JUDICIARY SUBCOMMITTEE ON CIVIL PROCEDURES

Senator Richard Rock, Chairman
March 17, 1992

HB 2828 - relating to the supreme court nominating commission and the district court nominating commissions.

PROPONENTS

Chief Justice Richard Holmes, Supreme Court of Kansas (ATTACHMENT 1)
Randy Hearrell, Kansas Judicial Council (ATTACHMENT 2)
Thomas Erker, Johnson County Bar Association (ATTACHMENT 3)
Carol Gilliam Green, Clerk of the Kansas Appellate Courts (ATTACHMENT 4)
Senator Dick Bond for Judge Larry McClain, Johnson County District Court

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: to amend by striking lines 17 through 20 on page 2; recommend favorable for passage as amended.

HB 2831 - service agents for corporations for service of process.

PROPONENTS

Paul Shelby, Office of Judicial Administration (ATTACHMENT 5)
Sherlyn Sampson, Kansas Association of District Court Clerks and Administrators (ATTACHMENT 6)
John Wine, General Counsel of the Secretary of State (ATTACHMENT 7)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable and to be placed on the Consent Calendar.

HB 2870 - personal service for execution orders.

PROPONENTS

Elwaine Pomeroy, Collection Attorneys Association (ATTACHMENTs 8, 9 and 10)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend adoption of amendments as suggested; amend to permit private process service to include execution on judges; recommend favorable for passage as amended.

HB 2829 - lien filings; indexed by the clerk.

PROPONENTS

Paul Shelby, Office of Judicial Administration (ATTACHMENT 11)
Sherlyn Sampson, Kansas Association of District Court Clerks and Administrators (ATTACHMENT 12)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: recommend favorable and to be placed on the Consent Calendar.

HB 2769 - telefacsimile communications.

PROPONENTS

Randy Hearrell, Kansas Judicial Council (ATTACHMENT 13)
Helen Stephens, Kansas Police Officers Association (ATTACHMENT 14)
James Clark, Kansas County and District Attorneys Association (ATTACHMENT 15)
Paul Shelby, Office of Judicial Administration (ATTACHMENT 16)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATIONS: delay action until the Senate Ways and Means Committee completes its examination of docket fees.

Supreme Court of Kansas

RICHARD W. HOLMES
Chief Justice

Kansas Judicial Center
Topeka, Kansas 66612-1507

(913) 296-4898

HB 2828
Senate Judiciary Subcommittee on Civil Procedures
March 17, 1992

Testimony of Chief Justice Richard W. Holmes

Thank you for this opportunity to appear on behalf of the Kansas Supreme Court in support of HB 2828.

HB 2828 as originally prepared by the Office of Judicial Administration, upon directions from the Supreme Court, was one of a number of bills considered by the Court to reduce unnecessary expense and conserve the time of non-judicial employees in the office of the clerk of the appellate courts. The bill pertains to the selection and filling of vacancies on the Supreme Court Nominating Commission and the various District Court Nominating Commissions. K.S.A. 20-126, applicable to the Supreme Court Nominating Commission and K.S.A. 20-2904, relating to District Court Nominating Commissions, require that every resident licensed lawyer in the state be notified by first-class mail of a vacancy on the Supreme Court commission and every lawyer in the district be similarly notified of a vacancy on the district court commission. The proposed amendment would have eliminated the need to mail a notice to every lawyer and

provided for a cheaper method of notice which we feel would be equally effective in notifying members of the bar of such vacancies. Unfortunately, that portion of the bill was not maintained in the bill now before you.

A second proposed amendment seeking the same objectives of reduced expense and clerical time provides that in cases where the election of the chairman or a member of the Supreme Court Nominating Commission is uncontested, the sole nominee may be declared elected without the preparation and mailing of a ballot to all lawyers in the state, or congressional district as the case may be. The bill also provides for similar filling of vacancies on a district court nominating commission when the number of nominees does not exceed the number of vacancies to be filled. These provisions remain in the version of the bill now before you.

Prior to our actual filing of the proposed bill to seek the above changes, the Hon. Sam Bruner of the Tenth Judicial District sought, and has been elected to fill a vacancy on the nominating commission for that district. While we have absolutely no question about the ability or integrity of Judge Bruner, the members of the Supreme Court are unanimous in

seeking a third proposed amendment in HB 2828 which would preclude an active district judge, court of appeals judge or supreme court justice from sitting as a voting member on a local district court nominating commission. The nonpartisan, merit selection of judges is a carefully considered and thought out method of selecting judges in those districts which have adopted the system. However, we doubt that anyone in drafting the original legislation even thought of, let alone considered, a situation in which a sitting district judge would participate in the selection of nominees to replace that judge or one of his or her colleagues.

We think that for a sitting judge to participate in such a selection, at the very least, could create the impression or appearance of partiality or undue influence. Judges may be perceived by members of the public and possibly by other members of the commission as authority figures whose opinions should be given undue weight. The fact that the lawyer members of the commission must appear regularly before a judge who is advocating certain nominees for judgeship could give a false or misconceived appearance of influence. The practice of sitting judges being directly involved in participating in the process of selecting successor judges to the court may appear to many to

be improper. I should also point out that K.S.A. 20-127 and Article 3, Section 13 of the Kansas Constitution precludes active judges and justices from sitting on the Supreme Court Nominating Commission. For these and other reasons, the Supreme Court unanimously supports the prohibition of sitting judges or justices as voting members of any district court nominating commission.

In closing, I do want to ask for a housekeeping amendment to this last proposal so that the amendment would read, "Except as provided by K.S.A. 20-2903(a), no active judge of the district court or court of appeals or justice of the supreme court shall be eligible to serve, during such judge's or justice's term of office, on any district nominating commission."

Again, I want to thank you for your attention and I will try to answer any questions you might wish to ask.

Respectfully submitted,

Richard W. Holmes
Chief Justice

RWH:cv

As Amended by House Committee

·tion of 1992

HOUSE BILL No. 2828

By Committee on Judiciary

1-31

AN ACT concerning the courts; relating to the supreme court nominating commission and the district court nominating commissions; amending K.S.A. 20-126, 20-128, 20-2904 and 20-2906 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 20-126 is hereby amended to read as follows: 20-126. The selection of subsequent members of the commission by the members of the bar shall be in like manner as is prescribed in K.S.A. 20-119 and 20-120, *and amendments thereto,* for the selection of the first members, and nominations shall be made and ballots mailed and returned within the times of the years when such elections are held as correspond to the times mentioned in ~~said~~ K.S.A. 20-119 and 20-120, *and amendments thereto, except that in any uncontested election, the nominee shall be declared elected without preparation of a ballot*. The clerk of the supreme court, ~~between March 1 and~~ *in* March ~~15~~ of any year in which a member of the commission is to be elected by members of the bar, shall ~~send by ordinary first class mail to all members of the bar eligible to vote for the member to be elected a~~ ~~*publish*~~ **send by ordinary first class mail to all members of the bar eligible to vote for the member to be elected a** notice that such election is to be held and advising how nominations for such office may be made. ~~*Such notice and information on nominating procedures shall be posted in each office of the clerk of the district court. The clerk of the supreme court shall provide such notice and information on nominating procedures to groups of members of the bar, including, but not limited to, state and local bar associations and shall publish such notice and information once a week for three consecutive weeks in the Kansas register and in such other newspapers, authorized by law to publish legal notices, as the supreme court may direct.*~~

Sec. 2. K.S.A. 20-128 is hereby amended to read as follows: 20-128. Any vacancy occurring from any cause in the office of chairman of the commission or among the lawyer members from the con-

Civil Procedure Subcommittee
March 17, 1992
Attachment 2 1/2

gressional districts shall be filled by appointment by the chief justice of the supreme court of Kansas, such appointee to hold office until the first day of July following the expiration of four ~~(4)~~ months after such appointment is made. During the four ~~(4)~~ months immediately preceding the termination of such appointive term an election shall be held in the manner by this act provided for other elections *of subsequent members of the commission*, for the unexpired term, if any, of the member whose vacancy is being filled. Appointments to fill such vacancies shall be certified to the clerk of the supreme court.

Sec. 3. K.S.A. 20-2904 is hereby amended to read as follows: 20-2904. (a) Lawyer members of the district judicial nominating commission shall be elected by the lawyers who are qualified electors of the judicial district and who are registered with the clerk of the supreme court pursuant to rule 201 of such court. Each lawyer member of a district judicial nominating commission shall be a qualified elector of such judicial district. ~~No~~ *active judge of the district court or court of appeals or justice of the supreme court shall be eligible to serve, during such judge's or justice's term of office, on any district nominating commission.* The number of lawyer members to be elected to the district judicial nominating commission of a judicial district shall be as follows:

Except as provided in K.S.A 20-2903 (a) no

(1) In a judicial district consisting of a single county, the number of members elected shall be equal to the number of nonlawyer members appointed pursuant to subsection (a)(1) of K.S.A. 20-2905, and amendments thereto.

(2) In a judicial district consisting of two counties, four members shall be elected.

(3) In a judicial district consisting of three or more counties, the number of members elected shall equal the number of counties in such judicial district.

(b) Between December 1 and December 15 of the year in which nonpartisan selection of judges of the district court is approved by the electors of the judicial district as provided in K.S.A. 20-2901, and amendments thereto, the clerk of the supreme court shall send to each ~~such~~ lawyer by ordinary first class mail a form for nominating one ~~such~~ lawyer for election to the commission. Any such nomination shall be returned to the clerk of the supreme court on or before January 1 of the following year, together with the written consent of the nominee. After receipt of all nominations which are timely submitted, the clerk shall prepare a ballot containing the names of all lawyers so nominated and shall mail one such ballot and instructions for voting such ballot to each registered lawyer in the judicial

Johnson County Bar Association

7300 West 110th Street, Suite 510
Overland Park, KS 66210
(913) 491-4522
Fax (913) 491-1861

March 13, 1992

Senator Wint Winter, Jr., Chairman
Senate Judiciary Committee
Capitol Building
Topeka, Kansas 66612

Re: H.B. 2828

Dear Senator Winter:

On March 12, 1992, the Board of Directors of the Johnson County Bar Association considered H.B. 2828 and, after a rather thorough discussion, voted unanimously to oppose that portion of the bill which prohibits a district judge from serving on any district nominating commission.

After discussing this matter and considering the pros and cons, it is our conclusion the presence of a district judge on this commission would not unduly influence other members of the commission. It would also provide the commission with insight into the nature of this complex and difficult position and provide insight as to attorney applicants.

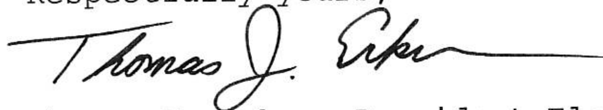
In the most recent election of our commission Judge Bruner received the highest number of votes among all nominees. The effect of H.B. 2828 is to void that election because the bill would prohibit Judge Bruner from serving on the commission.

We also considered whether or not there should be placed a limitation on the number of judges serving on any nomination commission and would support legislation limiting the number of elected judges serving on the commission to one judge.

I am respectfully requesting your support in opposing the passage of H.B. 2828 as it is presently written.

I understand Judge McClain will be appearing before a Senate Judiciary Subcommittee and the Board of Directors of this Association has authorized him to represent the association. If I can be of further assistance to you on this matter, please feel free to contact me.

