). Because trial counsel elected not pursue a mental disease or defect defense, evidence of Mr. Doe's mental illness did not make its way into trial evidence. (R. XIV, 13-14).

Sadly, Mr. Doe believed that he was on the verge of inventing a perpetual energy motor. (R. I, 506; III, 77; XXIII, 63, 74-75). He also believed that businessmen, who profit by selling energy, were plotting against him. (R. III, 77; XXIII, 63-64). As Mr. Doe walked home from Walmart, he thought that he was being followed by businessmen who wished to harm him. (R. VII, 18; XXIII, 63-64).

*Mr. Doe encounters Officer White and Sergeant Blue.*

Around the time that Mr. Doe got back to his apartment complex, one of his neighbors called police to make a noise complaint. (R. XVIII, 142). Officer White and Sergeant Blue separately responded to that call. (R. X IX, 7-8, 139-40).

Officer White arrived on the scene first. (R. XIX, 22, 181). When he got there, Mr. Doe was outside, holding his axe handle over his shoulder. (R. XIX, 22). Officer White perceived Mr. Doe to be holding a baseball bat. (R. XIX,

24).

When Officer White approached Mr. Doe, Mr. Doe commented that people were chasing him. (R. XIX, 26). In response, Officer White asked Mr. Doe to put his bat down, so that they could talk. (R. XIX, 27-28). When making that request, Officer White explicitly stated that he was a police officer. (R. XIX, 28).

Mr. Doe did not put down his axe handle. (R. XIX, 28). Instead, he stated that he would put his axe handle down in his apartment. (R. XIX, 79-80). Officer Hite indicated that this course of action would be acceptable, after another officer arrived on the scene. (R. XIX, 79-80).

Shortly thereafter, Sergeant Blue arrived on the scene. (R. XIX, 150). Sergeant Blue was unaware that Officer White had just informed Mr. Doe that he could put down his bat (which was actually an axe handle) in his apartment. (R. XIX, 191).

Sergeant Blue reported that Mr. Doe was holding a stick *and* a knife when he arrived on the scene. (R. XIX, 151). This claim conflicted with an observation from Officer White that Mr. Doe had a sheathed knife *on his waistband*. (R. XIX, 107). At any rate, Sergeant Blue began ordering Mr. White to put his weapons down. (R. XIX, 158).

Mr. White did not comply with Sergeant Blue's requests, and, instead, walked toward his apartment. (R. XIX, 33, 159). This noncompliance

prompted Sergeant Blue to unholster his Taser, and Officer White to unholster his service pistol. (R. XIX, 34, 156).

*Mr. Doe is tased and shot by law enforcement.*

When Mr. Doe reached the front door of his apartment, Sergeant Blue fired his Taser. (R. XIX, 160). One Taser barb lodged in Mr. Doe's jaw. (R. XX, 201). The other planted in his jacket. (R. XX, 202). According to Sergeant Blue, he gave no warning prior to firing his Taser. (R. XIX, 200-02). And, according to Officer White, Mr. Doe had not made any aggressive movements toward law enforcement, prior to his tasing. (R. XIX, 84-85).

The Taser did not, initially, work. (R. XIX, 161-62). But, after a few moments, 50,000 volts of electricity ran through Mr. Doe's body. (R. XIX, 214). Law enforcement testimony indicated this would have been extraordinarily painful. (R. XVIII, 117).

After Mr. Doe fell to the ground, Sergeant Blue approached, to make an arrest. (R. XIX, 162). But, when Sergeant Blue came near, Mr. Doe stood up, and made a slashing motion with his knife. (R. XIX, 162). Then, Mr. Doe walked toward Sergeant Blue with an axe handle in one hand, and a knife in the other. (R. XIX, 162).

Sergeant Blue started backpedaling, and tried (unsuccessfully) to continue shocking Mr. Doe with his Taser. (R. XIX, 165-66). When Mr. Doe got to within five feet of Sergeant Blue, Sergeant Blue ordered Officer White

to shoot. (R. XIX, 167-68). Officer White, subsequently, shot toward Mr. Doe. (R. XIX, 40-41).

Officer White's shot caused Mr. Doe to spin, and fall to the ground. (R. XIX, 42). As Mr. Doe fell, his knife flew from his hand. (R. XIX, 42-43). This reaction led Officer White to assume that Mr. Doe had been hit by a bullet. (R. XIX, 42). This assumption was incorrect.

The bullet fired toward Mr. Doe actually hit a Gatorade bottle tucked beneath his arm. (R. XIX, 188-89; XXII, 52-53). The force of that impact brought Mr. Doe to the ground, but did not cause serious injury. (R. XIX, 43).

When Officer White approached Mr. Doe to render aid, Mr. Doe stood up. (R. XIX, 43). Then, Mr. Doe ran toward Officer White, while swinging his axe handle. (R. XIX, 43-44). While approaching Officer White, Mr. Doe reportedly stated, "I'm going to fucking kill you." (R. XIX, 44). After Mr. Doe made this comment, Officer White shot him in the chest. (R. XIX, 45).

This time, a bullet passed through Mr. Doe's body, causing a life-threatening injury. (R. XX, 165-66, 173). After a lengthy hospital stay, Mr. Doe survived. (R. XXII, 115).

### *Trial Proceedings*

Prior to trial, the State filed K.S.A. 60-455 motions seeking permission to admit evidence of three prior occasions when Mr. Doe became involved in violent altercations with law enforcement. (R. I, 231, 242, 249). None of these

three incidents resulted in a criminal conviction. In the first case (involving Utopia City police officers), Mr. Doe was admitted to State Hospital, apparently, in lieu of criminal prosecution. (R. XIII, 68-69). In the second case (involving Cowboy County officers), Mr. Doe was found not guilty of criminal charges due to mental disease or defect. (R. XIII, 79). In the third case (involving Faraway County and State Highway Patrol officers), criminal charges were never filed. (R. XIII, 93-94).

Following litigation, the State decided not to seek admission of the first two altercations that Mr. Doe had had with law enforcement officers. (R. XIV, 4). Because those cases concluded with Mr. Doe's admission to State Hospital, the State feared that evidence of those cases would open the door for Mr. Doe to put on evidence of his mental illnesses. (R. XIII, 107-10).

With regard to evidence of Mr. Doe's third altercation with law enforcement, the district court ruled that the evidence would be, preliminarily, inadmissible at trial. (R. XIII, 18). The court noted that Mr. Doe could develop a trial defense which would make the evidence admissible. (R. XIII, 17-18).

The week proceeding trial, the State moved to put on limited evidence of Mr. Doe's prior altercation with Faraway County officers. (R. I, 380). Particularly, the State sought to introduce evidence that Mr. Doe had told Officer White and Sergeant Blue, prior to being tased, that Faraway County

officers would have already tackled and/or tased him. (R. I, 381; XVIII, 33).

The State proffered that evidence of this comment was relevant, because it demonstrated that Mr. Doe knew that Officer White and Sergeant Blue were law enforcement officers. (R. I, 380). The State also, asserted (vaguely) that the evidence was relevant to prove Mr. Doe's "state of mind." (R. I, 380).

At trial, the district court agreed with the State's argument that the evidence was relevant to establish Mr. Doe's "knowledge that he was dealing with law enforcement officers." (R. XVIII, 34). Thus, over defense counsel's K.S.A. 60-455 objection, the court ruled that evidence of the comment would be admissible at trial. (R. XVIII, 34-35).

Subsequently, Officer White testified that Mr. Doe made the following comments to him, prior to his tasing:

If you were Faraway County, you would have tackled me by now [...]

Faraway County would have tased me already.  
(R. XIX, 28, 35).

Additionally, Sergeant Blue testified that Mr. Doe commented that, in Faraway County, "it would take about six to eight cops to tackle him." (R. XIX, 154).

This testimony prompted contemporaneous objections from trial counsel. (R. XIX, 28, 35, 153). Those objections were all overruled. (R. XIX,

28, 35, 153).

Also at trial, the jury was instructed with a criminal threat instruction that provided alternative means for committing criminal threat, including reckless criminal threat. (R. I, 80; R. XIX, 564).

### *Verdict and Sentencing*

Following the presentation of evidence, a jury acquitted Mr. Doe of attempting to murder Sergeant Blue, but convicted him of attempting to murder Officer White and of criminal threat against Brenda. (R. XXII, 196-97). The jury also convicted Mr. Doe of assaulting Sergeant Blue with a deadly weapon. (R. XXII, 196-97).

At sentencing, the district judge expressed sympathy for Mr. Doe, but felt it necessary to impose a 102 month prison sentence. (R. XXIII, 78, 81-82). Mr. Doe subsequently appealed his convictions. (R. I, 552).

### **Arguments and Authorities**

**Issue I: The district court erred by admitting evidence indicating that Mr. Doe had had a prior Taser-altercation with law enforcement.**

#### *Introduction*

At trial, the State admitted evidence indicating that Mr. Doe had previously been involved in a Taser altercation with Faraway County law enforcement officers. Since evidence of that altercation only served to prove criminal propensity, it should have been excluded by the district court.



Because it wasn't, this Court must reverse Mr. Doe's convictions, and remand this case for a new trial.

*Preservation*

Prior to trial, the State filed K.S.A. 60-455 motions seeking permission to admit evidence of three prior occasions when Mr. Doe became involved in violent altercations with law enforcement. (R. I, 231, 242, 249). The district court ruled that the evidence would be, preliminarily, inadmissible at trial. (R. XIII, 18).

When the issue came up at trial, the district court agreed with the State's argument that the evidence was relevant to establish Mr. Doe's "knowledge that he was dealing with law enforcement officers." (R. XVIII, 34). Thus, over defense counsel's K.S.A. 60-455 objection, the court ruled that evidence of the comment would be admissible at trial. (R. XVIII, 34-35).

