

KANSAS APPELLATE PRACTICE HANDBOOK

5TH EDITION



KANSAS JUDICIAL COUNCIL

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KANSAS JUDICIAL COUNCIL

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PREFACE

The authors and editors of this Fifth Edition of the handbook owe a professional debt to those who authored the First Edition of the handbook in 1978 and issued a revision in 1984. Members of the original KBA Kansas Appellate Practice Handbook Writing Committee included Hon. J. Richard Foth and Robert J. Roth, Co-Chairs, Hon. Bob Abbott, Lewis C. Carter, Professor Robert C. Casad, Professor James Concannon, Jerry G. Elliott, Don Patterson, Fred N. Six, and Hon. Jerome Harman, Editor. The 1984 revision was prepared by Hon. J. Richard Foth, Hon. Bob Abbott, and Carol Gilliam Green.

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In 2005, the Kansas Bar Association, publisher of the handbook, generously donated its copyright to the Kansas Judicial Council which assumed responsibility for publication. In addition to traditional publication, the Judicial Council makes the handbook available online, as a public service, at www.kansasjudicialcouncil.org and www.kscourts.org.

The Fourth Edition, published in 2007, was prepared under the direction of the Judicial Council Appellate Procedure Advisory Committee, chaired by Hon. Jerry G. Elliott. Authors and editors included Janet L. Arndt, Hon. Jerry G. Elliott, Teri E. Canfield-Eye, Hon. Nancy L. Caplinger, Richard L. Cram, Nicholas S. Daily, James M. Gannon, Carol Gilliam Green, Randall L. Hodgkinson, Clinton L. Hurt, Gayle B. Larkin, Hon. Marla J. Luckert, Patricia E. McComas, Hon. Kevin P. Moriarty, Steven J. Obermeier, Debra Sue Byrd Peterson, Nancy J. Strouse, Michelle M. Watson, and Tonia Owens Whitener.

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This handbook represents a collective view of current appellate practices and procedures which are subject to change. The Kansas Appellate Courts have not endorsed, nor are they bound by, statements in this handbook.

Statutory references throughout are to the latest version of the *Kansas Statutes Annotated* unless otherwise specifically indicated. Rules refer to the Kansas Supreme Court Rules, published annually in the *Kansas Court Rules Annotated*.

Carol Gilliam Green, Chair
Kansas Judicial Council
Appellate Practice Advisory Committee

DEDICATION

The Honorable Jerry G. Elliott
November 25, 1936 - April 5, 2010

In recognition of his invaluable contributions to the
Kansas Appellate Practice Handbook over more than thirty years of
publication.

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CHAPTER 1

History of the Appellate Courts

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.

CHAPTER 2

Personnel of the Appellate Courts

§ 2.1 The Supreme Court

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. Research attorneys are usually recent law school graduates, and their customary term of service is either one or two years. 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 and conducts research for the court as a whole as well as individual research projects as directed.

Shared executive assistants type opinions, orders, correspondence, and memoranda; maintain the justices' files; deal 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.

§ 2.2 The Court of Appeals

The Court of Appeals consists of thirteen 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.

§ 2.3 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(e).

The office of the clerk of the appellate courts is located in the southwest corner of the third floor of the Kansas Judicial Center, Room 374, 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.

§ 2.4 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 after each opinion day of that court. Court of Appeals opinions that are ready for publication form a separate section at the back 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.

§ 2.5 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.

§ 2.6 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*.

§ 2.7 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 3

Internal Operating Procedures

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 § 7.38, *infra*.

The Supreme Court regularly sits in Topeka six times a year for one week periods. 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 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.

§ 3.2 Decision

The Supreme Court's decision conference begins on the day an appeal is argued with additional conferences scheduled as needed. The preassigned cases are presented to the court by the authoring justice. The form of the opinion, whether formal (published) or memorandum (unpublished), is tentatively determined at the decision conference.

§ 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 attached, the original 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 mailed to counsel 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.

§ 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. See Supreme Court Internal Operating Procedure V.

§ 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. When a petition for review is granted, the appeal is processed as provided in Rule 8.03, scheduled for oral argument, and assigned to an authoring justice.

The Supreme Court's denial of a petition for review does not constitute an expression of opinion on the merits of the case. Rule 8.03(f).

If the Supreme Court determines that review has been improvidently granted, it may issue an order stating that review was improvidently granted and that the Court of Appeals opinion or disposition of the case is final. Rule 8.03(h)(1). Other possible dispositions, short of a formal opinion, for cases in which review has been granted are discussed in Rule 8.03(h).

§ 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 involving an original action or an issue of great public importance, 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).

See also “Supreme Court Internal Operating Procedures” in the Kansas Court Rules Annotated.

II. COURT OF APPEALS

§ 3.7 Prehearing

All cases are screened by the Chief Judge’s staff as soon as the docketing statement is filed. The purpose is to categorize the cases for complexity of the factual and legal issues involved, determine whether jurisdictional questions exist, and generally assist in the process of calendaring the case in either of the two appellate courts.

After the appellant’s and appellee’s briefs are filed, cases are screened by senior staff attorneys to determine appropriate calendaring and to focus research. Cases meeting the criteria of Rule 7.02(c)(2) are placed on the Court of Appeals summary calendar; other cases are placed on the 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 assigned to 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 the court to grant additional time for oral argument by printing “oral argument” on the lower right portion of the brief cover, followed by the desired amount of time. If oral argument is granted, the court will designate the amount of time

allowed on the published docket. The appellant and the appellee will be granted the same amount of time. Rule 7.02(f).

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 to be assigned to a docket. A copy of the docket, specifying when and where the case will be heard, is mailed to each counsel of record. 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 to be argued. 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

Each case is decided by the panel that heard it at a conference held 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 taken to the Chief Judge for delivery to the clerk for filing. Copies are mailed to counsel 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 *en banc* 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.

See also “Court of Appeals Internal Operating Procedures” in the Kansas Court Rules Annotated.

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 shall hold 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).

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). 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).

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.

An original and 8 legible copies of petitions in original actions must be filed with the clerk of the appellate courts. Respondents or their counsel of record must be served. Rule 9.01(a).

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 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 pay a docketing fee of \$125 and any applicable surcharge. Upon receipt of the prescribed docket fee or an affidavit of indigency, the clerk of the appellate courts must docket the original proceeding and submit the petition to the court. Rule 9.01(a).

No docket fee will be charged to file a petition for writ of habeas corpus. Rule 9.01(a). 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

In the Kansas Supreme Court, petitions in an original action (quo warranto, mandamus, habeas corpus) are assigned for initial consideration

and recommendation to an individual justice (except the Chief Justice), on a rotating basis. Supreme Court Internal Operating Procedure II(B)(1). The petition is then presented to the full court in conference. If the court is of the opinion the relief should not be granted, it will deny the petition. 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). If the petition, response, 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. 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, 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 only be resolved by oral testimony. 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). 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. *State ex rel. Slusher v. City of Leavenworth*, 279 Kan. 789, Syl. ¶ 5, 112 P.3d 131 (2005). 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, *rev. denied* 256 Kan. 996 (1994).

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.

Jurisdiction to entertain an appeal is conferred by statute. *State v. Verge*, 272 Kan. 501, 521, 34 P.3d 449 (2001); *In re J.D.B.*, 259 Kan. 872, Syl. ¶ 1, 915 P.2d 69 (1996); *City of Wichita v. Smith*, 31 Kan. App. 2d 837, 839, 75 P.3d 1228 (2003). “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, *rev. denied* 269 Kan. 938 (2000). “The right to appeal is entirely statutory....” *State v. Legero*, 278 Kan. 109, Syl. ¶ 2, 91 P.3d 1216 (2004). 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. 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 Court of Appeals, except in those cases reviewable by law in the district court and those cases where direct appeal to the Supreme Court is required. K.S.A. 22-3601(a). Direct appeal to the 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. 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: Off-grid crimes under the Kansas Sentencing Guidelines Act (KSGA) have been in effect for more than 20 years. Appeals involving class A felonies under the pre-KSGA criminal code are becoming increasingly more rare.

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), *cert. granted in part on other grounds*, 133 S. Ct. 1460, ___ U.S. ___ (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 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).

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 (G), the off-grid crimes over which the Court of Appeals has jurisdiction are: Aggravated human trafficking under K.S.A. 21-5426(c)(2)(B); rape under K.S.A. 21-5503(b)(2)(B); aggravated criminal sodomy under K.S.A. 21-5504(c)(2)(B)(ii); aggravated indecent liberties with a child under K.S.A. 21-5506(c)(2)(C)(ii); sexual exploitation of a child under K.S.A. 21-5510(b)(2)(B); promoting prostitution under K.S.A. 21-6420(b)(4); and an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-5301, 21-5302 or 21-5303, to commit any such listed off-grid felonies.

A defendant may appeal to the court having appellate jurisdiction “from any judgment against the defendant...” K.S.A. 22-3602(a). There are restrictions following a guilty plea. See K.S.A. 22-3602(a) and § 5.5, *infra*. However, the Kansas Supreme Court has stated that “a criminal defendant has a nearly unlimited right of review.” *State v. Boyd*, 268 Kan. 600, 605, 999 P.2d 265 (2000). Jurisdiction over an appeal of a motion to correct an illegal sentence under K.S.A. 22-3504 lies with the 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.shtml. 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 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. 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. Mountjoy*, 257 Kan. 163, Syl. ¶ 4, 891 P.2d 376 (1995). 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).

Judgment has been rendered when there has been a conviction and sentence. *State v. Donabue*, 25 Kan. App. 2d 480, Syl. ¶ 2, 967 P.2d 335, *rev. denied* 266 Kan. 1111 (1998) (an order disqualifying counsel from joint representation of several criminal defendants is not an appealable order; there has been no final judgment). To have a final judgment in a criminal case, the defendant must be convicted and sentenced. A defendant's sentence is not final if the district court has ordered restitution but has not yet set the amount. "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 also no statutory procedure for a defendant to appeal a question of law after an acquittal of the crime charged. *Mountjoy*, 257 Kan. 163, Syl. ¶ 4. 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 Pleas

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 *nolo contendere*, “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).

Following a plea, a criminal defendant can, however, raise a number of issues on appeal unrelated to his conviction. For instance, following a plea, a criminal defendant can appeal from the court’s restitution order. See *State v. Hunziker*, 274 Kan. 655, 56 P.3d 202 (2002); *State v. Beechum*, 251 Kan. 194, 202, 833 P.2d 988 (1992). See also *State v. Scott*, 265 Kan. 1, 961 P.2d 667 (1998) (appeal from an order requiring registration as a sexual offender). Denial of a motion to withdraw a guilty plea pursuant to K.S.A. 22-3210(d) may also be appealed. *State v. Solomon*, 257 Kan. 212, Syl. ¶ 1, 891 P.2d 407 (1995); *State v. McDaniel*, 255 Kan. 756, Syl. ¶ 1, 877 P.2d 961 (1994).

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 or a municipal court judge. The proceedings in magistrate or municipal court have no bearing on the case as it comes before the district court de novo. *State v. Gillen*, 39 Kan. App. 2d 461, 467-69, 181 P.3d 564 (2008); K.S.A. 22-3609a (a defendant shall have the right to appeal from any judgment of a district magistrate judge). 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 motion as part of a plea negotiation, he or she should proceed based upon stipulated facts as opposed to entering a plea of guilty. 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, *rev. denied* 269 Kan. 936 (2000). However, the appellate court does not have de novo review from a judgment of conviction after a plea of guilty or nolo contendere. K.S.A. 22-3602(a).

B. Appeals by the Prosecution to the Court of Appeals

§ 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 only in specific situations under K.S.A. 22-3602(b). These are set forth in § 5.7 through § 5.11, *infra*. “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: In *State v. McCarley*, 287 Kan. 167, 176, 195 P.3d 230 (2008), *State v. Vanwey*, 262 Kan. 524, 526-27, 941 P.2d 365 (1997), and *State v. Sisk*, 266 Kan. 41, 966 P.2d 671 (1998), the court entertained the State’s appeal from an order correcting an illegal sentence under K.S.A. 22-3504. 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), or 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. ___, 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 refile 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. Donabue*, 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, *rev. denied* 38 Kan. 879 (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.

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. 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).

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, *rev. denied* 271 Kan. 1040 (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).

A sentence of imprisonment or probation in a border box case is a presumptive sentence for purposes of appeal, so it is not subject to appellate review. See *State v. Schad*, 41 Kan. App. 2d 805, Syl. ¶ 12, 206 P.3d 22 (2009); *State v. Clark*, 21 Kan. App. 2d 697, 700, 907 P.2d 898 (1995), *rev. denied* 259 Kan. 928 (1996).

“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. 21-6604b(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. 21-4721(e)(1) (now K.S.A. 21-6820[e][1]) states, “In any appeal, the appellate court may review a claim that: a sentence that departs from the presumptive sentence resulted from partiality, prejudice, oppression

or corrupt motive.” This subsection seemingly gives the appellate courts jurisdiction to consider another issue in departure sentence appeals. *State v. Favela*, 259 Kan. 215, 239, 911 P.2d 792 (1996).

By inference, K.S.A. 21-4719(b)(1) (now K.S.A. 21-6818[b][1]) is interpreted to give appellate courts the authority to review the extent of a downward durational departure. Scope of review is limited to an abuse of discretion standard. *Favela*, 259 Kan. at 242. 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). But see *State v. Martin*, 285 Kan. 735, 746-47, 175 P.3d 832 (2008) (issue of whether departure factors relied on by sentencing court are substantial and compelling is reviewed de novo).

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. Vandervort*, 276 Kan. 164, 72 P.3d 925 (2003) (appellate court could consider criminal history issue under K.S.A. 21-4721(e)(2) even though not raised at trial court). 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).

Regardless of whether a notice of appeal has been filed, the sentencing court retains jurisdiction for 90 days after the entry of judgment to modify its judgment and sentence to correct any arithmetic or clerical errors. 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 must be to a district judge. K.S.A. 38-2382(a).

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).

The Revised Kansas Juvenile Justice Code does not permit an appeal of the denial of a postappeal 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).

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)(2)

(appeals from final orders of the Court of Tax Appeals issued after June 30, 2008, in all cases other than no-fund warrant proceedings); 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, 213 (2011), *rev. denied* 296 Kan. (Feb. 25, 2013); *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; *Donnini v. Ouano*, 15 Kan. App. 2d 517, 526, 810 P.2d 1163 (1991). However, an exception to this rule has been recognized when an order granting a new trial under K.S.A. 60-259(a) or K.S.A. 60-260 is challenged on jurisdictional grounds. *Brown v. Fitzpatrick*, 224 Kan. 636, Syl. ¶¶ 2, 3, 585 P.2d 987 (1978); *Donnini*, 15 Kan. App. 2d at 526.

- 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), *rev. denied* 236 Kan. 875 (1985). 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). 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).

The denial of a motion to terminate parental rights is a final, appealable order. *In re T.D.W.*, 18 Kan. App. 2d 286, Syl. ¶¶ 5, 6, 850 P.2d 947 (1993). See also *In re C.H.W.*, 26 Kan. App. 2d 413, 416, 988 P.2d 276 (1999).

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 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); and K.S.A. 5-418 (certain orders involving arbitration agreements).

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, 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. Such deficiency cannot be corrected by an order nunc pro tunc, *Star B., Inc.*, 241 Kan. at 697, nor can an order be amended to include the required findings after an unauthorized appeal has been filed. *Beyrle*, 262 Kan. at 510.

When a trial court makes mere reference to K.S.A. 60-254(b), it has not made “an express determination or an express direction, as required in the statute; these omissions [are] not mere clerical errors which may be corrected nunc pro tunc; and the proposed change would enlarge the judgment as originally rendered and substantially change the effective date of the judgment.” *Star B., Inc.*, 241 Kan. at 697. 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), *cert. denied* 493 U.S. 1036 (1990), 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.

Where a district court fails to make the proper express determinations required by 254(b) at the time it issues its interlocutory orders, it has no discretion thereafter to make those orders “final judgments” retroactively. *Prime Lending II v. Trolley’s Real Estate Holdings*, 48 Kan. App. 2d 847, 855, 304 P.3d 683 (2013). In *Prime Lending*, the Court of Appeals expressed no determination whether the district court’s contemporaneous certification of its later foreclosure order “would have resolved the jurisdictional problem.” *Prime Lending*, 48 Kan. App. 2d at 855-56.

§ 5.22 Probate Proceedings

Effective July 1, 2006, significant statutory changes occurred in the appeal of orders from decisions under the Probate Code.

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*. 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 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 to an appellate court under article 21 of chapter 60 of the Kansas Statutes Annotated. *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 from a district magistrate judge.

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 and any parent of the child." 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."

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(d); 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 (an original and 8 copies) 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 § 12.22, *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 § 7.45, *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(d); K.S.A. 60-2101(b). See § 7.46, *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(a)(1). This is a jurisdictional requirement. Rule 8.03(a)(1). Time limits for filing 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(a)(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(a)(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(e)(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.

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 District Magistrate Judges in Criminal Cases

A defendant has the right to appeal any judgment of a district magistrate judge 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 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 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 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 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 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(1); 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, *rev. denied* 258 Kan. 859 (1995); *City of Lenexa v. Higgins*, 16 Kan. App. 2d 499, Syl. ¶ 1, 825 P.2d 1152, *rev. denied* 250 Kan. 804 (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), *rev. denied* 260 Kan. 992 (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(2), 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. Kirkeley*, 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. *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)(2).
- 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). See *Mildfelt v. State*, 11 Kan. App. 2d 617, 620-21, 731 P.2d 884 (1987).

§ 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, *rev. denied* 243 Kan. 779 (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 or by mailing a copy of the order. 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, 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; *In re Equalization Appeal of Prieb Properties*, 47 Kan. App. 2d 122, 126, 275 P.3d 56 (2012).

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 *Chowning v. Cannon Valley Woodwork, Inc.*, 32 Kan. App. 2d 982, 991, 93 P.3d 1210 (2004) (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

Gleason v. Samaritan Home, 260 Kan. 970, 976, 926 P.2d 1349 (1996). 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, *rev. denied* 246 Kan. 767 (1990); and
- 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); *Angle v. Kansas Dept. of Revenue*, 12 Kan. App. 2d 756, 761, 758 P.2d 226, *rev. denied* 243 Kan. 777 (1988).

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;
- 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.

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., *Kansas Industrial Consumers Group, Inc. v. Kansas Corporation Comm'n*, 36 Kan. App. 2d 83, 138 P.3d 338, *rev. denied* 282 Kan. 790 (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 § 12.3, *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 § 12.4, *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 §§ 12.5, 12.6, *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 Chapter 60 Appeals

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; *In re Marriage of Galvin*, 32 Kan. App. 2d 410, 411, 83 P.3d 805 (2004).

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).

A notice of appeal must be filed within 30 days from “entry of the judgment.” K.S.A. 60-2103(a). Note, however, that a notice of appeal from an order appointing or refusing to appoint a receiver must be filed within 14 days of the entry of the order. K.S.A. 60-1305.

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. 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, *rev. denied* 253 Kan. 858 (1993).

Another type of premature notice of appeal occurs when multiple parties or issues are involved in a case and judgment is entered that does not dispose of all the parties or claims. The Kansas Supreme Court has held that a notice of appeal filed after the interlocutory order becomes effective upon entry of final judgment. “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).

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 should be filed after entry of those orders or final judgment. Rule 2.03(b); *L.P.P. Mortgage, Ltd. v. Haysse*, 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, the appellate courts have 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 involves judicial action that seemingly extended the time to file a notice of appeal or posttrial motion.

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 absent infringement on a party's constitutional right, 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 mailed, faxed, or e-mailed to the parties. 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, *rev. denied* 245 Kan. 782 (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 such power is exercised prior to the time for docketing the appeal. *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 11-12, 687 P.2d 603 (1984).

§ 7.3 Chapter 61 Appeals

The rules governing appeals in Chapter 61 cases depend on whether the case was heard by a magistrate or a district judge and whether the case was filed in small claims court.

A notice of appeal in Chapter 61 cases must be filed within 30 days after entry of a district judge's order, ruling, decision or judgment, and the procedure specified in K.S.A. 60-2103(a) and (b) applies. However, if a defendant desires to appeal an action for forcible detainer granting restitution of the premises, a notice of appeal must be filed within 7 days after entry of judgment. K.S.A. 61-3902. Timely posttrial motions extend the time to appeal. *Nolan v. Auto Transporters*, 226 Kan. 176, Syl. ¶ 1, 597 P.2d 614 (1979); *Squires v. City of Salina*, 9 Kan. App. 2d 199, Syl. ¶ 1, 675 P.2d 926 (1984).

All appeals from orders, rulings, decisions, or judgments of district magistrate judges in limited actions must be filed in district court within 14 days after entry of the order. K.S.A. 60-2103a(a). Posttrial motions do not extend the time to appeal from a district magistrate's orders. See K.S.A. 60-2103a(b). Compare K.S.A. 60-2103(a).

Appeal from any judgment under the Small Claims Procedure Act 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).

§ 7.4 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, 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. K.S.A. 38-2273(b). 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), *rev. denied* 289 Kan. 1278 (2010). 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). Orders denying termination of parental rights are appealable. *In re T.D.W.*, 18 Kan. App. 2d 286, 289, 850 P.2d 947 (1993). 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 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.