Respectfully yours,



Thomas E. Erker, President Elect
Johnson County Bar Association

TEE/s

Board of Directors 1991-1992

Hon. William A. Cleaver, *President*
Thomas J. Erker, *President-Elect*
Kip A. Kubin, *Vice President*
Richard G. Guinn, *Secretary/Treasurer*
Russell C. Leffel, *Past President*
Richard W. Byrum, *Elected Director I*
Hon. Larry McClain, *Elected Director II*
Timothy V. Pickell, *Elected Director III*
Peter A. Jouras, Jr., *Appointed Director*
Michael E. Whitsitt, *Appointed Director*
Linda Coffee, *Executive Director*

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House Bill No. 2828

Proposed amendments to K.S.A. 20-126, 20-128, 20-2904 and 20-2906

Testimony offered by: Carol Gilliam Green Clerk of the Kansas Appellate Courts

The Supreme Court requests amendments to K.S.A. 20-126 (supreme court nominating commission) and K.S.A. 20-2904(b) (district court nominating commissions) which would allow nominees in uncontested elections to be declared elected without preparation of a ballot. Each attorney eligible to vote receives an envelope with five enclosures: a letter of instruction, the ballot, a ballot envelope, a certificate of qualification, and a return envelope.

Supreme Court Nominating Commission

In the 1990 election for commission chair, the clerk of the supreme court was required to mail ballots to over 8,000 attorneys although the incumbent chair was running unopposed.

District Court Nominating Commissions

In elections recently conducted, three of the sixteen judicial districts had uncontested elections. Two hundred attorneys reside in those three judicial districts.

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House Bill No. 2831
Senate Judiciary Subcommittee
March 17, 1992

Testimony of Paul Shelby
Assistant Judicial Administrator
Office of Judicial Administration

Mr. Chairman and members of the committee:

I thank you for the opportunity to appear today to discuss with you House Bill No. 2831 which is a proposal from the Kansas Association of District Court Clerks and Administrators. It relates to the filing of process service agent instruments with the various clerks of the district court in Kansas.

This bill amends civil procedure by transferring the responsiblility for keeping a file of agents upon whom civil process may be served from locations scattered about the state to a central location, the Secretary of State.

The Secretary of State performs in a similar fashion for other commercial and legal functions so that adding this function and its increased cost to that office should be more than offset by the service fee the bill directs.

I do want you to know that there will be a very small loss to the State General Fund from this transfer of registration of process service agents to the Secretary of State from clerks of the district court. A $5 fee is deleted a line 39 opn page 2 (and replaced by a higher fee for the Secretary of State). However, we estimate the loss at no more than $500 (an amount estimated as the fees collected as normal turnover in these agents occur in a year's time in 105 counties of the state).

We did amend this bill on page 2, lines 8 and 9. Our amendment struck the language "<u>of said such county</u>".

The Secretary of State supports this bill and we urge your favorable consideration.

Sherlyn Sampson, Clerk of the District Court, Lawrence, and President of the Kansas Association of District Court Clerks and Administrators is here to testify and explain the bill more in detail.

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House Bill No. 2831
Senate Judiciary Committee
March 17, 1992

Testimony of Sherlyn Sampson
Clerk of District Court, Douglas County
President Kans. Assoc. Of District Court Clerks & Administrators

Mr. Chairman:

I appreciate the opportunity to appear before you today to discuss House Bill No. 2831. This bill was requested by the Clerk's Association in order to eliminate duplicate filings at the state and local level of service of process agents, and to provide a centralized depository for such appointments.

Presently, both the Clerk of the District Court and the Secretary of State are filing these appointments. This proposal would require all appointments be filed with the Secretary of State and eliminate these filings with the (105) Clerks of the District Court.

Filing of process service agent instruments with the Clerk of District Court is optional in most instances pursuant to K.S.A. 60-306.

Persons wanting to locate the name of a service agent would have to check with Clerks in multiple counties if trying to locate the same through the court offices.

Many filings are made at both the state and local level as parties are wary of not covering all bases.

The Clerks' Legislative Committee surveyed all the Clerks in the State to see how many service of process agents were being filed. There were approximately 50 filed in clerk's offices last year in the entire state.

The Secretary of State's Office is well able and willing to handle the few additional filings which may be made in that office that are not being filed there now.

We have worked with John Wine Jr., General Counsel for the Secretary of State in the drafting of this bill and that office has agreed to this change and supports this proposal. I believe Mr. Wine or someone from his office will be visiting with you in regard to this bill.

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Thank you again for allowing me to speak to you on behalf of the clerks in Kansas in regard to this bill. I urge your support of this bill.

I would be happy to answer any questions you may have.

Sherlyn K. Sampson
Sherlyn K. Sampson
Clerk of District Court, Douglas Co.
President, KADCCA

Bill Graves
Secretary of State

2nd Floor, State Capitol
Topeka, KS 66612-1594
(913) 296-2236

STATE OF KANSAS

TESTIMONY BEFORE THE SENATE JUDICIARY
SUBCOMMITEE ON CIVIL PROCEDURE
HOUSE BILL NO. 2831

March 17, 1992

The office of the Secretary of State supports HB 2831 and encourages this committee to favorably recommend it for passage.

This bill would permit an individual or organization to appoint a single service agent with the Secretary of State. The current statute permits filings in each county.

We are told that the current statute is rarely used and that the bill would only add several hundred agents to our records. We already maintain a record of the resident agent and registered office for over 60,000 active corporations. Adding several hundred agents to our records would be not be burdensome or expensive.

Although we anticipate a small initial expense for computer programming, this bill provides for a filing fee to be deposited in our information and copy service fee fund which would cover the programming expense. No general fund expenditures would be required.

Again, we encourage this committee to favorably report HB 2831 for passage.

Thank you.

John Wine, General Counsel

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March 17, 1992

TESTIMONY IN SUPPORT OF AMENDMENTS TO HOUSE BILL 2870
SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CIVIL PROCEDURE

I am Elwaine F. Pomeroy, appearing on behalf of the Collection Attorneys Association, in support of proposed amendments to House Bill 2870. The Collection Attorneys Association is an unincorporated group of attorneys in Wichita, Kansas who have a particular interest in collection law, because of the areas in which they practice. Present with me today are two members of the Association, Joseph H. Cassell, and Bruce C. Ward.

We are asking that HB 2870 be amended in line 25 on page 1, after "sheriff" by inserting "of the county wherein the action is filed"; on page 2, in line 32, after "Service" by inserting ", levy and execution"; also in that same line, after "subsection" by inserting ", including, but not limited to, writs of execution, orders of attachment, replevin orders, orders for delivery, writs of restitution and writs of assistance,"; and in line 43, by inserting, before the period, ", and such other fees and costs as the court shall allow. All persons authorized under this subsection to serve, levy and execute process shall be considered an 'officer' as used in K.S.A. 60-2401 and 60-706, and amendments thereto". We are requesting that the bill be further amended by adding an additional section to the bill which would amend K.S.A. 1991 Supp. 61-1803 in the same manner as we are requesting the first section of the bill be amended.

I have presented you with a handout which illustrates how the bill would read if amended as we are requesting.

I have also presented you with the syllabus of a recent decision of the Kansas Supreme Court, which was handed down February 28, 1992. If any of you are interested in reading the full opinion, I will be happy to furnish you with copies of it; it is a 27 page opinion, and I furnished the chair of your committee with a copy of the full opinion yesterday.

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I have discussed this proposed amendment with Rep. Heinemann, and he has indicated that he has no objection to his bill being used as a vehicle for this amendment.

The first amendment we are requesting is simply a clarification of which sheriff should serve the process by certified mail. Members of the Collection Attorneys Association have had difficulties when they would file an action, for instance in Sedgwick County, but the defendant resides in Butler County. The Sheriff of Sedgwick County has been refusing to make the service by certified mail, contending that since the defendant resides in Butler County, it should be the Sheriff of Butler County who should serve the process by certified mail. The Sheriff of Butler County, on the other hand, takes the position that since the action originated in Sedgwick County, it is the responsibility of the Sedgwick County Sheriff to make the service by certified mail. Our amendment would clarify that it would be the sheriff of the county wherein the action is filed who should make the service by certified mail.

Mr. Ward and Mr. Cassell can give you more specifics concerning both the recent lawsuit and the long-standing practice in Wichita of using process servers. My understanding is that all of the process servers involved in the lawsuit are licensed private investigators, and many of them have had extensive law enforcement experience. The work done by the process servers removes a great burden from the Sedgwick County Sheriff's Department. The process servers arrange with the attorney for the plaintiff to perform their work for a flat fee - they never work on a contingent fee - and that fee ranges from $35.00 to a much larger fee if the case is quite complicated. As I understand, the process servers often do considerable investigative work, assisting in locating the defendant, obtaining information as to the location of property of defendant, and then

assisting in the execution of the orders of the court. I would suggest that if you are interested, these gentlemen could provide more detail as to the work which has been done by the process servers.

The first part of the amendment we are requesting to be made in line 43 on page 2 simply clarifies that the cost of the process servers can be included as costs when a judge orders the losing party to pay the costs of the action.

The new sentence we are requesting to be added in line 43 on page 2 addresses the issues raised in the lawsuit.

Mr. Ward has discussed this proposed amendment with Judge Rogg, a District Judge in Sedgwick County, and Judge Rogg authorized Mr. Ward to advise the committee that the proposed amendment would address an administrative problem that Judge Rogg has frequently encountered in Sedgwick County.

Elwaine F. Pomeroy
On behalf of Collection Attorneys Association

HOUSE BILL No. 2870

By Representative Heinemann

2-6

AN ACT concerning civil procedure; relating to service of execution orders; amending K.S.A. 60-2401~~, and~~ K.S.A. 1991 Supp. 60-303 and K.S.A. 1991 Supp. 61-1803 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1991 Supp. 60-303 is hereby amended to read as follows: 60-303. (a) Methods of service of process within this state, except service by publication as provided in K.S.A. 60-307, and amendments thereto, are described in this section. Methods of out-of-state service of process are described in K.S.A. 60-308, and amendments thereto.

(b) *Service by certified mail.* Except if the attorney for the party or the party, if the party is not represented by an attorney, requests personal or residence service pursuant to subsection (c); if the attorney or the party requesting service elects to serve process by certified mail pursuant to this subsection; as provided in K.S.A. 60-903, 60-906, *60-2401* or 60-3104, and amendments thereto; or as otherwise provided by law, the sheriff of the county wherein the action is filed shall serve any process by certified mail, evidenced by return receipt signed by any person or by restricted delivery, unless otherwise permitted by this article. The sheriff, attorney for the party seeking service or the party, if the party is not represented by an attorney, shall cause a copy of the process and petition or other document to be placed in an envelope addressed to the person to be served in accordance with K.S.A. 60-304, and amendments thereto, adequate postage to be affixed and the sealed envelope to be placed in the United States mail as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The sheriff, party's attorney or the party, if the party is not represented by an attorney, shall execute a return on service stating the nature of the process, the date on which the process was mailed, and the name and address on the envelope containing the process mailed as certified mail return receipt requested. The sheriff, party or the party's attorney shall file the return on service and the return receipt on return envelope in the records of the action. Service of process shall be considered obtained under K.S.A. 60-203, and amendments thereto, upon the delivery of the certified mail envelope. If the certified mail envelope is returned with an endorsement showing refusal of delivery, the sheriff, serving party or the party's attorney shall send a copy of the process and petition or other document to be served to the defendant by ordinary first-class mail. The mailing shall be evidenced by a certificate of mailing which shall be filed with

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the clerk. Service shall be considered obtained upon the mailing by ordinary first-class mail. Failure to claim certified mail service is not refusal of service within the meaning of this subsection.