Subsequently, Officer White testified that Mr. Doe made the following comments to him, prior to his tasing:

If you were Faraway County, you would have tackled me by now [...]

Faraway County would have tased me already.  
(R. XIX, 28, 35).

Additionally, Sergeant Blue testified that Mr. Doe commented that, in Faraway County, "it would take about six to eight cops to tackle him." (R. XIX, 154).

This testimony prompted contemporaneous objections from trial counsel. (R. XIX, 28, 35, 153). Those objections were all overruled. (R. XIX, 28, 35, 153). Trial counsel's contemporaneous objections to the admission of K.S.A. 60-455 evidence have preserved this issue for appeal.

### *Standard of Review*

When reviewing the admissibility of K.S.A. 60-455 evidence, an appellate court applies a three-part test: (1) a court exercised unlimited review to determine whether the fact to be proven is material – *i.e.*, whether it has real bearing on the case; (2) a court uses an abuse of discretion standard to determine whether a material fact is disputed and, if so, whether evidence is relevant to prove the disputed fact; and (3) a court uses an abuse of discretion standard to determine whether the probative value of the evidence outweighs the potential for undue prejudice against a defendant. *State v. Torres*, 294 Kan. 135, 139-40 (2012).

### *Analysis*

K.S.A. 60-455 provides that (in non-sex offense cases) evidence of prior crimes is inadmissible to prove criminal propensity. However, prior crime evidence may be admissible to prove some other relevant fact, provided that the fact is in dispute. *State v. Boggs*, 287 Kan. 298, 305 (2008). Pure propensity evidence is not allowed as it might cause a jury to conclude that a defendant deserves punishment, even though the State has not established

guilt, in the case at hand, beyond a reasonable doubt. See *Boggs*, 287 Kan. at Syl. ¶ 2.

In this case, the State admitted evidence that Mr. Doe made the following comments to police officers, prior to his tasing:

If you were Faraway County, you would have tackled me by now [...]

Faraway County would have tased me already.

[In Faraway County], it would take about six to eight cops to tackle [me]. (R. XIX, 28, 35, 154).

Evidence of these comments was admitted, through K.S.A. 60-455, on the theory that they were relevant to show that Mr. Doe knew that Officer White and Sergeant Blue were law enforcement officers. (R. XVIII, 34; XXII, 133). There are two problems with that theory.

First, according to trial testimony, Officer White and Sergeant Blue were both wearing police uniforms when they interacted with Mr. Doe. (R. XIX, 14-16, 142-43). And Officer White explicitly told Mr. Doe that he was a police officer. (R. XIX, 28). Thus, trial evidence didn't lend itself to a finding that Mr. Doe had no idea that he was interacting with police officers. For that reason, defense counsel did not entertain that possibility in opening and closing statements. (R. XVIII, 26-32; XXII, 173-191). Since Mr. Doe's knowledge wasn't in dispute, K.S.A. 60-455 precluded the State from proving that fact with evidence of prior criminal conduct. *Boggs*, 287 Kan. at 315-16.

Second, the State didn't need to prove that Mr. Doe knew that Officer White or Sergeant Blue were police officers to secure attempted murder or aggravated assault on a law enforcement officer convictions. K.S.A. 21-5403(a)(1) criminalizes the intentional killing of any person, whether they are a civilian or a police officer. And, according to our Supreme Court, an offender needn't have actual knowledge that he or she is assaulting a police officer to be guilty of assault of a law enforcement officer. All that need be proven is that an offender knowing assaulted someone who happened to be a uniformed law enforcement officer. *State v. Wood*, 235 Kan. 915, Syl. ¶ 8 (1984).

In sum, the jury's verdict, in no way, turned upon whether Mr. Doe had a previous Taser-altercation with Faraway County law enforcement officers. Evidence of that altercation only served to prove criminal propensity. Since propensity evidence is inadmissible, this Court should find that the district court erred.

#### *Harmless Error*

Since a trial error implicated Mr. Doe's statutory rights, the State must show that there is no reasonable probability the error affected the outcome of trial. Unless the State can do that, this Court must reverse Mr. Doe's convictions. *State v. McCullough*, 293 Kan. 970, Syl. ¶ 9 (2012).

For two reasons, the State cannot establish harmless error. First, the evidence against Mr. Doe was not overwhelming, particularly on the State's

attempted murder charges. Indeed, the jury actually acquitted Mr. Doe of attempting to murder Sergeant Blue. And, while Mr. Doe reportedly stated that he intended to kill Officer White, this comment was an excited utterance made by a man who had just been shocked and shot at by police officers. It seems quite possible that Mr. Doe was speaking angrily, rather than literally, when he expressed an intent to kill Officer White.

Second, the error in this case was extremely prejudicial. It is significant that the district court did not err by admitting evidence of general criminal propensity. Rather, the court erred by admitting evidence that Mr. Doe had previously been involved in the same behavior which led to charges being filed in this case. This information may have prompted the jury to convict Mr. Doe of attempted murder, simply because he had a propensity of becoming involved in dangerous altercations with law enforcement. See *Boggs*, 287 Kan. at Syl. ¶ 2 (noting that propensity evidence might cause a jury to conclude that a defendant deserves punishment, even though the State has not established guilt, in the case at hand, beyond a reasonable doubt).

### *Conclusion*

The district court erred by admitting propensity evidence. Since that error may have affected the jury's verdict, this Court must reverse Mr. Doe's convictions, and remand this case for a new trial.

**Issue II: The district court erred by not instructing the jury on lesser-included offenses of attempted voluntary manslaughter.**

*Introduction*

Trial evidence strongly indicated that Mr. Doe honestly, but unreasonably, believed that deadly force was necessary to protect himself from great bodily harm. Thus, the district court erred by not instructing the jury on lesser included offenses of attempted voluntary manslaughter. Since that error very likely affected the jury's verdict, this Court must reverse Mr. Doe's attempted murder conviction.

*Standard of Review and Preservation*

At trial, Mr. Doe did not request a lesser included offense instruction for attempted voluntary manslaughter. (R. XXII, 126-27). Even when a defendant does not object to the omission of a jury instruction, an appellate court may review the omission for clear error. *State v. Fisher*, 304 Kan. 242, 257, 260 (2016).

When reviewing for clear error, appellate court first decides whether an omission was, actually, error. That review is without limit. If the omission was error, an appellate court reviews the entire record and determines whether it is firmly convinced that the jury would have reached a different verdict had the error not occurred. *State v. Knox*, 301 Kan. 671, 680 (2015).

*Analysis*

Mr. Doe contends that the district court erred by not instructing the jury on lesser included offenses of attempted imperfect self-defense voluntary manslaughter. See K.S.A. 21-5404(a)(2). To determine whether this claim is correct, this Court must answer two questions: (1) Is attempted voluntary manslaughter a lesser included offense of attempted second degree murder? and (2) Did trial evidence permit a rational jury to convict Mr. Doe of attempted voluntary manslaughter? *Fisher*, 304 Kan. at 257-58.

*Attempted Voluntary Manslaughter Is A Lesser Included Offense of Attempted Second Degree Murder.*

The answer to this Court's first inquiry is controlled by Supreme Court precedent. Attempted voluntary manslaughter is a lesser included offense of attempted second-degree murder. *Fisher*, 304 Kan. at 257-58.

*Trial Evidence Permitted Rational Jurors to Convict Mr. Doe of Attempted Voluntary Manslaughter.*

To convict Mr. Doe of attempted voluntary manslaughter, jurors needed to have found it reasonably possible that Mr. Doe honestly, but unreasonably, believed that circumstances surrounding his interaction with Officer White and Sergeant Blue were ones which legally justified the use of deadly force. *State v. Roeder*, 300 Kan. 901, 923-26 (2014); see also, K.S.A. 21-5108(b) ("When there is a reasonable doubt as to which of two or more degrees of a crime the defendant is guilty, the defendant shall be convicted of the lowest

degree only”). Essentially, Mr. Doe had to establish the subjective belief prong of a self-defense claim.

It is notable that the district court, in this case, saw fit to instruct the jury on self-defense. (R. I, 419). If it was appropriate to instruct on self-defense, it was also, as a matter of logic, appropriate to instruct on imperfect self-defense voluntary manslaughter.

Admittedly, an appellate court can solely rely upon a district court’s decision to instruct on self-defense when considering the factual propriety of a voluntary manslaughter instruction. *State v. Nelson*, 291 Kan. 475, 481-82 (2010). But, in this case, trial evidence was clearly sufficient to support an attempted voluntary manslaughter conviction.

To recap trial evidence (in the light most favorable to the defense), Mr. Doe refused to obey an order from police to put down an axe handle that he had been using as a cane. Instead of putting down his axe handle, Mr. Doe walked to his apartment, without making any aggressive movements toward law enforcement. Upon reaching his apartment, police, without warning, shot a Taser barb into his jaw. Subsequently, 50,000 volts of electricity brought Mr. Doe to the ground.

Before his encounter with law enforcement, Mr. Doe was scared, agitated, and intoxicated. After police shocked, and shot at Mr. Doe, he was likely incapable of reasonable decision-making. Thus, jurors could have



concluded that Mr. Doe honestly, but unreasonably, believed that use of deadly force was necessary to protect himself from imminent great bodily harm. For that reason, the district court erred by not instructing the jury on attempted voluntary manslaughter.

*Clear Error*

At sentencing, when considering a departure motion, the district court commented:

Mr. Doe's request for departure relies in part upon that Mr. Doe invited the officers or at least Officer White to come into the apartment and talk; that he made no aggressive movements; that he was tased without warning. Mr. Doe has spoken at [ ] length about that this afternoon. **And I really don't question Mr. Doe's perception as to that, and that that is his belief**, but I would suggest that the record of jury trial that lasted approximately a week reflects differently [...] I think the record reflects that the police officers acted with restraint. (R. XXIII, 77) (emphasis added).