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).

§ 7.5 Probate Appeals

Notice of appeal must be filed within 30 days from the entry of the judgment in any case involving a decedent's estate or other proceeding under K.S.A. Chapter 59. K.S.A. 59-2401(b); K.S.A. 59-2401a(b); K.S.A. 60-2103(a). A timely posttrial motion extends the time to appeal. *In re Estate of Burns*, 227 Kan. 573, 575, 608 P.2d 942 (1980).

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*.

§ 7.6 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).

§ 7.7 Criminal Appeals

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. *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, Syl. ¶ 1, 869 P.2d 598 (1994); *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).

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).

An exception to the time limits has been recognized when an indigent defendant (1) was not informed of his or her rights 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 criminal defendant has the right to appeal to district court any conviction in municipal court for violations of municipal ordinances. 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. 22-3609(2).

A criminal defendant also has the right to appeal a judgment of a district magistrate judge. 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. 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. 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, 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, *rev. denied* 238 Kan. 879 (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. Bobannon*, 3 Kan. App. 2d 448, Syl. ¶ 1, 596 P.2d 190 (1979).

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 cases before a district magistrate judge from these same orders. K.S.A. 22-3602(d).

§ 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 § 12.7, *infra*. See, e.g., *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 290-91, 718 P.2d 1318 (1986) (Supreme Court lacked jurisdiction to remand case for retrial of issues between plaintiff and defendant physician where Supreme Court held drug manufacturer, which jury had found to be 100% negligent, to be free of negligence as a matter of law and plaintiff filed no cross-appeal of jury's finding that defendant physician was 0% at fault); and *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 307 P.3d 1255 (2013) (failure to cross-petition for review precluded Supreme Court's consideration of First Amendment claim).

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 papers 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).

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). K.S.A. 60-206 was amended in 2010 as part of a general restyling of the Kansas Code of Civil Procedure. Before the amendments, a time period of more than 10 days was computed differently than a time period of 10 days or less. Intervening Saturdays, Sundays and legal holidays were included for longer time periods but excluded for shorter time periods.

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).

To avoid shortening statutory deadlines, the legislature extended most 10-day time periods to 14 days. The legislature also extended many time periods of three or five days to seven days. The Kansas Supreme Court similarly amended the time periods contained in the Kansas Supreme Court Rules effective July 1, 2010.

Most judgments and orders now are served by first class mail, although they can also be served by fax or by electronic means if authorized by court rule. K.S.A. 60-205(b). Rule 1.05(c) allows the parties to make a written agreement to effect service by electronic means. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper by mail, fax or e-mail, 3 mailing days are added to the period of time. K.S.A. 60-206(d). This rule also applies to judgments. *Danes v. St. David’s Episcopal Church*, 242 Kan. 822, 825-27, 752 P.2d 653 (1988). These mailing days are calendar days.

Note that the 3-day mailing rule applies only when the measuring event is *service*. For example, the mail rule does not apply to petitions for review because Rule 8.03(a)(1) requires the petition to be served and filed within 30 days after the *date of the decision* of the Court of Appeals, not within 30 days after the date of service of the decision. Therefore, even if the opinion is mailed, the 30 days will be counted from the date of decision. Motions for rehearing or modification in the Supreme Court and Court of Appeals likewise count time from the date the decision is filed. Rules 7.05 and 7.06.

PRACTICE NOTE: The 30-day time limit to file a petition for review is jurisdictional. Rule 8.03(a)(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 Chapter 60 Appeals

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 or, for judgments exceeding \$1 million, at \$1 million plus 25% of any amount in excess of \$1 million. However, the court may set bond in a lower amount if required by other law or for good cause shown. 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).

§ 7.12 Chapter 61 Appeals

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.

§ 7.13 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).

§ 7.14 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*.

§ 7.15 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. K.S.A. 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 § 12.9, *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.

IV. DOCKETING THE APPEAL

§ 7.16 Generally

The appellant must docket the appeal with the clerk of the appellate courts within 21 days after filing the notice of appeal in the district court. The address is:

Clerk of the Appellate Courts
Kansas Judicial Center, Room 374
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:

- an original and one copy of 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 \$125 docket fee and any applicable surcharge. Rule 2.04(a)(1) and (d).

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

- an original and one copy of 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 §§ 12.10-12.13, *infra*, and on the Judicial Council website at www.kansasjudicialcouncil.com.

Since 2009, the Supreme Court has imposed a Judicial Branch Surcharge of \$10 to appellate docket fees, bringing the total docket fee to \$135. See Supreme Court Order 2013 SC 60.

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;
- 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 mailed 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. Parties designated to receive notice must include the attorney or party who signed the docketing statement and those on whom the docketing statement is served. Others who wish to receive notice must file a separate entry of appearance. See Rule 2.04(e).

The clerk's office will prepare an appellate case file that is open to the attorneys of record but may not be taken from the clerk's office. Files are generally also open 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 if beyond the 21-day period. See § 12.14, *infra*.

PRACTICE NOTE: Although motions to docket out of time are granted with some frequency, the likelihood of success diminishes the farther one is past the 21-day period.

Failure to docket within 21 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. The application must comply with Rules 5.01 and 2.04. Rule 5.051.

PRACTICE NOTE: A rush to the district court on the 22nd 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, *rev. denied* 253 Kan. 860 (1993), *cert. denied* 511 U.S. 1052, 114 S. Ct. 1611, 128 L. Ed. 2d 339 (1994).

§ 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 §§ 12.15 and 12.16, *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).

§ 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.

§ 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 § 12.19, *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. 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).

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 either why the appeal should not be dismissed for failure to make payment or 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 “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. Rule 3.02 sets out in detail a list of items that must be included in the record for civil and criminal cases. 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.

§ 7.26 Request for Additions to the Record on Appeal

Any document in the entire record, 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, stating 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 his or her claims 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 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)(2).

- 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 § 12.20, *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)(3).
- 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

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. Documents of unusual bulk and physical exhibits other than documents will not be transmitted unless requested by a party, who is then responsible for the transportation and cost of transportation of such items. Rule 3.07.

PRACTICE NOTE: Attorneys are often surprised when large exhibits that have been added to the record are not automatically forwarded to the appellate courts. The appellate court, on the other hand, often does not know that the exhibit has been made a part of the record on appeal. Remember that exhibits are in the custody of the court reporter, and you should contact the district court clerk and the court reporter about transportation arrangements for large or bulky exhibits.

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.

VII. CONSOLIDATION OF APPEALS

§ 7.28 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 § 12.21, *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 § 7.39, *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

§ 7.29 Generally

Any application to an appellate court should be made in writing 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, 144 P.3d 697 (2006). Oral arguments are held on motions only when ordered by an appellate court. Rule 5.01(e).

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 documents as the forms demonstrate the proper format for motions and, more importantly, the information an appellate court or the clerk likely will need to rule on various motions.

The original motion must be filed with the clerk of the appellate courts and must be accompanied by the correct number of copies. If the motion is filed in the Supreme Court, eight copies should be included with the original; only three copies and the original are required if the motion is filed in the Court of Appeals. Rule 5.01(b).

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.

The clerk of the supreme court is also the clerk of the court of appeals and should be referred to as “the clerk of the appellate courts.” Rule 1.01(e).

Any party may respond to a motion. Responses to motions should be filed with the same number of copies as the original motion and must be timely filed. Rule 5.01(c). Responses to motions for involuntary dismissal or motions for summary disposition must be filed within 14 days after the party is served with the motion; responses to all other motions must be made within 7 days after service. Rule 5.01(c); 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. If the motion is mailed to the other party, 3 mailing (calendar) days are added to the end of the business days. K.S.A. 60-206(d). See § 7.9, *supra*. If no provision is made for a reply, the court will accept a further filing, but the party must act quickly before the court rules on the motion.

After a party’s time to respond has passed or a response has been filed, the appellate court or clerk may rule on the motion and the clerk issues the court’s order. 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 5.01(d).

§ 7.30 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). Each such motion must be filed before the original deadline to act has expired and state: the present date, the number of extensions previously requested, the amount of additional time needed, and the reason for the request. Rule 5.02(a). See § 12.23, *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. The motion must state the reasons for the delay, and the court can grant the motion if the reasons constitute excusable neglect. Rule 5.02(c); K.S.A. 60-206(b)(1)(B).

PRACTICE NOTE: At times, each appellate court will limit the number of motions for extension of time on which the clerk may act. That number has never been higher than three.

Generally, when a party is granted additional time to file a brief, the length of the extension is the length of time the rules originally allowed a party to file a brief. For example, an appellee is allowed 30 days after service of an appellant's brief to file a brief. Any extension, absent exceptional circumstances, is for 30 days. Similarly, an appellant is allowed 15 days to file a reply brief so any extension is 15 days. If the court grants an extension and the time granted is more or less than a party requested, the party probably miscalculated the due date.

§ 7.31 Motions Relating to Corrections in Briefs

If a party discovers its brief contains typographical errors, printing errors, or similar non-substantive errors, the party may file a motion to correct its brief. Such a motion must be made before the appeal is set for hearing or placed on summary calendar. If the motion is granted, the movant must make the corrections by the date specified in the order.

If the errors are easily corrected, the party may request to correct the errors in the clerk's office without withdrawing the brief. See § 12.26, *infra*.

If, however, the error is difficult to correct, such as improperly collated pages, the party may request to withdraw its brief and submit corrected copies. See § 12.27, *infra*.

§ 7.32 Motion to Substitute Parties

A concise but informative statement must be made in the motion as to the reasons for the substitution of parties. See § 12.28, *infra*.

§ 7.33 Motion for Permission to File *Amicus* 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 §§ 7.33, *supra*, and 12.31, *infra*.

PRACTICE NOTE: An application for permission to file an *amicus curiae* brief should describe the individual or entity seeking to file the brief, their interest in the appeal, and the reason their input would be helpful. Such applications are not granted as a routine matter. 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 at least 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 within 21 days after the brief is filed. Rule 6.06(c). An *amicus curiae* is not entitled to oral argument. Rule 6.06(d).

§ 7.34 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 §§ 7.28, *supra*, and 12.21, *infra*.

§ 7.35 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. Such a motion must be filed with the clerk not less than 30 days after the service of the notice of appeal and must be accompanied by 8 copies. The motion should state the nature of the appeal; should demonstrate the appeal is within the Supreme Court's jurisdiction; and should 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); § 12.22, *infra*.

IX. VOLUNTARY AND INVOLUNTARY DISMISSALS

§ 7.36 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 should 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 § 12.29, *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 the appellee's costs and expenses against the appellant to the extent the costs and expenses could have been assessed if the appeal had not been dismissed and the judgment or order had been affirmed. Rule 5.04(b).

§ 7.37 Involuntary Dismissal

An appellate court has discretion to dismiss an appeal due to a substantial failure to comply with the 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 reasons for an involuntary dismissal are a party's failure to complete a required step in the appellate process, such as failure to pay a court reporter's timely demand for advance payment; failure to file a brief or a motion for extension of time; untimely filing of the notice of appeal; attempt to appeal from a non-appealable order; mootness; and acquiescence. See § 12.30, *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, 212 P.3d 1029 (2009).

The court may dismiss an appeal not 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 the appellee's costs and expenses against the appellant to the extent the costs and expenses could have been assessed if the appeal had not been dismissed and the judgment or order had been affirmed. Rule 5.05(c).

X. APPEALS PLACED ON SUMMARY CALENDAR

§ 7.38 Summary Calendar Screening and Procedure

After docketing, each appeal is screened. If it is determined 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)(2); Rule 7.02(c)(2). 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 which must be served on all parties and filed with the clerk not 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

§ 7.39 Requesting Additional Oral Argument Time

Appeals scheduled for oral argument are traditionally allotted 15 minutes 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 § 12.36, *infra*. If the appeal is granted additional oral argument time, it will be indicated on the docket sheet.

§ 7.40 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).

§ 7.41 Notice of Hearing Date

At least 30 days before the hearing date, the clerk of the appellate courts will notify the parties or their counsel of the time and location of the hearing by mailing a copy of the hearing docket. Rule 7.01(d); Rule 7.02(e). The amount of time set aside for argument will be indicated on the docket sheet.

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 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.

§ 7.42 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, however, 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 among themselves by mutual agreement. If the parties cannot agree on 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 which tracks the oral argument time remaining. The timer is located on the podium and is visible to the speaking party. However, 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.

Parties who fail to 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

§ 7.43 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 mails one copy of the decision to the attorney of record of each party or to the party if the party has appeared in the appellate court but has no counsel of record. In appeals from the district court, the clerk also mails a copy of the opinion to the judge of the district court from which the appeal arose. A certified copy of the opinion is sent to the clerk of the district court when the mandate issues. Rule 7.03(a).

PRACTICE NOTE: Supreme Court and Court of Appeals opinions are mailed to the parties and released to the media at 9:30 a.m. on the day of filing. Parties may also contact the appellate clerk's office and inquire whether an opinion has been filed or check the list of opinions filed 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 can file a motion for publication with the Supreme Court. The motion shall state the grounds for such belief and be accompanied by a copy of the opinion. All parties to the appeal must be served. 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 which allows citation.

By citing Rule 7.041 and the controlling decision, the 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 the appeal, the clerk notifies the parties of the proposed disposition and the parties then have 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.

§ 7.44 Motion for Rehearing or Modification

A motion for rehearing or modification of a Court of Appeals case 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 the points of law or fact by which the movant feels the court has erred, overlooked, or misunderstood. See § 12.33, *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 a mandate until the appellate court rules on the issues raised by 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 by the Supreme Court. See K.S.A. 20-3018(b); Rule 7.05(b). See also Rule 8.03(a)(2) (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).

§ 7.45 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 constitutions 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(e)(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 opinion. The 30-day period is jurisdictional. Rule 8.03(a).

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(a), but the cover title should read Petition for Review as a Matter of Right.

§ 7.46 Petition for Review

Any party aggrieved by a Court of Appeals decision may petition the Supreme Court for review in accordance with 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(e)(2).

§ 7.47 Timing of Petition for Review

The petition for review must be filed within 30 days of the filing of the Court of Appeals opinion. This 30-day period is jurisdictional, and the 3-day mail rule does not apply. K.S.A. 20-3018(b); Rule 8.03(a)(1); *Kargus v. State*, 284 Kan. 908, 925, 169 P.3d 307 (2007). The petitioner must file the original and nine copies of the petition with the clerk of the appellate courts, and attach a copy of the Court of Appeals opinion to the petition. Rule 8.03(a)(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.

§ 7.48 Content of Petition for Review

The petition for review must contain the following items in order: a clear prayer for review; date of the Court of Appeals decision; a clear statement of the issues decided by the Court of Appeals of which review is sought; 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(a)(4). The appendix also must include copies of other documents from the appellate record that are relevant to the issues presented for review. See Rule 8.03(a)(4)(F).

PRACTICE NOTE: The purpose of the petition, 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(e)(3). That purpose is not served if the filings merely repeat arguments made to the Court of Appeals.

§ 7.49 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).

PRACTICE NOTE: The petition and cross-petition must include clear statements of the issues on which review is sought. Generally, the court will not consider issues not presented or fairly included in the petition, cross-petition, or response. See Rules 8.03(a)(4)(C) (content of petition), 8.03(b)(2) (content of cross-petition), and 8.03(c)(3) (content of response); see also Rule 8.03(g)(1) (discussing issues subject to review). See also *State v. Sanchez-Loredo*, 294 Kan. 50, 53-54, 272 P.3d 34 (2012) (discussing petitioner's failure to challenge some adverse rulings made by Court of Appeals); *State v. Roberts*, 293 Kan. 29, 33, 259 P.3d 691 (2011) (noting the State must file cross-petition to preserve issues decided in defendant's favor).

§ 7.50 Cross-Petitions and Responses

A cross-petition must be filed within 14 days from the date the petition for review is filed. Rule 8.03(b). As with the petition, the 3-day mail rule does not apply to this deadline. Responses to a petition or cross-petition must be filed within 14 days of the date the petition or cross-petition is filed. The adverse party is not required to respond. Rule 8.03(c).

PRACTICE NOTE: The failure to file a response to a petition for review is not an admission that the petition should be granted. Rule 8.03(c)(4). The party that prevailed in the Court of Appeals should consider filing a cross-petition for review on issues that were not decided in favor of that party.

§ 7.51 Page Limits and Covers

The petition for review, cross-petition, and responses must not exceed 15 pages in length (excluding the appendix), must have a white cover, and must conform to applicable format provisions of Rule 6.07. See Rule 8.03(a)(3), (b)(2), and (c)(2).

§ 7.52 Procedures Following Granting of Review

If review is granted, the Supreme Court may limit the issues to be considered or may, in civil appeals, consider other issues presented to the Court of Appeals and preserved for review. Rule 8.03(g)(1) and (h)(4). Unless the court orders otherwise, the issues subject to review will be considered on the basis of the record and briefs filed in the Court of Appeals and, within 14 days of the date of the order granting review, the parties must file an additional ten copies of the brief(s) originally filed in the Court of Appeals. Rule 8.03(g)(2).

Within 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 and follow the same color scheme used for original briefs. Supplemental briefs should not repeat material contained in the Court of Appeals briefs. Sixteen copies of a supplemental brief must be filed with the clerk of the appellate courts and two copies served on opposing counsel. See Rules 6.09(a) and 8.03(g)(3).

§ 7.53 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(g)(4).

§ 7.54 Effect on Mandate

Timely filing of a petition for review will stay the issuance of the mandate by the Court of Appeals. Rule 8.03(i). 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(i).

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(i).

§ 7.55 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(h). 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.

§ 7.56 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(f) and (i). 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(f).

XIII. COSTS AND ATTORNEY FEES

§ 7.57 Costs

In any appeal in which they are applicable, all fees for service of process, witness fees, reporter's fees, allowance for 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, the expenses for transcripts, and any additional fees and expenses allowed in the appeal against any one or more of the parties in such a manner 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).

§ 7.58 Attorney Fees

Appellate courts may award attorney fees for services on appeal in any case in which the trial court had authority to award attorney fees. See Rule 7.07(b)(1). See also *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 Rule 5.01. An affidavit specifying 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 must be attached to the motion. See Kansas Rule of Professional Conduct 1.5 Fees; Rule 7.07(b)(2). See also § 12.34, *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).

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).

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. The mandate will include a statement of any such assessment, or in an original matter, the clerk of the appellate courts may cause an execution to issue. Rule 7.07(c).

On its own motion, or on the motion of an aggrieved party filed not later than 14 days after an assessment of the costs under Rule 7.07, the appellate court may assess against a party or the party's counsel, or both, all or any 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, pursuant to a written request and in accordance with 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

§ 7.59 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.

§ 7.60 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 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.

§ 7.61 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(i). If review is denied, the mandate issues on the date of denial. Rule 8.03(f). 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.

§ 7.62 Stays After Decision

When a party seeks review in the United States Supreme Court, it may be necessary to stay the decision of the state appellate court to preserve the status quo or prevent mootness. A motion to stay the issuance of the mandate should be sought in the court that issued the decision and will be issuing the mandate. When a petition for review of a Court of Appeals decision has been denied by the Kansas Supreme Court, the motion for stay should be addressed to 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). If the stay is granted before the mandate is issued, the clerk of the appellate courts will hold the mandate. If the mandate has already been filed with the district court, the appellate court can enter an order recalling the mandate from the district court in order to rule on the motion for stay.

CHAPTER 8

Standards and Scope of Appellate Review

I. INTRODUCTION

§ 8.1 Preliminary Matters

Following an appellate court's determination that it has jurisdiction over an appeal, the next inquiry is the proper standard of review to be applied to each issue.

§ 8.2 Standard of Review – Definition

The appellate court's true standard of review “focuses on the deference due to a lower court, jury, or agency, and on the materials the reviewer can look to in performing that oversight function. It broadly defines the freedom or handcuffs the appellate court carries in passing on the prior decision makers within the judicial process.” 1 Childress & Davis, *Federal Standards of Review* §1.03, p. 1-18 (4th ed. 2010). “In other words, the standard of review establishes the ‘framework by which a reviewing court determines whether the trial court erred. [Citation omitted.]” *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012).

The standard of review is a concept distinct from the test for reversibility. See *State v. Plummer*, 295 Kan. 156, 160, 283 P.3d 202 (2012).

§ 8.3 Requirements for Appellate Briefs

Under the Kansas Supreme Court Rules, an appellant must begin each issue with a citation to the appropriate standard of review and a reference to the specific location in the record on appeal where the issue was raised and ruled upon. Rule 6.02(a)(5). An appellee also has a duty to cite to the appropriate standard of review and must either concur in the appellant's citation to the standard of review or offer additional authority. Rule 6.03(a)(4).

§ 8.4 Issues Must be Preserved for Appeal

In an appeal, the record is everything. Any potential error must be preserved for the record on appeal. The “central premise of error preservation is simple but of great consequence: if it's not in the record developed in the trial court, it did not happen for the purposes of appeal.” Bratvold and Penny, *The Importance of Error Preservation*, 53 No. 3 DRI For the Defense 8 (March 2011). Rule 6.02(a)(5) requires that an appellant's brief contain a reference to the specific location in the record on appeal where each issue on appeal was raised and ruled upon. This requirement is consistent with the general rule that an appellant cannot raise an issue on appeal that was not raised below. See *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009) (civil); *State v. Lesbay*, 289 Kan. 546, 553, 213 P.3d 1071 (2009) (criminal).