(c) *Personal and residence service.* (1) When the plaintiff files a written request with the clerk for service other than by certified mail, service of process shall be made by personal or residence service. Personal service shall be made by delivering or offering to deliver a copy of the process and accompanying documents to the person to be served. Residence service shall be made by leaving a copy of the process and petition or other document to be served, at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion residing therein. If service cannot be made upon an individual, other than a minor or a disabled person, by personal or residence service, service may be made by leaving a copy of process and petition, or other document to be served, at the defendant's dwelling house or usual place of abode and mailing a notice that such copy has been left at such house or place of abode to the individual by first-class mail.

(2) When process is to be served under this subsection, the clerk of the court shall deliver the process and sufficient copies of the process and petition, or other documents to be served, to the sheriff of the county where the process is to be served or, if requested, to a person appointed to serve process or to the plaintiff's attorney.

(3) Service, levy and execution of all process under this subsection, including, but not limited to, writs of execution, orders of attachment, replevin orders, orders for delivery, writs of restitution and writs of assistance, shall be made by a sheriff within the sheriff's county, by the sheriff's deputy, by an attorney admitted to the practice of law before the supreme court of Kansas or by some person appointed as a process server by a judge or clerk of the district court, except that a subpoena may also be served by any other person who is not a party and is not less than 18 years of age. Process servers shall be appointed freely and may be authorized either to serve process in a single case or in cases generally during a fixed period of time. A process server or an authorized attorney may make the service anywhere in or out of the state and shall be allowed the fees prescribed in K.S. A. 28-110, and amendments thereto, for the sheriff, and such other fees and costs as the court shall allow. All persons authorized under this subsection to serve, levy and execute process shall be considered an "officer" as used in K.S.A. 60-2401 and 60-706, and amendments thereto.

(4) In all cases when the person to be served, or an agent authorized by the person to accept service of process refuses to receive copies thereof, the offer of the duly authorized process server to deliver copies thereof, and the refusal, shall be sufficient service of the process.

(d) *Acknowledgment or appearance*. An acknowledgment of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance.

Sec 2. K.S.A. 60-2401 is hereby amended to read as follows: 60-2401. (a) *Definitions.* A general execution is a direction to an officer to seize any nonexempt property of a judgment debtor and cause it to be sold in satisfaction of the judgment. A special execution or order of sale is a direction to an officer to effect some action with regard to specified property as the court determines necessary in adjudicating the rights of parties to an action. *Executions served under this section shall be by personal service and not by certified mail return receipt requested.*

(b) *By whom issued.* Executions and orders of sale shall be issued by the clerk at the request of any interested person and directed to the appropriate officers of the counties where they are to be levied.

(c) *When returnable.* The officer to whom any execution or order of sale is directed shall return it to the court from which it is issued within 60 days from the date thereof.

(d) *Manner of levy.* A general execution shall be levied upon any real or personal nonexempt property of the judgment debtor in the manner provided for the service and execution of orders of attachment under K.S.A. 60-706 through 60-710, and amendments thereto. Oil and gas leaseholds, for the purposes of this article, shall be treated as real property. Special executions or orders of sale shall be levied and executed as the court determines.

[Section 3. K.S.A. 1991 Supp. 61-1803 is hereby amended to read as follows: 61-1803. (a) Methods of service of process within this state, except service by publication, are described in this section. Service of process outside the state shall be made in substantial compliance with the applicable provisions of K.S.A. 60-308, and amendments thereto.

(b) *Service by certified mail.* Except if the attorney for the party or the party, if the party is not represented by an attorney, requests personal or residence service pursuant to subsection (c); if the attorney or the party requesting service elects to serve process by certified mail pursuant to this subsection; or as otherwise provided by law, the sheriff <u>of the county wherein the action is filed</u> shall serve any process by certified mail, evidenced by return receipt signed by any person or by restricted delivery, unless otherwise permitted by this article. The sheriff, attorney for the party seeking service or the party, if the party is not represented by an attorney, shall cause a copy of the process and petition or other document to be placed in an envelope addressed to the person to be served in accordance with K.S.A. 61-1805, and amendments thereto, adequate postage to be affixed and the sealed envelope to be placed in the United States mail as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The sheriff, party's attorney or the party, if the party is not represented by an attorney, shall execute a return on service stating the nature of the process, the date on which the process was mailed, and the name and address on the envelope containing the process mailed as certified mail return receipt requested.

The sheriff, party or the party's attorney shall file the return on service and the return receipt on return envelope in the records of the action. Service of process shall be considered obtained under K.S.A. 61-1703, and amendments thereto, upon the delivery of the certified mail envelope. If the certified mail envelope is returned with an endorsement showing refusal of delivery, the sheriff, serving party or the party's attorney shall send a copy of the process and petition or other document to be served to the defendant by ordinary first-class mail. The mailing shall be evidenced by a certificate of mailing which shall be filed with the clerk. Service shall be considered obtained upon the mailing by ordinary first-class mail. Failure to claim certified mail service is not refusal of service within the meaning of this subsection.

(c) *Personal and residence service.* (1) When the plaintiff files a written request with the clerk for service other than by certified mail, service of process shall be made by personal or residence service. Personal service shall be made by delivering or offering to deliver a copy of the process and accompanying documents to the person to be served. Residence service shall be made by leaving a copy of the process and petition or other document to be served, at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion residing therein. If service cannot be made upon an individual, other than a minor or a disabled person, by personal or residence service, service may be made by leaving a copy of process and petition, or other document to be served, at the defendant's dwelling house or usual place of abode and mailing a notice that such copy has been left at such house or place of abode to the individual by first-class mail.

(2) When process is to be served under this subsection, the clerk of the court shall deliver the process and sufficient copies of the process and petition, or other documents to be served, to the sheriff of the county where the process is to be served or, if requested, to a person appointed to serve process or to the plaintiff's attorney.

(3) Service, levy and execution of all process under this subsection, including, but not limited to, writs of execution, orders of attachment, replevin orders, orders for delivery, writs of restitution and writs of assistance, shall be made by a sheriff within the sheriff's county, by the sheriff's deputy, by an attorney admitted to the practice of law before the supreme court of Kansas or by some person appointed as a process server by a judge or clerk of the district court, except that a subpoena may also be served by any other person who is not a party and is not less than 18 years of age. Process servers shall be appointed freely and may be authorized either to serve process in a single case or in cases generally during a fixed period of time. A process server or an authorized attorney may make the service anywhere in or out of the state and shall be allowed the fees prescribed in K.S. A. 28-110, and amendments thereto, for the sheriff, and such other fees and costs as the court shall allow. All persons authorized under this subsection to serve, levy and execute process shall be considered an "officer" as used

in K.S.A. 60-2401 and 60-706, and amendments thereto.

(4) In all cases when the person to be served, or an agent authorized by the person to accept service of process refuses to receive copies thereof, the offer of the duly authorized process server to deliver copies thereof, and the refusal, shall be sufficient service of the process.

(d) *Acknowledgment or appearance*. An acknowledgment of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance.]

Sec. 4. K.S.A. 60-2401, ~~and~~ K.S.A. 1991 Supp. 60-303 and K.S.A. 1991 Supp. 61-1803 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 67,057

ROBERT STEELE, SHELDON WULF,
RONALD WAITS, GARY DAVIS,
GARETH SMITH, BILL WARFIELD,
JAMES WALTERS, and EMERY L. GOAD,
Appellants,

v.

CITY OF WICHITA,
Appellee.

SYLLABUS BY THE COURT

1.

The legislative history of K.S.A. 1991 Supp. 60-303(c)(3) leads to the conclusion that the statutory term "process" is broad enough to include delivery of all process of the court.

2.

K.S.A. 1991 Supp. 60-303(c)(3) authorizes only *service* of process, *i.e.,* the delivery of process. The statute does not authorize the *execution* of process. Thus, general process servers appointed under K.S.A. 1991 Supp. 60-303(c)(3) are authorized to serve any process which only involves delivery of the process.

Civil Procedure Subcommittee
March 17, 1992
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3.

"Officer" as used in K.S.A. 60-2401 and K.S.A. 60-706 refers to sheriffs, undersheriffs, deputies, county clerks, and others who are authorized by law to exercise the sheriff's duties.

4.

K.S.A. 1991 Supp. 60-303 is a general statute regarding service of process. K.S.A. 60-2401 and K.S.A. 60-706 are specific statutes dealing with service and execution of writs of execution and orders of attachment. The specific statutes control over the general statute.

5.

K.S.A. 60-2401 and K.S.A. 60-706 require a sheriff or person authorized to exercise the duty of a sheriff to serve and execute writs of executions and orders of attachment. Such statutes do not authorize process servers under a general appointment to serve and execute such writs.

Appeal from Sedgwick district court; DAVID W. KENNEDY, judge. Opinion filed February 28, 1992. Affirmed in part and reversed in part.

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Joseph H. Cassell, of Wichita, argued the cause, and *Bruce C. Ward*, of Wichita, was with him on the brief for appellants.

Thomas R. Powell, of Hinkle, Eberhart & Elkouri, of Wichita, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

SIX, J.: This is a first-impression statutory interpretation case coming to us as a declaratory judgment action seeking: (1) a determination that persons, duly appointed as general process servers under K.S.A. 1991 Supp. 60-303(c)(3), have the authority and power to serve all process, including writs of execution and orders of attachment; and (2) an injunction enjoining the City of Wichita (City) from interfering with such service of process.

Eight individual plaintiffs, Robert Steele, Sheldon Wulf, Ronald Waits, Gary Davis, Gareth Smith, Bill Warfield, James Walters, and Emery L. Goad, have been appointed process servers by a judge or clerk of the 18th Judicial District under K.S.A. 1991 Supp. 60-303(c)(3). The process server plaintiffs (process servers) brought this action against the City.

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The trial court ruled that K.S.A. 1991 Supp. 60-303(c)(3) limits the authority of general-appointment process servers to serve summonses, petitions, and those documents that might be attached to a summons.

We granted the process servers' motion to transfer from the Court of Appeals. Our jurisdiction is under K.S.A. 20-3017.

The issue for resolution in the case at bar centers on the breadth of K.S.A. 1991 Supp. 60-303(c)(3). What is the extent of the authority the legislature intended for process servers under a general appointment? What is the relationship of K.S.A. 60-706, K.S.A. 60-2401, and K.S.A. 1991 Supp. 60-303(c)(3) in describing the authority of general-appointment process servers?

We hold that K.S.A. 1991 Supp. 60-303(c)(3) authorizes process servers, under a general appointment, to serve all process which is complete upon delivery unless special statutes require service by the sheriff or persons authorized to exercise the duty of a sheriff.

We agree with the trial court that K.S.A. 60-706 and K.S.A. 60-2401 do not authorize court-appointed general process servers to serve writs of execution and orders of attachment.

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Facts

The parties stipulated to the following facts and legal issues:

"1. Plaintiffs have all been appointed as process servers by a Judge or Clerk of the 18th Judicial District, pursuant to K.S.A. [1991 Supp.] 60-303(c)(3).

"2. Plaintiffs have relied on K.S.A. [1991 Supp.] 60-303(c)(3), [K.S.A.] 60-706(b), [K.S.A.] 60-2401 and other statutes, to serve, execute, and carry out writs of execution, attachment, restitution or assistance, and other similar court orders or process. Plaintiffs also seize property, retain possession thereof, cause such property to be sold at judicial sale, and transfer title to such property to such purchasers.