To paraphrase, Mr. Doe's judge believed that Mr. Doe honestly, but unreasonably, perceived himself as having been attacked by police, without any provocation. If the judge felt that way, it is likely that jurors felt similarly. And, if properly instructed jurors felt that way, they would have convicted Mr. Doe of attempted voluntary manslaughter, rather than attempted murder.

In sum, this Court can have confidence that the jury's verdict would have been different, had instructional error not happened. Thus, Mr. Doe has established clear error, which warrants remedy from this Court.

### *Conclusion*

The district court erred by not instructing on attempted voluntary manslaughter as a lesser included offense of both of the State's attempted murder charges. The jury's acquittal on one attempted murder charge makes the court's error partially harmless. Thus, Mr. Doe asks this Court to reverse his attempted murder conviction, affirm his aggravated assault of a law enforcement officer conviction, and remand his case for a new trial.

**Issue III: The reckless form of criminal threat is unconstitutionally overbroad because the true threat exception to the First Amendment only extends to intentional threats.**

### *Introduction*

The reckless form of criminal threat under K.S.A. 21-5415 is unconstitutionally overbroad because it criminalizes protected speech under the First Amendment. Particularly, only "true threats" go beyond the First Amendment's protection and those threats require intent. Because Mr. Doe was convicted under an alternative means instruction that included reckless threat, this Court must now reverse Mr. Doe's conviction under the constitutionally overbroad statute.

*Preservation and Jurisdiction*

Mr. Doe did not assert an argument that the statute was unconstitutionally overbroad at the district court. Generally, constitutional issues cannot be raised for the first time on appeal. *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010). However, Kansas Courts have recognized three main exceptions to this rule:

“Despite the general rule, appellate courts may consider constitutional issues raised for the first time on appeal if the issue falls within one of three recognized exceptions: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason. *State v. Spotts*, 288 Kan. 650, 652, 206 P.3d 510 (2009).” *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010).

Here, Mr. Doe’s overbreadth challenge argues the reckless criminal threat statute violates the First Amendment’s protection of speech, a fundamental right. Resolving the issue is also necessary to serve the ends of justice in order to assure that the protected right to speech is preserved. Finally, this is solely a legal question based on the statutory language and Constitutional law. Thus, this court may review the issue for the first time on appeal.

In addition, a defendant has standing to bring an overbreadth challenge based on First Amendment rights, even when that defendant is

only asserting the rights of third parties. *State v. Williams*, 299 Kan. 911, 919, 329 P.3d 400 (2014).

### *Standard of Review*

“Whether a statute is unconstitutionally vague or overbroad is a question of law over which this court has unlimited review.” *State v. Whitesell*, 270 Kan. 259, 268, 13 P.3d 887 (2000).

### *Analysis*

Kansas’ reckless threat statute is unconstitutionally overbroad because it goes beyond the true threat exception to the First Amendment, which applies to intentional threats, and criminalizes protected speech. Several general rules apply to challenges to the constitutionality of a statute requiring the reviewing court to: 1) presume the law is constitutional; 2) resolve all doubts in favor of validating the law; 3) uphold the law if there is a reasonable way to do so; and 4) strike down the law only if it clearly appears to be unconstitutional. *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 298 Kan. 540, 544, 316 P.3d 707 (2013). The burden rests on the party bringing the challenge to show the law is unconstitutional. *City of Lincoln Ctr.* 298 Kan. at 544.

“[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected.” *Dissmeyer v. State*, 292 Kan. 37, Syl. ¶ 2, 249 P.3d 444 (2011). “A successful overbreadth challenge can thus be

made only when 1) the protected activity is a significant part of the law's target, and 2) there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications.” *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 533, 646 P.2d 1091, 1099 (1982). Further, “An overbreadth challenge will be successful if the challenged statute trenches upon a substantial amount of First Amendment protected conduct in relation to the statute's plainly legitimate sweep.” *State v. Whitesell*, 270 Kan. 259, 271, 13 P.3d 887 (2000) (quoting *Staley v. Jones*, 108 F. Supp. 2d 777, 786 (W.D. Mich. 2000), *rev'd*, 239 F.3d 769 (6th Cir. 2001)).

Federal and Kansas Courts have long recognized that “violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection.” *Smith v. Martens*, 279 Kan. 242, 254, 106 P.3d 28 (2005). In line with that reasoning, the Court has recognized an exception to the First Amendment’s protection for “true threats.” *Watts v. United States*, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

*Watts* involved a prosecution for threatening the president based on the defendant’s statements at a draft-protest rally that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” The Court concluded that the remark was not a true threat, and therefore protected speech, based on its context, such as the fact that it was made at a political

rally and that the crowd responded with laughter. *Watts* 394 U.S. at 708. The Court referenced, but declined to resolve, a question of whether willfulness was a requirement for true threats. *Watts* 394 U.S. at 708.

The Court again addressed the true threats doctrine in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), where the Court discussed Virginia’s ban on intimidating cross burning, which provided that the burning of a cross in a public place was *prima facie* evidence of an intent to intimidate. The Court described the true threat exception as allowing the criminalization of intentional threats:

“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States, supra*, at 708, 89 S.Ct. 1399 (‘political hyberbole’ is not a true threat); *R.A.V. v. City of St. Paul*, 505 377 (1992). The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’ *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Black*, 538 U.S. at 359–60.

Thus, the Court noted that “A ban on cross burning carried out *with the intent* to intimidate” is consistent with the First Amendment exception for true threats. *Black*, 538 U.S. at 363 (Emphasis added).

A plurality of the Court then went on to conclude that the prima facie evidence provision does not does not comport with the First Amendment's protection of speech. The plurality noted a chilling effect on protected speech and that "It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings." *Black*, 538 U.S. at 366. Thus, the Court established that intent was a sufficient standard to meet the "true threat" exception to the First Amendment, and the plurality concluded that a pure objective standard based on the expressive conduct was insufficient. This left unresolved, however, whether lower standards would suffice.

The Court was again set to resolve whether a negligent threat standard could pass First Amendment muster in *Elonis v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015), but instead resolved the issue based on the statutory language rather than the Constitutional question. The Court determined that the Federal threat statute, which did not include a mental culpability element, still required some level of mental culpability and noted "[t]here is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Elonis*, 135 S. Ct. at 2012. The Court declined, however, to address

whether a reckless standard would be sufficient to comply with the statute or the First Amendment's protections because the parties had not briefed the issue. *Elonis*, 135 S. Ct. at 2012; See also *Elonis*, 135 S. Ct. at 2016 (Alito, J. Concurring in part dissenting in part.) (Stating that he would find that a reckless culpability standard would satisfy the statute and the First Amendment.); *Elonis*, 135 S. Ct. at 2027(Thomas, J., Dissenting) (Arguing "general intent" standard is sufficient). Thus, the Court left unresolved whether a reckless culpability level is sufficient to be a "true threat" and be beyond the First Amendment's protections.

Kansas Courts last addressed an overbreadth challenge to the reckless form of the criminal threat statute two years before *Virginia v. Black* in *State v. Cope*, 29 Kan. App. 2d 481, 484, 29 P.3d 974 (2001) (Reversed on other grounds in *State v. Cope*, 273 Kan. 642, 44 P.3d 1224 (2002)). That case involved an earlier form of the current law that criminalized a threat to "[c]ommit violence communicated with intent to terrorize another, or to cause the evacuation of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such terror or evacuation." *Cope*, 29 Kan. App. 2d at 483; K.S.A. 21-3419. This Court briefly compared the terroristic threat statute with other laws that had been found overbroad, such as a law banning the display of films not rated by the MPAA, concluding the law is not overbroad in comparison. *Cope*, 29 Kan. App. 2d at 484.



The holding in *Cope* is now called into question because of the statutory changes to the threat law and the Court's comments in *Virginia v. Black* indicating that intent is required for the true threat exception. First, the former terroristic threat law has since been amended to criminalize any threat to “[c]ommit violence communicated with intent to place another in fear, . . . or in reckless disregard of the risk of causing such fear[.]” K.S.A. 21-5415. In particular, the law no longer requires a threat that would “terrorize” but only one that could cause “fear.” Thus, the category of speech covered by the statute has broadened because it requires a lower threshold, *i.e.* that the speech be done in a reckless disregard to the risk of causing fear, rather than a risk of terrorizing. See *Cope*, 29 Kan. App. 2d at, 486 (“‘terrorize’ means to reduce to terror by violence or threats; and ‘terror’ means an extreme fear or fear that agitates the body and mind.”) More speech is targeted by the current law than the prior version.

Second, *Virginia v. Black* indicated that intent is a requirement for threat when noting “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death.” 538 U.S. at, 359–60 (emphasis added). While the Court has since declined to expressly determine whether recklessness is a sufficient standard to bypass the First Amendment, the language in *Black* indicates that intent

is necessary. Further, several courts have already reached that conclusion relying on *Black*. See *United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (Concluding that between the *Black* plurality and concurring opinions, “eight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction.”); *O'Brien v. Borowski*, 461 Mass. 415, 426, 961 N.E.2d 547 (2012) *abrogated on other grounds by Seney v. Morhy*, 467 Mass. 58, 3 N.E.3d 577 (2014) (Describing “true threat” exception as requiring intent under *Black* and *Cassel*.); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011) (“Without a finding that his statement represented an actual intent to put another in fear of harm or to convey a message of actual intent to harm a third party, the statement cannot reasonably be treated as a threat.”). Thus, there are grounds to revise the holding in *Cope* because of the indication in *Black* that intent to cause fear is necessary for true threats.

Looking to the text of the Kansas law indicates it violates the same First Amendment concerns at issue in *Black*. The law criminalizes threats to commit violence communicated in reckless disregard of the risk of causing fear in another. K.S.A. 21-5415. Reckless acts are defined as “when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable

person would exercise in the situation.” K.S.A. 21-5202 (j). Thus, the law criminalizes speech in which the speaker is conscious of a risk of causing fear from their speech, yet continues anyway, and that speech risk is considered a gross deviation from the standard of care of a reasonable person. That law encompasses a broad range of politically or socially distasteful statements that are still protected by the First Amendment.

