Approved by the Judicial Council
December 13, 2019

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE REGARDING AMENDMENTS TO THE KANSAS RULES OF EVIDENCE

INTRODUCTION

In October, 2018, Professor James M. Concannon requested that the Judicial Council consider amendments to the Kansas Rules of Evidence to add provisions from the Federal Rules of Evidence relating to the original writing rule (also referred to as the best evidence rule) and authentication. The Council agreed to do the study and assigned it to an ad hoc Advisory Committee, co-chaired by the Chairs of the Civil Code and Criminal Law Advisory Committees and made up of members from both Committees. A list of the Committee members is attached to this report.

BACKGROUND

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

When Kansas adopted its Rules of Evidence, the Federal Rules of Evidence did not yet exist as those Rules were not adopted until 1975. Despite having different origins, the Kansas Rules of Evidence and the Federal Rules of Evidence are similar in substance on many points. Professor Concannon stated that where there are substantive differences, they are mostly based on legitimate policy differences, but that is not the case with regard to the original writing rule and authentication, the areas that were the subject of this study. These differences exist because the Kansas rules are outdated and have not been updated to accommodate technologic advances such as easily-produced reliable copies and documents created or stored electronically.

Federal Rules 1001-1008 govern the original writing rule, as do K.S.A. 60-467-469. However, unlike the Kansas statutes, the Federal Rules deal expressly with modern methods of document reproduction and electronic storage of information. Professor Concannon has recommended that Kansas update its evidence rules by adopting language from the Federal Rules to better take into account both the ease and accuracy of current document reproduction methods and electronic methods of document creation and storage. Professor Concannon also recommended amendments to K.S.A. 60-464 and 60-465 because closer conformity to the Federal Rules regarding authentication would be helpful to practitioners and has the potential to reduce the cost and inconvenience of some current authentication requirements in cases in which the authentication is not likely to be contested.

DISCUSSION

K.S.A. 60-467 requires that a party offer the original writing to prove its content unless an excuse for nonproduction of the original is shown. K.S.A. 60-469 allows admission of a reliably created copy of a business or public record without an excuse for not having the original, but K.S.A. 60-469 applies only in limited numbers of cases because the copy must have been made and preserved in the regular course of the business or public activity. Surprisingly, there was for years no case law indicating that litigants were citing K.S.A. 60-467 to challenge the admissibility of a duplicate when the proponent failed to show any reason for not producing the original. The issue finally arose in *State v. Robinson*, 303 Kan. 11, 363 P.3d 875 (2015), *disapproved on other grounds by State v. Cheever*, 304 Kan. 866, 375 P.3d 979 (2016). *Robinson* involved "best evidence" challenges to printouts of emails printed from a police department computer rather than the computers of the people who received the messages and forwarded them to the police. The Supreme Court seemingly conformed the Kansas best evidence rule to the Federal Rules in finding the printouts admissible, relying on the federal definitions of "original" and "duplicate," as well as Federal Rule 1003's provision that a "duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."

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

The uncertainty of the current state of the law after these cases prompted Professor Concannon to ask the Judicial Council to consider amending the statutes to incorporate appropriate parts of the Federal Rules. He proposed amendments to K.S.A. 60-467 to accomplish that objective.

The Committee discussed the proposed amendments, which incorporated into K.S.A. 60-467 language from Federal Rules 1001, 1002, 1003, 1007, and 1008. The majority of the Committee was in favor of the amendments and agreed that, in most cases, a duplicate should be admissible to the same extent as the original. Technology has simplified the creation of reliable duplicates, and it is often difficult to tell an original document from a copy of the same. The Committee discussed whether subsection (c) regarding faxes is necessary anymore and considered deleting it. However, it was agreed it does no harm to retain that language in the statute.

The Committee also considered Professor Concannon's proposed amendments relating to authentication. He believes this is another area that would be improved by further conforming the Kansas statutes to the Federal Rules. For example, the current K.S.A. 60-464 is fairly limited and applies only to a writing. The proposed amendment to K.S.A. 60-464(a) picks up the language from Federal Rule 901(a), which applies to authentication generally, rather than just to a writing. The federal language imposes the same sufficiency of the evidence standard as the current statute, but says it better. Federal Rule 901(b) gives ten examples of evidence that satisfies the authentication requirement, including 901(b)(4), which the Court relied on in reaching its decision in *Robinson*. The Committee unanimously approved the proposed amendments to K.S.A. 60-464.