"3. On occasion, police officers have been called to the scene by the Plaintiffs, the person on whom a writ of execution or other Court order is being carried out, or by parties who are not involved but who have observed the Plaintiffs carrying out the execution, writ, or other court order or process.

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"4. Police officers are called to the scene where writs of execution and other court orders or process are being carried out, most often, because an alleged breach of the peace is occurring or there is a fear that a breach of the peace will occur. More often than not Plaintiffs have called police to the scene.

"5. Plaintiffs maintain they have authority under their appointment as a process server under K.S.A. [1991 Supp.] 60-303(c)(3) to execute or carry out a writ of execution, writ of attachment, or other similar court order or process, and they maintain they have the authority to seize property and retain possession thereof to the same extent that a sheriff or other law enforcement has as provided by law.

"6. Police officers, upon arrival at a scene where Plaintiffs are executing or carrying out a writ of execution, writ of attachment, or other similar court order or process, have on occasion stopped the carrying out of such court order or process for the purpose of conducting an investigation into an alleged breach of peace. On such occasions certain of the Plaintiffs have been threatened with arrest and Plaintiff Goad has been arrested for provoking an assault, disorderly conduct and interfering with a police officer.

"7. Police officers have also on occasion, when called to a scene, reviewed the documentation that allegedly empowers Plaintiffs to serve process, carry out a writ of execution, writ of attachment, or other similar court order or process, and such review has resulted in Plaintiffs being delayed in their service and execution.

"8. The parties agree that if this Court renders judgment, there exists a factual basis for some form of permanent equitable relief consistent with said judgment. Parties may propose forthwith the appropriate equitable order or injunctive relief. The parties hereby respectfully request the Court to render such determination as expeditiously as possible, to protect the parties and enforce the declaratory judgment of the Court.

"9. The parties agree that the temporary Restraining Order entered June 27, 1991, shall remain in full force and effect until further Order of this Court.

"Issues

"1. Is a person appointed as process server under K.S.A. [1991 Supp.] 60-303(c)(3) authorized and empowered to execute and carry out writs of execution, attachment, restitution or assistance, and other similar court order or process pursuant to K.S.A. 60-706(b), 60-2401 and other statutes?

"2. Does a person appointed under K.S.A. [1991 Supp.] 60-303(c)(3) have the authority during the serving of executions and carrying out writs of execution, attachment, restitution, assistance or other court orders, to breach the peace if reasonably necessary, pursuant to other statutes such as K.S.A. 60-706(b), 60-2401?

"3. Does a police officer who is called to the scene when a writ of execution, writ of attachment, or other similar court order or process is being carried out have authority to temporarily stop or delay the serving or execution of such court order or process for the purpose of conducting an investigation into alleged breaches of the peace? Further, does the police officer have the authority to review the documentation that such person (who is serving the Court order or process) has in his possession that relates to the order being served?

"4. Does a person appointed under K.S.A. [1991 Supp.] 60-303(c)(3) and other statutes such as K.S.A. 60-706(b) and 60-2401 have the authority to sell and transfer title to property seized according to law?"

Ruling of the Trial Court

The trial court adopted the stipulation of facts and ruled for the City, finding, as a matter of law, that K.S.A. 1991 Supp. 60-303(c)(3) "limits the appointment of individuals as process servers to the issuance of summonses." The trial court stated: "K.S.A. [1991 Supp.] 60-303(c)(3) does not authorize a general appointment that empowers an individual to serve all process." The trial court stated that it was not ruling whether a district court judge may specially appoint individuals to serve writs of execution, attachment, or other court process under K.S.A. 60-706 or K.S.A. 60-2401 *et seq.* because the issue was not fairly before the court. The trial court did not reach the stipulated issues 2, 3, and 4, stating its ruling made such issues moot.

Scope of Review

This case was decided by the trial court on the basis of stipulated facts; consequently, we exercise de novo review. *Kneller v. Federal Land Bank of Wichita,* 247 Kan. 399, 400, 799 P.2d 485 (1990). In addition, the issue is one of statutory construction, which is subject to unlimited appellate review. See *Pyeatt v. Roadway Express, Inc.,* 243 Kan. 200, 204, 756 P.2d 438 (1988).

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The trial court's ruling related only to a general appointment; consequently, our opinion also is limited to general appointments.

Argument of the Process Servers

Plaintiffs assert that K.S.A. 1991 Supp. 60-303(c)(3) authorizes persons appointed generally as process servers to serve "all process," including writs of execution and orders of attachment. They emphasize that all reference in K.S.A. 1991 Supp. 60-303 is to "process" and not solely to "summons." Plaintiffs contend "process" means all legal writs, orders, and summonses, including writs of execution. The limiting language of K.S.A. 1991 Supp. 60-303(c)(3), "under this subsection," makes clear that process servers appointed under K.S.A. 1991 Supp. 60-303(c)(3) may not serve process by certified mail. Plaintiffs contend the 1990 legislature amended article 3, chapter 60, by substituting "process" for "summons and petition" (L. 1990, ch. 202, § 5; K.S.A. 1991 Supp. 60-304) and substituting "summons" for "process" (L. 1990, ch. 202, § 9; K.S.A. 1991 Supp. 60-308). K.S.A. 1991 Supp. 60-312(a)(1) provides for proof of service of "summons or other process" made by an officer. If service of "such process" is directed to a nonofficer, K.S.A. 1991 Supp. 60-312(a)(2) directs the

nonofficer to make an affidavit as to time, place, and manner of service. Plaintiffs assert that if a nonofficer may file a return of service, such nonofficer must be able to serve process. Plaintiffs declare that if appointed process servers are limited to service of summonses under K.S.A. 1991 Supp. 60-303(c)(3), then sheriffs are also limited to service of summonses. Therefore, no one is authorized to serve any process other than a summons under K.S.A. 60-301 *et seq.*

Plaintiffs contend K.S.A. 1991 Supp. 60-303(b) excludes service by certified mail for service provided for in K.S.A. 1991 Supp. 60-903 (restraining order without notice), K.S.A. 1991 Supp. 60-906 (injunction order, restraining order), and K.S.A. 1991 Supp. 60-3104 (protection from abuse). Service under these statutes must be personal and can only be served under K.S.A. 1991 Supp. 60-303(c)(3). If K.S.A. 1991 Supp. 60-303(c)(3) is limited to summonses, there is no mechanism under article 3 for service of process under K.S.A. 1991 Supp. 60-903, 60-906, and 60-3104. Finally, plaintiffs argue that the legislative history, specifically the testimony by a representative of the Judicial Council, indicates that the 1986 amendments authorizing general appointments would allow service of all process by process servers serving under a general appointment.

The City's Position

The City contends "all process" as used in K.S.A. 1991 Supp. 60-303(c)(3) was intended to refer to "original process," which is synonymous with summons. The limiting language "under this subsection" in 60-303(c)(3) refers back to 60-303(c)(1), which involves personal and residence service of "process and petition, or other document to be served," which means summonses and petitions and documents that may be attached to petitions. The amendments to article 3 changing "summons" to "process" did not give plaintiffs the authority to serve writs of execution and orders of attachment. K.S.A. 1991 Supp. 60-303(c)(3) is limited to service under K.S.A. 1991 Supp. 60-303(c)(1), *i.e.*, service of summonses, petitions, and other related attached documents. Addressing plaintiffs' K.S.A. 1991 Supp. 60-303(b) argument, the City asserts that K.S.A. 1991 Supp. 60-903, 60-906, and 60-3104 deal with the process of bringing a party into a lawsuit, in other words, original process. Finally, the City contends the legislative history does not indicate the Judicial Council was advocating that process servers were to be appointed to serve process other than summonses, petitions, and attached documents.

K.S.A. 1991 Supp. 60-303(c)(3)

A fundamental rule of statutory construction is that the intent of the legislature governs when the intent can be ascertained from the statute. In construing statutes, legislative intent is to be determined from a general consideration of the entire act. It is our duty, as far as practicable, to reconcile the different provisions to make them consistent, harmonious, and sensible. *State v. Adee*, 241 Kan. 825, 829, 740 P.2d 611 (1987).

We must give effect to the legislature's intent even though words, phrases, or clauses must be omitted or inserted in the statute. In determining legislative intent, we are not limited to consideration of the language used in the statute. We may look to the historical background of the statute, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. *Read v. Miller*, 247 Kan. 557, 561-62, 802 P.2d 528 (1990). Ordinarily, courts presume that by changing the language of a statute the legislature intends to change its effect. However, the presumption may be strong, weak, or absent, depending on the circumstances. *Board of Education of U.S.D. 512 v. Vic Regnier Builders, Inc.*, 231 Kan. 731, 736, 648 P.2d 1143 (1982).

Having stated the rubric for statutory construction, we turn to the key statute in issue.

K.S.A. 1991 Supp. 60-303(c) states in part:

> "*Personal and residence service.* (1) When the plaintiff files a written request with the clerk for service other than by certified mail, service of process shall be made by personal or residence service. Personal service shall be made by delivering or offering to deliver a copy of the process and accompanying documents to the person to be served. Residence service shall be made by leaving a copy of the *process and petition, or other document to be served,* at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion residing therein. If service cannot be made upon an individual, other than a minor or a disabled person, by personal or residence service, service may be made by leaving a copy of the *process and petition, or other document to be served,* at the defendant's dwelling house or usual place of abode and mailing a notice that such copy has been left at such house or place of abode to the individual by first-class mail.

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"(2) When process is to be served under this subsection, the clerk of the court shall deliver *the process* and sufficient copies of *the process and petition, or other document to be served,* to the sheriff of the county where the process is to be served or, if requested, to a person appointed to serve process or to the plaintiff's attorney.

"(3) Service of *all process* under this subsection shall be made by a sheriff within the sheriff's county, by the sheriff's deputy, by an attorney admitted to the practice of law before the supreme court of Kansas or *by some person appointed as a process server* by a judge or clerk of the district court, except that a subpoena may also be served by any other person who is not a party and is not less than 18 years of age. *Process servers shall be appointed freely and may be authorized either to serve process in a single case or in cases generally during a fixed period of time.* A process server or an authorized attorney may make the service anywhere in or out of the state and shall be allowed the fees prescribed in K.S.A. 28-110, and amendments thereto, for the sheriff." (Emphasis added.)

The City relies on Black's Law Dictionary 1205 (6th ed. 1990), as authority that "process" means summons and petition only.

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The legislative history of K.S.A. 1991 Supp. 60-303(c)(3), however, leads to the conclusion that the term "process" as used in the statute is broad enough to include delivery of all process of the court.

The 1990 legislature added subsections (b), (c)(1), and (c)(2) to 60-303. The major 1990 change in 60-303 was the addition of subsection (b), which provided for service by certified mail. The only significant difference in K.S.A. 1991 Supp. 60-303(c)(3) is the additional language, "under this subsection." "[U]nder this subsection" was not necessary when 60-303 only authorized personal and residence service. Thus, the phrase "under this subsection" limits the provisions in 60-303(c)(3) to personal and residence service as defined in 60-303(c)(1).

K.S.A. 60-303 (Corrick) was first enacted in 1963 when Kansas revised the Code of Civil Procedure to conform to the Federal Rules of Civil Procedure. Originally, K.S.A. 60-303 (Corrick) provided:

> "*By whom served.* Service of all process shall be made by a sheriff within his county, by his deputy or by some person specially appointed by the judge for that purpose, or

in his absence, by the clerk, except that a subpoena may be served as provided in section 60-245(*d*). Special appointments to serve process shall be made freely when substantial savings in travel fees will result. A person specially appointed to serve process may make such service any place in the state, and shall be allowed the same fees as the sheriff for similar services."