As an example, one of the two cross burnings discussed in *Black* involved the burning of a cross on private property within the view of a public roadway and other houses, where locals had stopped to watch. *Black*, 538 U.S. at 349-50. Given the long history of the violence associated with cross burnings, See *Black*, 538 U.S. at 352-57, the perpetrators of that cross burning would necessarily be conscious of the risk that their actions would be recognized as a threat to commit violence causing fear, and those actions are a gross deviation from the standard of care exercised by a reasonable person. Thus, the cross burnings would be reckless threats under Kansas law, even though it was protected political speech done on private property. The reckless threat law, like the prima facie intent element in *Black*, goes too far in criminalizing protected, if distasteful, speech. Because the Kansas reckless threat law criminalizes protected speech by going beyond the recognized First Amendment exception for intentional threats, it is constitutionally overbroad in violation of the First Amendment.

*Conclusion*

Because Mr. Doe was convicted under an alternative means instruction that included reckless threat, this Court must now vacate Mr. Doe's conviction under the constitutionally overbroad statute.

**Conclusion**

Mr. Doe respectfully asks this Court to reverse his convictions, and remand his case for a new trial.

Respectfully submitted,

/s/ Attorney Electronic Signature

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**Certificate of Service**

I hereby certify that the above and foregoing Appellant's brief was served on the XXXXX County District Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b) and Name of AG, Attorney General, at [ksagappealsoffice@ag.ks.gov](mailto:ksagappealsoffice@ag.ks.gov), on the DAY of XXXXX Month, YEAR.

*/s/ Attorney Electronic Signature* \_\_\_\_\_  
Attorney Name, Bar Number



No. 00-000000-A

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**IN THE  
SUPREME COURT OF THE  
STATE OF KANSAS**

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**STATE OF KANSAS**  
Plaintiff-Appellee

vs.

**JOHN DOE**  
Defendant-Appellant

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**PETITION FOR REVIEW OF THE APPELLANT**

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Appeal from the Kansas Court of Appeals Opinion  
dated MONTH DAY, YEAR.  
An appeal from the District Court of XXXXX County, Kansas  
Honorable XXXX XXXX, Judge  
District Court Case No. 00-CR-000

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**Notice to the Attorney General Pursuant to K.S.A. 2016 Supp. 75-764**

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*United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014).... 12-15

*United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005) ..... 12-15

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*State v. White*, 53 Kan. App. 2d 44, 384 P.3d 13 (2016) ..... 13

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### **Prayer for Review**

John Doe respectfully asks this Court to review and reverse rulings of the Court of Appeals which resulted in the affirmation of his attempted second-degree murder, aggravated assault of a law enforcement officer, and criminal threat convictions. Review of this case is appropriate for four primary reasons.

First, review would allow this Court to consider the extent to which evidence must suggest the commission of a prior crime, before it implicates K.S.A. 60-455. The Court of Appeals' greatly underestimated the jury's ability to make a logical inference of prior criminal activity from evidence that does not conclusively establish that fact. For this reason, Mr. Doe believes the Court of Appeals decision reached an incorrect result and a clarification of that case law is needed.

Second, review of this case is warranted to reiterate that, when considering the propriety of non-instruction on a lesser included offense, courts must review trial evidence in the light most favorable to a verdict on the lesser included offense. Although the Court of Appeals, in this case, purported to do this, its analysis affirming the propriety of non-instruction on a lesser slanted trial evidence in the State's favor improperly. For this reason, Mr. Doe believes the Court of Appeals decision reached an incorrect result and a clarification of that case law is needed.

Third, review of this case is necessary to clarify that a defendant needn't satisfy the objective reasonability prong of a meritorious self-defense claim to be convicted of imperfect self-defense voluntary manslaughter. In this case, the Court of Appeals affirmed non-instruction on attempted voluntary manslaughter because trial evidence did not support a finding that it was objectively reasonable for Mr. Doe to feel that he needed to act in self-defense. That affirmation was obviously flawed, as the objective *unreasonability* of an offender's beliefs is a necessary element imperfect self-defense voluntary manslaughter. For this reason, Mr. Doe believes the Court of Appeals decision reached an incorrect result and a clarification of that case law is needed.

Finally, review of this case is necessary because it presents an issue of first impression regarding the intersection between the fundamental right to free speech under the First Amendment and Kansas' criminal threat statute, and the Court of Appeals reached an incorrect decision in this case that results in the failure to protect that free speech right.

### **Date of Decision**

Month, Date, Year.

### **Statement of Issues**

**Issue I: The Court of Appeals erred by holding that evidence of a prior, violent altercation with law enforcement did not implicate K.S.A. 60-455.**

**Issue II: The Court of Appeals erred by viewing trial evidence in the State’s favor on its way to affirming non-instruction on a lesser included offense. The Court of Appeals also erred by holding that evidence establishing an element of an attempted voluntary manslaughter offense required non-instruction on that crime.**

**Issue III: The Court of Appeals erred in finding the reckless form of criminal threat was not overbroad under the First Amendment because the “true threats” exception only extends to threats made with the intent to cause fear.**

### Statement of Facts

Except as otherwise stated below, Mr. Doe incorporates the facts from the Court of Appeals’ opinion pursuant to Rule 8.03(b)(6)(C).

### Arguments and Authority

**Issue I: The Court of Appeals erred by holding that evidence of a prior, violent altercation with law enforcement did not implicate K.S.A. 60-455.**

Review of this issue would allow this Court to clarify the extent to which evidence must suggest the commission of a prior crime, before it qualifies as “evidence that a person committed a crime or civil wrong on a specified occasion” within the meaning of K.S.A. 60-455.

K.S.A. 60-455(a) provides:

[E]vidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.

In this case, over a K.S.A. 60-455 objection, the district court permitted testimony that Mr. Doe made the following comments during his interaction with Officer White and Sergeant Blue:

- “If you were Faraway County [law enforcement], you would have tackled me by now.”
- “Faraway County would have tased me already.”
- “If it was Faraway County, it would take about six to eight cops to tackle [me].”

In its opinion, the Court of Appeals panel provided a procedural history demonstrating that Mr. Doe’s comments related to a prior, violent altercation with law enforcement officers. *State v. Doe*, No. XXX, XXX, slip op. at 4-5 (Kan. App. July 2, 2018) (unpublished opinion). But, in its substantive analysis of a K.S.A. 60-455 claim, the panel asserted that, within the context of trial evidence, Mr. Doe’s comments did not qualify as evidence of a prior crime. The panel reasoned:

First, the statements only provide Doe’s opinion about Faraway County law enforcement; nothing in these statements refer to an interaction between Doe and Faraway County law enforcement. And even if the statements did establish Doe had personal experience interacting with Faraway County law enforcement in the past, prior interaction with law enforcement falls far short of evidence that he committed a crime or civil wrong on a specified occasion. *Doe*, No. XXX,XXX, slip op. at 6.

It is notable that the panel provided no citations to legal authority when explaining why Mr. Doe’s comments were not specific enough to

constitute evidence of a prior crime. This is not surprising, since there is scant case law touching on how definite evidence of prior crime must be before it qualifies as K.S.A. 60-455 evidence. By granting review of this case, this Court could offer lower courts guidance on this issue.

Mr. Doe agrees that his comments did not *establish* prior criminal conduct. But K.S.A. 60-455(a) does not purport to bar “proof” of certain prior criminal conduct. Rather, it bars “evidence” of certain prior criminal conduct.

K.S.A. 60-401(a) defines evidence as:

[T]he means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.

Upon learning that Mr. Doe told the police officers about what would happen if he was confronted in a similar manner by Faraway County law enforcement officers, jurors doubtlessly inferred that Mr. Doe had been involved in a prior, violent altercation with Faraway County law enforcement. The panel erred by concluding that Mr. Doe’s comments were not *evidence* of a prior crime, implicating K.S.A. 60-455.

On appeal, Mr. Doe also took issue with the district court’s K.S.A. 60-455 ruling. See Appellant’s Brief at 7-14. But the Court of Appeals panel affirmed the district court by holding that Mr. Doe’s comments did not actually qualify as K.S.A. 60-455 evidence. *Doe*, No. XXX,XXX slip op. at 6.

Thus this case presents an issue which was argued to the district court and the Court of Appeals, but was not decided by the Court of Appeals. Mr. Doe would like this Court to review the merits of the district court's K.S.A. 60-455 ruling and therefore now address the district court's ruling in this petition. See Sup. Ct. Rule 8.03(b)(6)(C)(ii).

K.S.A. 60-455 provides that (in non-sex offense cases) evidence of prior crimes is inadmissible to prove criminal propensity. But prior crime evidence may be admissible to prove some other relevant fact, provided that the fact is in dispute. *State v. Boggs*, 287 Kan. 298, 305 (2008). In this case, the State admitted evidence that Mr. Doe made comments that were admitted through K.S.A. 60-455 on the theory that they were relevant to show that Mr. Doe knew that Officer White and Sergeant Blue were law enforcement officers. (R. XVIII, 34; XXII, 133). There are two problems with that theory.

First, according to trial testimony, Officer White and Sergeant Blue were both wearing police uniforms when they interacted with Mr. Doe. (R. XIX, 14-16, 142-43). And Officer White explicitly told Mr. Doe that he was a police officer. (R. XIX, 28). Since Mr. Doe's knowledge wasn't in dispute, K.S.A. 60-455 precluded the State from proving that fact with evidence of prior criminal conduct. *Boggs*, 287 Kan. at 315-16.

