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TO: **House Judiciary Committee**

FROM: **Kansas Judicial Council – Professor James M. Concannon**

DATE: **March 23, 2021**

RE: **Testimony in Support of SB 122 Amending the Kansas Rules of Evidence**

The Kansas Judicial Council recommends SB 122 amending the Kansas Rules of Evidence. In October, 2018, Professor James M. Concannon requested that the Judicial Council consider amendments to the Kansas Rules of Evidence to add provisions from the Federal Rules of Evidence relating to the original writing rule (also referred to as the best evidence rule) and authentication. Professor Concannon recommended updating the Rules to accommodate technologic advances such as easily-produced reliable copies and documents created or stored electronically. The Judicial Council agreed to study the issue and assigned it to an ad hoc Advisory Committee, co-chaired by the Chairs of the Civil Code and Criminal Law Advisory Committees and made up of members from both Committees. The Judicial Council considered and approved the Advisory Committee's recommendations in December 2019. A list of the ad hoc Advisory Committee members may be found on the last page of this testimony.

Background

The Kansas Rules of Evidence were originally proposed by a Judicial Council Advisory Committee and were adopted by the Legislature in 1963. The Kansas Rules are patterned after the 1953 Uniform Rules of Evidence, which were drafted by the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission or ULC). Judge Spencer A. Gard of Iola chaired the ULC committee that drafted the Uniform Rules of Evidence and later, as a member of the Kansas Judicial Council, chaired the Advisory Committee that worked in the early 1960s to draft the proposal that became the Kansas Rules of Evidence.

When Kansas adopted its Rules of Evidence, the Federal Rules of Evidence did not yet exist as those Rules were not adopted until 1975. Despite having different origins, the Kansas Rules of Evidence and the Federal Rules of Evidence are similar in substance on many points. The original writing and authentication provisions are two areas in which there are differences.

Federal Rules 1001-1008 govern the original writing rule, as does K.S.A. 60-467. However, the Federal Rules deal expressly with modern methods of document reproduction and electronic storage of information, which are not contemplated by the Kansas statute. The Judicial Council recommends that Kansas update its evidence rules by adopting language from the Federal Rules to better take into account both the ease and accuracy of current document reproduction methods and electronic methods of document creation and storage. The Judicial Council also recommends amendments to authentication provisions in K.S.A. 60-464 and 60-465. Closer conformity to the Federal Rules regarding authentication would be helpful to practitioners and has the potential to reduce the cost and inconvenience of some current authentication requirements in cases in which the authentication is not likely to be contested.

By adopting SB 122, Kansas would be doing what most other states already have done. There are 43 states that, either by statute or court rule, pattern their rules of evidence after the Federal Rules of Evidence, much the way Kansas patterns its code of civil procedure in K.S.A. 60-201 et seq. after the Federal Rules of Civil Procedure. Some of the 43 states deviate from particular Federal Rules, e.g. regarding use of convictions for impeachment, but they almost uniformly have conformed their state codes to Rule 901 [which Section 2 of SB 122 does as a replacement for K.S.A. 60-464], Rule 902 (5)-(10) [which Section 3 of SB 122 does by adding K.S.A. 60-465(b)(1)-(6)], and Rules 1001-1008 [which Section 4 of SB 122 does by rewriting K.S.A. 60-467].

The self-authentication provisions in proposed K.S.A. 60-465(b)(7)-(10) correspond to Federal Rule 902 (11)-(14), which were added as amendments. At least 23 states have amended their evidence rules by adopting the 2000 amendments in 902 (11) and (12), and at least nine states already have adopted the December, 2017 amendments in 902 (13) and (14).