In 1 Gard's Kansas C. Civ. Proc. 2d Annot., Ch. 60, Art. 3 (1979), the Prefatory Note of the Advisory Committee states:

"Generally an effort has been made to provide, under this article, *a complete method of service for every possible civil remedy. It is sufficiently complete that all other methods of service provided in numerous chapters of the statutes can be repealed except where the service is tied to the substantive law for constitutional reasons.* We have not attempted to do the repealing. This can be done from time to time as the legislature desires. The methods presented here are alternative to but not in restriction of the different methods specifically provided by law." (Emphasis added.)

The 1963 version of 60-303 was substantially similar to the original version of Fed. R. Civ. Proc. 4(c), which provided:

> "By Whom Served. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result."

The 1986 amendment to 60-303 changed the statute to substantially the same language that is now contained in K.S.A. 1991 Supp. 60-303(c)(3). The major change in the 1986 amendment deleted the reference to specially appointed process server and added the language: "*Process servers shall be appointed freely and may be authorized either to serve process in a single case or in cases generally during a fixed period of time.*" L. 1986, ch. 215, § 14. A Judicial Council staff attorney appeared before the Senate Committee on Judiciary in 1986, stating that the bill (Senate Bill 480) contained amendments relating to the rules of civil procedure and service of process recommended by the Civil Code Advisory Committee and approved by the Judicial Council. The staff attorney testified:

"The amendments [to K.S.A. 60-301 and K.S.A. 60-303, respectively] would allow service of the summons and petition and *other process* by Kansas attorneys and appointed process servers in addition to service by the sheriff. The amendments were prompted in part by the federal practice of making service of the summons and complaint the responsibility of the plaintiff rather than the U.S. Marshal." (Emphasis added.) Minutes of the Senate Committee on Judiciary, February 5, 1986, Attachment I.

When the 1986 amendment to 60-303 was passed, the current version of Fed. R. Civ. Proc. 4(c) was in effect and differentiated between service of a summons and complaint and service of other process. Fed. R. Civ. Proc. 4(c) now states in part:

"Service.

"(1) Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.

"(2)(A) A summons and complaint shall, except as provided in subparagraph (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age."

The Judicial Council and the legislature, contrary to Fed. R. Civ. Proc. 4(c), chose not to distinguish between service of a summons and petition and service of other process. K.S.A. 60-303 was originally adapted from the Fed. R. Civ. Proc. 4(c) in effect in 1963. Both statutes used the language "all process."

In 1966, the Fifth Circuit Court of Appeals held that Rule 4(c) governs the service of writs of garnishment issued in federal court. *United States v. St. Paul Mercury Insurance Company,* 361 F.2d 838 (5th Cir. 1966). Thus, "all process" in Rule 4(c) was not limited to service of summonses and complaints.

We conclude that "process" as used in K.S.A. 1991 Supp. 60-303 was intended to be broader than summonses, petitions, and documents which may be attached. The broader interpretation is consistent with the interpretation extended to the earlier version of Fed. R. Civ. Proc. 4(c) from which K.S.A. 60-303 was originally adapted. See, *e.g., St. Paul Mercury Insurance Co.,* 361 F.2d at 839.

Our reasoning that "all process" as used in K.S.A. 1991 Supp. 60-303(c)(3) refers to process other than summonses,

petitions, and attached documents does not, however, lead to the conclusion that the legislature intended to grant authority for process servers under a general appointment to serve writs of execution and orders of attachment. As we discuss later in this opinion, K.S.A. 60-2401 and 60-706 limit the authority for service of such writs to sheriffs or other law enforcement officers. Furthermore, service of process involving obligations of the process server beyond serving notice invokes other duties and responsibilities which may require the enforcement presence of a sheriff. Where enforcement may be required, it would be improper to appoint a person who does not possess the same statutory powers. See 4A Wright & Miller, Federal Practice and Procedure: Civil § 1091 (1987).

The policy preventing the service of writs of execution and orders of attachment by generally appointed process servers may be reconciled with the language of K.S.A. 1991 Supp. 60-303(c)(3). K.S.A. 1991 Supp. 60-303(c)(3) authorizes only *service* of process, *i.e.*, the delivery of process. The statute does not authorize the *execution* of process. Thus, general process servers appointed under K.S.A. 1991 Supp. 60-303(c)(3) are authorized to serve any process which only involves delivery of the process.

The trial court erred in limiting "all process" to summonses, petitions, and attached documents. K.S.A. 1991 Supp. 60-303(c)(3) is broad enough to authorize the general appointment of process servers to serve all process which is complete upon the delivery of the process; consequently, we need not address the process servers' 60-303(b) argument.

K.S.A. 60-706 and K.S.A. 60-2401

Plaintiffs argue that K.S.A. 60-706 and K.S.A. 60-2401 authorize process servers under a general appointment to serve writs of execution and orders of attachment. K.S.A. 60-2401(a) authorizes "an officer" to seize nonexempt property. A writ of execution is served in the same manner as an order of attachment under K.S.A. 60-706 through 60-710. K.S.A. 60-2401(d). K.S.A. 60-706 authorizes a sheriff or "other officer" authorized by law to serve an order of attachment in the same manner as an ordinary summons under article 3. (K.S.A. 60-301 *et seq.*) Plaintiffs contend that a court-appointed process server under a general appointment is an "officer" of the court and authorized to serve writs of executions and orders of attachment under K.S.A. 60-706 and 60-2401.

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K.S.A. 60-2401 provides in part:

"Writ of execution. (a) *Definitions.* A general execution is a direction to an officer to seize any nonexempt property of a judgment debtor and cause it to be sold in satisfaction of the judgment. A special execution or order of sale is a direction to an officer to effect some action with regard to specified property as the court determines necessary in adjudicating the rights of parties to an action.

"(b) *By whom issued.* Executions and orders of sale shall be issued by the clerk at the request of any interested person and directed to the appropriate officers of the counties where they are to be levied.

. . . .

"(d) *Manner of levy.* A general execution shall be levied upon any real or personal nonexempt property of the judgment debtor in the manner provided for the service and *execution* of orders of attachment under K.S.A. 60-706 through 60-710, and amendments thereto. Oil and gas leaseholds, for the purposes of this article, shall be treated as real property. Special executions or orders of sale shall be levied and executed as the court determines." (Emphasis added.)

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K.S.A. 60-706 provides in part:

"Attachment order. (a) *Issuance and contents.* The order of attachment shall be delivered to the sheriff of any county or other officer authorized by law to serve the same, and shall command such sheriff or officer to attach the property of the defendant or so much thereof as will be sufficient to satisfy the plaintiff's claim . . . .

"(b) *Manner of serving order.* The attachment order shall be served as follows:

"(1) *Service of attachment.* In addition to the process required under article 3 of this chapter, the order of attachment shall be *served* upon the defendant, if the defendant can be found, in the same manner as an ordinary summons, and a return made thereof.

"(2) *Manner of executing order, inventory.* The order of attachment shall be *executed* by the officer without delay. . . ." (Emphasis added.)

Both K.S.A. 60-706 and 60-2401 distinguish between service and execution. K.S.A. 1991 Supp. 60-303(c)(3) only authorizes service.

K.S.A. 19-812 provides:

> "The sheriff, in person or by his undersheriff or deputy, shall serve and *execute,* according to law, all process, writs, precepts and orders issued or made by lawful authority and to him directed, and shall attend upon the several courts of record held in his county, and shall receive such fees for his services as are allowed by law." (Emphasis added.)

K.S.A. 19-812 specifically authorizes the sheriff, undersheriff, or deputy to *execute* writs. K.S.A. 19-804a authorizes the county clerk to exercise all the powers and duties of the sheriff when there is no sheriff in an organized county. K.S.A. 19-801a requires the sheriff to execute a bond. K.S.A. 19-820 provides for penalties when the sheriff neglects to make return of "any writ or process."

A review of K.S.A. 19-812, 19-804a, 19-801a, and 19-820 leads us to conclude that "officer" as used in K.S.A. 60-706 and K.S.A. 60-2401 refers to sheriffs, undersheriffs, deputies, county clerks, and others who are authorized by law to exercise the sheriff's duties. In addition, K.S.A. 1991 Supp. 60-312(a) distinguishes between the manner in which

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officers and nonofficers return proof of service. If plaintiffs' argument that persons authorized to serve process are officers of the court had merit, there would be no need to distinguish between officers and nonofficers.

K.S.A. 1991 Supp. 60-303 is a general statute regarding service of process. K.S.A. 60-706 and K.S.A. 60-2401 are specific statutes dealing with service and execution of writs of execution and orders of attachment. The specific statutes control. See *Kansas Racing Management, Inc. v. Kansas Racing Comm'n,* 244 Kan. 343, 353, 770 P.2d 423 (1989).

K.S.A. 60-706 and K.S.A. 60-2401 require a sheriff or person authorized to exercise the duty of a sheriff to serve and execute writs of executions and orders of attachment. Such statutes do not authorize process servers under a general appointment to serve and execute such writs.

We reverse the trial court's holding that K.S.A. 1991 Supp. 60-303(c)(3) limits process servers operating under a general appointment to serving summonses, petitions, and attached documents. We hold that K.S.A. 1991 Supp. 60-303(c)(3) authorizes general appointment process servers to serve all process which is complete upon delivery unless specific statutes require the sheriff or persons authorized to exercise the duty of a sheriff to serve the same.

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We affirm the trial court's ruling that K.S.A. 60-706 and 60-2401 do not authorize process servers under a general appointment to serve writs of execution and orders of attachment.

Affirmed in part and reversed in part.

10-27/27

House Bill No. 2829
Senate Judiciary Subcommittee
March 17, 1992

Testimony of Paul Shelby
Assistant Judicial Administrator
Office of Judicial Administration

Mr. Chairman and members of the committee:

I appreciate the opportunity to appear today to discuss with you House Bill No. 2829 which relates to lien filings in the district courts. This is a proposal from the Kansas Association of District Court Clerks and Administrators. This is a recommendation to amend the statutes to reflect the modern filing and recording practices currently being followed in the trial courts.

The statutorily prescribed method requires purchase of large bound volumes which have blank pages overprinted with column headings as set forth at lines 14-16, page 2 of this bill. Such books may be posted by hand or in some instances may be disassembled to permit posting by typewriter. In any event, these books are no longer in wide usage and now approach a cost of $300 per book.

Passage of this bill will permit mechanics liens to be incorporated only in the general index of a court. Although not stated in the present statutes, mechanics liens are now being indexed in most courts as a service to abstracters and other persons interested in possible encumbrances.

Passage of this bill will save clerks time and district court county operating funds used to purchase the outmoded bound volumes. This bill passed the House 125-0 on February 27, 1992.

We urge your favorable consideration of this bill and Sherlyn Sampson, Clerk of the District Court, Lawrence, Kansas is also here to testify and explain the bill in more detail. She is currently the President of Kansas Association of District Court Clerks and Administrators.

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House Bill No. 2829
Senate Judiciary Committee
March 17, 1992

Testimony of Sherlyn Sampson
Clerk of District Court, Douglas County
President Kans. Assoc. of District Court Clerks & Administrators

Mr. Chairman:

I appreciate the opportunity to appear before you today to discuss House Bill No. 2829. This bill was requested by the Clerk's Association and is a cleanup bill to bring the statutes into compliance with modern filing practices currently being followed in the courts.

Section 2, subsection (b) of the bill indicates the language we wish to delete. This language requires us to keep a lien book and gives specific instructions as to how information from the lien filing should be copied into the book under specific headings.