Second, the State didn't need to prove that Mr. Doe knew that Officer White or Sergeant Blue were police officers to secure attempted murder or

aggravated assault on a law enforcement officer convictions. K.S.A. 21-5403(a)(1) criminalizes the intentional killing of any person, whether they are a civilian or a police officer. An offender needn't have actual knowledge that he or she is assaulting a police officer to be guilty of assault of a law enforcement officer. *State v. Wood*, 235 Kan. 915, Syl. ¶ 8 (1984).

In sum, the jury's verdict, in no way, turned upon whether Mr. Doe had a prior altercation with Faraway County law enforcement officers. Evidence of that altercation only served to prove criminal propensity. Thus, the district court erred by admitting evidence of that altercation. Accordingly, this Court should reverse his convictions in this case and remand his case for a new trial.

**Issue II: The Court of Appeals erred by viewing trial evidence in the State's favor on its way to affirming non-instruction on a lesser included offense. The Court of Appeals also erred by holding that evidence establishing an element of an attempted voluntary manslaughter offense required non-instruction on that crime.**

Review would allow this Court to reiterate that courts must resolve conflicting trial evidence in favor of a conviction on a lesser included offense when considering whether a district court erred by not instructing on a lesser included offense. Furthermore, this Court should grant review to clarify that imperfect self-defense voluntary manslaughter occurs when an offender *cannot* establish the objective reasonability prong of a self-defense claim.



When affirming the district court's non-instruction on attempted voluntary manslaughter as a lesser included offense of attempted second-degree murder, the Court of Appeals panel asserted that trial evidence did not support a finding that Mr. Doe subjectively believed that circumstances existed which would have permitted for the lawful exercise of self-defense. The Court of Appeals recitation of evidence is flawed because cuts disputed trial evidence in the State's favor.

For example, at trial, it wasn't at all clear that Mr. Doe was holding a knife – which he was ordered to drop – prior to being tased by police. Sergeant Blue testified that Mr. Doe was defiantly holding a knife prior to his tasing. (R. XIX, 151). But Officer White testified that Mr. Doe had a sheathed knife *on his waistband* until Sergeant Blue shot him in the head with a Taser gun. (R. XIX, 107).

As a second example, it also wasn't clear from trial evidence whether police warned Mr. Doe that he would be tased if he continued walking toward his apartment. Again, there is conflicting testimony on that point. Officer White testified that Sergeant Blue said "Taser, Taser, Taser" slightly before shooting Mr. Doe in the head with a Taser gun. (R. XIX, 35). But Sergeant Blue testified that he gave no such warning. (R. XIX, 200-02). Again, the panel's summarization of trial evidence resolved an evidentiary conflict in the prosecution's favor.

Had Mr. Doe raised a sufficiency of the evidence issue in his appeal, it would have been appropriate for the panel to resolve conflicting trial evidence in the State's favor. *State v. Woods*, 301 Kan. 852, Syl. ¶ 12 (2015). But, since Mr. Doe took issue with non-instruction on a lesser included offense, the panel should have resolved all evidentiary conflicts in favor of supporting an attempted voluntary manslaughter conviction. *State v. McLinn*, 307 Kan. 307, Syl. ¶ 3 (2018). This means that panel should have assumed, contrary to what it did, that police, without warning, tased a man who was not holding an inherently deadly weapon.

The panel's analysis is not only flawed in its recitation of facts. It is also flawed in the inferences which it draws from facts. For example, the panel assumed that Mr. Doe intentionally disregarded warnings from police officers not to enter his apartment. *Doe*, No. XXX,XXX, slip op. at 9. When making this inference, the panel didn't mention that Mr. Doe was mentally agitated and extremely drunk when he was interacting with law enforcement. (R. XX, 92, 169-70, 203; XXII, 7). Consideration of those facts supports an inference that Mr. Doe simply wasn't tracking with what police were telling him to do. When reading the evidence as counsel has argued above, a rational factfinder could have found that Mr. Doe *subjectively* believed that police were inflicting great bodily harm upon him for no legitimate reason. Thus, the panel was wrong to affirm the district court's

non-instruction on that lesser included offense of attempted second-degree murder.

Furthermore, in its opinion, the panel asserted that it would have been wrong for the district court to instruct on attempted voluntary manslaughter, because a reasonable person in Mr. Doe's shoes wouldn't have perceived circumstances as permitting for lawful self-defense. *Doe*, No. XXX,XXX, slip op. at 10. This reasoning is flawed for one simple reason. Imperfect self-defense voluntary manslaughter elementally requires an offender to have an honest *but unreasonable* belief that circumstances exist which would permit one to act in lawful self-defense. *State v. Fisher*, 304 Kan. 242, 258 (2016); see also, K.S.A. 21-5404(a)(2). Essentially, the panel found that evidence establishing an element of a crime precludes a district court from giving a lesser include offense instruction for that crime. This holding is illogical, and should not stand. If proof satisfying an element of imperfect self-defense voluntary manslaughter really precludes a defendant from being guilty of that crime, it would be literally impossible for anyone to ever be guilty of imperfect self-defense voluntary manslaughter. This Court should grant review, and disapprove of the panel's analysis.

**Issue III: The Court of Appeals erred in finding the reckless form of criminal threat was not overbroad under the First Amendment because the "true threats" exception only extends to threats made with the intent to cause fear.**

Review would allow this Court to address, for the first time, whether Kansas' criminalization of threats done without the specific intent to cause fear, *i.e.*, reckless threat, is overbroad in violation of the First Amendment's protections of speech.

“[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected.” *Dissmeyer v. State*, 292 Kan. 37, Syl. ¶ 2, 249 P.3d 444 (2011). Resolving this overbreadth challenge requires determining if the reckless threat statute criminalizes protected speech or only “true threats,” a recognized exception to the First Amendment's protection of speech. *Watts v. United States*, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969). However, what is a “true threat” remains poorly defined. Key to this case is the unresolved question of what *mens rea* is required for a “true threat” following the Court's plurality opinion in *Virginia v. Black*, 538 U.S. 343, 363, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

On appeal to the Court of Appeals, Mr. Doe argued that, consistent with *Black's* holding, a true threat requires subject intent, meaning a threat to commit violence made “*with the intent* to intimidate[.]” 538 U.S. at 363. Therefore, the statute is unconstitutionally overbroad as a threat to commit violence made with reckless disregard to the risk of causing fear, as under K.S.A. 21-5415(a)(1), is not a true threat, but protected speech. (Appellant's Brief, 10-19.) However, the Court of Appeals panel found *Black's* use of

“intent” means only a *mens rea* greater than negligence, and reckless disregard meets that requirement. *Doe*, No. XXX,XXX, slip opinion at 4-5. This Court should now grant review of this issue because it presents an issue of first impression regarding the fundamental right to free speech under the First Amendment, and the Court of Appeals reached an incorrect conclusion that fails to protect that right.

What *mens rea* is necessary for a “true threat” under the First Amendment following *Black*, is a matter of great debate. Some courts have engaged in extensive analysis of the various concurring opinions in *Black*, finding it held that a true threat occurs “only if the defendant *intended* the recipient of the threat to feel threatened.” *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014); See also *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (Reaching the same conclusion). Still, other courts interpret *Black* differently, or find it unclear, and apply either objective, reasonable person-type standards, or recklessness. See, e.g., *State v. Trey M.*, 186 Wash. 2d 884, 901, 383 P.3d 474 (2016) pet. for cert. docketed, January 26, 2017 (Finding an objective, negligence style standard for “true threats”); *Major v. State*, 800 S.E.2d 348 (Ga. 2017) (Recklessness is sufficient).

In Kansas the matter is an unresolved, as the panel noted this was the first case applying *Black* to the reckless disregard provision of K.S.A. 21-5415(a)(1). *Doe*, XXX,XXX, slip opinion at 4-5; See also *State v. White*, 53

Kan. App. 2d 44, 57-59, 384 P.3d 13 (2016) (Applying *Black* to intentional threats). In sum, there is a split of persuasive authority and no prior Kansas cases addressing the issue since *Black*. Mr. Doe contends that this Court should follow the well-reasoned opinions of the 9<sup>th</sup> and 10<sup>th</sup> circuits in *Cassel* and *Heineman* to conclude that *Black* requires an intent to cause fear. *Cassel*, 408 F.3d 622; *Heineman*, 767 F.3d 970. Moreover, even if *Black* is not clear, a specific-intent standard is still necessary to protect the right to free speech.

This Court should further grant review of the issue because the Court of Appeals relied upon several analytical errors in reaching an incorrect conclusion. First, the panel incorrectly stated that reckless threat law does not encompass politically or socially distasteful statements protected by the First Amendment “because the law criminalizes only statements that are threats to commit an act of violence, not statements expressing ‘distasteful’ ideas.” *Doe*, XXX,XXX, slip opinion at 3; See K.S.A. 21-5415(a)(1). This was faulty reasoning, assuming threats to commit violence are wholly exclusive from protected speech. However, the true threat standard has always functioned as the dividing line in determining which threats to commit violence are protected speech and which are not.

For example, the defendant in *Watts*, 394 U.S. at 706, made a threat to commit violence when he said at a political rally, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” However, that threat

to commit violence was not a “true threat” subject to criminalization, but protected “political hyperbole[.]” *Watts*, 394 U.S. at 708. Likewise, the Court later noted that true threats require that a speaker communicates “a *serious* expression of an intent to commit an act of unlawful violence[.]” *Black*, 538 U.S. at 359–60 (Emphasis added). In contrast, the plain language of K.S.A. 21-5415(a)(1) contains no limitation to *serious* threats to commit violence, and Kansas courts are directed not to add something to the statute when the meaning is plain. *State v. Ruiz-Reyes*, 285 Kan. 650, 653, 175 P.3d 849 (2008).