Original Writing or "Best Evidence" Rule

K.S.A. 60-467 requires that a party offer the original writing to prove its content unless an excuse for nonproduction of the original is shown. K.S.A. 60-469 allows admission of a reliably created copy of a business or public record without an excuse for not having the original, but K.S.A. 60-469 applies only in limited numbers of cases because the copy must have been made and preserved in the regular course of the business or public activity. Surprisingly, there was for years no case law indicating that litigants were citing K.S.A. 60-467 to challenge the admissibility of a duplicate when the proponent failed to show any reason for not producing the original. The issue finally arose in *State v. Robinson*, 303 Kan. 11, 363 P.3d 875 (2015), *disapproved on other grounds by State v. Cheever*, 304 Kan. 866, 375 P.3d 979 (2016). *Robinson* involved "best evidence"

challenges to printouts of emails printed from a police department computer rather than the computers of the people who received the messages and forwarded them to the police. The Supreme Court seemingly conformed the Kansas best evidence rule to the Federal Rules in finding the printouts admissible, relying on the federal definitions of "original" and "duplicate," as well as Federal Rule 1003's provision that a "duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."

However, a later Court of Appeals panel ruled differently in *State v. Patrick*, No. 117,516, 2018 WL 4374269 (Kan. App. 2018) (unpublished opinion), *rev. denied* 309 Kan. 1352 (2019), stating the Supreme Court's reliance on the Federal Rules for guidance in the *Robinson* case had been appropriate because K.S.A. 60-467 doesn't address what constitutes an "original" of an email that is created and stored electronically. There was "no original tangible document for best evidence purposes." In *Patrick*, the defendant in a DUI case challenged the admissibility of a printout of his implied consent advisory form, which had been scanned by the police department. The prosecution did not contend the original was lost or destroyed. The witness testified he did not know what happened to the physical copy after it was scanned. The court, without citing K.S.A. 60-469, found that since none of the exceptions in K.S.A. 60-467 applied, the printout of the scanned form was secondary evidence of the original form. The court further found that, although the trial court erred in admitting the printout of the scanned document, it was harmless error.

The current state of the law is uncertain after these cases. The Judicial Council recommends amendments to K.S.A. 60-467 that will eliminate the uncertainty and update the Kansas Rules by incorporating appropriate parts of Federal Rules 1001, 1002, 1003, 1007, and 1008.

Authentication

The Judicial Council also recommends amending K.S.A. 60-464 and 60-465 to further conform the Kansas statutes to the Federal Rules relating to authentication. For example, current K.S.A. 60-464 is fairly limited and applies only to a writing. The proposed amendment to K.S.A. 60-464(a) picks up the language from Federal Rule 901(a), which applies to authentication generally, rather than just to a writing. The federal language imposes the same sufficiency of the evidence standard as the current statute, but says it better. Federal Rule 901(b) gives ten examples of evidence that satisfies the authentication requirement, including 901(b)(4), which the Court relied on in reaching its decision in *Robinson*.

The Judicial Council's proposed amendments to K.S.A. 60-465 include adding a number of self-authentication provisions from Federal Rule 902. The Council also recommends an amendment to the hearsay exception in K.S.A. 60-460(m), which incorporates the self-authentication provisions proposed in K.S.A. 60-465(b)(7) and (8).

Advisory Committee Comments

The following are the Advisory Committee's comments to the amendments in each section of the bill.

Section 1 – Amending K.S.A. 60-460, Hearsay evidence excluded; exceptions.

This amendment to K.S.A. 60-460(m) incorporates the self-authentication provisions in Federal Rule 902(11) and (12), which the Committee recommends adding to K.S.A. 60-465 as new subsections (b)(7) and (b)(8).

Section 2 – Amending K.S.A. 60-464, Authentication required; ancient documents.

The existing text of K.S.A. 60-464(a) is replaced with the text of Federal Rule 901(a). The existing language requires authentication of writings only, while the Federal Rule recognizes that authentication is required for items of evidence other than writings. The Federal Rule does not itself impose an authentication requirement, recognizing that the requirement of authentication flows from the general requirement to show relevance. Subsection (a) now specifies what is required to satisfy the requirement of authenticating or identifying an item of evidence, which is essentially to satisfy a "sufficiency of evidence" standard.