We wish to eliminate this statutory requirement for maintaining a book for the following reasons:

1. Maintaining docket books are very expensive. They are very heavy to handle; and in many instances require that information be hand written to make entries.

2. The specific information required to be copied from the filing is not used as abstractors are responsible for verifying the information is correct, therefore, refer to the original filing for property descriptions, etc.

3. By indexing these filings in the court's general index instead of in a separate book, it centralizes the listing of court filings.

This bill would also allow for assignments filed to be attached to the applicable lien. This would allow the abstractors to take notice of such an assignment without checking for a handwritten notation in a separate docket book and is in conformity with the current procedures.

This bill would also provide for cancellation of liens in accordance with existing law [K.S.A 60-1105(a)] without further independent action of the clerk. Since the law clearly sets forth the limitation of liens, it is repetitive to require further action to release the lien. Furthermore, the duties of the clerk are generally ministerial in nature, and clerks who are not law trained should not be required to make a legal determination in regard to when a lien should or should not be released.

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Thank you again for allowing me to speak to you on behalf of the clerks in Kansas in regard to this bill. I urge your support of this bill.

I would be happy to answer any questions you might have.

Sherlyn K. Sampson

Sherlyn K. Sampson
Clerk of District Court, Douglas Co.
President, KADCCA

KANSAS JUDICIAL COUNCIL

KANSAS JUDICIAL CENTER
301 West Tenth Street, Suite 262
Topeka, Kansas 66612-1507

PHONE (913) 296-2498
FAX (913) 296-1863

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March 19, 1992

TESTIMONY ON 1992 HOUSE BILL 2769

BACKGROUND

Within the past year it came to the Judicial Council's attention from a number of sources including legislators, judges and the judicial administrator that fax machines were being used by the courts and it was thought that a statute should be enacted and rules adopted clarifying this usage.

COMMITTEE

Last year the Judicial Council created the Judicial Council Technology Advisory Committee to study not only the use of fax machines by the courts, but the application of other technology to the judicial system. A cross-section of lawyers, judges, legislators, nonjudicial personnel and other persons with knowledge in the field were appointed to the committee.

THE STUDY

The committee considered fax rules from Illinois, Minnesota, Colorado, Idaho, Oregon, Nevada, Washington, Michigan, Florida, California, the National Center for State Courts and the United States District Courts. After consideration of the rules of the other jurisdictions, the committee drafted its statutory work-product which is House Bill 2769. In addition, the committee prepared Supreme Court Rules relating to the use of fax machines by the district courts and relating to use of fax machines by the appellate courts. Those rules will be submitted to the Supreme Court after passage of HB 2769 by the legislature.

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HOUSE BILL 2769

House Bill 2769 authorizes use of fax machines to send or transmit copies of court documents in accordance with Supreme Court Rules setting forth procedure for doing so. The bill provides for the Judicial Administrator to contract with credit card companies thus permitting use of credit cards to collect docket fees and other court costs. The bill also establishes a Judiciary Technology Fund and increases various docket fees $1.50 to raise revenue for the fund. The bill creates a new crime, harassment by telefacsimile communication which makes it a crime to send or to transmit telefacsimile communication to or from a court in Kansas for other than court business.

On a section-by-section basis, the bill states the following:

Section 1 - courts shall accept filings by telefacsimile communication and signatures on such filings shall be valid.

Section 2 - creates the crime of harassment by telefacsimile communication.

Section 3 - directs the Judicial Administrator to contract with credit card companies to provide for use of credit cards for payments to the courts.

Section 4 - creates a Judiciary Technology Fund and originally set forth the amount of $1.50 per case, but that has been amended to an equivalent percentage which makes the administration of the fund simpler.

Sections 5 through 11, 14, 15 and 16 - implement the $1.50 increase in fees under the various codes.

Section 12 - amends K.S.A. 60-203, indicates petitions may be filed by fax under chapter 60.

Section 13 - states service upon an attorney may be made by fax and that such service is complete upon receipt of a confirmation generated by the transmitting machine.

Sections 17 and 18 - amended into the bill on the floor of the House and are the contents of House Bill 3060, which was requested by the County and District Attorneys Association. Sections speak to fax use in search warrants.

SUPREME COURT RULES

The committee has prepared Supreme Court rules both for the district court level and the appellate court level to implement the fax statutes. The rules will not be submitted to the Supreme Court until passage of the bill, so any questions that arise may be considered.

On behalf of the Judicial Council Technology Advisory Committee and the Kansas Judicial Council, I urge passage of HB 2769.

Randy M. Hearrell
Research Director

A COMPENDIUM OF Fax Law REPORTED CASES

By Richard G. Barrows

1942?

Although invented in 1842, the fax (facsimile) machine did not reach universal use in the legal community until the late 1980s. Today almost every law firm in the U.S. has a fax machine. The question "Do you have a fax?" has been replaced in the last two years with "What is your fax number?" An immediate question, then, is what are the legal ramifications of widespread fax use? What is the fax law? Commonplace usage is too new for an article in *C.J.S.*, *Am. Jur.* or *A.L.R.*

What follows is a compendium of the small number of reported cases making fax law.

Signature

A "signature" is the intentional authentication of an instrument.[1] For some reason, there seems to be an ill-defined conception that a fax signature is no good, that a party is bound only by the original signature. Under that misconception, an "original signature" is an autograph manually put to paper with an ink pen. Yet the law itself never has required a signature to be applied either manually or in ink.

In the absence of a statute requiring a specific affixation method, a signature may be applied to paper by any mode, including handwriting, printing, typewriter, etc.[2] It is immaterial what the type of instrument is that affixes a signature if the signer intends it to be his or her signature.[3]

In particular, a lead pencil, handwritten signature always has been valid, and even a will may be signed validly by the testator with a rubber stamp. From the point of view of a technological signature, a teletype signature long ago was validated.[4]

Withm this background, can there be any doubt that a fax signature is a valid signature?

I have been able to find only one reported case on point.[5] It involved a nominating petition for New Jersey public office. A nominating petition was filed on the last day to file. However, New Jersey law required the nominee to "sign" the petition—and the nominee was then in Indiana. The nominators faxed the petition to Indiana and the nominee signed the fax printout and faxed it back to New Jersey. The resulting fax was filed on time. The filing was challenged on the ground that the petition was not "signed" by the nominee as the statute required, since a fax signature is not a valid signature.

The court rejected the challenge and allowed the nomination to stand. The court expressly held that a fax signature is a valid "signature" in the absence of 1) an express

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ory requirement that the sig ure be ginal manual autograph, 2) a showing of fraud or 3) a showing of any other wrongdoing. The court held that since all parties conceded the nominee actually had signed the document before it was faxed, there was no reason not to accept the fax signature.

Mailed Original Need Not Follow

The same ill-conceived notion of the validity of fax signatures seems to hold that if a faxed document is going to be sent, the sender should follow up with a mailing of the original.[6]

The necessity of such duplication is rejected by the law of signatures in general and the reasoning of the New Jersey election case in particular. But of equal importance, a follow-up mailing practice actually may be counterproductive to its goal.

It is loosely thought that a fax sender is protecting *himself or herself* by making a follow-up mailing of the original. However, the main danger of using a fax is fraudulent signature switching and page switching by the recipient. If a fax recipient charges fraud by the sender, the best defense the fax sender can have is to produce the original.

Admissibility in Evidence

After a fight on the merits breaks out, is a faxed document—with or without a fax signature—admissible in evidence?

The common law rule ("best evidence") is that a copy is not admissible unless the proponent can account for the absence of the original.[7] The rule had its origin in the (prephotocopy) days when "copying" a document meant doing so by hand, and copying errors was common. The *reason* for the rule died with the advent of photocopying and the "exact" copies produced by the new technology. However, the rule itself lingered on.

It has taken statutory action to bring the law of evidence up to date with technology. First, the Uniform Photographic Copies of Business and Public Records as Evidence Act[8] provided that photocopies made in the regular course by a business or public agency were as admissible in evidence as the original itself. Finally, in 1974, the Federal Rules of Evidence completed the modernization process. Fed. R. Evid. 1001 defined a "duplicate" to include a copy produced by means of photography or equivalent technique which accurately reproduces the original; and Fed. R. Evid. 1003 provided that a "duplicate" is admissible to the same extent as an original un 1) a genuine question is raised as to the authenticity of the original or 2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. Thus, under the modern statutes, any party may introduce a photocopy of *any* document, and the burden is on the other party to object and prove either a genuine authenticity question or unfairness.

Because of the broad definition of a "duplicate" by Fed R. Evid. 1001, a faxed document has the same evidentiary standing as a photocopy.[9]

Service by Fax

The developing rule seems to be—and should be—that *jurisdictional* service may not be made by fax, but other service may.

The developing rule seems to be—and should be—that *jurisdictional* service may not be made by fax, but other service may.

Fax service of a summons was held not to be an authorized method of service because personal jurisdiction may be acquired only by expressly authorized methods.[10]

Most court rules allow service of pleadings or other post-summons papers by mailing or delivery to a party's attorney. "Delivery," within the rule, includes "leaving it at his office with his clerk or other person in charge; or, if there is no one in charge, leaving it in a conspicuous place therein." The one reported case which has decided the issue has held that a fax of a pleading or other paper to the office of the party's attorney is a complying "delivery" to a person in charge or in a conspicuous place.[11]

Service of demand for arbitration by fax has been held to be valid.[12] It would be anomalous for a person transacting business (maybe even multimillion-dollar orders) by fax to be successful in arguing that a demand for arbitration actually received by fax is invalid.

"Long-Arm" Jurisdiction

Most of the reported cases which have addressed the use of the fax machine are personal jurisdiction cases in which the defendant sent faxes from one state to the plaintiff in another state. The question was whether the faxes were sufficient "minimum contacts" under the due process clause to constitute "doing business" or "committing a tort" within the recipient state so that the recipient state could acquire personal jurisdiction over the defendant by "long-arm" service.

So far, all of the reported cases[13] stand for the proposition that a fax may be considered as a "contact" with the forum state, but the

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A court has held that the attorney cannot use the fax machine as a profit center for the office.

faxes are not sufficient contacts under the facts of the case. No case held that a contact with the forum state could not give rise to personal jurisdiction.

Recoverability of Fax Charges

The decisions are giving mixed signals as to the recoverability of fax charges. The two earliest cases to take up the issue were "antifax." But the next three cases were more receptive. In any event, it is clear that a fax charge (*i.e.*, $1 per page sent) is not *per se* recoverable.