The panel incorrectly found that Kansas’ reckless *mens rea* is sufficient culpability to make a statement a “true threat” under the First Amendment. *Doe*, XXX,XXX, slip opinion at 4-5. As discussed above, , Mr. Doe contends that *Cassel* and *Heineman* reach the correct conclusion on this question. *Cassel*, 408 F.3d 622; *Heineman*, 767 F.3d 970. Moreover, consideration of types of speech limited under a law criminalizing a threat to commit violence communicated in reckless disregard of the risk of causing fear, reveals that protected activity is a significant part of the law's target, and the reckless culpability level simply does not go far enough to protect speech. K.S.A. 21-5415(a)(1).

As an example, consider again the statement in *Watt*. This statement is clearly a threat to commit violence as it communicated an intent to inflict harm upon the president. See K.S.A. 21-5111(ff) (defining “threat”). The

question then is whether the threat made with “reckless disregard” to the risk of causing fear, *i.e.*, was the speaker aware of a risk of causing fear from their speech, yet continues anyway, and doing so was a gross deviation from the reasonable person standard. K.S.A. 21-5202(j). The answer to this question is also yes. However, the Court in *Watts* recognized the inherent value in free political speech, even when that speech is violent, and found the defendant’s conviction violated the First Amendment. 394 U.S. 705. That statement, in that context, however, would be a reckless threat under the Kansas law and that protected speech would be criminalized.

The reckless criminal threat statute criminalizes a broad range of politically or socially distasteful statements protected by the First Amendment. In contrast, the panel’s conclusion that reckless culpability is sufficient gives no consideration to the chilling effect the law has on speech. *Doe*, XXX,XXX, slip opinion, at 5. Thus, in order to adequately protect that right to free speech, this Court should grant review of this case and find the reckless form of the criminal threat overbroad. See, *e.g.*, *Heineman*, 767 F.3d 970; *Cassel*, 408 F.3d 622.

### **Conclusion**

Mr. Doe respectfully asks this Court to reverse the Court of Appeals opinion, vacate his convictions, and remand his case to the district court for further proceedings in accordance with the above argued issues.



Respectfully submitted,

/s/ Attorney Electronic Signature

Attorney Name, Bar Number

Name of Firm or Agency

Address

City, State, ZIP

Telephone Number

Fax Number

Email Service Address

Attorney for Appellant

**Memorandum Opinion**

**COURT OF APPEALS OPINION ATTACHED HERE**

**Certificate of Service**

I hereby certify that the above and foregoing Appellant's petition was served on the XXXXX County District Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b) and NAME OF ATTORNEY GENERAL, Attorney General, at [ksagappealsoffice@ag.ks.gov](mailto:ksagappealsoffice@ag.ks.gov), on the DAY of MONTH, YEAR.

*/s/ Attorney Electronic Signature* \_\_\_\_\_  
Attorney Name, Bar Number

# **APPENDIX C**

## **KANSAS APPELLATE COURTS**

### **CITATION AND STYLE GUIDE**

#### **REVISED 2021**

#### **Introduction**

The Citation and Style Guide serves as a general resource for grammar, citation, and formatting rules used in Kansas appellate opinions. This Guide will apply in most situations; however, there may be circumstances where the Reporter’s Office will suggest changes that do not strictly follow these rules (for example, determining the correct version of a statute). Our office strives for consistency, but we must evaluate each opinion individually and determine what is best suited in the context of an opinion as a whole. Our intention is that this Guide will make the reviewing process as quick and efficient as possible by answering the basic and most common stylistic questions encountered in opinions.

As technology progresses and resources are updated, our rules may change over time. Some of the rules contained in this Guide are different from the past and may continue to change in the future. These changes are intended to make the reviewing process more streamlined so we can focus on making only the necessary edits to ensure accurate and concise opinions.

Many rules stem from the Fourth Edition of Bryan Garner’s Redbook or the Twentieth Edition of the Bluebook. We have included references to the rules from these texts in some areas for your guidance. However, some rules in those sources are different from those in this Guide, in which case the Guide’s rules govern.

**Sara R. Stratton**

Appellate Reporter

Brittany Laski

Deputy Appellate Reporter

## **KANSAS CITATIONS**

### **CASELAW**

#### **1. Notes**

- Use the official case name as identified in the Kansas bound volumes. For published opinions, use the caption at the top of the pages in the bound volume. For unpublished opinions, use the name in the table of unpublished opinions. Note that Westlaw captions and abbreviations in Bluebook Table 6 and 10 may differ from the bound volumes.
- When citing cases before 1934, indicate the Pacific Reporter by using P. not Pac.

#### **2. Kansas Supreme Court**

##### **a. Published**

- Full cite: *State v. Dunn*, 304 Kan. 773, 798, 375 P.3d 332 (2016).
- Short cite: *Dunn*, 304 Kan. at 799-800.

b. Unpublished

- Full cite: *State v. Edwards*, No. 112,253, 2016 WL 3659639, at \*2 (Kan. 2016) (unpublished opinion).
- Short cite: *Edwards*, 2016 WL 3659639, at \*2
  - **Note:** If the case has more than one docket number, only include the first one.

c. Order

- *State v. Buser*, No. 105,982 (order filed September 25, 2015)
  - **Note:** Do not include page numbers for orders.

**3. Kansas Court of Appeals**

a. Published

- Full cite: *State v. Cook*, 45 Kan. App. 2d 468, 475, 249 P.3d 454 (2011).
- Short cite: *Cook*, 45 Kan. App. 2d at 475-76

b. Unpublished

- Full cite: *In re J.K.*, No. 108,804, 2013 WL 3793173, at \*2-3 (Kan. App. 2013) (unpublished opinion).
- *J.K.*, 2013 WL 3793173, at \*2, 5

- *Francis v. IBP, Inc.*, No. 75,904, unpublished opinion filed June 27, 1997, slip op. at 3 (Kan. App.). (Use this format if the opinion is not available on Westlaw.)
- **Note:** If the case has more than one docket number, only include the first one.
- **Note:** If an unpublished opinion later becomes published, use the published citation.

#### 4. Subsequent history

##### a. General Rules

- Only include *rev./cert. denied* if the original decision is less than two years old.
- When including both a parenthetical and subsequent history, place the parenthetical before the subsequent history.
- If the subsequent history year is the same as the year the decision was filed, then only include the year once at the end of the citation.
  - *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 296 P.3d 1106, *cert. denied* 134 S. Ct. 162 (2013).
  - *State v. Hernandez*, No. 107,032, 2013 WL 1943058 (Kan. App.) (unpublished opinion), *rev. denied* 298 Kan. 1205 (2013).
- ◆ **Exception:** If there is not a formal citation yet for the subsequent history, include the year both times.



- Follow Bluebook Rule 10.7.2 to determine when to use sub nom. Often it is not necessary to use it, especially when the parties' names are merely reversed. See Bluebook Rule 10.7.2(c).

b. Petition for review/certiorari filed but not yet decided

- *State v. Kelly*, No. 114,563, 2017 WL 1295354 (Kan. App. 2017) (unpublished opinion) (parenthetical), *petition for rev. filed* April 25, 2017.
  - **Note:** Court of Appeals opinions are not binding while review is pending. Please refer to Kansas Supreme Court Rule 8.03(k) (2021 Kan. S. Ct. R. 60) for more information.
- *State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018), *petition for cert. filed* April 29, 2019.

c. Petition for review denied or granted

- *State v. Acevedo*, 49 Kan. App. 2d 655, 315 P.3d 261 (2013) (parenthetical), *rev. denied* 300 Kan. 1104 (2014).
- *State v. Ward*, 52 Kan. App. 2d 663, 372 P.3d 417 (2016) (parenthetical), *rev. granted* 305 Kan. 1257 (2017).
  - Note: If a formal citation is not yet available, then cite as: *rev. denied* \_\_\_ Kan. \_\_\_ (full date).

d. Cert. denied

- *State v. Ross*, 280 Kan. 878, 127 P.3d 249 (parenthetical), *cert. denied* 548 U.S. 912 (2006).

- **Note:** If the U.S. cite is not yet available, use the S. Ct. cite.
  - *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015) (parenthetical), *cert. denied* 136 S. Ct. 865 (2016).
  
- e. Affirmed
  - *State v. Simmons*, 45 Kan. App. 2d 491, 249 P.3d 15 (2011) (parenthetical), *aff'd* 295 Kan. 171, 283 P.2d 212 (2012).
  
- f. Affirmed in part and reversed in part
  - *State v. Suady*, No. 105,603, 2012 WL 6734503 (Kan. App. 2012) (unpublished opinion) (parenthetical), *aff'd in part, rev'd in part* 299 Kan. 1001, 327 P.3d 466 (2014).
  
- g. Reversed
  - *Garcia v. Ball*, 50 Kan. App. 2d 197, 323 P.3d 872 (2014) (parenthetical), *rev'd* 303 Kan. 560, 363 P.3d 399 (2015).
  
- h. Overruled
  - *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 570 (2016) (parenthetical), *overruled by State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016).
  
  - *State v. Tosh*, 278 Kan. 83, 91 P.3d 1204 (2004) (parenthetical), *overruled on other grounds by State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016).

## 5. Syllabus paragraphs

- Full cite: *State v. Williams*, 299 Kan. 509, Syl. ¶ 4, 324 P.3d 1078 (2014) (parenthetical).
- Short cite: *Williams*, 299 Kan. 509, Syl. ¶ 4.
  - **Note:** Always include the first page of the opinion when citing a syllabus paragraph even if the syllabus paragraph appears on a subsequent page.
- When citing more than one syllabus paragraph, use two paragraph symbols and a comma if a series of nonconsecutive paragraphs are cited or a hyphen if consecutive paragraphs are cited. Never use more than two paragraph symbols, even if citing to more than two paragraphs.
  - *Williams*, 299 Kan. 509, Syl. ¶¶ 1, 3.
  - *Williams*, 299 Kan. 509, Syl. ¶¶ 4-7.
- When citing to both a syllabus paragraph and a separate page, separate the syllabus paragraph and page number with a comma. Do not use “at.”
  - *Williams*, 299 Kan. 509, Syl. ¶ 1, 524.
- When citing to a syllabus paragraph from an opinion that has only one unnumbered syllabus paragraph, cite as: Syl. (not Syl. ¶ 1).