The rationale for this rule 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). There are several exceptions to the rule that a new legal theory cannot be raised for the first time on appeal. The 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; and (3) the district court is right for the wrong reason. See *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 1178 (2009) (civil); *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010) (criminal).

§ 8.5 Determining the Appropriate Standard of Review

“Traditionally, decisions by judges are divided into three categories: questions of law (reviewable de novo), questions of fact (reviewable for clear error), and discretionary matters (reviewable for abuse of discretion).” Levy, *How to Handle an Appeal*, §6:5.2, p. 6-20 (4th ed. 2009). In practice, the lines between these categories can blur, leading to the application of several layers of review on a single issue or a case where it is unclear whether the appellate court is reviewing a question of law or a question of fact. This fluidity requires the practitioner to make strategic decisions about how to frame the standard of review.

To assist in understanding the distinctions among various standards of review, further explanation and examples are provided in §§ 8.7-8.22.

§ 8.6 Practical Considerations

The standard of review is the “single most important factor in the decision to affirm or reverse in the face of a claim of error that has been preserved.” Wisotsky, *Professional Judgment on Appeal: Bringing and Opposing Appeals*, § 8.02 (2002). The structure of the court system allows the trial court’s decision to come to the appellate court with a “strong presumption of correctness” in all issues except for questions of law.

For that reason, determining the appropriate standard of review can be helpful when considering whether to pursue an appeal. Counsel for the appellant is in the best position when he or she can focus an argument on a question of law, which affords de novo review. And both counsel and client should know that the deference given the trial court on discretionary matters means that an appeal based solely on those grounds is unlikely to succeed. Bentele & Cary, *Appellate Advocacy Principles and Practice*, pp. 119-120 (4th ed. 2004). Conversely, counsel for the appellee should always frame an issue in a way that affords the greatest amount of possible deference to the trial court.

When examining a record for potentially reversible errors, counsel should take care not to base an appeal around harmless error. Appellate courts will disregard merely “technical errors” that do not appear to have prejudicially affected the substantial rights of the party complaining if the record as a whole reflects that “substantial justice” has been done by the judgment. *State v. Gilliland*, 294 Kan. 519, 541, 276 P.3d 165 (2012).

The degree of certainty required to persuade the court that the error did not affect the outcome of the trial will vary depending on whether the error implicates a constitutional right and whether the error was cured or mitigated by an instruction or admonition. *State v. Ward*, 292 Kan. 541, 565, 569-70, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

II. DISCUSSION AND EXAMPLES

§ 8.7 Discretionary Issues

The amount and degree of judicial discretion varies depending on the character of the question presented for determination. In general, when a discretionary decision is made within the legal standards and takes the proper factors into account in the proper way, the trial court's decision will be protected even if it is not wise. Abuse is found when the trial court goes outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by higher courts to guide a discretionary determination. *In re Adoption of B.G.J.*, 281 Kan. 552, 563-64, 133 P.3d 1 (2006).

A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Critchfield Physical Therapy v. The Taranto Group, Inc.*, 293 Kan. 285, 292, 263 P.3d 767 (2011) (civil); *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012) (criminal).

One way to determine whether a judicial act is discretionary is to look at the language of the applicable statute. Statutes typically use the word “may” to indicate that the decision is discretionary. The following are examples of statutes granting discretionary authority. “[T]he court may: (1) Join for hearing any or all matters at issue” K.S.A. 60-242(a). “The court may, on motion, grant a new trial” K.S.A. 60-259(a). “Attorney fees and related expenses may be awarded” K.S.A. 79-3268(f).

§ 8.8 Factual Issues When Appellant Did Not Have Burden of Proof

If the appellant was not the party who had the burden of proof on the issue, the appellate court will apply either the substantial competent evidence or the sufficiency of evidence standard. Which of these standards is appropriate depends on whether factual determinations were made by the trial court or by a jury.

§ 8.9 Substantial Competent Evidence

K.S.A. 60-252(a) mandates that, in cases where the trial court enters judgment without a jury - such as in a bench trial or upon a summary judgment motion - the court must “find the facts specially and state its conclusions of law separately.” The standard of review applied to such findings of fact is the substantial competent evidence standard. *Schoenholz v. Hinzman*, 295 Kan. 786, 792, 289 P.3d 1155 (2012).

“Substantial competent evidence” is both relevant and substantial and provides a substantial basis of fact from which the issues can reasonably be resolved. In other words, it is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. *Venters v. Sellers*, 293 Kan. 87, 93, 261 P.3d 538 (2011). When reviewing a trial court, the appellate courts may not weigh conflicting evidence or pass on the credibility of witnesses or redetermine questions of fact. *Mitchell v. Kansas Dept. of Revenue*, 32 Kan. App. 2d 298, 301, 81 P.3d 1258 (2004).

For example, the appellate courts review a district court’s determination to suspend a driver’s license for substantial competent evidence. *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 514, 242 P.3d 1179 (2010). Similarly, the standard is used when reviewing whether a trial court properly denied a criminal defendant’s motion to suppress a confession, *State v. Sharp*, 289 Kan. 72, 80, 210 P.3d 590 (2009), and when deciding whether the Workers Compensation Board of Review’s factual findings were correct. See K.S.A. 77-621(c)(7).

Often, issues of substantial competent evidence are mixed in with questions of law. In fact, the question of whether substantial competent evidence even exists is itself a question of law. *Redd v. Kansas Truck Center*, 291 Kan. 176, 182, 239 P.3d 66 (2010). When questions of fact and law intersect, the substantial competent evidence standard is used to review the

trial court's factual determinations and any legal conclusions are reviewed under a de novo standard. When faced with such decisions, practitioners should pay attention to the precise issue being reviewed within the mixed question, in order to apply the most advantageous standard of review.

§ 8.10 Sufficiency of the Evidence

The sufficiency of the evidence standard is applied in cases resolved by a jury trial where factual findings are not made. The standard is stated differently for civil and criminal cases.

Civil case: “When a verdict is challenged as being contrary to the evidence, 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.” *Unrub v. Purina Mills*, 289 Kan. 1185, 1195, 221 P.3d 1130 (2009).

Criminal case: When the sufficiency of evidence is challenged in a criminal case, the appellate court reviews such claims “by looking at all the evidence in a light most favorable to the prosecution and determining whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.” *State v. Frye*, 294 Kan. 364, 374-75, 277 P.3d 1091 (2012).

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 Ward*, 35 Kan. App. 2d 356, 370, 131 P.3d 540, *rev. denied* 282 Kan. 789 (2006).

§ 8.11 Factual Issues When Appellant Had Burden of Proof

The finding that a party did not meet its burden of proof is a negative factual finding. The appellate court's standard of review for a negative finding of fact is that “the party challenging the finding must prove arbitrary disregard of undisputed evidence or must prove some extrinsic consideration such as bias, passion, or prejudice. [Citation omitted.]” *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 (2008).

Examples of cases where a negative finding was used include: a finding that the appellant did not prove that he was “incapacitated” under the workers compensation statutes, *Kincade v. Cargill, Inc.*, 27 Kan. App.

2d 798, 801, 11 P.3d 63, *rev. denied* 270 Kan. 898 (2000); a finding that a party did not prove 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), *rev. denied* 292 Kan. 965 (2011); and a finding that the State failed to prove that certain evidence was derived from a legitimate source in the face of use and derivative use immunity, *State v. Carapezza*, 293 Kan. 1071, 1080, 272 P.3d 10 (2012).

§ 8.12 Factual Evidence Undisputed or Based Solely Upon Documents

In cases decided on the basis of documents and stipulated facts, the appellate courts have de novo review. *Ward v. Ward*, 272 Kan. 12, 19, 30 P.3d 1001 (2001).

“Where the controlling facts are based upon written or documentary evidence by way of pleadings, admissions, depositions, and stipulations, the trial court has no peculiar opportunity to evaluate the credibility of witnesses. In such situation, [an appellate court] has as good an opportunity to examine and consider the evidence as did the court below, and to determine de novo what the facts establish.” *Heiman v. Parrish*, 262 Kan. 926, 927, 942 P.2d 631 (1997).

In *In re Adoption of Baby Boy B.*, 254 Kan. 454, Syl. ¶ 2, 866 P.2d 1029 (1994), the Kansas Supreme Court clarified that where 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,” the standard of review is “whether the findings of the district court are supported by substantial competent evidence.” This standard of review only applies to cases where the documentary evidence is uncontroverted.

§ 8.13 Legal Issues

The scope of review for questions of law is unlimited. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009). This may also be referred to as “de novo” or “plenary” review. Examples of cases where de novo review was used include:

Contract interpretation: “The legal effect of a written instrument is a question of law. It may be construed and its legal effect determined by the appellate court regardless of the construction made by the district

court. [Citation omitted.]” *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011).

Existence of a duty: “The existence of a legal duty is a question of law to be determined by the court. Appellate courts have unlimited review of questions of law.” *D.W. v. Bliss*, 279 Kan. 726, Syl. ¶ 2, 112 P.3d 232 (2005).

Jurisdiction: Whether jurisdiction exists is a question of law over which the appellate court’s scope of review is unlimited. *Associated Wholesale Grocers, Inc. v. Americold Corporation*, 293 Kan. 633, 637, 270 P.3d 1074 (2011) (civil); *State v. Ellmaker*, 289 Kan. 1132, 1147, 221 P.3d 1105 (2009), *cert. denied* 130 S. Ct. 3410 (2010) (criminal).

Legal Conclusions: An appellate court has de novo review of legal conclusions upon which a trial court’s decision is based. The trial court’s factual findings must be supported by substantial competent evidence and must be sufficient to support the legal conclusions dependent upon them. *Venters v. Sellers*, 293 Kan. 87, Syl. ¶ 1, 261 P.3d 538 (2011).

Statutory interpretation: Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Unruh v. Purina Mills*, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009) (civil); *State v. Dale*, 293 Kan. 660, 662, 267 P.3d 743 (2011) (criminal).

III. PARTICULAR TOPICS OR AREAS OF LAW

§ 8.14 Administrative Actions – State Agencies

Judicial review of a state administrative agency action is defined by the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.* It is important to note that there were extensive amendments to the KJRA in 2009. Read carefully if citing an appellate case from before the amendments were effective. It is also important to note that the 2009 statutory changes do not apply retroactively. They should be used only for agency actions arising on or 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).

The KJRA defines eight issues that a court can review. K.S.A. 77-621(c). The burden of proving the invalidity of agency action is on the party asserting invalidity. K.S.A. 77-621(a)(1).

Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010).

Appellate courts review an agency's factual findings to determine whether they are supported by substantial competent evidence in light of the record as a whole. K.S.A. 77-621(c)(7). The 2009 amendments to the KJRA alter that analysis in three ways. First, the appellate court must review the evidence both supporting and contradicting the agency's findings. Second, the court must consider the presiding officer's determination of witness credibility. And third, the court must review the agency's explanation of why the evidence supports its findings. Despite these changes, the appellate court is still precluded from reweighing the evidence or engaging in de novo review. K.S.A. 77-621(d); *Gustin v. Payless Shoesource, Inc.*, 46 Kan. App. 2d 87, 92, 257 P.3d 1277 (2011).

Appellate court review of an agency's interpretation of a statute that the agency administers has also changed. Historically, the courts have given substantial deference to the agency's statutory interpretation -- this was sometimes referred to as the "doctrine of operative construction." More recently, the Kansas Supreme Court has indicated an unwillingness to extend any deference to an agency's statutory interpretation, instead preferring to exercise de novo review. *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012). Appellate cases citing the doctrine of operative construction should no longer be cited for issues involving statutory interpretation in administrative cases.

§ 8.15 Administrative Actions – Non-state Agencies

If the administrative decision was made by a non-state agency, the appropriate standard of review depends on whether the agency is acting in a legislative or quasi-judicial capacity. K.S.A. 60-2101(d) authorizes an appeal to the district court from any "judgment rendered or final order made by a political or taxing subdivision, or any agency thereof, exercising judicial or quasi-judicial functions."

Judicial review of judicial or quasi-judicial functions 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).

If the non-state agency was acting in a legislative capacity, the review by the district and the appellate court is limited to determining whether the agency had the statutory authority to issue the order that it made. *Cedar Creek Properties, Inc. v. Board of Johnson County Comm'rs*, 249 Kan. 149, 156, 815 P.2d 492 (1991).

However, the standard of review in zoning cases is slightly different. See *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 304-05, 40 P.3d 522 (2002).

§ 8.16 Cumulative Error

Cumulative trial errors, when considered collectively, may require reversal of a defendant's conviction when the totality of the circumstances substantially prejudiced the defendant and denied him a fair trial. If the evidence is overwhelming against the defendant, however, no prejudicial error may be found based upon the cumulative error rule. *Thompson v. State*, 293 Kan. 704, 721, 270 P.3d 1089 (2011).

§ 8.17 Ineffective Assistance of Counsel

"A claim of ineffective assistance of counsel presents mixed questions of law and fact requiring de novo review. [Citation omitted.]" *Thompson v. State*, 293 Kan. 704, 715, 270 P.3d 1089 (2011). The appellate court "reviews the underlying factual findings for substantial competent evidence and the legal conclusions based on those facts de novo. [Citation omitted.]" *Boldridge v. State*, 289 Kan. 618, 622, 215 P.3d 585 (2009).

§ 8.18 Jury Instructions

The standard of review for an issue involving jury instructions varies depending on whether the instruction in question was either requested or objected to during trial. There are also slight differences depending on whether the case is civil or criminal.

CIVIL INSTRUCTION RAISED TO TRIAL COURT

The trial court must properly instruct the jury on a party's theory of the case. Errors regarding jury instructions will not require reversal unless they result in prejudice to the appealing party. Instructions must

be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct and the jury could not reasonably have been misled by them, the instructions will be approved on appeal. *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 81, 274 P.3d 609 (2012).

CRIMINAL INSTRUCTION RAISED TO TRIAL COURT

When a party has objected to an instruction at trial, the appellate court will examine the instruction to determine if it properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury. In making this determination, the appellate court must consider the instructions as a whole and not isolate any one instruction. *State v. Appleby*, 289 Kan. 1017, 1059, 221 P.3d 525 (2009).

When a party has requested an instruction at trial and that request has been denied, the appellate court will first determine whether the requested instruction was legally and factually appropriate. If the instruction was legally and factually appropriate, the appellate court will find error, but will then review the record to determine whether the failure to give the instruction was harmless. *State v. Plummer*, 295 Kan. 156, 160-63, 283 P.3d 202 (2012).

CIVIL INSTRUCTION NOT RAISED TO TRIAL COURT

The failure to object to a jury instruction invokes a clearly erroneous standard of review. To reverse, the appellate court must be able to find a real possibility exists that the jury would have returned a different verdict had the trial error not occurred. *Unruh v. Purina Mills*, 289 Kan. 1185, 1197, 221 P.3d 1130 (2009).

CRIMINAL INSTRUCTION NOT RAISED TO TRIAL COURT

When reviewing a jury instruction in this context, the appellate court must first determine whether there is error. In other words, the appellate court must perform a merits review of the issue. This review for error presents a legal question subject to de novo review. *State v. Williams*, 295 Kan. 506, 515-16, 286 P.3d 195 (2012) (discussing “clearly erroneous” standard set out in K.S.A. 22-3414[3]).

Only after the appellate court determines that the trial court erred by giving or failing to give a particular instruction does the court inquire into reversibility. The test for clear error requiring reversal is whether the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. This assessment involves a review of the entire record and de novo review. The defendant bears the burden of proving clear error. *State v. Williams*, 295 Kan. at 516.

§ 8.19 Motions to Dismiss – Civil

The granting of a motion to dismiss is not favored by courts. When reviewing a trial court's decision granting a motion to dismiss, the appellate court must assume that the facts alleged by the plaintiff are true and make any reasonable inferences to be drawn from those facts. Additionally, the court is required to determine whether those pleaded facts and inferences state a claim, not only on the theory espoused by the plaintiff, but on any possible theory that can be ascertained. Dismissal is justified only when the allegations in the petition clearly show plaintiff has not stated a claim. *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001). The standard of review is different when the decision is entered during a bench trial prior to the conclusion of trial. When a trial court has ruled on a motion for judgment on partial findings under K.S.A. 60-252(c), the appellate court determines whether the trial court's findings of fact are supported by substantial competent evidence and are sufficient to support its conclusions of law. *Lyons v. Holder*, 38 Kan. App. 2d 131, 134-35, 163 P.3d 343 (2007).

§ 8.20 Motions to Dismiss – Criminal

The test used to evaluate the sufficiency of a charging document depends upon whether the issue was raised before the trial court. If the issue was raised to the trial court, via the filing of a motion for arrest of judgment, the appellate court considers whether the complaint or information omits an essential element of the crime. If so, it is fatally defective, and the conviction must be reversed for lack of jurisdiction. *State v. Shirley*, 277 Kan. 659, 661-62, 89 P.3d 649 (2004). If the issue is being raised for the first time on appeal, the appellate court applies a "common-sense rule under which a charging document is sufficient if it would be fair to require the defendant to defend on the stated charge,

even if an essential element is missing from the document. [Citation omitted.]” In making such a determination, the reviewing court looks at the entire record. *State v. Edwards*, 39 Kan. App. 2d 300, 308, 179 P.3d 472, *rev. denied* 286 Kan. 1181 (2008).

§ 8.21 Prosecutorial Misconduct

Appellate review of an allegation of prosecutorial misconduct involving improper comments to the jury requires a two-step analysis. First, the court determines whether the prosecutor’s comments were outside the wide latitude that a prosecutor is allowed in discussing the evidence. Second, if misconduct is found, the appellate court must determine whether the improper comments prejudiced the jury against the defendant and denied him or her a fair trial. *State v. Bridges*, 297 Kan. 989, 306 P.3d 244, 260 (2013); *State v. Marshall*, 294 Kan. 850, 856, 281 P.3d 1112 (2012).

In the second step of the analysis, the appellate court considers whether the misconduct was gross and flagrant, whether it was motivated by prosecutorial ill will, and whether the evidence was of such an overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. None of these three factors is individually controlling. *State v. Marshall*, 294 Kan. at 857. The ultimate question in the second part of the analysis is whether the prosecutorial misconduct was harmless under the standards of both K.S.A. 60-261 (statutory harmless error) and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 (1967) (constitutional harmless error). See *State v. Bridges*, 2013 WL 4039431, at *17, 19.

A claim of prosecutorial misconduct based on comments made during voir dire or opening or closing statements may be reviewed on appeal even in the absence of a contemporaneous objection. In contrast, a contemporaneous objection must be made to all evidentiary claims - - including questions posed by a prosecutor -- to preserve the issue for appellate review. *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009).

PRACTICE NOTE: Although a contemporaneous objection is not necessary to preserve a claim of prosecutorial misconduct during voir dire, opening statements, or closing arguments, the failure to object may impair the appellant’s ability to argue on appeal that the misconduct constituted reversible error.

§ 8.22 Summary Judgment

“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, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. Where there is no factual dispute, appellate review of an order regarding summary judgment is de novo. *David v. Hett*, 293 Kan. 679, 682, 270 P.3d 1102 (2011).

§ 8.23 Termination of Parental Rights

The State must prove by “clear and convincing evidence” that a child is a child in need of care. K.S.A. 38-2250. “Clear and convincing evidence” is an intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt. *In re B.D.-Y.*, 286 Kan. 686, 691, 187 P.3d 594 (2008). “Clear and convincing evidence is evidence which shows that the truth of the facts asserted is highly probable.” *In re B.D.-Y.*, 286 Kan. 686, Syl. ¶ 3.

IV. NO APPELLATE REVIEW

§ 8.24 Acquiescence

Acquiescence to a judgment cuts off the right of appellate review. Acquiescence occurs when a party voluntarily complies with a judgment by assuming the burdens or accepting the benefits of the judgment contested on appeal. A party that voluntarily complies with a judgment should not be permitted to take an inconsistent position by appealing

that judgment. With that in mind, the question of whether a party has acquiesced to a judgment is a matter of jurisdiction. Accordingly, that question is reviewed de novo. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1271, 136 P.3d 457 (2006).

§ 8.25 Invited Error

A party may not invite and lead a trial court into error and then complain of the trial court's error on appeal. *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003) (civil); *State v. Divine*, 291 Kan. 738, 742, 246 P.3d 692 (2011) (criminal).

Because issue of jurisdiction may be raised by an appellate court at any time and upon the court's own motion, the invited error rule does not apply to issues of jurisdiction. *In re Tax Appeal of Professional Engineering Consultants*, 281 Kan. 633, 639, 134 P.3d 661 (2006). Similarly, where a defendant challenges an illegal sentence on the ground that the sentencing court lacked jurisdiction, the invited error rule does not apply. *State v. McCarley*, 287 Kan. 167, 174-76, 195 P.3d 230 (2008).

§ 8.26 Moot Issues

The general rule is appellate courts do not decide moot questions or render advisory opinions. *Smith v. Martens*, 279 Kan. 242, 244, 106 P.3d 28 (2005) (civil); *State v. Torres*, 293 Kan. 790, 792, 268 P.3d 1197 (2012) (criminal).