A prevailing Clean Air Act plaintiff was not allowed fax charges, since the plaintiff did not show that fax expenses were 1) not avoidable by attending to the task earlier, 2) necessitated by a sudden emergency *and* 3) not merely for the convenience of client or counsel.[14]

The next "antifax" case held, without analysis, that fax charges were part of the attorney's overhead and not compensable from a bankruptcy estate.[15]

On the other side of the issue, the same court held that fax charges *are* compensable from a bankruptcy estate to the extent they are extraordinary and vital to the estate.[16] And a bankruptcy court in California held, also without analysis, that a trustee *is* entitled to reimbursement for fax charges.[17]

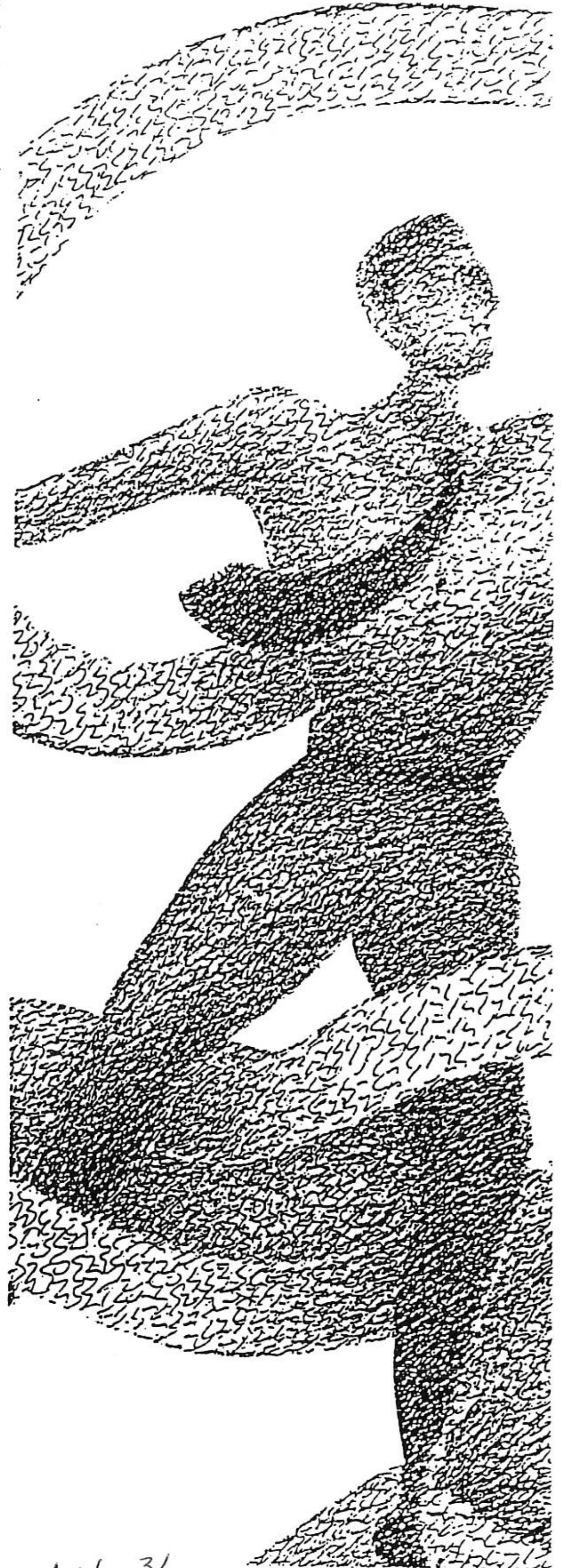
The only seemingly reasoned decision held that fax charges *are* compensable from a bankruptcy estate—but only to the extent of the actual cost to the attorney. The court held that the attorney cannot use the fax machine as a profit center for the office.[18]

In civil rights cases, a prevailing plaintiff is entitled to reimbursement of fax charges as part of the *fee* award under 42 U.S.C. § 1988, but is *not* entitled to recover fax charges as a taxable cost under 28 U.S.C. § 1920.[19]

The *Ginji Corp.* decision seems like the reasonable approach. The charge for a fax is identical to a voice call of the same duration. Therefore, a $2-per-page charge for an across-town fax would be an overcharge, but for a fax to New Hampshire from out of state would be an undercharge. However, there is a snag. In order to recover under the precedent of *Ginji Corp.*, a fax sender will have to ascertain and document the actual cost of each fax. Although most fax machines print out the time of the "call" after each fax, the administrative nightmare involved in computing and documenting the per-fax cost based on recipient location would practically rule out a *Ginji Corp.* approach.

Telephone Deposition

One of the earliest fax decisions was also one of the most technologically enlightened. It held that a telephone deposition witness may be "handed" deposition exhibits by interrogating counsel in a distant city through fax transmission.[20]



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Contract Formation

[illegible]ce a fax actually received is the func-[illegible]al equivalent of a hand delivery or received mailing of the same document, fax contract decisions are not surprising.

In one case, the contract was held to have been formed on the date an offeree faxed its acceptance to an offeror.[21] In another, a notice of exercise of option, faxed to the optionor on the last day, was held to have been exercised validly and timely in the absence of an express provision in the option requiring a different manner of exercise.[22] Conversely, fax transmissions cannot make a contract when basic contract law principles don't allow it.[23]

Criminal Issues

The fax decisions have not left out criminal practitioners.

A Michigan decision[24] has taken fax technology to its logical extreme. A police officer believed he had sufficient ground to obtain a search warrant. However, the hour was late and the judge was at home. The officer faxed an unsigned affidavit to the judge; the judge administered the oath to the officer by voice phone; the officer signed the affidavit and refaxed it to the judge; the judge then signed the search warrant and faxed it back to the officer. T[illegible] court held the resulting search was co[illegible]itutionally valid.[25]

Fax Foundation

Before a fax is admissible in a criminal fraud case, the state must lay a foundation proving that the defendant was the sender of the fax which defrauded the victim.[26] Conversely, when the recipient denies receiving the fax, a foundation must be laid both that the fax was sent and that the intended recipient received it. A thorough and successful foundation is described in a recent civil case.[27]

Conclusion

In essence, the transaction of business and practice of law by fax has become so widespread that a flood of fax cases can be expected in the next few years. However, once the novelty wears off on the courts, the decisions should evidence an acceptance of the fax as merely a long-distance copy machine. ■

Richard G. Barrows is with Wilson & Barrows, Ltd., 442 Court Street, Elko, Nevada 89801.

A fax actually received is the functional equivalent of a hand delivery or received mailing of the same document.

Endnotes

1 80 C.J.S. *Signatures* § 1; Black's Law Dictionary, 5th Ed., p. 1239; Restatement (Second) of Contracts § 134; U.C.C. § 1-201 (39) [Nev. Rev. Stat. § 104.1201 (39)].

2 80 C.J.S. *Signatures* § 7.

3 80 C.J.S. *Signatures* § 7.

4 *Joseph v. Crane*, 79 F. Supp. 117 (D. Cal. 1948), *aff'd*, 188 F.2d 569 (9th Cir. 1951), *cert. denied.*, 72 S.Ct. 37, 342 U.S. 820, 96 L. Ed. 620 (1951).

5 *Madden v. Hegadorn*, 565 A.2d 725 (N.J. 1989), *aff'd*, 571 A.2d 296 (1989).

6 In the case of a filing with the Nevada Supreme Court, a follow-up mailing is not recommended; it is required. NRAP 25(2) (amended to follow fax filings beginning on January 15, 1989).

7 McCormick on Evidence 3rd Ed § 236; 32A C.J.S. *Evidence* § 815; 76 A.L.R. 2d 1356.

8 9A U.L.A. 584, adopted in Nevada in 1953 as CH. 50 and codified as Nev. Rev. Stat. §§ 51.050-51.070 (Repealed).

9 *State v. Hutchinson*, 458 N.W.2d 389 (Wisc. 1990).

10 *Marshall by Larry v. State*, 544 N.Y.S.2d 437 (1989).

11 *Calabrese v. Springer Personnel of New York, Inc.*, 534 N.Y.S.2d 83 (1988).

12 *Waterspring, S.A. v. Trans Marketing Houston, Inc.*, 717 F. Supp. 181 (D.N.Y. 1989).

13 *Lawrence Wisser and Co., Inc. v. Slender You, Inc.*, 695 F. Supp. 1560 (D.N.Y. 1988) (sending one or more faxes into New York was not per se "doing business" in New York); *CPC-Rexcell, Inc. v. LaCarona Foods, Inc.*, 726 F. Supp. 754 (D.Mo. 1989) (Arizona defendant ordering goods from Missouri plaintiff by fax was not "doing business" in Missouri), *aff'd*, 912 F.2d 241 (8th Cir. 1990); *Torco Oil Co. v. Innovative Thermal Corp.*, 730 F. Supp. 126 (D. Ill. 1989) (Oklahoma defendant faxing contract to Illinois plaintiff was not "doing business" in Illinois); *Abbey v. Henzell*, 731 F. Supp. 143 (D. Mo. 1990); *Commercial Cas. Ins. Co., Inc. v. BSE Management, Inc.*, 734 F. Supp. 511 (D. Ga. 1990).

14 *Student Public Interest Research Group of New Jersey v. Monsanto Co.*, 721 F. Supp. 604 (D.N.J. 1989). *See also Cappeletti Bros., Inc. v. Broward County*, ___ F. Supp. ___, 1991 WL 5112 (DC Fla 1991).

15 *In re Constant Care Community Health Care, Inc.*, 103 B.R. 110 (Bankr.D.Md. 1989).

16 *In re Garrison Liquors, Inc.*, 108 B.R. 561 (Bankr.D.Md. 1989).

17 *Matter of Rauch*, 110 B.R. 467 (Bankr.D.Cal. 1990).

18 *In re Ginji Corp.*, 117 B.R. 983 (Bankr.D.Nev. 1990).

19 *Allen v. Freeman*, 122 F.R.D. 589 (D.Fla. 1988) and *Desisto v. Town*, 718 F. Supp. 906 (D.Fla. 1989).

20 *Bywaters v. Bywaters*, 123 F.R.D. 175 (D.Pa. 1988), *aff'd*, 902 F.2d 1559 (3rd Cir. 1990).

21 *Market Development Corp. v. Flame-Glo, Ltd.*, 1990 W.L. 116319 (D.Pa. 1990). *See also, Nolt & Nolt, Inc. v. Rio Grande, Inc.*, 738 F. Supp. 163 (D.Pa. 1990).

22 *Zink v. Elliott*, 1990 W.L. 176382 (D.N.Y. 1990).

23 *Novelly Oil Co. v. Mathy Constr. Co.*, 433 NW2d 628 (Wisc. 1988).

24 *People v. Snyder*, 449 N.W.2d 703 (Mich. 1989).

25 For the same result, see *People v. Fournier*, 793 P.2d 1176 (Colo. 1990).

26 *People v. Hagan*, 556 N.E.2d 1224 (Ill. 1990).

27 *Zink Communications v. Elliott*, 1990 W.L. 176382 (D.N.Y. 1990).

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Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX (913) 357-6352
EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of
HOUSE BILL NO. 2769
(as Amended by the House Committee of the Whole)

The Kansas County and District Attorneys Association appears in support of House Bill No. 2769, particularly as amended by the House Committee of the Whole. The original bill is an attempt to incorporate current technology in court proceedings, i.e. telefacsimile communication and credit card transactions, as well as well as an attempt to implement future technological advances. As amended by the House Committee of the Whole, the bill incorporates provisions of HB 3060, which allows the use of telefacsimile communications in the issuance of search warrants in criminal cases.

The issue of telephonic search warrants has been considered in only one case. In State v. Leopold,(Court of Appeals unpublished, Nov. 9, 1989) the Court considered the use of a telephonic search warrant. While acknowledging that Federal Rule of Criminal Procedure 41(c)(2)(A) expressly permits the issuance of search warrants based on telephonic communication, and that K.S.A. 22-2502 is based on the Federal rule, the Court of Appeals specifically held that language allowing for issuance of warrants based on telephone conversations was not adopted by the Legislature. The provisions of Sections 17 and 18 of HB 2769 do not give as broad authority as does the Federal rule, but at least they provide clear legislative authority for telefacsimile communications. KCDAA urges the Senate Judiciary Committee to recommend the bill favorably.

Civil Procedure Subcommittee
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Attachment 15

FINAL

RULES FOR FAX FILING

Recommended by the Kansas Judicial Council
Effective January 1, 1992

RULE I. AUTHORITY

These rules are adopted under Code of Civil Procedure § ____________.