The Committee discussed and approved proposed amendments to K.S.A. 60-465, which included adding a number of self-authentication provisions from Federal Rule 902. The Committee also approved an amendment to the hearsay exception in K.S.A. 60-460(m), which incorporates the self-authentication provisions the Committee agreed to add to K.S.A. 60-465(b)(7) and (8). These amendments were approved by a majority of the Committee, with one member voting no.

The proposed amendments, with comments, are attached to this report.

RECOMMENDATION

The Advisory Committee on Evidence recommends amendments that will modernize the Kansas Rules by adopting language from the Federal Rules relating to the original writing rule and authentication. The Judicial Council has long noted the many benefits of conformity with the Federal Rules. One of the benefits is uniformity of practice in the state and federal courts in Kansas. In addition, interpretation and analysis of the Federal Rules are available to assist in construing the corresponding Kansas provisions.

The Committee recommends that the Judicial Council request introduction of a bill in the 2020 legislative session to amend the Kansas Rules of Evidence based on the attached proposal.

COMMITTEE MEMBERSHIP

The members of the Advisory Committee on Evidence are:

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

PROPOSED AMENDMENTS TO THE KANSAS RULES OF EVIDENCE

60-460. Hearsay evidence excluded; exceptions

Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:
…

(m) *Business entries and the like*. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if ~~the judge finds that~~ the following conditions are shown by the testimony of the custodian or other qualified witness, or by a certification that complies with K.S.A. 60-465(b)(7) or (8), and amendments thereto: (1) They were made in the regular course of a business at or about the time of the act, condition or event recorded; and (2) the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.

If the procedure specified by K.S.A. 60-245a(b), and amendments thereto, for providing business records has been complied with and no party has required the personal attendance of a custodian of the records or the production of the original records, the affidavit or declaration of the custodian shall be prima facie evidence that the records satisfy the requirements of this subsection.
…

COMMENT

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

60-464. Authentication required; ancient documents

(a) *In general.* To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. ~~Authentication of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law. If the judge finds that a writing (1) is at least thirty years old at the time it is offered, and (2) is in such condition as to create no suspicion concerning its authenticity, and (3) at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found, it is sufficiently authenticated.~~

COMMENT

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

(b) *Examples*. The following are examples only, not a complete list, of evidence that satisfies the requirement:

(1) *Testimony of a witness with knowledge*. Testimony that an item is what it is claimed to be.

(2) *Nonexpert opinion about handwriting*. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an expert witness or the trier of fact*. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive characteristics and the like*. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion about a voice*. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence about a telephone conversation*. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence about public records*. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence about ancient documents or data compilations*. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 30 years old when offered.

(9) *Evidence about a process or system***.** Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods provided by a statute or rule***.** Any method of authentication or identification allowed by law or a rule prescribed by the supreme court.

COMMENT

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

60-465. Authentication of copies of records

(a) *Public documents.* A writing purporting to be a copy of an official record or of an entry therein, meets the requirements of authentication if the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept or evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required if:

(1) The office in which the record is kept is within this state and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record;

(2) the office in which the record is kept is within this state and the record is attested by a person purporting to be an official custodian of the records of the Kansas bureau of investigation as a correct copy of criminal history record information or electronically stored information, as defined in K.S.A. 22-4701, and amendments thereto, accessed through the criminal justice information system central repository maintained by the Kansas bureau of investigation pursuant to K.S.A. 22-4705, and amendments thereto;

(3) the office in which the record is kept is within the United States or territory or insular possession subject to the dominion of the United States and the writing is attested to as required in paragraph (1) and authenticated by seal of the office having custody or, if that office has no seal, by a public officer having a seal and having official duties in the district or political subdivision in which the records are kept who certifies under seal that such officer has custody; or

(4) the office in which the record is kept is in a foreign state or country, the writing is attested as required in paragraph (1) and is accompanied by a certificate that such officer has the custody of the record which certificate may be made by a secretary of an embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of that office.

(b) *Self-authenticating evidence.* The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Official publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(2) *Newspapers and periodicals.* Printed material purporting to be a newspaper or periodical.