§ 8.27 Correct Ruling for Erroneous Reason

If a trial court reaches the correct result, its decision will be upheld even though it relied upon the wrong ground or assigned erroneous reasons for its decision. *Hockett v. The Trees Oil Co.*, 292 Kan. 213, 218, 251 P.3d 65 (2011) (civil); *State v. May*, 293 Kan. 858, 870, 269 P.3d 1260 (2012) (criminal).

§ 8.28 Abandoned Points

An issue not briefed by the appellant is deemed waived and abandoned. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011) (civil); *State v. McCaslin*, 291 Kan. 697, 709, 245 P.3d 1030 (2011) (criminal). This rule encompasses an issue which is raised incidentally in a brief but

not fully argued. *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 (2012) (civil); *State v. Anderson*, 291 Kan. 849, 858, 249 P.3d 425 (2011) (criminal).

§ 8.29 Failure to Designate a Record

The burden is on the party making a claim to designate facts in the record to support that claim; without such a record, the claim of error fails. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 283, 225 P.3d 707 (2010) (civil); *State v. McCullough*, 293 Kan. 970, 999, 270 P.3d 1142 (2012) (criminal).

V. SUMMARY

The above standards of review are not an exhaustive list but should assist the parties in deciding how to address an issue. The parties should research the applicable area of law to determine if a different standard can be used for an issue, based upon the particular facts of the case. In many instances, there are exceptions to the above rules.

In conclusion, the appellant should choose an issue that shows the alleged error warrants reversal of the case and cite to the record where the error was raised to the trial court. Thereafter, the parties should state the proper standard of review and weave it into their arguments. By doing so, the parties' arguments and the appellate court's review of the case will be properly focused on how the appellate court can grant/deny relief within the limitations of its authority.

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.

Consult the appropriate rules before starting to format your appellate brief, and review the “Brief Checklist” in Chapter 12, § 12.35, *infra*.

The rules are found in the Kansas Court Rules Annotated, an annual publication of the Kansas Supreme Court. Check the rules online to determine whether there have been any recent amendments. http://www.kscourts.org/rules/New_Rules_and_Amendments.

§ 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: When a brief due date is counted from a prior service date, the appellate clerk’s office will add the three-day mail time if service has been perfected under K.S.A. 60-206(d).

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 prior to docketing, 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).

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 bound 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) addresses the extension, by the court, of the time to file a brief. See also Rule 5.02 and § 7.30, *supra*.

§ 9.2 Content of Appellant's Brief—Rule 6.02

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 and 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 this statement must be brief and without elaboration. Because the court will read the statement of the issues before reading the facts of the case, an elaborate issue statement may confuse, rather than clarify. Moreover, the court has only two options when faced with a lengthy issue statement: to read it or to skip it. If it chooses the former, a lengthy issue statement will likely render some of the following argument redundant. If it chooses the latter, the lengthy issue statement has only wasted precious space.

- A concise but complete statement, without argument, of the facts that are material to determining the issues to be decided in the appeal. The facts must be keyed to the record on appeal by volume and page number. For example, (R. I, 23). 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 *In re Care & Treatment of Hay*, 263 Kan. 822, 835, 953 P.2d 666 (1998).

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.

This section must include *all* of the material facts and *only* the material facts. Avoid statements such as, “Further facts will be developed as necessary.” Also avoid setting up an issue that will not be raised. For instance, if the brief will not include an argument 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. Finally, include – but minimize – negative critical facts. Rambo and Pflaum, *Legal Writing by Design* § 21.6, p. 371 (2001).

- The arguments and authorities relied on, separated by issue if applicable. Each issue *must begin* with a citation to the appropriate standard of review. Each issue *must begin* 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 6.01(a)(5). “Issues not raised before the district court generally cannot be raised on appeal. 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). The appellant must identify *which* of these exceptions applies *and 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, choose quality over quantity. String cites are almost always unnecessary. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument*, p. 122 (4th ed. 2009).

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).

§ 9.3 Content of Appellee's Brief—Rule 6.03

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).
- A statement, without argument, of the facts *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. Appellee must either 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).

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).

§ 9.4 Content of Cross-Appellee's Brief—Rule 6.04

A cross-appellee's brief *must* contain:

- Content 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 permits the filing of a reply brief *only when made necessary by new material* contained in the brief of the appellee or the cross-appellee.

If a reply brief is appropriate, it *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).

§ 9.6 Brief of *Amicus Curiae*—Rule 6.06

A brief of an *amicus curiae* may only be filed when the party filing the brief serves an application to file the brief on all parties and files it 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(g). See § 12.36, *infra*, for a sample brief.

The brief must be printed on 8½” by 11” white bond paper. Rule 6.07(a)(1). The brief must be reproduced by a 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)(5).

The color of the brief cover must correspond to the party filing the brief:

- Appellant — yellow.
- Appellee, appellee/cross-appellant, or appellee/cross-appellee — blue.
- Cross-appellee or cross-appellee/reply — yellow.
- Intervenor or *amicus curiae* — green.
- Reply — grey. Rule 6.07(b)(1).

The cover of the brief must include:

- The appellate court docket number.

- The words “IN THE COURT OF APPEALS OF THE STATE OF KANSAS” or “IN THE SUPREME COURT OF THE STATE OF KANSAS,” whichever is appropriate.
- 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.
- The title of the document, *e.g.*, “Brief of Appellant” or “Brief of Appellee,” etc.
- The words “Appeal from the District Court of _____ County, Honorable _____, Judge, District Court Case No. _____”.
- 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.
- 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).

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).

Any motion to exceed these page limitations 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(e). The appellate court hearing a matter may order briefs to be abbreviated in content or format. Rule 6.07(f).

The text must be in black type or print in a conventional-style font at least 12-point. Rule 6.07(a)(1) and (a)(2).

Text must be double-spaced except block quotations and footnotes, which may be single-spaced. The text must not exceed six inches by nine inches, excluding page numbers. Rule 6.07(a)(2).

The margins must be at least 1 ½ inches on the left, and at least 1 inch on the top, bottom and right. Rule 6.07(a)(3).

PRACTICE NOTE: Cheating on font size, margins, 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).

Footnotes should be avoided. If they are *absolutely necessary*, each footnote *must* begin on the same page as the text to which it relates. Rule 6.07(a)(4).

Binding

- If a brief exceeds 15 pages, at least 10 of the required 16 copies must be assembled with full-length spiral binders on the left side.
- The remaining copies (and briefs not exceeding 15 pages) may be fastened together by staples or brads. Rule 6.07(c).

Filing of E-brief on CD-ROM

- Parties and *amici curiae* may and are encouraged to submit briefs on a CD-ROM disk (an e-brief) in addition to

submitting the requisite number of printed briefs required by Rule 6.09.

- An e-brief must comply with the current technical specifications available from the clerk of the appellate courts or posted at www.kscourts.org. An e-brief must be identical in content and format — including page numbering — to the printed version, except that an e-brief also may provide electronic links (hyperlinks) to the complete text of any authority cited in the brief and to any document or other material included in the record on appeal.
- An e-brief must be accompanied by a statement that verifies the absence of computer viruses and describes the software used to ensure that the e-brief is virus-free.
- If an e-brief is filed under this subsection, not fewer than 5 CD-ROM disks of the brief must be filed, with proof of service of at least one disk on each party to the appeal.
- An e-brief, if filed, must accompany printed copies of the brief. Rule 6.07(h).

§ 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.

PRACTICE NOTE: Referring to a client by name can help humanize him or her. Be consistent. It is acceptable to refer to a party by full name the first time and by 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. 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 and Additional Authority—Rule 6.09

The party filing the brief must:

- Include a certificate of service as the last page of the brief.
- Serve two copies of the brief on all adverse parties united in interest.
- File 16 copies - simultaneously with service – with the clerk of the appellate courts. Rule 6.09(a).

Additional Authority

A party may file a letter advising the court of additional persuasive or controlling authority that has come to the party's attention since filing its last brief. 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 unless (1) 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, in which case the party must promptly advise the court, by letter, of the citation, or (2) 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 but before the court issues a decision. Rule 6.09(b)(1).

The body of 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. 6.09(b)(1)(C).

The party filing the letter must serve all adverse parties united in interest with a copy *and* file the letter and sixteen copies, with proof of service, with the clerk of the appellate courts. Rule 6.09(b)(2).

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 letter to the reference, brief statement, and 350-word limit under Rule 6.09(b)(1)(C); *and* serve the response on all adverse parties united in interest. Rule 6.09(b)(3).

§ 9.10 Brief in Criminal or Postconviction Case—Rule 6.10

In a criminal matter or postconviction case, each party filing a brief must serve the Attorney General of Kansas with a copy of the brief. No officer or agent of the State may file a brief by or on behalf of the State unless the approval of the Attorney General or a member of the Attorney General’s staff is endorsed on the brief. Rule 6.10.

PRACTICE NOTE: The Attorney General’s approval is not required for juvenile offender appeals.

§ 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 four main subheadings: Introduction, Standard of Review and Preservation of the Issue, Analysis, and Conclusion. The “Standard of Review and Preservation of the Issue” subsection might have two subsections: one addressing the appropriate standard of review and one addressing where, in the record on appeal, the issue was raised and ruled on or, in the alternative, why the court should consider it despite the fact that it was not raised below. 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*.

Include 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 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.

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.”

Address unfavorable authority.

Anticipate and refute potential counter-arguments. Garner at p. 410.

If 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.

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(b). 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. Fax file this letter under Rule 6.09(b) and serve by fax as well to assure your opponent has advance notice of any fresh authority to be raised 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(b). 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(b) 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 § 12.36, *infra*. 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.

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 (c). 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 § 12.36, *infra*.

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 the Discipline of Attorneys, which provide substantive conduct standards and procedural rules in attorney discipline cases, can be found in the Kansas Court Rules Annotated, beginning at Rule 201. In 1988, the Kansas 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 at Kansas Supreme Court Rule 226.

§ 11.2 Jurisdiction

Original actions before the Kansas 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. See Rule 205.

§ 11.4 Kansas Board for Discipline of Attorneys

The Kansas Board for Discipline of Attorneys consists of 20 attorneys appointed by the Supreme Court. The board members serve staggered 4-year terms. Board members may serve three consecutive 4-year terms. See Rule 204(c). 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 not inconsistent with the rules of the Supreme Court. See Rule 204(g). Accordingly, the board adopted the Internal Operating Rules of the Kansas Board for Discipline of Attorneys. 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 Kansas Court Rules Annotated following Rule 224 and can be found at the Supreme Court's website: www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys.

§ 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 citizens generally. Typically, the disciplinary administrator receives approximately 900 complaints every year. Of those complaints, approximately two-thirds are handled informally with correspondence to the complainant and the complained-of attorney. Approximately 300 complaints 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 or the appellate clerk's office for consumers of legal services and others thinking about filing a complaint. The information in the brochure can also be found at the disciplinary administrator's website: www.kscourts.org/rules-procedures-forms/attorney-discipline/complaints.asp.

In 2004, the disciplinary administrator developed a three-page complaint form. The complaint form is designed so that the complainant will provide all of the necessary basic information, *e.g.*, contact information, case number, court of jurisdiction. In addition to completing the complaint form, all 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, the appellate clerk's office, or by downloading it from the Disciplinary Administrator's website. See also § 12.37, *infra*.

§ 11.6 Disciplinary Investigations – Duties of the Bar and Judiciary

All members of the bar must assist the disciplinary administrator pursuant to Rule 207. The duty applies to judges as well as attorneys. The duty includes reporting violations as well as aiding the Supreme Court, the Kansas Board for Discipline of Attorneys, and the disciplinary administrator in investigations and prosecutions. One must be mindful that Rule 207 contains no exception for 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. See Rule 206. Violations by attorneys must be reported to the disciplinary administrator. Attorneys who find themselves charged with a felony crime have an affirmative duty to inform the disciplinary administrator in writing of the charge and the disposition. Rule 203(c)(1).

When an attorney has knowledge that a judge has violated the rules governing judicial conduct, which 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 Qualifications by contacting the clerk of the appellate courts.

The disciplinary administrator generally sends a letter to the attorney accused of misconduct and requests a response to the initial complaint. The disciplinary administrator provides the attorney 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 207; KRPC 8.1; *In re Lober*, 276 Kan. 633, 638-40, 78 P.3d 458 (2003); *In re Williamson*, 260 Kan. 568, 571, 918 P.2d 1302 (1996); 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 three investigators on staff at the disciplinary administrator's office. Finally, pursuant to 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 often becomes apparent that the lawyer is impaired because of an addiction or mental illness. In order to assist lawyers and protect the public, the Supreme Court, in 2002, created the Kansas Lawyers Assistance Program. See Rule 206. All records and information maintained by the director of the Kansas Lawyers Assistance Program are confidential and not subject to discovery or subpoena. The reporting requirements of Rule 207 and KRPC 8.3 do not apply to lawyers working for or in conjunction with the Kansas Lawyers Assistance Program. See Rule 206(k).

In addition to the Kansas Lawyers Assistance Program, some local bar associations also have their own lawyers assistance committees. 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

After the investigation is completed, the investigative report and associated materials are forwarded by the disciplinary administrator to the review committee. The review committee is charged with reviewing all disciplinary cases that have been docketed for investigation to determine if probable cause exists to believe an attorney has violated a rule of professional conduct or other Supreme Court rule.

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 Kansas Board for Discipline of Attorneys conduct a formal hearing. Rule 210(c). Throughout the formal disciplinary proceedings, the attorney accused of misconduct is referred to as the respondent. If the review committee determines that probable cause does not exist, the review committee will dismiss the case. Rule 210(c). The review committee also may dismiss the complaint if it determines that, while probable cause exists, clear and convincing evidence, which is the burden of proof in disciplinary proceedings, does not exist. The review committee dismisses approximately 65% of all docketed complaints.

All complaints filed with the disciplinary administrator's office remain confidential during the investigation.

PRACTICE NOTE: Confidentiality applies to all persons connected with the disciplinary process except the complainant and the respondent, who are never covered by the rule of confidentiality. See *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d 23 (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 222.

PRACTICE NOTE: Once the review committee has found probable cause to believe that a violation has occurred, the disciplinary administrator maintains a policy of open file review by all attorneys accused of misconduct, their attorneys, and any member of the public.

The disciplinary administrator or the respondent may request that the review committee reconsider a probable cause determination. The review committee may reconsider or deny reconsideration. If the review committee, 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: Once there has been a probable cause determination, it is a good idea to be represented by counsel in disciplinary proceedings. Many respondents are unfamiliar with the special procedural rules that apply and may also be less than objective in considering and presenting their positions.

§ 11.8 Temporary Suspension

The Supreme Court, the Kansas Board for Discipline of Attorneys, or the disciplinary administrator may file a motion requesting that the attorney's license be temporarily suspended pending the outcome of the disciplinary proceedings. See Rule 203(b). Typically, the disciplinary administrator reserves that remedy for cases where clients are in immediate risk of an attorney's continued misconduct.

An attorney who has been convicted of a felony is temporarily suspended automatically, pending the outcome of the disciplinary proceedings. See Rule 203(c)(4).

§ 11.9 Attorney Diversion Program

In 2001, the Supreme Court created the Attorney Diversion Program by adopting Rule 203(d). The diversion program is an alternative to traditional disciplinary procedures. It is designed for attorneys who have not previously been disciplined. Attorneys will be disqualified from

diversion if the conduct complained of involved “self-dealing, dishonesty, or a breach of fiduciary duty.” Rule 203(d)(1)(ii).

In determining whether an attorney should be allowed to participate in the diversion program, the review committee determines “whether the diversion process can reasonably be expected to cure, treat, educate, or alter the [attorney’s] behavior so as to minimize the risk of similar future misconduct.” Rule 203(d)(1)(ii).

The diversion agreement should include provisions uniquely designed to correct the misconduct. The agreement may include provisions, among others, 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 attorney’s participation in the diversion program is terminated and traditional disciplinary procedures resume. Rule 203(d)(2)(vii).

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. Rule 203(d)(2)(vi).

§ 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 appeal the review committee’s decision. Rule 210(d). If the attorney accepts the informal admonition, an appointment is scheduled between an attorney in the disciplinary administrator’s office and the attorney. During the meeting, the attorneys discuss the misconduct, discuss any remedial action already taken by the attorney, and discuss any remedial action that needs to be taken.

If the attorney appeals from the review committee’s decision that he or she be informally admonished, a hearing panel is appointed and the matter proceeds as described below. Rule 210(d) and 211.

§ 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 appeals from the review committee's decision that the attorney be informally admonished, a hearing panel is appointed. The chair of the Kansas Board for Discipline of Attorneys appoints the hearing panel. Hearing panels consist of two members of the Kansas Board for Discipline of Attorneys and one member from attorneys at large. See Rule 211(a). 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: Generally, 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.

After the hearing panel is appointed, the hearing is scheduled. Thereafter, an attorney from the disciplinary administrator's office files a formal complaint. The formal complaint must be sufficiently clear and specific as to inform the attorney of the alleged misconduct. See Rule 211(b). The disciplinary administrator is required to serve a copy of the formal complaint and notice of the hearing on the attorney, the attorney's counsel, and the complainant, giving at least 15 days' advance notice. The formal complaint and notice of hearing must be personally served on the respondent or sent by certified mail to the respondent's last registration address or last known office address. See Rule 215. The respondent is required to file a written answer to the formal complaint within 20 days of the filing of the formal complaint. See Rule 211(b).

PRACTICE NOTE: Disciplinary hearings are governed by the Rules of Evidence as set forth in the Code of Civil Procedure, K.S.A. 60-401 *et seq.* See Rules 211(d) and 224(b).

It is imperative that a respondent and his or her counsel review the Rules Relating to the Discipline of Attorneys, the Internal Operating Rules of the Kansas Board for Discipline of Attorneys, and the Kansas Rules of Professional Conduct to fully understand their rights and obligations.

PRACTICE NOTE: Internal Operating Rule D.1 requires all pre-hearing procedural matters, including requests to continue a hearing, be raised by written motion at least 10 days before the hearing.

All disciplinary proceedings before hearing panels and the Supreme Court are open to the public. At the hearing, witnesses are sworn and all proceedings are transcribed. See Rule 211(e).

The disciplinary administrator may introduce evidence that the respondent engaged in criminal activity or other actionable conduct. All criminal convictions and civil judgments that are based upon clear and convincing evidence are conclusive evidence of the commission of the crime or civil wrong. Additionally, participation in a diversion program for a criminal offense is deemed, for disciplinary purposes, a conviction. Other civil judgments, based upon a preponderance of the evidence, are prima facie evidence of misconduct, requiring the respondent to disprove the findings. See Rule 202.

Following the submission of evidence, the hearing panel files a report setting forth its findings, conclusions, and recommendations. “To warrant a finding of misconduct the charges must be established by clear and convincing evidence.” See Rule 211(f). The hearing panel’s report also includes any mitigating and aggravating circumstances relied upon. 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. The only issue before the hearing panel and the Supreme Court, in that situation, is the sanction to be imposed. See Rule 202. If the other jurisdiction’s decision is based on a preponderance of the evidence or on probable cause, the facts must be established in the Kansas proceeding. See *In re Tarantino*, 286 Kan. 254, 182 P.3d 1241 (2008).

The hearing panel may recommend disbarment, suspension for an indefinite period of time, suspension for a definite period of time, censure to be published in the *Kansas Reports*, censure not to be published in the

Kansas Reports, informal admonition by the Kansas Board for Discipline of Attorneys or by the disciplinary administrator, or any other form of discipline or conditions, including probation. See Rule 203(a) and § 11.12, *infra*.

If the hearing panel finds a violation of the rules and recommends that the respondent be informally admonished by the disciplinary administrator, the respondent may not appeal the decision. However, if the hearing panel recommends informal admonition or no discipline or if the hearing panel dismisses the complaint, the disciplinary administrator may appeal to the Supreme Court. See Rule 211(f).

If the hearing panel recommends that the attorney be disbarred, suspended, or censured, the case is filed with the clerk of the appellate courts and is docketed for oral argument before the Supreme Court. Until the attorney receives a copy of a docketing notice from the clerk of the appellate courts, nothing relating to the disciplinary proceeding should be filed with the clerk. But see § 11.8, *supra* (Temporary Suspension).

§ 11.12 Probation

In 2004, the Supreme Court adopted a rule that sets forth certain requirements regarding a respondent's request for probation. See Rule 211(g). If the respondent intends to request probation, respondent must provide "the hearing panel and the disciplinary administrator with a workable, substantial, and detailed plan of probation at least 10 days prior to the hearing on the Formal Complaint." Rule 211(g)(1). The hearing panel is prohibited from recommending that the respondent be placed on probation unless each of the following conditions is present:

- The respondent puts the plan of probation into effect prior to the hearing on the formal complaint;
- The misconduct can be corrected by probation; and
- Placing the respondent on probation is in the best interests of the legal profession and the citizens of the State of Kansas. See Rule 211(g)(3).

The probation rule also sets forth a specific procedure to be followed in the event the respondent fails to comply with the terms and conditions of probation. See Rule 211(g)(9) - (12).

§ 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, have employed the Standards as guidelines for imposing lawyer discipline in individual cases. The disciplinary administrator and the respondent may refer to the Standards when recommending an appropriate level of discipline at hearings. 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 model developed through the Standards requires the hearing panel, in making a recommendation regarding the imposition of discipline, or the Supreme Court, in imposing discipline, to 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?