Proposed new subsection (b) tracks Federal Rule 901(b) and presents a nonexclusive list of examples of how to satisfy the authentication requirement discussed in subsection (a). The only substantive difference between the proposed language and the Federal Rule is that subsection (b)(8)(C) retains Kansas' 30-year age requirement for ancient documents or data compilations. The Federal Rule has a 20-year requirement.

Section 3 – Amending K.S.A. 60-465, Authentication of copies of records.

The proposed amendment to K.S.A. 60-465 renames the existing text as subsection (a) and adds new subsection (b) that tracks the language in Federal Rule 902(5) through (14). Federal Rule 902(1) through (4) relate to public documents and records, which is what is covered by the existing language in K.S.A. 60-465. The Committee recommends retaining the Kansas language for those categories and adding the ten additional categories of self-authenticating evidence set forth in the Federal Rule. The first six are additional categories of documents that are admissible with no need for extrinsic evidence to prove authenticity. Subsections (b)(7) through (b)(10) provide certification procedures that take place prior to trial, which includes notice and inspection opportunities to give parties a fair opportunity to challenge the records. The purpose of adopting these procedures from the Federal Rule is to reduce the cost and inconvenience of calling witnesses to prove facts unlikely to be disputed.

Section 4 – Amending K.S.A. 60-467, Original document required as evidence; exceptions.

The proposed amendments to K.S.A. 60-467 incorporate language from the Federal Rules to make needed updates to a number of concepts while preserving as much of the existing language as possible. Recent appellate cases have shown the difficulty of applying this rule requiring original documents in light of modern technology. Based on the 1953 Uniform Rules of Evidence, K.S.A. 60-467 reflects a time when easy creation of reliable duplicates was not possible.

The substance of the first part of current subsection (a) is restated with the language of Federal Rule 1002, both of which provide the general rule that an original is required unless otherwise provided in another statute. The remainder of current subsection (a), which is a list of exceptions to the general rule, is retained and relocated as subsection (d).

Subsection (b) is a new section that tracks Federal Rule 1003 and provides for the admission of duplicates to the same extent as the original unless there is a genuine question about authenticity or it would be unfair to admit the duplicate. Accurate reproduction of documents, recordings, and photographs is now commonplace, and a duplicate serves the purpose as well as the original unless a genuine issue is raised to oppose its admission.

The first sentence in what is now subsection (d) contains the substance of the first sentence of the old subsection (b). Subsection (d) also contains the remainder of what was formerly subsection (a) and sets out the situations in which an original is not required and extrinsic evidence may be admitted to prove the contents of a writing, recording, or photograph.

The Committee recommends adopting new subsection (e), which tracks Federal Rule 1007 and allows a proponent to use the testimony, deposition, or written statement of the other party to prove content without accounting for the original.

New subsection (f) tracks Federal Rule 1008 and is recommended to replace subsection (b) of the existing statute. The new language is substantively the same, but the Committee believes the Federal Rule's wording is easier to understand.

Definitions of "photograph," "original," and "duplicate" from Federal Rule 1001 have been added to what is now subsection (h). The definition of "photograph" clarifies that a photograph can be in a digital format. The definitions of "original" and "duplicate" are necessary complements to the new rule allowing admission of duplicates in subsection (b).

The members of the Civil Code and Criminal Law Advisory Committees who served on the ad hoc Advisory Committee on Evidence were:

Stephen E. Robison, Co-Chair, Wichita
F. James Robinson, Co-Chair, Wichita
James M. Armstrong, Wichita
Natalie Chalmers, Topeka
Professor James Concannon, Topeka
Hon. Bruce T. Gatterman, Larned
Ann Sagan, Lawrence
Ann Swegle, Wichita
Donald W. Vasos, Fairway
Ron Wurtz, Topeka