RULE II. APPLICABILITY

These rules apply to all district court proceedings except small claims

RULE III. DEFINITIONS

As used in this Rule, unless the context requires otherwise:

(1) "Facsimile transmission" means the transmission of a copy of a document by a system that encodes a document into electronic signals, transmits the signals over a telephone line, and reconstructs the signals to print a duplicate of the document at the receiving end.

(2) "Facsimile machine" means a machine that can send a facsimile transmission using the international standard for scanning, coding and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT)[1], in a regular resolution.

> (A) A facsimile machine used to send documents to a court shall send at an initial transmission speed of no less than 4800 baud and be able to produce a transmission record.
>
> (B) As applied to a court, or a fax filing agency, "facsimile machine" also means a receiving unit meeting the standards specified in this subdivision which prints on plain bond paper or is connected to and prints through a printer on plain bond paper, and a facsimile modem that is connected to a personal computer that prints through a printer which prints on plain

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[1] Recommendations T.4 and T.30, Volume III-Facsimile VII.3, CCITT Red Book, Malage-Torremolinos, 1984, U.N. Bookstore Code ITU 6731

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bond paper. The receiving unit shall also automatically place the date and time of receipt on the printed transmission.

(3) "Facsimile filing" or "filing by fax" means the facsimile transmission of a document to a court or fax filing agency for filing with the court.

(4) "Service by fax" means the transmission of a document to the attorney for a party under these rules.

(5) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time, and an indication of errors in transmission.

(6) "Fax" is an abbreviation for "facsimile" and refers, as indicated by the context, to facsimile transmission or to a document so transmitted.

(7) "Fax filing agency" means an entity that receives documents by fax for processing and filing with the court.

(8) "Court document" means the facsimile transmitted document made a part of the official court file.

RULE IV. FORM OF DOCUMENTS

The document placed in the transmitting fax machine shall comply with all applicable rules on the form, format, and signature of papers.

RULE V. METHODS OF FILING

(1) An attorney may file by fax directly to the court clerk at the facsimile numbers authorized by local court rule, a document of not more than ten (10) pages (not including the cover sheet required by Rule V (4)). The clerk shall file the document if it complies with these rules.

(2) A party or an attorney may transmit documents by fax to a fax filing agency for filing with a court.

(3) Each court shall have its facsimile machine available on a 24-hour basis, when practicable. Filing by fax is complete upon receipt of the entire document by the receiving party's facsimile machine.

(4) A facsimile filing shall be accompanied by the Facsimile Transmission Cover Sheet, as identified in Appendix B, for each case concerning which a filing is made during

the transmission. The cover sheet shall be the first page transmitted, followed by any special handling instructions needed to assure the document complies with local rules. Neither the cover sheet nor the special handling instructions shall be filed in the case. The credit card information on the cover sheet shall not be publicly disclosed. The court shall not be required to keep a copy of the cover sheet.

(5) Each document filed by fax shall include the words "By fax" on the first page. The attorney shall also include his or her facsimile machine telephone number, designated as a "fax" number, with the attorney's name, address, and telephone number on the document.

(6) An attorney filing by fax shall cause the transmitting facsimile machine to print a transmission record of each filing by fax. If the facsimile filing is not filed with the court because of (1) an error in the transmission of the document to the court which was unknown to the sender or (2) a failure to process the facsimile filing when received by the court, the sender may move the court for an order filing the document *nunc pro tunc*. The motion shall be accompanied by the transmission record, a copy of the document transmitted, and a ~~Certificate of Service~~ PROOF OF TRANSMISSION in the form set forth in Rule XI.

(7) When requested, the clerk shall acknowledge filing of a document by fax by indicating its receipt on a copy of the facsimile transmission cover sheet and returning the same to the sending attorney.

(8) When multiple copies of a pleading are required only one copy shall be filed by fax. Providing additional copies shall be the responsibility of the originating attorney.

RULE VI. POSSESSION OF DOCUMENTS

A person who files by fax a document which is verified, notarized, witnessed, or acknowledged, shall retain such document is in his or her possession or control during the pendency of the action and shall produce such document upon request under K.S.A. 60-234, by the Court, or any party to the action. Upon failure to produce such document, the Court may strike such document and may impose sanctions under K.S.A. 60-211 and K.S.A. 60-2007.

RULE VII. SIGNATURES

A signature produced by facsimile transmission will be treated as an original signature.

RULE VIII. PAYMENT OF DOCKET FEES

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or other filing fees

(1) Only credit cards designated by the Office of Judicial Administration may be used to charge docket fees on facsimile filings.

(2) A document requiring the payment of a fee in order to be filed shall include on the cover sheet (1) the credit card account number to which the fees shall be charged, (2) the signature of the cardholder authorizing the charging of the fees, and (3) the expiration date of the credit card.

(3) If the charge is rejected by the issuing company the pleading shall not be filed.

(4) The amount authorized to be charged shall be the applicable docket fee, plus any fax filing fee approved by the office of Judicial Administration.

RULE IX. FAX FILING AGENCY

(1) An attorney or a party may transmit a document by fax to a fax filing agency for filing with the court. The fax filing agency acts as the agent of the filing party and not as an agent of the court.

(2) A fax filing agency shall not be required to accept papers for filing unless appropriate arrangements for payment of docket fees and service charges have been made by the transmitting person before the papers are transmitted to the fax filing agency.

RULE X. SERVICE OF PAPERS BY FACSIMILE TRANSMISSION

(1) A court may serve a notice by fax if the notice may be served by mail. The notice may be served by fax on an attorney who consents to fax service under subdivision (4) or (5).

(2) Service of papers pursuant to K.S.A. 60-205 may be made by facsimile transmission only in proceedings subject to these rules and only on an attorney representing a party.

(3) Service by fax shall be made by transmitting the document to the attorney's designated facsimile machine telephone number.

(4) An attorney who files a paper by fax consents to service of papers on him or her by fax in that proceeding.

(5) An attorney who is willing to accept service of papers by fax shall so indicate by including his or her facsimile machine telephone number, designated as a "fax" number, as part of the attorney's name, address, and telephone number on a document filed in the action.

(6) An attorney who consents to fax service under subdivision (4) or (5) shall make his or her fax machine generally available for receipt of documents between 9:00 a.m. and 5:00 p.m., Monday through Friday, except on days that are legal holidays under K.S.A. 60-206(a). This provision does not prevent the attorney from sending documents by fax or providing for normal repair and maintenance of the fax machine during these hours.

(7) Service by fax is complete upon receipt of a confirmation generated by the transmitting machine. Service that occurs after 5:00 p.m. shall be deemed to have occurred on the next court day.

(8) Proof of service by fax shall include the following:

(A) the date of transmission;

(B) the name and facsimile machine telephone number of the person served;

(C) a statement that the document was transmitted by facsimile transmission and that the transmission was reported as complete and without error;

RULE XI. FORMS

The forms contained in the Appendices shall be used in compliance with these rules. The Certificate of Service required by Rule V (6) shall be in the form set forth in Appendix A to these Rules. The Facsimile Transmission Cover Sheet shall be in the form set forth in Appendix B to these Rules.

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PROOF OF TRANSMISSION BY FAX

APPENDIX A - ~~CERTIFICATE OF SERVICE BY FAX~~

PROOF OF TRANSMISSION

~~CERTIFICATE OF SERVICE~~ BY FAX

Date of Transmission: __________________.

At the time of transmission I was at least 18 years of age and not a party to this legal proceeding. I transmitted the following documents:

____

____

____

to the following court or attorney:

____

at fax number ________________

by facsimile machine. The facsimile machine I used complied with Supreme Court Rule _______ and no error was reported by the machine.

I declare under penalty of perjury under the laws of the State of Kansas that the foregoing is true and correct.

____

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APPENDIX B - FACSIMILE TRANSMISSION COVER SHEET

ATTORNEY (*NAME AND ADDRESS*): TELEPHONE NO: ATTORNEY FOR: FAX:	*FOR COURT USE ONLY*
COURT NAME:	
PETITIONER / PLAINTIFF: RESPONDENT / DEFENDANT:	
FACSIMILE TRANSMISSION COVER SHEET	CASE NUMBER:

TO THE COURT:

1. Please file the following transmitted documents in the order listed below:

<u>Document Name</u> <u>No. of Pages</u>

2. ☐ Confirmation requested.
3. ☐ Processing instructions:

4. ☐ Docket Fee $________ ☐ Other $________ (Describe)

I authorize the above fees to be charged to the following account:

☐ VISA ☐ MASTERCARD Account No. ________________ Expiration date: ________

____________________ ____________________

(TYPE OR PRINT NAME OF CARDHOLDER) (SIGNATURE OF CARDHOLDER)

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[Draft of Proposed Appellate Rule]

Rule____. Facsimile Filings

(a) Routine motions, pleadings, or correspondence which does not require a filing fee will be accepted for filing by facsimile transmission if the document, together with any supporting documentation, does not exceed ten pages.

(b) Each document transmitted by facsimile must include a cover sheet in the following format.

FACSIMILE TRANSMISSION COVER SHEET

DATE: ______________

TO: Carol G. Green, Clerk of the Appellate Courts
FAX Number: ( ) ___ - ______

FROM: Attorney or Party Without Attorney (Name and Address)

____

____

____

Kansas Attorney Registration Number: __________

Voice Phone Number: ( ) ___ - _____

FAX Phone Number: ( ) ___ - _____

Attorney for (Name):______________________

RE: Appellate Case Number: ____________

Caption: ______________________________

vs.

____

Name of the Document Being Transmitted:

____

Number of facsimile pages excluding this cover page:
_____

FAX fee: $10.00
This fee must be received by the Appellate Clerk's Office within five working days. See Rule ____ (g).

OTHER INSTRUCTIONS:

(c) Only one copy of the pleadings or other papers shall be transmitted; the Clerk of the Appellate Courts will provide any additional copies required by these rules.

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(d) Facsimile filings received in the Appellate Clerk's Office before 5:00 p.m. of a regular workday shall be deemed filed as of that day. Filings received after 5:00 p.m. shall be filed as if received on the next regular Court workday. Time of receipt will be the time printed by the Court's facsimile machine on the final page of the facsimile received document.

(e) Pleadings or other papers filed by facsimile transmission shall have the same effect as any other document filed with the Court. A facsimile signature shall have the same effect as an original signature.

(f) The certificate of service shall state the date and time of service and the facsimile telephone numbers of both the transmitting and the receiving attorney.

(g) Within five working days after the Court receives the transmission, the party filing the document shall forward a $10.00 transmission fee by check made payable to the Clerk of the Appellate Courts. Upon the party's failure to timely forward the transmission fee, the Court in which the action is pending may make such orders as are just, including, but not limited to, an order striking the transmitted document.

FACSIMILE TRANSMISSION COVER SHEET

DATE: ______________________

TO: Carol G. Green, Clerk of the Appellate Courts
FAX Number: (   ) ____ - ______

FROM: Attorney or Party Without Attorney (Name and Address)

____

____

____

Kansas Attorney Registration Number: ____________

Voice Phone Number: (   ) ____ - ______

FAX Phone Number: (   ) ____ - ______

Attorney for (Name):______________________________

RE: Appellate Case Number: ______________

Caption: ______________________________

vs.

____

Name of the Document Being Transmitted:

____

Number of facsimile pages <u>excluding</u> this cover page:
____

FAX fee: $10.00
This fee must be received by the Appellate Clerk's Office within five working days. See Rule ____ (g).

OTHER INSTRUCTIONS:

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