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. 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 process;
- 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.

Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. 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 his or her cooperation during the hearing and his or her 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 dependence 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;
- Remoteness of prior offenses; and
- Any statement by the complainant expressing satisfaction with restitution and requesting no discipline.

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.

PRACTICE NOTE: Copies of the 67-page booklet *Standards for Imposing Lawyer Sanctions* are no longer available. However, an Adobe version of the Standards, without the commentary, can be found on the ABA's website at: www.abanet.org/cpr/regulation/standards_sanctions.pdf.

Recognizing the importance of consistency in imposing sanctions, the Supreme Court and the Kansas Board for Discipline of Attorneys have cited the Standards with approval in their decisions and reports, respectively. See *In re Ware*, 279 Kan. 884, 892-93, 112 P.3d 155 (2005); *In re Anderson*, 247 Kan. 208, 212, 795 P.2d 64 (1990); *In re Price*, 241 Kan. 836, 837, 739 P.2d 938 (1987). But see *In re Jones*, 252 Kan. 236, 843 P.2d 709 (1992), in which the Supreme Court expressly states that “[c]omparison of past sanctions imposed in disciplinary cases is of little guidance. Each case is evaluated individually in light of its particular facts and circumstances and in light of protecting the public.” *Jones*, 252 Kan. 236 at Syl. ¶ 1.

§ 11.14 Disabled Attorneys

When the Kansas Board for Discipline of Attorneys or the disciplinary administrator petitions the Supreme Court to determine whether an attorney is incapacitated from continuing to practice law because of a mental illness or because of an addiction to drugs or intoxicants, the Court may order that the attorney be examined by a qualified medical expert. If the Supreme Court concludes that the attorney is incapacitated, then the Supreme Court shall transfer the attorney to disabled inactive status. See Rule 220.

If, during a disciplinary proceeding, it is determined that the respondent is suffering from a disability because of a mental illness or because of an addiction to drugs or intoxicants, then the Supreme Court shall transfer the respondent to disabled inactive status, and the disciplinary proceedings are placed on hold until such time as the respondent is no longer disabled. See Rule 220(c). Respondents who have been transferred to disabled inactive status may not engage in the practice of law. See Rule 220(a).

After an attorney has been transferred to disabled inactive status or if it appears that for some other reason the affairs of an attorney's clients are being neglected, the chief judge of the judicial district in which the attorney practiced shall appoint an attorney to inventory the attorney's client files. With the approval of the judge, the appointed attorney may take such action as may be necessary to protect the interests of the attorney and the attorney's clients. See Rule 221(a).

PRACTICE NOTE: Disciplinary proceedings have been deemed judicial proceedings. As a result, all participants in disciplinary proceedings are granted judicial immunity and public official immunity. See Rule 223 and *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d 23 (1992).

§ 11.15 Proceedings Before the Supreme Court

At the time a case is docketed with the Supreme Court, the clerk of the appellate courts mails a copy of the final hearing report to the respondent. Within 20 days, the respondent must file exceptions to the report or all findings of fact are deemed admitted. If exceptions are filed, the clerk of the appellate courts provides a copy of the hearing transcript to the respondent. The respondent has 30 days from service of the transcript to file a brief. The disciplinary administrator has 30 days from the service of the respondent's brief to file a brief, and the respondent then has 14 days in which to file a reply brief. See Rule 212(e)(3).

All Supreme Court rules relating to civil appellate practice apply to original disciplinary proceedings. Failure of the respondent to file a brief in a timely manner is considered to be a waiver of the exceptions taken. When the filing of briefs is complete, the matter is set for oral arguments as in civil appeals.

When no exceptions are filed, the respondent is notified when to appear before the Supreme Court for oral argument. The respondent may appear with counsel and may be heard regarding the discipline to be imposed even if no exceptions are filed.

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 admitted into evidence, and the hearing panel's final hearing report. See Rule 212(b). 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.

§ 11.16 Scope of Review and Standard of Review

Appellate briefs must begin the 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).

The Supreme Court has stated, though, that while the report "is advisory only, it will be given the same dignity as a special verdict by a jury, or the findings of a trial court, and will be adopted where amply sustained by the evidence, or where it is not against the clear weight of the evidence, or where the evidence consisted of sharply conflicting testimony." *State v. Zeigler*, 217 Kan. 748, 755, 538 P.2d 643 (1975), quoted in *In re Carson*, 252 Kan. 399, 406, 845 P.2d 47 (1993).

§ 11.17 Oral Argument

Disciplinary matters are generally heard as the final cases on the Supreme Court's oral argument docket. The parties are 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. See § 12.36, *infra*. 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. The Supreme Court will direct counsel to limit their comments to the dispositive legal issues and the appropriate sanction.

Regardless of whether the disciplinary administrator files an appeal or the respondent files exceptions from the final hearing report, the disciplinary administrator always argues first and has the ultimate burden of proof. Additionally, the disciplinary administrator may reserve rebuttal time.

While oral argument before the Supreme Court is most effective when presented by competent counsel for the respondent, the Supreme Court does favor a statement by the respondent as to recognition of the nature of the violation and the appropriate level of discipline. The shortest and most succinct arguments are generally the most effective and well received by the Supreme Court. Most positions can be effectively stated in five to ten minutes.

PRACTICE NOTE: It is important to keep in mind that there are only three issues involved in disciplinary proceedings: the facts, the rule violations, and the sanctions. The hearing panel is the fact finder, and the findings have virtually never been set aside by the Supreme Court. Rarely, the Supreme Court has concluded that a particular violation found by the hearing panel has not been established as a matter of law. Thus, the respondent is well-advised to emphasize appropriate discipline to be imposed rather than to hope for a factual substitution by the Supreme Court.

The best opportunity the disciplinary administrator has to argue and emphasize the facts fully is when the respondent has opened the door by filing exceptions and a brief. Otherwise, the Supreme Court considers the cold recitation of the facts contained in the hearing panel's final hearing report and does not conduct a closer factual review.

As to the level of discipline to be imposed, the Supreme Court is not bound by the recommendation of the hearing panel. See Rule 212(f); *In re*

Gershater, 270 Kan. 620, 625, 17 P.3d 929 (2001); and *In re Jones*, 252 Kan. 236, 239, 843 P.2d 709 (1992). The sanction suggested by the hearing panel or requested by the disciplinary administrator is only a recommendation, and the issue remains open at the Supreme Court level. The most effective arguments requesting lighter sanctions include arguments which focus on the presence of compelling mitigating factors.

§ 11.18 Supreme Court Opinions

Discipline of suspension or disbarment is effective immediately upon the filing of the order with the clerk of the appellate courts unless otherwise ordered by the Supreme Court. The respondent may file a motion for rehearing or modification within 20 days. The filing of a motion for rehearing or modification does not stay the effect of the order until the Supreme Court rules otherwise. See Rule 212(g). No motion for rehearing or modification has ever been granted by the Supreme Court, as far as can be determined from the disciplinary records. On rare occasions, the Supreme Court has granted remand to the hearing panel for additional evidence and reconsideration of the final hearing report.

The final judgment of the Supreme Court cannot be attacked 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 with regard to disciplinary decisions of the Kansas Supreme Court.

Upon final resolution of each disciplinary complaint, the disciplinary administrator notifies the complainant, the respondent, the ethics and grievance committee assigned to investigate the complaint, and the investigator assigned to investigate the complaint of the outcome.

Typically, the Supreme Court's opinion imposing discipline on an attorney is published in the *Kansas Reports*. However, Rule 203(a)(3) 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 clerks of all other state and federal courts in which the respondent is known to be licensed. See Rule 224(e). Any discipline imposed by the Supreme Court is also reported to the National Discipline Data Bank for dissemination to other jurisdictions. Any pending disciplinary proceedings terminate upon disbarment of the respondent. See Rule 217(b)(1)(C).

Upon suspension or disbarment, the attorney must notify each client in writing of the attorney's inability to continue to represent or undertake further representation within 14 days of the order or opinion. Additionally, the attorney must inform his clients of their need to retain other counsel. The attorney must provide written notification to all courts and administrative bodies before whom there are pending proceedings, as well as opposing counsel, of his or her inability to proceed in the matter within 14 days of the order or opinion. Appropriate motions to withdraw as counsel of record must also be filed within 14 days of the order or opinion. See Rule 218(a).

Costs of the disciplinary proceedings, as certified by the disciplinary administrator, are assessed against the respondent when the respondent is found to have violated one or more rules. Costs include hearing panel fees and expenses, witness fees and expenses, some investigative expenses, transcript and deposition costs, and the docketing fee. If a disciplinary proceeding is dismissed at any stage of the proceeding, the respondent is not responsible for the costs of the action. See Rule 224(c).

§ 11.19 Additional Procedural Rules

Rule 224 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 (d) provides that any deviation from the rules is not a defense to the disciplinary proceedings absent actual prejudice to the respondent. In such cases, respondents must show actual prejudice by clear and convincing evidence.

§ 11.20 Voluntary Surrender of License to Practice Law

Pursuant to Rule 217(b), an attorney facing charges of ethical misconduct may voluntarily surrender his or her license to practice law. When an attorney voluntarily surrenders and the attorney is facing charges of ethical misconduct, the Supreme Court issues an order of disbarment and the attorney's name is stricken from the roll of licensed Kansas attorneys. See Rule 217(b) and *In re Rock*, 279 Kan. 257, 262-63, 105 P.3d 1290 (2005). Thereafter, the clerk of the appellate courts notifies other jurisdictions as in other cases of suspension or disbarment. See Rule 224(e).

An example of a surrender letter appears at § 12.38, *infra*. Along with the surrender letter, the attorney must send to the clerk of the appellate courts his or her original bar certificate and the most recent annual registration card. See Rule 217(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 217(c).

§ 11.21 Reinstatement

Five years after the date of disbarment and three years after the date of an indefinite suspension, 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 and eight copies of the petition, along with a \$1,250 filing fee. See Rule 219(a).

The petition must contain evidence that the attorney has been rehabilitated. 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 of time has elapsed since the discipline was imposed, considering the gravity of the misconduct. If insufficient time has elapsed or the gravity of the misconduct is overwhelming, the petition is dismissed. See Rule 219(d)(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 Kansas Board for Discipline of Attorneys. Rule 219(d)(1)(B).

The petitioner must establish all aspects of the reinstatement petition by clear and convincing evidence. The petitioner must be able to establish that the petitioner has paid the costs of the prior disciplinary proceedings and that all notifications required by Rule 218 were made in a timely

manner. Finally, the petitioner must establish that he or she has satisfied claims made by clients in any other disciplinary cases. Rule 219(d)(4)(K).

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. At that point, or if the report recommends approval of the petition, the matter stands submitted to the Supreme Court. No briefs or oral arguments are permitted unless requested by the Supreme Court. 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 219(f).

PRACTICE NOTE: As a statistical footnote, as far as can be determined from disciplinary records, since 1950, only one attorney disbarred in Kansas has been reinstated to the practice of law.

§ 11.22 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 as a result 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 a county or district attorney or to the disciplinary administrator as a condition precedent to filing a claim. See Rule 227 and Lawyers' Fund for Client Protection Rule 12.E. Further information on the Lawyers' Fund for Client Protection may be obtained by contacting the clerk of the appellate courts.

II. JUDICIAL DISCIPLINE

§ 11.23 History

The Kansas Commission on Judicial Qualifications was established by the Supreme Court of the State of Kansas on January 1, 1974. The Commission, created under the authority granted by Article III, Section 15 of the Kansas Constitution and in the exercise of the inherent powers of the Supreme Court, is charged with assisting the Supreme Court in the exercise of the court's 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. Each panel meets every other month, alternating with the other panel. See Rule 602(e). The full Commission meets in January and upon call.

§ 11.24 Jurisdiction/Governing Rules

The Commission's jurisdiction extends to approximately 500 judicial positions including justices of the Supreme Court, judges of the Court of Appeals, judges of the district courts, 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 operation of the Commission and standards of conduct are found in the Kansas Court Rules Annotated, Rules 602 through 627.

§ 11.25 Staff

The Clerk of the Supreme Court serves as secretary to the Commission under Rule 603. The secretary acts as custodian of the official files and records of the Commission and directs the daily operation of the office. A deputy clerk manages the operation of the office.

The Commission also retains an examiner, a member of the Kansas Bar who investigates complaints, presents evidence to the Commission, and participates in proceedings before the Supreme Court.

§ 11.26 Initiating a Complaint

The Commission is charged with conducting an investigation when it receives a complaint indicating that a judge has failed to comply with the Code of Judicial Conduct or has a disability that seriously interferes with the performance of judicial duties. See Rule 609.

Any person may file a complaint with the Commission. Initial inquiries may be made by telephone, by letter, by email, or by visiting the Appellate Clerk's Office personally. All who inquire are given a copy of the Supreme Court Rules Relating to Judicial Conduct, a brochure about the Commission, and a complaint form. For complaint form, see § 12.39, *infra*. The complainant is asked to set out the facts and to state specifically how the complainant believes the judge has violated the Code of Judicial Conduct. Very often, the opportunity to voice the grievance is sufficient, and the Commission never receives a formal complaint. In any given year, one-fourth to one-third of the initial inquiries will result in a complaint being filed.

The remainder of the complaints filed come from individuals already familiar with the Commission's work or who have learned about the Commission from another source. Use of the standard complaint form is encouraged but not mandatory. If the complaint received is of a general nature, the Commission's secretary will request further specifics.

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 Qualifications. See Kansas Court Personnel Rules 9.4(e).

The Disciplinary Administrator refers complaints to the Commission if investigation into attorney misconduct implicates a judge. There is a reciprocal sharing of information between the two offices.

§ 11.27 Commission Review and Investigation

When written complaints are received, all are mailed to a panel of the Commission for review at its next meeting. In the interim, if it appears that a response from the judge would be helpful to the Commission, the secretary may request the judge to submit a voluntary response. With that additional information, the panel may be able to consider a complaint and reach a decision at the same meeting.

All complaints are placed on the agenda, and the panel determines whether they will be docketed or remain undocketed. A docketed complaint is given a number and a case file is established.

Undocketed complaints are those that facially do not state a violation of the Code; no further investigation is required.

Appealable matters constitute the majority of the undocketed complaints 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.

Many complaints address the judge's demeanor, attitude, degree of attention, or alleged bias or prejudice. These are matters in which the secretary is likely to request a voluntary response from the judge and, based on that response, the panel in some instances determines there has clearly been no violation of the Code.

These undocketed complaints are dismissed with an appropriate letter to the complainant and to the judge, if the judge has been asked to respond to the complaint. Judges are not routinely notified of undocketed complaints.

Docketed complaints are those in which a panel feels that further investigation is warranted.

A panel has a number of investigative options once it docketed a complaint. Docketed complaints may be assigned to a subcommittee for review and report at the next meeting. These complaints may be referred to the Commission Examiner for investigation and report. Finally, the panel may ask for further information or records from the judge.

PRACTICE NOTE: A panel of the Commission, seeking further information from a judge, appreciates candor and will often consider in mitigation acceptance of responsibility and expression of regret.

Failure to cooperate in an investigation or use of dilatory tactics may be considered as a separate Code violation. See Rule 609.

§ 11.28 Disposition of Docketed Complaints

After investigation of docketed complaints, the panel may choose a course of action short of filing formal proceedings.

A complaint may be dismissed after investigation. On docketing, there appeared to be some merit to the complaint, but after further investigation the complaint is found to be without merit.

A complaint may be dismissed after investigation with a letter of informal advice. The panel finds no violation in the instant complaint, but the judge is advised to avoid such situations in the future. Such letters have been issued when alcohol consumption appears problematic or when there is a strong suggestion of inappropriate personal comment. See Rule 610.

Letters of caution are issued when some infraction of the Code has occurred, but the infraction does not involve a significant violation or course of conduct sufficient to warrant further proceedings. Such letters may, for example, address isolated instances of delay, *ex parte* communication, or discourtesy to litigants or counsel. See Rule 610.

A cease and desist order may be issued when the panel finds a factually undisputed violation of the Code that represents a significant violation or violations representing a continuing course of conduct. Cease and desist orders may be either private or public. See Rule 611. The judge must agree to comply by accepting the order, or formal proceedings will be instituted. Examples of conduct resulting in cease and desist orders

include: activity on behalf of a political candidate, intervention with a fellow judge on behalf of family or friends, or *ex parte* communications.

Upon disposition of any docketed complaint, the judge and the complainant are notified of the Commission's action. Other interested persons may be notified within the Commission's discretion.

§ 11.29 Confidentiality

The panel assigned a complaint conducts investigations, 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 607(a). One exception to the confidentiality rule exists if the panel gives written notice to the judge, prior to the judge's acceptance of a cease and desist order, that the order will be made public. Rule 611(a).

Other narrowly delineated exceptions to the rule of confidentiality exist. Rule 607(d)(3) provides a specific exception to the rule of confidentiality with regard to any information that the Commission or a panel considers relevant to current or future criminal prosecutions or ouster proceedings against a judge. Rule 607 further permits a waiver of confidentiality, in the Commission's or panel's discretion, to the Disciplinary Administrator, the Judges Assistance Committee, and to the Supreme Court Nominating Commission, the District Judicial Nominating Commissions, and the Governor with regard to nominees for judicial appointments.

The rule of confidentiality does not apply to the complainant or to the respondent. See Rule 607(c).

§ 11.30 Formal Proceedings

During the investigation stage prior to the filing of the notice of formal proceedings, the judge is advised by letter that an investigation is underway. The judge then has the opportunity to present information to the examiner. Rule 609.

PRACTICE NOTE: A judge would be well-advised to be represented by counsel before responding to a 609 letter, which represents a step in the investigation beyond the panel's initial request for response.

If a panel institutes formal proceedings, specific charges stated in ordinary and concise language are submitted to the judge. The judge has an opportunity to answer, and a hearing date is set. Rule 611(b); Rule 613. The hearing on that notice of formal proceedings is conducted by the other panel, which has no knowledge of the investigation or prior deliberations.

PRACTICE NOTE: A prehearing conference may be held to further define issues or to facilitate stipulations. Scheduling issues such as dates for submission of witness and exhibit lists as well as a date of hearing may be discussed.

The hearing on a notice of formal proceedings is a public hearing on the record. 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. 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 Commission Examiner presents the case in support of the charges in the notice of formal proceedings. At least five members of the panel must be present when evidence is introduced. A vote of five 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 620(a); *In re Rome*, 218 Kan. 198, Syl. ¶ 9, 542 P.2d 676 (1975).

If the panel finds the charges proven, it can admonish the judge, issue an order of cease and desist, or recommend to the Supreme Court the discipline or compulsory retirement of the judge. Discipline means public censure, suspension, or removal from office. Rule 620.

In all proceedings resulting in a recommendation to the Supreme Court for discipline or compulsory retirement, the panel is required to make written findings of fact, conclusions of law, and recommendations that shall be filed and docketed by the Clerk of the Supreme Court as a case. Rule 622. The respondent judge then has the opportunity to file written exceptions to the panel's report within 20 days after receipt of the clerk's citation directing a response. A judge who does not wish to

file exceptions may reserve the right to address the Supreme Court with respect to disposition of the case. Rule 623.

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 respondent appears in person and, at respondent's discretion, by counsel. 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. In either case, the Supreme Court may adopt, amend, or reject the recommendations of the panel. Rule 623.

CHAPTER 12

Forms

§ 12.1 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],)	
)	
Plaintiff,)	
)	
v.	)	[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, which arises 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 filed suit against 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 filed a motion 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. Plaintiff alleged that K.S.A. 60-206(a) controlled and that she had filed her petition within the statute of limitations.

Following oral argument, the Court on [Insert Date], entered an Order denying the defendant'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 the findings required by K.S.A. 60-2102(b) and stayed the proceedings until such time as the Kansas Court of Appeals should accept or deny an interlocutory appeal filed in the matter. 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 the plaintiff's claims were barred by the statute of limitations under K.S.A. 60-513 and, therefore, an immediate appeal may materially advance the ultimate termination of the litigation.

Attorney's Signature

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 United States mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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 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.

A similar format should be adopted for the civil interlocutory appeal under Rule 4.01A.

§ 12.2 Petition for Judicial Review of an Order of the Court 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 COTA Docket Number]
 Ad Valorem Taxation.)

PETITION FOR JUDICIAL REVIEW OF AN ORDER OF THE COURT OF TAX APPEALS

XYZ Corporation asks the Court of Appeals for judicial review of all adverse rulings made by the Court of Tax Appeals in that Court's order, dated [Insert Date], and that Court'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.*

Petitioner requested ad valorem taxation exemption for certain real property under K.S.A. 79-201b Sixth. Petitioner 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 Court of Tax Appeals issued an order in which it 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 the petitioner was receiving a benefit in the form of Internal Revenue Code Section 42 low income housing tax credits. Petitioner filed a motion for reconsideration on [Insert Date]. The Court of Tax

Appeals issued an order on [Insert Date], denying the motion for reconsideration. The Court 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 Court 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 Court of Tax Appeals, the petition for reconsideration, and the Court of Tax Appeals' 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 Court 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 Court 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

PRACTICE NOTE: See § 12.4, *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.