## 6. Dissenting/concurring decisions

- *State v. Robinson*, 303 Kan. 113, 350, 63 P.3d 875 (2015) (Johnson, J., dissenting) (parenthetical), *cert. denied* 137 S. Ct. 164 (2016).

## 7. Decisions not yet published in Kansas Reports

- **Note:** Do not use a slip op. pincite with a Westlaw or Pacific Reporter pincite.
  - a. No Kansas or Pacific cite
    - *State v. Baker*, \_\_\_ Kan. \_\_\_, 2017 WL 2493294, at \*6 (Kan. 2017).
  - b. Kansas cite but no Pacific cite
    - *State v. Wimbley*, 313 Kan. 1029, 1031, \_\_\_ P.3d \_\_\_, 2021 WL 3700305 (No. 122,812, filed August 20, 2021).
  - c. Citing an opinion filed on the same date
    - Full cite: *State v. Petersen-Beard*, \_\_\_ Kan. \_\_\_ (No. 108,061, this day decided), slip op. at 25-26.
    - Short cite: *Petersen-Beard*, \_\_\_ Kan. at \_\_\_, slip op. at 26.
    - *Hernandez v. State* (No. 119,838, this day decided), slip op. at 1 (unpublished opinion).

## 8. Specific courts

### a. District Court

- *State v. Hamilton*, No. 15-842 (Kan. 3d Jud. Dist. Ct. May 18, 2015).

### b. Workers Compensation Appeals Board

- *Titterington v. Brooke Insurance*, No. 270,414, 2004 WL 1058385, at \*2 (Kan. Work. Comp. App. Bd. April 30, 2004).

## LEGISLATIVE MATERIALS

### 1. Constitution

- Kan. Const. art. 6, § 6(b).
- Kan. Const. Bill of Rights, § 9.
- **Note:** When referring to a section of the Kansas Constitution within a sentence, the preferred style is to use lowercase “section,” not the section symbol.

### 2. Statutes Annotated

- K.S.A. 60-1208(a).
- K.S.A. 2016 Supp. 21-6811.
- K.S.A. 84-2-314, Kansas Comment 1 (1996).

### 3. Kansas Session Laws

- L. 2015, ch. 90, § 2.

### 4. General Laws and Statutes of Kansas

- G.L. 1864, ch. 64, sec. 2.
- G.S. 1935, 17-5558 (1943 Supp.).

## 5. Revised Statutes of Kansas

- R.S. 1923, 60-3303.

## 6. Kansas Territorial Statutes

- Kan. Terr. Stat. 1855, ch. 48, § 10.

## 7. Kansas Senate and House Journals

- Sen. Journal, p. 3047 (June 1, 2016).
- House Journal, p. 2000 (January 30, 2020).

## 8. Senate and House Bills and Resolutions

- S.B. 4 (2016).
- H.B. 2506 (2016).
- S. Res. 1808 (2016).
- H. Con. Res. 6006 (2016).

## STATUTES

### 1. Statute's applicability

- The date the crime was committed or the cause of action accrued controls which version of a statute is applicable. However, an opinion may discuss more than one version; for example, to illustrate changing legislative intent or to analyze former criminal statutes in illegal sentence appeals.
- When statutes are contained in both the bound volume and supplement, in some situations it may be sufficient to cite to the bound volume if the amendments are not substantive or pertinent to the issues in the case. For example, when referring to a 1507 motion, stating "Johnson filed a motion under K.S.A. 60-1507" is acceptable. **However, when citing statutes that are not in the bound volume, please include a supplement year so the reader can find it.** In particular, current criminal statutes are only found in supplements because the criminal code was revised and renumbered in 2011.

## 2. Citation to a bound volume

- If a bound volume contains the applicable version, then cite to the bound volume.
  
- If the applicable version of the statute is in a superseded bound volume, include the name of the revisor of statutes in parentheses at the end of the citation. If the revisor of the superseded volume is the same as the revisor of a current bound volume, include the year in parentheses with the revisor's name.
  - K.S.A. 21-3721 (Weeks).
  
  - K.S.A. 60-1507 (Furse 1994).

## 3. Citation to a supplement

- In general, when citing to a supplement, cite to the current supplement if the statute is substantively the same with regard to the relevant statutory language in both the earlier, applicable supplement and the current supplement.

**Exception:** When referencing the statute a defendant was charged under, it is preferable to use the supplement in effect at the date of the crime rather than the most current supplement. If a statute is cited in any sentence of the opinion in reference to a particular past trial event, then the relevant supplement in effect at the time of trial should be used, but only in that particular sentence. It is acceptable to go back and forth between supplement years (even in the same paragraph) when following the rule above and this exception, and it is not necessary to be consistent with the supplement year throughout the entire opinion.

- **Note:** Do not change the version of the statute cited when quoting or discussing a previously decided case.

- Cite to the current supplement when citing an entire statutory act *only if* the entire act is contained within the supplement.
  - Revised Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2020 Supp. 21-6801 et seq.
  - 
  - Revised Kansas Code for Care of Children, K.S.A. 2020 Supp. 38-2201 et seq.
  - 
  - Kansas Judicial Review Act, K.S.A. 77-601 et seq.
- It is not necessary to keep the supplement years the same throughout the entire opinion (see, e.g., the exception above).

#### **4. Citation to amended statute**

- When citing to a statute that has recently been amended but is not yet published in a supplement, cite as:
  - Full cite: K.S.A. 22-3504(d), as amended by L. 2019, ch. 59, § 15.
  - Short cite: K.S.A. 22-3504(d) (amended 2019)

### **MISCELLANEOUS**

#### **1. Pattern Instructions for Kansas**

- PIK Crim. 4th 54.202 (2016 Supp.).
- PIK Civ. 4th 107.57 (2016 Supp.).



- **Note:** If there is a supplement shown at the bottom of the PIK section's page, then include reference to the supplement the first time the PIK section is cited. Westlaw includes updates but does not list supplement years, which are different. PIKs are located in printed binders in the library and on the Kansas Judicial Council website: <https://www.ksjudicialcouncil.org/>. (You must have an account to log in, but it is free for attorneys to sign up and access the website.)

## 2. Rules and Orders

### a. Supreme Court Rules

- Full cite: Supreme Court Rule 6.02(a)(5) (2021 Kan. S. Ct. R. at 35)
- Short cite: Rule 6.02(a)(5).
  - **Note:** After a rule has been full-cited, it is not necessary to include the full cite in subsequent citations, even if the subsequent citation is citing to a different subsection of the rule. But see the note on quoting a rule below in subsection (e).

### b. Kansas Rules of Professional Conduct

- Full cite: KRPC 1.5(a) (2021 Kan. S. Ct. R. 327).
- Short cite: KRPC 1.5(a).

### c. Kansas Child Support Guidelines

- Kansas Child Support Guidelines § II.E.1. (2021 Kan. S. Ct. R. 104).

d. Supreme Court Administrative Orders

- Full cite: Kansas Supreme Court Administrative Order 2021-PR-009, effective January 26, 2021.
- Short cite: Order 2021-PR-009.

e. Citing versus quoting a rule

- If *citing* the rule in general, then cite the page number where the rule begins; if *quoting* from the rule, then cite the quoted page.
  - “If the issue was not raised below, there must be an explanation why the issue is properly before the court.” Supreme Court Rule 6.02(a)(5) (2021 Kan. S. Ct. R. 36).
- When quoting a rule, always include the parenthetical with the correct page number even if it is not the first time referencing the rule.

**3. Kansas Administrative Regulations**

- K.A.R. 36-39-3.
- K.A.R. 44-9-504 (2017 Supp.).

**4. Attorney General Opinions**

- Att’y Gen. Op. No. 2015-4.

## ORDER OF CITATIONS

When listing sources in a string citation, arrange sources after the same signal (or no signal) according to the following general principles.

- Cite the most authoritative sources before less authoritative or merely persuasive sources.
- Arrange cases decided by the same court in reverse chronological order.
  - **Note:** Treat the federal courts of appeals as one court for purposes of this rule.
  - ◆ **Exception:** All unpublished cases go after published cases, even if more recent.
- Arrange cases from the same jurisdiction in order of highest court to lowest court.
- Arrange out-of-state cases alphabetically by state.
- Cite federal statutes and cases before out-of-state statutes and cases.

The following example provides the order in which the most commonly cited sources would appear in a Kansas decision:

- United States Constitution; Kansas Constitution; Kansas statute; United States Supreme Court case; Kansas Supreme Court case; Kansas Court of Appeals case;

Kansas Supreme Court Rule; Kansas administrative regulation; federal Court of Appeals case; out-of-state case; secondary source.

- **Note:** Use semicolons between sources in a string citation.

Refer to Redbook Rule 9.7 and Bluebook Rule 1.4 for further guidance on how to order sources in a string citation.

### **CITATION OF OTHER SOURCES**

#### **NOTES**

- Do not cite to syllabus paragraphs from federal or out-of-state courts.
- When citing United States Supreme Court cases, use the official title as indicated at the top of the pages in the U.S. reports or S. Ct. reports (whichever is available), except always spell out United States even when U.S. appears in the title of any federal case.
- When citing more than one section of a constitution, statute, treatise, etc., use two section symbols and a comma if a series of nonconsecutive sections are cited or a hyphen if consecutive sections are cited. Never use more than two section symbols, even if citing to more than two sections.
  - 42 U.S.C. §§ 1396b, 1396d (2018).
  - 42 U.S.C. §§ 1396a-1396d (2018).

- For sources not included here, refer to the Bluebook (but do not use small caps).