(3) *Trade inscriptions and the like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(4) *Acknowledged documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(5) *Commercial paper and related documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(6) *Presumptions under law.* A signature, document, or anything else that a state or federal statute declares to be presumptively or prima facie genuine or authentic.

(7) *Certified domestic records of a regularly conducted activity.* The original or a copy of a domestic record that meets the requirements of K.S.A. 60-460(m) as shown by a certification of the custodian or another qualified person, in an affidavit or a declaration pursuant to K.S.A. 53-601, and amendments thereto, or a rule prescribed by the supreme court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record, and must make the record and certification available for inspection, so that the party has a fair opportunity to challenge them.

(8) *Certified foreign records of a regularly conducted activity.* The original or a copy of a foreign record that meets the requirements of paragraph (7), modified as follows: the certification, rather than complying with a statute or supreme court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of paragraph (7);

(9) *Certified records generated by an electronic process or system.* A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of paragraph (7) or (8). The proponent must also meet the notice requirements of paragraph (7).

(10) *Certified data copied from an electronic device, storage medium, or file.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of paragraph (7) or (8). The proponent also must meet the notice requirements of paragraph (7).

COMMENT

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

60-467. Original document required as evidence; exceptions

(a) ~~As tending to prove the content of a writing, no evidence other than the writing itself is admissible, except as otherwise provided in these rules, unless the judge finds that:~~ An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provide otherwise.

(b) A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

~~(1)~~ (c) If ~~the~~ a writing is a telefacsimile communication ~~as defined in subsection (d)~~ and is used by the proponent or opponent as the writing itself, such telefacsimile communication shall be considered as ~~the writing itself;~~ an original.

~~(2)(A)~~ (d) An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: (1) the writing, recording, or photograph is lost or has been destroyed without fraudulent intent on the part of the proponent, ~~(B)~~ (2) the writing, recording, or photograph is outside the reach of the court's process and not procurable by the proponent, ~~(C)~~ (3) the opponent, at a time when the writing, recording, or photograph was under the opponent's control, has been notified, expressly or by implication from the pleadings, that it would be needed at the hearing, and on request at the hearing has failed to produce it, ~~(D)~~ (4) the writing, recording, or photograph is not closely related to the controlling issues and it would be inexpedient to require its production, ~~(E)~~ (5) the writing is an official record, or is a writing affecting property authorized to be recorded and actually recorded in the public records as described in ~~exception (s) of~~ K.S.A. 60-460(s), and amendments thereto, or ~~(F)~~ (6) calculations or summaries of content are called for as a result of an examination by a qualified witness of multiple or voluminous writings, which cannot be conveniently examined in court, but the adverse party shall have had a reasonable opportunity to examine such records before trial, and such writings are present in court for use in cross-examination, or the adverse party has waived their production, or the judge finds that their production is unnecessary.

(e) The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

~~(b) If the judge makes one of the findings specified in subsection (a), secondary evidence of the content of the writing is admissible. If evidence is offered by the opponent tending to prove that (1) the asserted writing never existed, (2) a writing produced at the trial is the asserted writing or (3) the secondary evidence does not correctly reflect the content of the asserted writing, the evidence is irrelevant and inadmissible upon the question of admissibility of the secondary evidence but is relevant and admissible upon the issues of the existence and content of the asserted writing to be determined by the trier of fact.~~

(f) Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under subsection (d). But in a jury trial, the jury determines any issue about whether:

(1) an asserted writing, recording, or photograph ever existed;

(2) another one produced at the trial or hearing is the original; or

(3) other evidence of content accurately reflects the content.

~~(c)~~ (g) If the procedure specified by subsection (b) of K.S.A. 60-245a, and amendments thereto, for providing business records has been complied with and no party has required the personal attendance of a custodian of the records or the production of the original records, the copy of the records produced shall not be excluded under subsection (a).

~~(d)~~ (h) ~~As used in~~ The following definitions apply to this section~~;~~.

(1) ~~telefacsimile~~ "Telefacsimile communication" means the use of electronic equipment to send or transfer a copy of an original document via telephone lines.

(2) "Photograph" means a photographic image or its equivalent stored in any form.

(3) "Original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout--or other output readable by sight--if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(4) "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

COMMENT

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

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

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

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

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

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

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