§ 12.3 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 entered an order dated [Insert date] in which the Board 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 entered an order dated [Insert date] granting claimant benefits and ruling 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 in an order dated [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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

PRACTICE NOTE: See § 12.4, *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.

§ 12.4 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
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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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 Court 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.

§ 12.5 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 of 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

Appellate review is limited to the rulings specified in the notice of appeal. See § 7.1, *supra*.

§ 12.6 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-Appellants,)	
)	
vs.	)	[Insert District Court Case Number]
)	
[Insert Name],)	
)	
Defendant-Appellee.)	
_____)	

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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

PRACTICE NOTE: Appellate review is limited to the rulings specified in the notice of appeal. See § 7.1, *supra*.

§ 12.7 Notice of Cross-Appeal

IN THE [Insert Number] JUDICIAL DISTRICT
DISTRICT COURT OF [Insert Name] COUNTY, KANSAS
(CRIMINAL)(CIVIL) DEPARTMENT

[Insert Name],)	
)	
Plaintiffs-Appellants,)	
)	
vs.	)	[Insert District Court Case Number]
)	
[Insert Name],)	
)	
Defendant-Appellee.)	
_____)	

NOTICE OF CROSS-APPEAL

[Name the cross-appealing party or parties] cross-appeals 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

§ 12.8 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: () _____-_____
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: 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.

§ 12.9 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 the following offense(s): Aggravated robbery, K.S.A. 21-3427. Defendant was sentenced as follows: 61 months 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

§ 12.10 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 or judgment form filed: _____
- 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

 Attorney's Name (typed or printed)
 Kansas Attorney Registration Number
 Address
 Telephone Number
 Fax Number
 E-mail Address
 Name of the Party Represented
 Date: _____

ATTACH PROOF OF SERVICE

(List all parties served, including name, address, and who they represent.)

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)
Election Contest	Wrongful Death
Eminent Domain	Zoning
Employment	Other (please specify): _____

PRACTICE NOTE: Docketing statement forms are available in a fillable pdf format in the online version of this handbook at www.kscourts.org.

§ 12.11 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): _____
 Party Filing Cross-Appeal: _____
 Party or Parties who will Appear as
 Cross-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

Attorney's Name (typed or printed)
 Kansas Attorney Registration Number
 Address
 Telephone Number
 Fax Number
 E-mail Address
 Name of the Party Represented
 Date: _____

ATTACH PROOF OF SERVICE

(List all parties served, including name, address, and who they represent.)

PRACTICE NOTE: Docketing statement forms are available in a fillable pdf format in the online version of this handbook at www.kscourts.org.

§ 12.12 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): _____
 Party Filing Appeal: _____

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

Attorney’s Name (typed or printed)
 Kansas Attorney Registration Number
 Address
 Telephone Number
 Fax Number
 E-mail Address
 Name of the Party Represented
 Date: _____

ATTACH PROOF OF SERVICE

(List all parties served, including name, address, and who they represent.)

PRACTICE NOTE: Docketing statement forms are available in a fillable pdf format in the online version of this handbook at www.kscourts.org.

§ 12.13 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

Attorney's Name (typed or printed)
 Kansas Attorney Registration Number
 Address

Telephone Number

Fax Number

E-mail Address

Name of the Party Represented

Date: _____

ATTACH PROOF OF SERVICE

(List all parties served, including name, address, and who they represent.)

§ 12.14 Motion to Docket Appeal Out of Time

IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],)	
)	
Plaintiffs-Appellants,)	
)	
vs.	)	[Insert District Court Case Number]
)	
[Insert Name],)	
)	
Defendant-Appellee.)	
_____)	

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 case. This is an 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 21 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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 for late docketing. Failure to docket on time because of “excusable neglect” is an insufficient reason. If counsel believes excusable neglect exists, the basis for that belief should be stated in the motion.

**§ 12.15 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 attached.

Attorney's Signature

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

**§ 12.16 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.

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. Local counsel [Insert name of Kansas attorney], Supreme Court registration [Insert number], conducts business from [Insert address and phone number].
3. My residential address is [Insert residential address], my business address is [Insert business address], my business phone number is [Insert business phone], and my e-mail address is [Insert 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].

I swear or affirm that all of this information is true and correct to the best of my knowledge. 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.

Attorney's Signature

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

§ 12.17 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 is now representing [name of client as well as party designation] as counsel of record in this appeal.

Attorney's Signature

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

§ 12.18 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.
4. Counsel requests 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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. A motion to withdraw generally will not be granted in a criminal case unless another attorney has entered an appearance.

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 that type of withdrawal.

§ 12.19 Request for Transcript

**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
	)	and Division Number, if applicable]
)	
[Insert Name],)	
)	
Defendant-Appellant.)	
<hr style="border: 0.5px solid black;"/>		

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

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 United States Mail, postage prepaid, 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.]

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. 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).

§ 12.20 Request for Additions to the Record on Appeal

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)(3).
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

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 United States Mail, postage prepaid, 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.]

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.

§ 12.21 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] seeks 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

§ 12.22 Motion to Transfer to Supreme Court

IN THE SUPREME COURT OF THE STATE OF KANSAS

[Insert Name],)	
)	
Plaintiffs-Appellants,)	
)	
vs.	)	[Insert Appellate Court Case Number]
)	
[Insert Name],)	
)	
Defendants-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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

§ 12.23 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 4, 2013. 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.]

Because of this, the appellant asks the court for an extension of time of 30 days to file the brief.

Attorney's Signature

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

PRACTICE NOTE: A motion for extension of time will be held seven business days plus three calendar days by the clerk of the appellate courts for response from opposing counsel. Rule 5.01(c). A motion which requests twenty days or less will be acted upon immediately. See Rule 5.01(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. There will never be an extension longer than 30 days. 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.

§ 12.24 Motion to Immediately File Brief Out of Time

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 BRIEF OUT OF TIME

1. *Background.* The appellee's brief was due on July 4, 2013, 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, the printer did not complete the appellee's brief as requested and appellee has just received all of the copies needed for filing.]

Because of this, appellee asks for permission to file the brief immediately.

Attorney's Signature

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 Brief Out of Time was sent by United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

PRACTICE NOTE: This motion accompanies the completed brief. If the brief is not being submitted with the motion, the motion should be titled "Motion to File Brief Out of Time." The brief can then be submitted if the court grants the motion.

§ 12.25 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 4, 2013.
2. *Authority.* Supreme Court Rule 6.07(e).
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.

Therefore, the Appellant asks the Court for permission to file a 60-page brief.

Attorney's Signature

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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(e).

§ 12.26 Motion to Correct 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 CORRECT BRIEF

Appellee asks to correct typographical and citation errors in her brief.

1. *Background.* Appellee timely filed a brief on [Insert Date]. This case has not yet been set for oral argument.
2. *Reasons.* After the brief was filed, the Appellee discovered two incorrect case citations and the misspelling of two witness names in the brief. There is no need to withdraw the briefs as they can be easily corrected by a representative of the Appellee coming to the office of the clerk of the appellate courts and making the corrections by hand.

Therefore, the appellee seeks permission to correct the brief.

Attorney's Signature

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 Correct Brief was sent by United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

§ 12.27 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 briefs containing errors and replace them with briefs that have no errors.

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 typographical errors in two case citations on pages 2 and 14 of the brief. In addition, counsel discovered that the printer improperly collated the pages in the brief, specifically pages 7 through 27 in every copy of the brief are in random, nonsequential order. Neither the printer nor appellant's counsel discovered this mistake until the original copies had been filed with the clerk of the appellate courts.
3. These errors cannot be corrected in the office of the clerk of the appellate courts. Instead, an entirely new set of briefs, with corrections and proper collation, have been prepared for substitution for the briefs now filed with the Court.

Therefore, appellant asks that she be permitted to substitute corrected briefs.

Attorney's Signature

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

§ 12.28 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

§ 12.29 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

 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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

PRACTICE NOTE: 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.

§ 12.30 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

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

§ 12.31 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.

For these reasons, the Kansas Bankers Association makes this application to file a friend of the court brief.

Attorney's Signature

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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

§ 12.32 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

 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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

§ 12.33 Motion for Modification or Rehearing

**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 MODIFICATION OR REHEARING

The appellee seeks a modification of this court's holding or a rehearing 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

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 Modification or Rehearing was sent by United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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.

§ 12.34 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 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

 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 United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

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 also award attorney fees for the appeal in a case in which the district court had authority to award attorney fees. Costs for preparation of unnecessary transcripts may be recovered under Rule 7.07(d).

§ 12.35 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. Refer to the sample brief at § 12.36, *infra*. If you have questions, call the appellate clerk’s office at 785.296.3229 or email appellateclerk@kscourts.org.

- Is the cover page of the brief the correct color? Rule 6.07(b)(1).
- Does the following information appear on the cover of the brief? Rule 6.07(b)(2).

The appellate court docket number.

The words IN THE COURT OF APPEALS OF THE STATE OF KANSAS or IN THE SUPREME COURT OF THE STATE OF KANSAS.

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.

The title of the document, *e.g.*, “Brief of Appellant” or “Brief of Appellee,” etc.

The words “Appeal from the District Court of _____ County, Honorable _____, Judge, District Court Case No. _____”.

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.

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- Does the body of the brief appear in black type or print on 8½” by 11” white bond paper? Rule 6.07(a)(1).
- 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)(2).
- Is the text double-spaced, except block quotations and footnotes? Rule 6.07(a)(2).
- Is the left margin not less than 1½ inches and the top, bottom and right margins not less than 1 inch? Rule 6.07(a)(3).
- Is only one side of the paper used? Rule 6.07(a)(5).
- If the brief exceeds 15 pages in length, are at least 10 of the required 16 copies assembled with full length spiral binders on the left side? Rule 6.07(c).
- 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(d).
- 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 under the code for care of children, a juvenile offender, a party to an adoption proceeding, 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? Rule 6.02(b).
- Is there a certificate of service included as the last page of the brief? Rule 6.09(a)(2).
- Have the brief and certificate of service been signed?
- Have 2 copies of every brief been served on all adverse parties united in interest? Rule 6.09(a)(1).
- Have 16 total copies of the brief been filed with the clerk of the appellate courts? Rule 6.09(a)(3).

§ 12.36 Sample Brief

No. 11-000000-A

IN THE
[COURT OF APPEALS]
[SUPREME COURT] OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

JOHN DOE
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of xxx County, Kansas
Honorable xxx, Judge
District Court Case No. xx CR xxx

Attorney Name, Bar Number
Name of Firm or Agency
Address
City, State ZIP
Telephone Number
Email Address
Attorney for the Appellant

Oral Argument: 15 minutes

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Nature of the Case

A jury found John Doe guilty of two counts of aggravated robbery, a severity level three person felony; one count of aggravated battery, a severity level four person felony; and one count of aggravated assault, a severity level seven person felony. The district court imposed a controlling 112-month prison sentence, and Mr. Doe appealed.

Statement of Issues

- Issue I:** The State failed to present sufficient evidence to convict Mr. Doe of aggravated robbery because the taking was complete before the force or threat of bodily harm occurred.
- Issue II:** Mr. Doe's two convictions for aggravated robbery are multiplicitous, and violate the Fifth and Fourteenth Amendments to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.
- Issue III:** Because the district court failed to ask the jurors if the verdicts the district court recited were, in fact, the jurors' verdicts, this Court must vacate Mr. Doe's convictions for aggravated battery and aggravated assault.

Statement of Facts

Based on the events of June 14, 2009, the State charged John Doe with two counts of aggravated robbery and one count each of aggravated battery, aggravated assault, and possession of drug paraphernalia. (R. I, 15-16).

At trial, Mack Jones, the Store Manager at a xxx store in xxx, Kansas, testified that Mr. Doe had entered his store at approximately 10:30 P.M. on June 14, 2009. (R. XIII, 341-42). Due to Mr. Doe's suspicious behavior, Jones began to watch Mr. Doe. (R. XIII, 343). Eventually, Jones saw Mr. Doe "place a magazine down the front of his pants," and then "walk through the front of the store past the checkstands and out the door." (R. XIII, 344). After Mr. Doe placed the magazine in his pants, but before he left the store, Jones called customer service and "told them to have" Mary Drew, another store employee, "meet [him]

at the front of the store” so they could “stop [Mr. Doe] from leaving the store and ask him to come back inside.” (R. XIII, 344-45). Jones and Drew then confronted Mr. Doe outside the store, and asked him “to come back into the store to talk about merchandise that was not paid for.” (R. XIII, 345-46). Mr. Doe “turned around,” and acted as if he were returning to the store, but then stabbed Jones in the stomach with a knife, pointed the knife at Drew, and fled the parking lot. (R. XIII, 329-30, 333-34, 348-49).

At no point during his testimony did Jones mention what had ultimately happened to the magazine, which had a cover price of \$5.99. (R. XII, 152, 192, R. XIII, 325; State’s Exhibit 5). According to Drew’s testimony, however, Mr. Doe had handed the magazine to Jones before the struggle, and the magazine had then “flown” out of Jones’ hands and back into the store, where police found it when they arrived. (R. XX, 149).

After the State rested its case, defense counsel moved for a directed verdict, arguing that, because the use of force or threat of bodily harm to Jones and Drew had not occurred until after Mr. Doe had already taken, and, in fact, returned the magazine, the State had presented insufficient evidence to allow a rational factfinder to convict him of either of the counts of aggravated robbery. (R. XIII, 366). The district court ruled that it was “up to the jury to determine the fact[s],” and overruled defense counsel’s motion. (R. XIII, 374). Defense counsel also argued that the evidence could only support one conviction for aggravated robbery, because there was “only one owner involved, that being the store, not the employees.” (R. XIII, 375). The State acknowledged that the counts might be “multiplicitous for sentencing purposes,” but argued that the evidence supported two convictions based on the two victims. (R. XIII, 376). The district court “adopt[ed] the argument of the State,” but noted that, “[f]or sentencing purposes, it may be multiplicitous.” (R. XIII, 377).

The jury ultimately found Mr. Doe guilty of two counts of aggravated robbery and one count each of aggravated battery and aggravated assault. Neither party requested the district court to poll the jury; nor did the district court ask the jury if the verdicts the district

court had read were, in fact, the jury's verdicts. (R. XIII, 460). Based on Mr. Doe's criminal history score of "I," the district court imposed a controlling 112-month prison sentence. (R. XIV, 28). Mr. Doe appealed. (R. I, 68).

Arguments and Authorities

Issue I: The State failed to present sufficient evidence to convict Mr. Doe of aggravated robbery because the taking was complete before the force or threat of bodily harm occurred.

Standards of Review and Preservation of the Issue

"[W]hen sufficiency of the evidence is challenged following conviction in a criminal case," this Court asks "whether, after reviewing all the evidence, viewed in a light most favorable to the prosecution," this Court is "convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Martinez*, 290 Kan. 992, 1003, 236 P.3d 481 (2010) (citing *State v. Gant*, 288 Kan. 76, 83, 201 P.3d 673 [2009]). To the extent this issue involves a question of statutory interpretation, however, this Court has unlimited review. *State v. Henning*, 289 Kan. 136, 139, 209 P.3d 711 (2009).

Defense counsel raised this argument below. (R. XIII, 366). Moreover, "[t]here is no requirement that a criminal defendant challenge the sufficiency of the evidence before the trial court in order to preserve it for appeal." *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221 (2008).

Analysis

In order to prove that Mr. Doe was guilty of the aggravated robbery of Jones and Drew, the State had to prove, among other things, that any taking "was by force or by threat of bodily harm." (R. 7, 8, 16; R. XIII, 425). K.S.A. 21-3427; P.I.K. Crim. 3d 56.31. In other words, the State not only had to prove that a taking occurred and that, at some point, Mr. Doe used force or threat of bodily harm; it also had to prove that Mr. Doe took the property *by* force or threat of bodily harm, *i.e.*, that the force or threat of bodily harm was a "causative factor" of the taking. *See, State v. Finch*, 223 Kan. 398, 402-03, 573 P.2d 1048 (1978) (suggesting the term "by" is "synonymous with" the term "by means of.")

In order to prove that Mr. Doe took the magazine from Drew and Jones *by force* or threat of bodily harm, therefore, the State had to prove that Mr. Doe used that force or threat of bodily harm as a *means* of taking the property. Such an interpretation is consistent with the plain language of the statute. Even if this Court disagrees, however, it must at least acknowledge that the language of the statute is ambiguous, and interpret that ambiguity strictly in favor of Mr. Doe. *State v. Knight*, 44 Kan. App. 2d 666, 681, 241 P.3d 120 (2010).

Such an interpretation of K.S.A. 21-3427 is also consistent with our Supreme Court's holding in *State v. Aldershof*, 220 Kan. 798, Syl. ¶ 1, 556 P.2d 371 (1976). In *Aldershof*, two sisters were sitting in a booth in a drinking establishment. One of the women got up to use the restroom and left her sister to watch over her purse, which was sitting on the table. While the woman was in the restroom, the defendant came to the booth and took both women's purses: one from its position on the table, and the other from the remaining woman's lap. She immediately ran after him, followed him to the parking lot, and managed to grab him on the back of his shirt. He then turned and struck her in the eye with his hand. A jury convicted him of robbery. *Aldershof*, 220 Kan. at 799.

On appeal, the defendant argued that, because "the undisputed evidence show[ed] that no force or threat was used in the taking of the purses," and that "any force or violence in the case came after the purses had already been stolen," he was, at most, guilty of "theft, not robbery." *Aldershof*, 220 Kan. at 799-800. Our Supreme Court recognized that "the general rule is that the violence or intimidation must precede or be concomitant or contemporaneous with the taking." *Aldershof*, 220 Kan. at 800. After adopting this general rule, the Court stated that the appropriate test to determine whether one is guilty of robbery or merely theft is "whether or not the taking of the property has been completed at the time the force or threat is used by the defendant." *Aldershof*, 220 Kan. at 803. Applying this test to the facts before it, the Court held that the taking of the purses was complete when the defendant "snatched the purses and left the premises of the tavern" because, at that point, he had "obtained control over the purses with the intent to deprive the owner permanently

of their possession,” thereby committing the crime of theft. The Court concluded that, “[w]hen the thief left the tavern with the purses under his control, in our judgment the taking had been completed and any violence thereafter used by the thief in an attempt to prevent the owner from regaining possession of the same could not convert the theft into a robbery, although it may well have been the basis for a charge of battery under K.S.A. 21-3412.” *Aldershof*, 220 Kan. at 803-04.

Approximately seven years later, the Court considered a slightly different factual situation in *State v. Long*, 234 Kan. 580, 675 P.2d 832 (1984), rev’d on other grounds *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985). In *Long*, the victim and her husband sold milk on an honor system; patrons took milk from a refrigerator in a sale building and paid by placing their money in a locked, slotted money box mounted on a wall. *Long*, 234 Kan. at 581. On the evening of the theft, the victim entered the sale building to find “the defendant crouched in front of the money box. It had been pried open. The defendant had his hands in his pockets,” and there was money on the floor beneath the box. *Long*, 234 Kan. at 581 (quoting *Long*, 8 Kan. App. 2d 733). The victim stood in front of the door to prevent the defendant from leaving, but he shoved her out of the way and drove off in his car. *Long*, 234 Kan. at 581. A jury found the defendant guilty of robbery. *Long*, 234 Kan. at 580.

On appeal, the defendant argued that he had only used force “after the taking to effect his escape,” and was not, therefore, guilty of robbery. *Long*, 234 Kan. at 582. The Court cited the *Aldershof* test, but noted that prior Kansas cases were not “in accord with one another,” as some of them “imply a taking is not complete until the property has been removed from the premises of the owner,” while “others indicate the taking is accomplished at the moment the thief, with the intent to steal, removes the property from its customary location.” *Long*, 234 Kan. at 583-85 (citing *Aldershof*, 220 Kan. at 803-04; *State v. Miller*, 53 Kan. 324, 36 P. 751 [1894]).

In *Miller*, the defendant placed his payment on the counter. The victim put the payment in his money drawer, removed the appropriate change from the drawer, and placed

the change on the counter. The defendant then reached over the counter, and grabbed the money of the victim in the drawer. The victim caught the defendant's hand, and when the victim refused to let go, the defendant cut the victim's hand. He then ran out of the store. *Miller*, 53 Kan. at 325. On appeal, our Supreme Court affirmed the defendant's conviction for robbery, noting that it could not say that the "defendant had obtained complete possession of the money before using violence to [the victim]. It does not even appear that he had withdrawn his hand from the drawer" at the time the violence occurred. *Miller*, 53 Kan. at 327.

The *Long* Court compared the facts before it to those in *Miller*, and stated that the only difference was that, unlike the defendant in *Miller*, the appellant had "managed to place most of the money in his pocket before being confronted by the victim, whereas in *Miller* the defendant was stopped by the victim after he had grabbed the money from the drawer, but before he could secrete it on his person." The Court then "conclude[ed] that a thief does not obtain the complete, independent and absolute possession and control of money or property adverse to the rights of the owner where the taking is immediately resisted by the owner before the thief can remove it from the premises or from the owner's presence." *Long*, 234 Kan. at 586.