## FEDERAL

### 1. Constitution, statutes, regulations, rules, and reports

#### a. Constitution

- U.S. Const. art. I, § 9, cl. 2. • U.S. Const. amend. XIV, § 2.

#### b. Statutes & Regulations

- 42 U.S.C. § 285 (2018).
  - **Note:** Cite to the year the statute was published in the most recent official code or applicable supplement, not the year it went into effect. See Bluebook Rule 12.2 for further reference
  - **Note:** Only include the year the first time the statute is cited
- 40 C.F.R. § 63.6640 (2020).
  - **Note:** The C.F.R. titles are revised each year; cite the most recent edition found in the library unless an earlier version applies. See Bluebook Rule 14.2 for further reference.
  - **Note:** Only include the year the first time the C.F.R. is cited.
- Follow Bluebook Rule 12.4 when citing a federal session law.

c. Rules

- Fed. R. App. Proc. 3(a)(1).
- Fed. R. Civ. Proc. 12(b)(6).
- Fed. R. Crim. Proc. 32(h).
- Fed. R. Evid. 606.

d. Reports

- Follow Bluebook Rule 13.4 when citing a federal report, but do not use small caps.

## 2. Supreme Court

- *Smith v. Cane*, 565 U.S. 73, 76, 132 S. Ct. 627, 181 L. Ed. 2d 571 (2012).
- *Smith*, 565 U.S. at 76.
- **Note:** If the U.S. cite is not yet available, then include blank spaces (formed by using three underscores together) for the volume and/or page numbers and use the S. Ct. cite for pinpoints and short citations.
  - *Moore v. Texas*, 581 U.S. \_\_\_\_, 137 S. Ct. 1039, 1047, 197 L. Ed. 2d 416 (2017).
  - *Moore*, 137 S. Ct. at 1047.
- **Note:** Do not include *reh. denied* unless the denial is relevant to the point of law for which the case is being cited.

## 3. Courts of Appeals

a. Published

- *Vasquez v. Lewis*, 834 F.3d 1132, 1138 (10th Cir. 2016).

- For further reference, see Bluebook Rule 10.4(a).

b. Unpublished

- *Carroll v. Simmons*, 89 Fed. Appx. 658, 661 (10th Cir. 2004) (unpublished opinion).
- *Aston v. Cunningham*, No. 99-4156, 2000 WL 796086, at \*4 (10th Cir. 2000) (unpublished opinion).

**4. District courts**

a. Published

- *United States v. Reyes*, 202 F. Supp. 3d 1209, 1214 (D. Kan. 2016).
- For further reference, see Bluebook Rule 10.4(a).

b. Unpublished

- *Brown v. McKune*, No. 11-3147-SAC, 2013 WL 823317, at \*3 (D. Kan. 2013) (unpublished opinion).

**5. Bankruptcy cases**

a. U.S. District Courts

- *In re Robben*, 562 B.R. 469, 476 (Bankr. D. Kan. 2017).

b. U.S. Appellate Panels

- *In re Auld*, 561 B.R. 512, 520 (B.A.P. 10th Cir. 2017).

## 6. United States Court of Appeals for the Armed Forces

- *United States v. Akbar*, 74 M.J. 364, 370 (C.A.A.F. 2015).

## OUT-OF-STATE CASELAW AND STATUTES

### 1. Caselaw

- When citing published cases, follow Bluebook T1 to provide a citation to the state reporter(s) (if any) and the regional reporter.
  - **Note:** Do not include public domain cites.
- For unpublished cases, follow the unpublished citation format in the Kansas Citations section above.
  - *State v. Ringor*, No. CAAP-16-0000526, 2017 WL 2266882, at \*2 (Haw. App. 2017) (unpublished opinion).
- Refer to the Order of Citation section above to arrange cases in a string citation.

### 2. Statutes

- Refer to the Table at the end of this Guide for the citation format for out-of-state statutes.

## BOOKS AND ONLINE SOURCES

### 1. Legal encyclopedias

- 3 Am. Jur. 2d, Agency § 64.
- 16C C.J.S., Constitutional Law § 1622.



- Annot. 42 A.L.R.6th 545, § 18.

## 2. Restatements

- Restatement (Third) of Torts § 46, comment a (2012).
- **Note:** Indicate the *publication* year, not the year *adopted*.

## 3. Books and digests

- 1 Elrod, Kansas Law and Practice: Kansas Family Law § 6:17 (2018-2019 ed.).
- 2A Wright & Henning, Federal Practice and Procedure: Criminal 4th § 405 (2009).
- 4 Gard, Casad & Mulligan, Kansas Law and Practice: Kansas C. of Civ. Proc. Annot. § 60-455 (5th ed. 2012).
- Norwood, Constructive Possession in Criminal Law § 6 (2017).
- 2 LaFave, Substantive Criminal Law § 10.4(a) (3d ed. 2017).
- 6 Williams & Meyers, Oil and Gas Law, § 901 (2018).

## 4. Dictionaries

- Black's Law Dictionary 712 (11th ed. 2019).
- Webster's New World College Dictionary 485 (5th ed. 2014).

- When possible, cite to the definition in a print dictionary rather than an online dictionary. If using Black's Law Dictionary through Westlaw, use the citation format above, substituting three underscores for the page number; the Reporter's Office will fill in the page number.

## 5. Law reviews and journals

### a. Article

- Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 Washburn L.J. 275, 299 (2005).
- 44 Washburn L.J. at 299.
- Obermeier, *The Kansas Judicial Review Act: A Road Map*, 86 J.K.B.A. 24, 25 (May 2017).

### b. Notes and Comment

- Note, *The Kansas Nonparticipating Mineral Interest*, 53 Washburn L.J. 545, 547 (2014).
- 53 Washburn L.J. at 547.
- Comment, *A Meaningful Opportunity to Comply*, 63 Kan. L. Rev. 189, 191 (2014).

## 6. Medical treatise

- American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* § 309.21, p. 190 (5th ed. 2013).

## 7. Newspaper (Online)

- Shorman, *Kansas Supreme Court Rules School Funding Inadequate*, The Topeka Capital-Journal (Mar. 2, 2017), <http://cjonline.com/news/local/state-government/2017-03-02/kansas-supreme-court-rules-school-funding-inadequate>.

## 8. Websites

- Include the main title of the website, the web address, and, if applicable, a publication date.
  - Substance Abuse Center of Kansas, <http://sackansas.org>.
  - **Note:** Remove the hyperlink from the web address so no underlining is visible.

## TABLE OF OUT-OF-STATE STATUTES

<b>Alabama</b> Ala. Code § x.	<b>Louisiana*</b> La. Stat. Ann. § x.	<b>Ohio</b> Ohio Rev. Code Ann. § x.
<b>Alaska</b> Alaska Stat. § x.	<b>Maine</b> Me. Rev. Stat. tit. x, § x.	<b>Oklahoma</b> Okla. Stat. tit. x, § x.
<b>Arizona</b> Ariz. Rev. Stat. Ann. § x.	<b>Maryland*</b> Md. Code Ann., [Subject] § x.	<b>Oregon</b> Or. Rev. Stat. § x.
<b>Arkansas</b> Ark. Code Ann. § x.	<b>Massachusetts</b> Mass. Gen. Laws Ann. ch. x, § x.	<b>Pennsylvania</b> x Pa. Stat. § x.
<b>California*</b> Cal. [Subject] Code § x.	<b>Michigan</b> Mich. Comp. Laws § x.	<b>Rhode Island</b> R.I. Gen. Laws § x.
<b>Colorado</b> Colo. Rev. Stat. § x.	<b>Minnesota</b> Minn. Stat. § x.	<b>South Carolina</b> S.C. Code Ann. § x.
<b>Connecticut</b> Conn. Gen. Stat. § x.	<b>Mississippi</b> Miss. Code Ann. § x.	<b>South Dakota</b> S.D. Codified Laws § x.
<b>Delaware</b> Del. Code Ann. tit. x, § x.	<b>Missouri</b> Mo. Rev. Stat. § x.	<b>Tennessee</b> Tenn. Code Ann. § x.
<b>D.C.</b> D.C. Code § x.	<b>Montana</b> Mont. Code Ann. § x.	<b>Texas*</b> Tex. [Subject] Code Ann. § x.
<b>Florida</b> Fla. Stat. § x.	<b>Nebraska</b> Neb. Rev. Stat. § x.	<b>Utah</b> Utah Code Ann. § x.
<b>Georgia</b> Ga. Code Ann. § x.	<b>Nevada</b> Nev. Rev. Stat. § x.	<b>Vermont</b> Vt. Stat. Ann. tit. x, § x.
<b>Hawaii</b> Haw. Rev. Stat. § x.	<b>New Hampshire</b> N.H. Rev. Stat. Ann. § x.	<b>Virginia</b> Va. Code Ann. § x.
<b>Idaho</b> Idaho Code § x.	<b>New Jersey</b> N.J. Stat. Ann. § x.	<b>Washington</b> Wash. Rev. Code § x.
<b>Illinois</b> x Ill. Comp. Stat. § x.	<b>New Mexico</b> N.M. Stat. Ann. § x.	<b>West Virginia</b> W. Va. Code § x.

<b>Indiana</b> Ind. Code § x.	<b>New York*</b> N.Y. [Subject] Law § x.	<b>Wisconsin</b> Wis. Stat. § x.
<b>Iowa</b> Iowa Code § x.	<b>North Carolina</b> N.C. Gen. Stat. § x.	<b>Wyoming</b> Wyo. Stat. Ann. § x.
<b>Kentucky</b> Ky. Rev. Stat. Ann. § x.	<b>North Dakota</b> N.D. Cent. Code § x.	

\*Refer to T1 in the Bluebook to find the abbreviation for the subject in the citation to a California, Maryland, New York, or Texas statute. Also refer to T1 to find the applicable citation form for the Louisiana code being cited.



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