Eight years after deciding *Long*, our Supreme Court cited *Miller*, *Long*, and *Aldershof* in *State v. Dean*, 250 Kan. 257, 824 P.2d 978 (1992). In *Dean*, the victim pumped three dollars worth of gasoline into the defendant's car, and then requested payment. Instead of paying for the gasoline, however, the defendant stated, "I don't have any money. How about this." As he spoke these words, he raised his right arm underneath a jacket as if he had a weapon. The victim, believing he was about to be shot, jumped away from the car, and the defendant drove away from the gas station. *Dean*, 250 Kan. at 258. The State charged the defendant with aggravated robbery. The defendant moved to dismiss the charge, arguing that the facts did not support a charge of robbery. The district court agreed and dismissed the case, and the State appealed. *Dean*, 250 Kan. at 258. On appeal, our Supreme Court determined that

the facts before it were most similar to those in *Long* because the defendant in *Dean* had not left the premises or even attempted to drive away before threatening the victim. Because the defendant made his threat to prevent resistance to the taking and not as a means of escape, the Court reversed the district court's dismissal of the aggravated robbery charge.

Finally, a little over six years after deciding *Dean*, our Supreme Court released its opinion in *State v. Bateson*, 266 Kan. 238, 970 P.2d 1000 (1998). In *Bateson*, a woman entered her office to find the defendant bent over her desk and ninety-five dollars in cash missing from her purse. When she immediately demanded its return, the defendant left the office and walked quickly up the stairs. The victim followed directly behind him. As she attempted to open the door, however, it came back rapidly and hit her, presumably because the defendant had intentionally slammed it in her face. *Bateson*, 266 Kan at 238-39. On appeal, the defendant challenged the sufficiency of the evidence underlying his conviction for aggravated robbery, arguing that “[a]ny force was subsequent to taking of the property.” *Bateson*, 266 Kan. at 240. Our Supreme Court agreed, stating that the defendant had obtained possession of the property by stealth, and that the “defendant had control of the property when he left [the victim’s] office.” *Bateson*, 266 Kan. at 245, 247.

Here, Jones witnessed Mr. Doe conceal a magazine in his pants. (R. XIII, 344). Instead of immediately approaching Mr. Doe and questioning him or trying to detain him, Jones instead called for backup, and directed Drew to meet him at the front of the store so they could stop Mr. Doe from leaving the store and ask him to come back inside. (R. XIII, 344-45). Jones and Drew then confronted Mr. Doe *outside* the store, where Mr. Doe relinquished the magazine to Jones. (R. XIII, 328, 334, 336, 345-46). When the police arrived, they found the magazine inside the foyer area of the store. (R. XII, 152).

Our Supreme Court has previously held that a defendant completes the taking of property required under our theft statute when he or she “conceals” merchandise “on his [or her] person” with the intent to permanently deprive the owner of that property. *State v. Saylor*, 228 Kan. 498, 500-01, 618 P.2d 1166 (1980). In the present case, then, the taking

was complete when Mr. Doe concealed the magazine on his person. *Saylor*, 228 Kan. at 500-01. Moreover, Mr. Doe walked out of the building with the magazine before anyone attempted to stop him. Like the victim in *Aldershof*, who did not confront the defendant until he had already left the bar, Jones and Drew did not confront Mr. Doe until after he had already walked out of the store. In fact, if anything, the facts in the present case are even less indicative of a robbery than were the facts in *Aldershof*. It appears that, in *Aldershof*, the victim pursued the defendant *immediately* after he took the purses, and that she caught up with him as soon as she could. *Aldershof*, 220 Kan. at 799. In the present case, however, Jones did not *immediately* confront Mr. Doe, and he made no effort to keep him from leaving the store. Instead, he called for backup, and instructed Drew to meet him at the front of the store so they could stop Mr. Doe from leaving the store and *ask him to come back inside*. (R. XIII, 344-45). (Italics added). While “it may be wise to wait to apprehend a thief who has not used force or violence until after he has left a populated store,” one who does so “would be apprehending a thief who committed larceny, not a robber.” *People v. Randolph*, 466 Mich. 532, 548, n. 18, 648 N.W. 2d 164 (2002).

And, even if Jones and Drew *had* immediately pursued Mr. Doe, rather than trying to physically retrieve the magazine, physically detain Mr. Roberson, or at least physically block his exit, such facts would not necessarily elevate Mr. Doe’s theft to robbery. In *Bateson*, the victim immediately demanded her money back from the defendant and proceeded to follow six to eight feet behind him as he exited her office and made his way out of the building. *Bateson*, 266 Kan. at 246. Nevertheless, because the defendant made no threats and used no force before exiting the office, and instead simply walked rapidly away, our Supreme Court held that no robbery had occurred. *Bateson*, 266 Kan. at 245. Similarly, Mr. Doe made no threats and used no force before walking out of the store with the magazine in his possession. Thus, as in *Bateson*, no robbery occurred.

The facts in the present case also differ significantly from those in *Miller*, *Long*, and *Dean*. First, unlike the defendant in *Miller*, who had not even managed to remove the

money from the cash register, let alone conceal it on his person and leave the store before the violence occurred, Mr. Doe not only hid the magazine in his pants, but walked out of the store before Jones and Drew confronted him. Second, unlike the victim in *Long*, who confronted the defendant before he could leave the store and attempted to block the defendant's exit, it appears that Jones and Drew *purposefully* allowed Mr. Doe to exit the store before confronting him, and made no effort to block the door. Third, the facts in the present case would only be similar to those in *Dean* if Mr. Doe had gone through the checkout line with the magazine clearly visible, but, instead of paying for it, had menaced the cashier and *then* left the store. Even under those facts, of course, Mr. Doe would have only been guilty of the aggravated robbery of the cashier, not the aggravated robbery of any individuals who subsequently confronted him outside the store.

Finally, one additional fact sets this case apart from other cases in which our Supreme Court has considered whether the use of force or threat of bodily harm has either preceded or occurred contemporaneously with a taking: in the present case, Drew's uncontroverted testimony establishes that Mr. Doe actually *gave the magazine back* to Jones before any violence occurred. At that point, according to that uncontroverted testimony, the magazine was in Jones' possession, not Mr. Doe's. (R. XIII, 328, 334, 336). And, under our Supreme Court's holding in *Finch*, a defendant does not take property *by* force or the threat of bodily harm if the force or threat occurs *after* the defendant has abandoned the property. *Finch*, 223 Kan. at 402-03.

This Court must reverse Mr. Doe's convictions for aggravated robbery and remand to the district court with directions to resentence him.

Because the evidence the State presented at trial would support a conviction for misdemeanor theft, but not aggravated robbery, this Court should reverse Mr. Doe's convictions for aggravated robbery and remand to the district court with directions to resentence him on the lesser included offense of misdemeanor theft under K.S.A. 21-3701(b)(5). *Bateson*, 266 Kan. 238 at 246-47 (citing *State v. Kingsley*, 252 Kan. 761, 782, 851

P.2d 370 [1993]). (R. XII, 192; State's Exhibit 5). *See*, K.S.A. 21-3701(b)(5) (“Theft of property of the value of less than \$1,000 is a class A nonperson misdemeanor.”)

The State presented no evidence that Mr. Doe took the magazine by force or threat of bodily harm. This Court must, therefore, vacate his convictions for aggravated robbery and remand to the district court with directions to resentence him for misdemeanor theft.

Issue II: Mr. Doe’s two convictions for aggravated robbery are multiplicitous, and violate the Fifth and Fourteenth Amendments to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.

Standard of Review and Preservation of the Issue

Defense counsel raised this issue below. (R. XIII, 375). Moreover, this Court “may consider a multiplicity issue for the first time on appeal ‘to serve the ends of justice or prevent a denial of fundamental rights.’” *State v. Colston*, 290 Kan. 952, 971, 235 P.3d 1234 (2010). Finally, this Court has unlimited review over the question of whether two convictions are multiplicitous. *State v. Schoonover*, 281 Kan. 453, 462, 133 P.3d 48 (2006).

Analysis

In *Schoonover*, the Kansas Supreme Court “provided a roadmap for determination of multiplicity issues.” *State v. Gomez*, 36 Kan. App. 2d 664, 669, 143 P.3d 92 (2006). In order to determine if convictions are multiplicitous, a Court must determine whether the convictions are for the same offense. Convictions are for the same offense if they (1) arise from the same conduct, and (2) constitute only one offense by statutory definition. Convictions do not arise from the same conduct if the conduct is “discrete, *i.e.*, committed separately and severally.” If, however, the charges arise from the same act or transaction, then the conduct is unitary, and the convictions do arise from the same conduct. Under such circumstances, a reviewing Court must next determine whether the convictions are for violations of the same statute, or two or more different statutes. If the former is true, the Court must apply the “unit of prosecution test”; if the latter is true, then the Court applies the “same-elements” test. *Gomez*, 36 Kan. App. 2d at 669 (citing *Schoonover*, 281 Kan. at Syl. ¶ 15).

In *Schoonover*, our Supreme Court set forth the following test for determining whether convictions arise from the same conduct: “If the conduct is discrete, *i.e.*, committed separately and severally, the convictions do not arise from the same offense and there is no double jeopardy violation. If the charges arise from the same act or transaction, the conduct is unitary.” *State v. Pham*, 281 Kan. 1227, 1246, 136 P.3d 919 (2006) (citing *Schoonover*, 281 Kan. at 496). The Court also provided a list of factors for use in determining whether conduct is unitary: (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct. *Pham*, 281 Kan. at 1247 (citing *Schoonover*, 281 Kan. at 497).

In *Pham*, several men entered a home where a married couple lived with their two daughters and their two sons. After forcing all six members of the family into the living room, the defendant tied them up and told one of the other men to shoot them if they moved. When the defendant left the room, the daughters managed to escape and call the police. Before fleeing, the gunmen shot one of the sons twice. When the police arrived, the mother noticed that two pieces of jewelry were missing from her dresser drawer: a diamond pendant that belonged to one of her daughters and a diamond bracelet that belonged to the other daughter. *Pham*, 281 Kan. at 1231-34, 1247.

On appeal, the defendant argued that his six convictions for aggravated robbery – one for each of the six family members who were present at the time the defendant took the jewelry - were multiplicitous. *Pham*, 281 Kan. at 1236, 1245. The State conceded that not all six counts could survive, but argued that our Supreme Court should affirm two of the convictions – one for each daughter – because each daughter had lost jewelry. *Pham*, 281 Kan. at 1246.

In determining whether the defendant’s convictions were multiplicitous, our Supreme Court first considered whether the taking of the bracelet and the taking of the necklace constituted unitary conduct, noting that the defendant had entered *one* bedroom and opened *one* drawer to obtain the two pieces of jewelry, both of which the mother had placed there.

The Court “conclude[d] this constituted one transaction, *i.e.*,” that the convictions arose “from the same conduct,” and proceeded to the next step in the analysis. *Pham*, 281 Kan. at 1247.

Importantly, the *Pham* Court did not analyze whether the defendant or his codefendants used force or the threat of bodily harm at or near the same time or place, whether there was an intervening event or events between any uses of force or threats of bodily harm, or whether a fresh impulse motivated any of the force or threats of bodily harm. Instead, the Court analyzed only the facts surrounding the actual taking of the jewelry. *Pham*, 281 Kan. at 1247. For purposes of the first step in the multiplicity analysis, therefore, it appears that the relevant conduct in an aggravated robbery case is the taking or takings, and not the force or threats of bodily harm. That is, in determining whether Mr. Doe’s conduct was unitary, this Court should apply the *Schoonover* factors to the taking of the magazine only, not to Mr. Doe’s use of force or the threat of bodily harm. And if the conduct in *Pham* was unitary, where the defendant took *two* pieces of jewelry from one purse in one dresser drawer in one bedroom, then surely the conduct in the present case was unitary, where Mr. Doe took only *one* magazine from one shelf in one store.

Because both of Mr. Doe’s convictions arose from violations of K.S.A. 21-3427, this Court must apply the “unit of prosecution” test. *Schoonover*, 281 Kan. at 497. Under that test, “[t]here can be only one conviction for each allowable unit of prosecution.” *Schoonover*, 281 Kan. at 497-98. The determination of the allowable unit of prosecution does not “necessarily depend upon whether there is a single physical action or a single victim. Rather the key is the nature of the conduct proscribed.” *Gomez*, 36 Kan. App. 2d at 670 (citing *Schoonover*, 281 Kan. at 472). If the legislative intent is unclear, this Court applies the rule of lenity. *Pham*, 281 Kan. at 1248 (citing *Bell v. United States*, 349 U.S. 81, 83, 99 L.Ed. 905, 75 S. Ct. 620 [1955]).

In *Pham*, our Supreme Court considered whether the defendant’s six convictions for aggravated robbery were multiplicitous. *Pham*, 281 Kan. at 1233. The Court noted that it

was “unclear from the statute . . . whether the legislature intended for all six family members to be claimed as victims for the robbery of jewelry (a) belonging to only two and (b) taken from the bedroom of a third who was holding the jewelry for safekeeping.” Similarly, it is “unclear from the statute . . . whether the legislature intended for” both Drew and Jones “to be claimed as victims for the robbery of” a magazine that belonged to neither of them. “In the absence of clear legislative intent, the rule of lenity presumes a single physical action harming multiple victims is only one offense.” *Pham*, 281 Kan. at 1248.

Moreover, the fact that Mr. Doe inflicted bodily harm upon one victim and threatened another does not mean that his convictions survive the multiplicity analysis. In the present case, the jury found Mr. Doe guilty of two counts of aggravated robbery: one count for taking property from Jones and inflicting bodily harm upon him, and one count for taking property from Drew while armed with a dangerous weapon. (R. I, 58). Similarly, in *Pham*, the jury convicted the defendant of one count of aggravated robbery for taking property from the presence of one of the sons and inflicting bodily harm upon him, and five counts of aggravated robbery for taking property from the presence of the remaining five family members while armed with a dangerous weapon. *Pham*, 281 Kan. at 1231-34. In vacating all but one of the defendant’s convictions, the *Pham* Court indicated that the number of victims (1) physically harmed or (2) threatened with a dangerous weapon does not define the unit of prosecution in an aggravated robbery case.

Finally, our legislature has not amended K.S.A. 21-3427 since our Supreme Court issued its opinion in *Pham*. In the absence of such an amendment, this Court must presume that legislature concurs with the Court’s interpretation of the statute. *See, Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008) (“[W]hen the legislature does not modify a statute in order to avoid a standing judicial construction of that statute, the legislature is presumed to agree with that judicial construction.”) If our legislature intended for each victim present, harmed, or threatened during a taking to constitute a separate unit of prosecution in an aggravated robbery case, it would have amended the statute to

say as much after our Supreme Court decided *Pham*. That the legislature has not done so demonstrates that it did not intend for the taking of a single object from the presence of two individuals to constitute two counts of aggravated robbery, even if the defendant inflicts bodily harm upon, or threatens, each victim.

Because the conduct in the present case was unitary and because, “[i]n the absence of clear legislative intent, the rule of lenity presumes a single physical action harming multiple victims is only one offense,” this Court must vacate one of Mr. Doe’s convictions for aggravated robbery. *Pham*, 281 Kan. at 1248.

Issue III: Because the district court failed to ask the jurors if the verdicts the district court recited were, in fact, the jurors’ verdicts, this Court must vacate Mr. Doe’s convictions.

Introduction

After the district court read the jury’s verdict aloud, it failed to ask the jurors whether that verdict did, in fact, represent the jury’s verdict. This Court must, therefore, reverse Mr. Doe’s remaining convictions.

Preservation of the Issue and Standard of Review

Mr. Doe did not raise this issue below. Nevertheless, “[t]here are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal” including where “(1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; [and] (2) the consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights.” *State v. Johnson*, 40 Kan. App. 2d 1059, 1073, 198 P.3d 769 (2008) (citing *State v. Hawkins*, 285 Kan. 842, 845, 176 P.3d 174 [2008]).

This issue raises a question of law, does not rely on disputed facts, and is “finally determinative of the case.” Moreover, this issue implicates the fundamental right to a unanimous jury verdict. *See, U.S. v. Morris*, 612 F.2d 483, 489 (10th Cir. 1979) (The right to

a unanimous verdict is “so fundamental that it may not be waived.”) Finally, this Court has previously reached this issue for the first time on appeal. *Johnson*, 40 Kan. App. 2d 1073-81.

Because this issue involves the interpretation of K.S.A. 22-3421, this Court has unlimited review. *State v. Henning*, 289 Kan. 136, 139, 209 P.3d 711 (2009). This Court also has unlimited review over questions of jury unanimity. *State v. Daybuff*, 37 Kan. App. 2d 779, 784, 158 P.3d 330 (2007).

Analysis

Under K.S.A. 22-3421, “The verdict shall be written, signed by the presiding juror and read by the clerk to the jury, *and the inquiry made whether it is the jury’s verdict*. If any juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.” (Italics added).

This Court has held that “K.S.A. 22–3421 requires the trial court to inquire in open court whether the jury agrees with the verdict, even when the parties waive polling” in order to “ensure a defendant’s constitutional right to a unanimous verdict and to safeguard the concept of finality with respect to the jury verdict.” *State v. Gray*, 45 Kan. App. 2d 522, 249 P.3d 465 (2011), *petition for review denied* September 23, 2011 (citing *Johnson*, 40 Kan. App. 2d at 1076). A district court’s “failure to follow the statutory mandate of K.S.A. 22–3421 to inquire as to whether the verdict was the jury’s verdict” constitutes reversible error. *Gray*, 45 Kan. App. 2d at 525.

In the present case, the district court simply read the jury’s verdicts aloud, and, once the parties declined to have the jury polled, declared, “Ladies and gentlemen of the jury, this will conclude your - - your services as [a] juror for this year and this month.” The district court then discharged the jury. (R. XIII, 460-62). Because the district court failed to inquire whether the jurors agreed with the verdicts it had just read aloud, this Court must vacate Mr. Doe’s remaining convictions and remand for a new trial.

The State's failure to comply with the requirements of K.S.A. 22-3421 requires this Court to vacate Mr. Doe's remaining convictions and remand for a new trial on those charges.

Conclusion

For the aforementioned reasons, Mr. Doe respectfully requests that this Court (1) reverse one of his aggravated robbery convictions as multiplicitous; (2) reverse his remaining aggravated robbery conviction for insufficient evidence and remand it to the district court with directions to resentence Mr. Doe for misdemeanor theft or for attempted aggravated robbery; and (3) reverse his remaining convictions and remand for a new trial.

Respectfully submitted,

Attorney Name, Bar Number
Name of Firm or Agency
Address
City, State ZIP
Telephone Number
Email Address
Attorney for the Appellant

Certificate of Service

The undersigned hereby certifies that service of the above and foregoing Brief of Appellant was made by mailing, postage prepaid, two copies to Joe Smith, xxx County District Attorney, 600 W. Main Street, Anywhere, KS 00000; one copy to Derek Schmidt, Attorney General, 120 SW 10th Ave., Topeka, KS 66612; and sixteen copies to Carol G. Green, Clerk of the Appellate Courts, Kansas Judicial Center, 301 SW 10th Ave., Topeka, KS 66612 on the _____ day of October, 2011.

Attorney Name, Bar Number

§ 12.37 Complaint Form: Attorney Discipline

STANTON A. HAZLETT
Disciplinary Administrator

ALEXANDER M. WALCZAK
KIMBERLY L. KNOLL
KATE F. BAIRD

Deputy Disciplinary Administrators

GAYLE B. LARKIN
Admissions Attorney

STATE OF KANSAS



OFFICE OF THE DISCIPLINARY ADMINISTRATOR

701 Jackson St.
1st Floor
Topeka, Kansas 66603-3729
Telephone: (785) 296-2486
Fax: (785) 296-6049

COMPLAINT FORM

General Information. Complete the following form in as much detail as possible. Provide the attorney's full name. If you wish to complain about more than one attorney, complete a separate complaint form for each attorney. If any of the questions do not apply to your case, write N/A in the spaces that are not applicable.

Fee Disputes. Please be advised that we do not settle fee disputes. If you are disputing the fee paid to your attorney, please contact one of the following fee dispute committees: Johnson County Bar Fee Dispute Committee (913) 780-5460; Sedgwick County Bar Fee Dispute Committee (316) 263-2251, or Kansas Bar Association Fee Dispute Committee (785) 234-5696.

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.

Your Name: _____

Your Address: _____

City, State, Zip: _____

Home Phone: _____ Cell Phone: _____

Work Phone: _____ Fax No. _____

E-mail Address: _____

Attorney's Name: _____

Attorney's Address: _____

City, State, Zip: _____

Phone No.: _____

INFORMATION ABOUT YOUR COMPLAINT

Did you hire the attorney Yes _____ No _____

If yes, when did you hire the attorney? _____

How much did you pay the attorney for attorney fees? Please attach a copy of any receipts, cancelled checks, contracts, fee agreements, and engagement letters.

What did you hire the attorney to do? _____

If no, what is your connection with the attorney? Please explain briefly.

Is your complaint about a civil lawsuit or a criminal case? Yes _____ No _____

If yes, what is the name of the court? For example, the District Court of Shawnee County, Kansas or the Municipal Court of Topeka, Kansas. _____

What is the title of the case? For example, *Jane Smith v. John Doe* or *State v. John Doe*. _____

What is the case number? _____

Approximately when was the case filed? _____

If you are not a party to the lawsuit or the defendant in the criminal case, what is your connection with it? Please explain briefly.

Have you or a member of your family complained about an attorney in the past?

Yes _____ No _____

If yes, what is the name of the attorney who was the subject of the previous complaint?

Approximately when was the previous complaint filed? _____

What was the disposition of the previous complaint filed? _____

Factual Statement. Please prepare a detailed factual statement of your complaint on a separate piece of paper. State the facts as you understand them. Do not include opinions or arguments. Include information about the type of case it was, *i.e.* divorce, criminal, etc., and when it started. Please include the names, addresses, and telephone numbers of all persons who know something about your complaint. If you employed the attorney also include how you chose the attorney, when you first met with the attorney, what the fee agreement was, whether the agreement was written or oral, what has happened so far in the case, and the last contact you had with the attorney. Please be advised that a copy of your complaint will be forwarded to the attorney named in your complaint.

If you have letters or other documents you believe are relevant to your complaint, please attach copies of the letters or other documents to this complaint. We cannot return documents submitted to this office. You should retain a copy of all materials you submit.

Please sign and date your statement below. Further information may be requested later. Send the completed Complaint Form, your detailed factual statement of the complaint, along with any pertinent documents to Office of the Disciplinary Administrator, 701 Southwest Jackson, First Floor, Topeka, Kansas 66603.

The information provided in his complaint is true and correct to the best of my knowledge.

Date

Complainant's Signature

PRACTICE NOTE: This complaint form is available in a fillable pdf format in the online version of this handbook at www.kscourts.org.

§ 12.38 Surrender Letter—Voluntary Surrender of License to Practice Law

[Insert Date]

Carol G. Green
Clerk of the Appellate Courts
Kansas Judicial Center, Room 374
301 S.W. 10th Avenue
Topeka, Kansas 66612-1507

Dear Ms. Green,

Pursuant to Rule 217 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 original Supreme Court of Kansas license to practice law as well as my current annual attorney registration card.

I am fully aware of Rule 217 and understand that by surrendering my license the Court will duly enter an order disbaring me and terminating all pending disciplinary actions. I understand that other jurisdictions will be notified of the Court's action.

I have read Rule 218 and have or will appropriately and timely comply with the Court's directions contained therein.

Respondent Attorney

Attorney for Respondent Attorney

cc. Stanton Hazlett, Disciplinary Administrator

§ 12.39 Complaint Form: Judicial Discipline

KANSAS COMMISSION ON JUDICIAL QUALIFICATIONS

Kansas Judicial Center, 301 SW Tenth Avenue, Room 374, Topeka, Kansas 66612 785-296-2913

Complaint against a Judge

Person making the complaint

Address

City, State Zip Code

Phone Number

I would like to file a complaint against:

Name of Judge

Type of Judge (if known)

County or City

If the complaint involves a court case, give the case number and caption.

BEFORE YOU COMPLETE THIS FORM, please review the accompanying brochure which describes the functions of the Commission on Judicial Qualifications. Note in particular the examples of functions which the Commission cannot perform.

PLEASE TELL THE COMMISSION IN TWENTY-FIVE WORDS OR LESS WHAT THE JUDGE DID THAT WAS UNETHICAL. INCLUDE A MORE DETAILED EXPLANATION ON THE FOLLOWING PAGE.

Form area with horizontal lines for text entry.

Continue on next page

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

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-
Marla J. Luckert, Topeka.....	2003-
Robert L. Gernon, Hiawatha.....	2003-2005
Carol A. Beier, Wichita	2003-
Eric S. Rosen, Topeka	2005-
Lee A. Johnson, Caldwell	2007-
W. Daniel Biles, El Dorado.....	2009-
Nancy L. Moritz, Topeka	2011-

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

Judges of the Court of Appeals—Modern Court

Jerome Harman, Columbus	1977 (C.J.)
J. Richard Foth, Topeka	1977-1985 (C.J.)
Bob Abbott, Junction City	1977-1990 (C.J.)
John E. Rees, Wichita.....	1977-1992
Corwin C. Spencer, Oakley	1977-1984
Sherman A. Parks, Topeka	1977-1987
Joe Haley Swinehart, Kansas City.....	1977-1986
Marvin Meyer, Oberlin	1978-1987
Mary Beck Briscoe, Council Grove	1984-1995 (C.J.)
J. Patrick Brazil, Eureka	1985-2000 (C.J.)
Robert E. Davis, Leavenworth	1986-1993
Fred N. Six, Lawrence.....	1987-1988
Jerry G. Elliott, Wichita	1987-2010
Edward Larson, Hays.....	1987-1995
Gary W. Rulon, Emporia.....	1988-2011 (C.J.)
Robert L. Gernon, Hiawatha.....	1988-2003
Robert J. Lewis, Jr., Atwood.....	1988-2004
G. Joseph Pierron, Jr., Olathe.....	1990-
M. Kay Royce, Wichita.....	1993-1999

Henry W. Green, Jr., Leavenworth.....	1993-
Christel E. Marquardt, Topeka.....	1995-2013
David S. Knudson, Salina.....	1995-2003
Carol A. Beier, Wichita.....	2000-2003
Lee A. Johnson, Caldwell.....	2001-2007
Thomas E. Malone, Wichita.....	2003- (C.J.)
Richard D. Greene, Wichita.....	2003-2012 (C.J.)
Stephen D. Hill, Paola.....	2003-
Patrick D. McAnany, Overland Park.....	2004-
Nancy L. Caplinger, Topeka.....	2004-2010
Michael B. Buser, Overland Park.....	2005-
Steve Leben, Fairway.....	2007-
Melissa Taylor Standridge, Overland Park.....	2008-
G. Gordon Atcheson, Westwood.....	2010-
Karen Arnold-Burger, Overland Park.....	2011-
David E. Bruns, Topeka.....	2011-
Anthony J. Powell, Wichita.....	2013-
Kim R. Schroeder, Hugoton.....	2013-

APPENDIX B

Timetable for Steps in an Appeal

STEP	TIME
<p>1. Appellant serves, files notice of appeal with clerk of district court.</p> <p>(Appellant may seek a stay of the judgment pending appeal.)</p>	<p>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).</p>
<p>2. Appellant requests transcript if an evidentiary hearing was held.</p>	<p>21 days from notice of appeal. Rule 3.03.</p>
<p>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.</p>	<p>21 days from notice of appeal. Rules 2.04, 2.041.</p>
<p>4. District clerk compiles record then available.</p>	<p>14 days from notice that the appeal has been docketed. Rule 3.02.</p>
<p>5. Notice of cross-appeal.</p>	<p>21 days from notice of appeal. K.S.A. 60-2103(h). Docketing statement to be filed with clerk of appellate courts within 21 days of notice of cross-appeal. Rule 2.04(a)(2), 2.041(a).</p>

STEP	TIME
6. Either party may move for transfer to Supreme Court for final determination.	20 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 “prepared 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.
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. 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.

STEP	TIME
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).
17. Motion for rehearing or modification.	14 days of decision of Court of Appeals. Rule 7.05. 21 days of decision of Supreme Court. Rule 7.06.
18. Motion for assessment of appellate costs and attorney fees.	No later than 14 days after oral argument or assignment to summary calendar. Rule 7.07(b).
19. Petition for review by Supreme Court.	30 days of Court of Appeals decision, regardless of a motion for rehearing by Court of Appeals unless rehearing is granted. Rule 7.05, 8.03(a)(1).
20. Additional copies of briefs originally filed with the Court of Appeals.	Within 14 days after the review is granted. Rule 8.03(g)(2).
21. Supplemental briefs for Supreme Court by either party.	30 days after review is granted. Rule 8.03(g)(3).
22. Responses to supplemental briefs.	30 days after supplemental briefs served. Rule 8.03(g)(3).

APPENDIX C

Citation Guide

The following abbreviated Citation Guide conforms to the Guide used by the Kansas Appellate Courts for citation to authority in appellate court opinions.

CASE CITATIONS

The case name appearing at the top-of-the-page “header” of official reports is the “official” name given to a case cite. For example, in the case *Northern Natural Gas Company, Appellant, v. ONEOK Field Services Company, L.L.C.*, the header is *Northern Natural Gas Co. v. ONEOK Field Services Co.*—that will be the name to be used for citation purposes.

Cites should be to official sources whenever possible. Secondary sources, such as the Pacific Reports or Lawyers Edition, may not contain the final edited version of a court’s opinion. The United States Supreme Court, for example, may make changes to opinions up to the time the bound volume goes to print, including removing or adding sentences or paragraphs. Reporters of Decisions for many state courts (not Kansas) do their editorial work *after* an opinion has been publicly released by the respective state court, and even the advance sheets for the Kansas Reports and Kansas Court of Appeals Reports 2d are not considered final and “official” reports of the opinions.

FEDERAL COURTS

When citing to multiple federal cases in a single citation sentence the cites should be in the following order: United States Supreme Court, federal courts

of appeal, federal district courts. Within the same court, cases are arranged in reverse chronological order (most recent decision first).

United States Supreme Court cases have an official citation and two unofficial parallel citations (Supreme Court Reports and Lawyers Edition). Cite to the official reports for case name, quotes, pinpoint reference, etc., when possible, and put the year of the decision at the end in parentheses:

Kansas v. Ventris, 556 U.S. 586, 593, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009)

Courts of appeals cases are reported in the Federal Reports. Give the circuit number and year of decision:

Lees v. Carthage College, 714 F.3d 516 (7th Cir. 2013)

United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970)

For subsequent history of a court of appeals decision involving the Supreme Court when *certiorari* is denied, it is only necessary to cite to the U.S. Reports and not to the secondary reports:

United States v. Mackay, 491 F.2d 616 (10th Cir. 1973), cert. denied 416 U.S. 972 (1974)

District court cases are reported in the Federal Supplement (F. Supp.). It is not necessary to show divisions within a district:

Beattie v. Skyline Corp., 906 F. Supp. 2d 528 (S.D. W. Va. 2012)

STATE COURTS

Citations should identify the state, the court (unless it is the highest court of the jurisdiction), and the year of decision. When citing cases from multiple state jurisdictions, cite in alphabetical order, with cases from the highest court of the state cited first. If citing multiple cases from the same court, cite to the most recent case first. Cite to both official and unofficial (West) reports, with case name, quotes, pinpoint reference, etc. to official reports where possible:

Gerlt v. Planning & Zoning Commission, 290 Conn. 313, 316, 963 A.2d 31 (2009); *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 160, 298 P.3d 1120 (2013); *Pratt v. Kansas Dept. of Revenue*, 48 Kan. App. 2d 586, 588, 296 P.3d 1128 (2013); *Holmes v. Crawford Machine, Inc.*, 134 Ohio St. 3d 303, 307, 982 N.E.2d 643 (2012)

New York Court of Appeals (the highest court of New York) and California Supreme Court cases are reported with independent pagination in two reports of the National Reporter System; cases from those jurisdictions should be cited to the official and both unofficial reports:

Cohen v. Cuomo, 19 N.Y.3d 196, 946 N.Y.S.2d 536, 969 N.E.2d 754 (2012)

Smith v. Superior Court, 54 Cal. 4th 592, 142 Cal. Rptr. 3d 880, 278 P.3d 1231 (2012)

California courts of appeals will be cited to Cal. App. and Cal. Rptr.:

Gemini Ins. Co. v. Delos Ins. Co., 211 Cal. App. 4th 719, 149 Cal. Rptr. 3d 889 (2012)

The following states do not use abbreviations in state court citations: Alaska, Hawaii, Idaho, Ohio, Utah

Durkee v. Busk, 355 P.2d 588 (Alaska 1960)

The following states now have official opinions on-line and no longer print official reports for cases filed after the date the on-line version was designated the official version:

Arkansas, since 2009; Illinois, since 2012; Ohio Court of Appeals, since 2012 (Ohio Supreme Court opinions are still printed in official reports)

Rees v. Smith, 2009 Ark. 169, 301 S.W.3d 469 [note: the year is part of the cite: 2009]

State v. Hoseclaw, 2013-Ohio-3486, ___ N.E.2d___ (Ohio App.) [note: the year is part of the cite: 2013]

New Mexico has official opinions on-line but continues to print its reports.

UNPUBLISHED OPINIONS

Kansas Supreme Court Rule 7.04(g)(2) (2012 Kan. Ct. R. Annot. 60) addresses citations to unpublished opinions. The Rule clarifies that an unpublished opinion is not binding precedent (except under the doctrines of law of the case, *res judicata*, and collateral estoppel) but may be cited as persuasive authority “with respect to a material issue not addressed in a published opinion of a Kansas appellate court” and if it “would assist the court in disposition of the issue.”

Unpublished opinions are cited with the case name, docket number, and Westlaw citation; the cite should also indicate it is an unpublished opinion unless it is clear within the context of the discussion that the opinion is unpublished:

In re Care & Treatment of Burch, No. 102,468, 2010 WL 3324271 (Kan. App. 2010) (unpublished opinion)

PUBLISHED OPINION NOT YET IN PRINT:

If an opinion has been filed and the official cite is not yet available, cite to the slip opinion, to the unofficial report, or to Westlaw:

Shelby County v. Holder, 570 U.S. ___, 133 S. Ct. 2612, 2617, 186 L. Ed. 2d 651 (2013)

State v. Abrens, 296 Kan. ___, ___P.3d___ (No. 103,662, filed December 21, 2012), slip op. at 12-13

State v. Huffmier, 297 Kan. ___, 301 P.3d 669, 673 (2013)

Rinehart v. Morton Buildings, Inc., ___Kan. ___, ___P.3d___, 2013 WL 3835833, at *6 (No. 101,940)

PRIOR OR SUBSEQUENT HISTORY

Italicize prior and subsequent history phrases:

affirmed—*aff’d*

certiorari granted—*cert. granted*

petition for review granted—*rev. granted*

petition for review denied—*rev. denied*

rehearing denied—*reb. denied*

Morton Bldgs., Inc. v. Department of Human Resources, 10 Kan. App. 2d 197, 695 P.2d 450, *rev. denied* 237 Kan. 887 (1985).

United States v. Van Poyck, 77 F.3d 285 (9th Cir.), *cert. denied* 519 U.S. 912 (1996) [note: when year of subsequent history is same as year of original decision, put year at the end of full citation]

When a petition for review of a Kansas Court of Appeals case has been filed but is pending before the Supreme Court, Kansas Supreme Court Rule 8.03(i) indicates that the opinion of the Court of Appeals is not binding but may be used for persuasive authority before the mandate is issued. The Rule further states that an interested person citing to the opinion must note in the citation that the case is not final:

Markovich v. Green, 48 Kan. App. 2d 567, 297 P.3d 1176 (2013) (petition for rev. filed March 8, 2013)

SIGNALS

Citations are introduced by signals (or no signal) that indicate the purpose for the cited authority and the degree of support for the proposition being cited. Signals are divided into categories of support: positive, comparative, negative, or background. Signals may be strung together within a single citation sentence if they are of the same type, but when a different type is used, a new citation sentence begins.

A. Signals that indicate support:

1. [No signal] Cited authority clearly states the proposition or identifies a quotation source or an authority referred to in the text.
2. *E.g.* Cited authority states the proposition; although other authorities also state the proposition, citation to them would not be necessary or helpful.
3. Accord Cited authority directly supports the proposition but in a slightly different way than authority first cited.
4. See Cited authority directly supports the proposition but is not stated by the cited authority.

5. See also Cited authority constitutes additional source material that supports the proposition; generally used with a parenthetical explanation.

6. *Cf.* “Compare.” Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support; generally used with a parenthetical explanation.

B. Signal that suggests an appropriate comparison of multiple sources

Compare ____ [and ____] with ____ [and ____]

C. Signals that indicate contradiction:

1. *Contra* Cited authority states the contrary of the proposition.

2. *But see* Cited authority directly contradicts the proposition.

3. *But cf.* Cited authority supports a proposition analogous to the contrary of the main proposition.

D. Signal that indicates background material

See generally Cited authority presents helpful background material related to the proposition; generally used with a parenthetical explanation.

Baska v. Scherzer, 283 Kan. 750, 755, 156 P.3d 617 (2007); see *Golden v. Den-Mat Corporation*, 47 Kan. App. 2d 450, 461, 276 P.3d 773 (2012); accord *Nungesser v. Bryant*, 283 Kan. 550, 559, 153 P.3d 1277 (2007). See generally *Viernow v. Euripides Development Corp.*, 157 F.3d 785, 790 n.9 (10th Cir. 1998) (issues raised for the first time in a plaintiff’s response to a motion for summary judgment may be considered a request to amend the complaint).

STATUTES, RULES, AND REGULATIONS

FEDERAL:

Statutes:

A. United States Code (U.S.C.)

__ U.S.C. § __ (20__): 42 U.S.C. § 4332(2)(C)(iii) (2006)

B. Statutes currently in force but not in U.S.C. (by reverse chronological order of enactment)

Rules:

A. Federal Rules of Evidence: Fed. R. Evid. 702

B. Federal Rules of Civil Procedure: Fed. R. Civ. P. 32(a)(3)(B)

C. Federal Rules of Criminal Procedure: Fed. R. Crim. P. 58

Regulations:

Code of Federal Regulations: (name), __ C.F.R. § __ (20__): Cardiovascular Prosthetic Devices, C.F.R. § 870.3545 (2013)

STATES:

Kansas statutes:

A. Cite to bound volume if in effect: K.S.A. 60-455

B. Cite to Supplement if in effect; however, if an older Supp. was in effect but there are no substantive changes to that statute in the current Supp., it is permissible to cite to the most recent Supp.: K.S.A. 2012 Supp. 21-6001

C. Entire statutory act:

1. Kansas Tort Claims Act, K.S.A. 75-6101 *et seq.* [cite to bound volume even if some parts of Act were amended and appear in the Supp.]
2. Revised Kansas Sentencing Guidelines Act, K.S.A. 2012 Supp. 21-6801 *et seq.* [entire act appears in the Supp.]

D. Citation to superseded statute book:

If the applicable statute to be cited is in a superseded bound volume of the K.S.A.'s, include the name of the Revisor of Statutes in parentheses following the cite to distinguish it from the current bound volume: K.S.A. 21-3721 (Weeks).

Kansas Session Laws:

Cite to L., year, chapter, and section: L. 2010, ch. 51, sec. 1 [note: for session laws, sec. is used as the abbreviation instead of the symbol §]

Rules of the Kansas Supreme Court:

The official source for the Supreme Court Rules is the blue Rule Book that is published and annotated annually by the Reporter's office. Cite the year, Kan. Ct. R. Annot. __: Rule 133 (2012 Kan. Ct. R. Annot. 238).

Kansas Administrative Regulations:

Current regulation: K.A.R. 36-17-8

Amendment to current regulation: K.A.R. 82-4-56a (2012 Supp.)

Noncurrent regulation: K.A.R. 74-11-6 (2003)

Other State Statutes:

Cite to state statutes alphabetically by state when citing to statutes from multiple states

MISCELLANEOUS CITATIONS

Attorney General Opinions:

Cite to year-number: Att’y Gen. Op. No. 2013-08

Pattern Jury Instructions for Kansas (PIK):

PIK Crim. 4th 54.290

PIK Crim. 4th 56.080 (2012 Supp.)

PIK Civ. 4th 123.43

Constitutions:

United States Constitution:

U.S. Const. amend. XIV, § 1

U.S. Const. art. I, § 10, cl. 2

Kansas Constitution:

Kan. Const. art. 11, § 1 (2012 Supp.)

Kan. Const. Bill of Rights, § 5

Restatements:

Restatements are identified by the year adopted, not by the year of publication:

Restatement (Second) of Contracts § 238 (1979)

Restatement (Third) of Torts § 9, p. 187 (1997)

Occasionally, the number of a Tentative Draft is necessary to identify the Restatement since there are no Supplements as such to the Restatements:

Restatement (Third) of Agency § 8.06 (Tent. Draft No. 6, 2005)

Books and Digests:

Give last name of author as well as volume numbers where appropriate:

1. Williston on Contracts

11 Lord, Williston on Contracts 4th § 31:6 (2012)

2. Wigmore on Evidence:
Kaye, Bernstein & Mnookin, *The New Wigmore: Expert Evidence* § 4.10 (2d ed. 2010)
3. Wright etc. on Federal Practice and Procedure:
16 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3920 (3d ed. 2012)

Dictionaries:

Cite by name, page, edition, and date:

1. Black's Law Dictionary 977 (9th ed. 2009)
2. Webster's Third New International Dictionary 699 (1993)

Law Review and Journal Articles:

Cite by author, title, volume, name of publication, page, and year.
Abbreviate where appropriate.

1. Articles:
Dau-Schmidt, *Promises to Keep: Ensuring the Payment of Americans' Pension Benefits in the Wake of the Great Recession*, 52 Washburn L.J. 393 (2013)
2. Comments (name of student author is not given):
Comment, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the M'Naughten Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense*, 44 Washburn L.J. 213 (2004)
Comment, "Fraccident": *An Argument Against Strict Liability for Hydraulic Fracturing*, 60 Kan. L. Rev. 1215 (2012)

3. Notes (name of student author is not given)

Note, *Enabling Television Competition in a Converged Market*, 126 Harv. L. Rev. 2083 (2013)

4. Bar association journal:

Zimmerman, *E-Filing: Alive and Well*, 82 J.K.B.A. 13 (March 2013)

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