

Approved  
Date *January 16, 2001*

## MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson John Vratil at 9:36 a.m. on January 11, 2001 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Gordon Self, Revisor  
Mary Blair, Secretary

Conferees appearing before the committee:

Randy Hearrell, Kansas Judicial Council (KJC)  
Susan Bechard, Kansas County and District Attorneys Association (KCDA)  
Paul Davis, Kansas Bar Association (KBA)

Others attending: see attached list

Minutes of January 10, 2001 were approved on a motion by Senator Adkins, seconded by Senator O'Connor. Carried.

Conferee Hearrell summarized the following five bills the KJC is requesting for introduction: an amendment to correct conflicting language in current law relating to will and trust preparation as well as other instruments; enactment of the Kansas Estate Tax Apportionment Act; enactment of the Kansas Uniform Trust Code; clean-up amendments to the new Chapter 61 Code of Civil Procedure for Limited Actions as well as forms for use under the new code; and making Chapter 60 garnishment procedure parallel the procedure used under new Chapter 61 of the Code of Civil Procedure for Limited Actions. (attachment 1) Following informative discussion between the Conferee and Committee, Senator Goodwin moved to introduce the bills, Senator O'Connor seconded. Carried.

Conferee Bechard requested introduction of two bills which respectively would: give the crime of domestic battery it's own statute number so the offense will be identified as such in any pre-sentence investigation; and amend the HIV testing statutes making consistent the juvenile and criminal statutes to include testing for hepatitis and clearly defining the person financially responsible for the testing fees. (attachment 2) There was discussion regarding other blood borne diseases within the prison population and the possibility of including these in the bill. The Conferee agreed to include information on this when the bill was heard before Committee. Following further discussion, Senator Adkins moved to introduce the bills, Senator Donovan seconded. Carried.

Conferee Davis discussed a request by Kansans for an Independent Judiciary (KIJ) for introduction of a resolution recommended by the Kansas Justice Commission to authorize a vote of the people on a constitutional amendment that would provide for merit selection of judges and establish a Kansas Judicial Evaluation Commission. (attachment 3) Following lengthy discussion, Senator Goodwin moved to introduce the resolution, Senator Vratil seconded. Carried. Senator Vratil announced a hearing would be held on this issue on Tuesday January 23, 2001 in 123-S at 9:30 a.m. He stated that KIJ Co-chairs, Fred Logan and Jill Docking, would be testifying at that time.

Senator Schmidt discussed his request for introduction of a bill which would amend the Consumer Protection Act specifically the provision to sequester assets. His bill proposal would provide procedures to sequestration and define the function of sequestration of assets. Following brief discussion, Senator Oleen moved to introduce the bill, Senator Umbarger seconded. Carried.

The meeting adjourned at 10:25 a.m. The next scheduled meeting is Tuesday, January 16, 2001.





## KANSAS JUDICIAL COUNCIL

JUSTICE TYLER C. LOCKETT, CHAIR, TOPEKA  
JUDGE C. FRED LORENTZ, FREDONIA  
JUDGE MARLA J. LUCKERT, TOPEKA  
SEN. JOHN VRATIL, LEAWOOD  
REP. MICHAEL R. O'NEAL, HUTCHINSON  
J. NICK BADGEROW, OVERLAND PARK  
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RANDY M. HEARRELL  
EXECUTIVE DIRECTOR  
CHRISTY R. MOLZEN  
RESEARCH ATTORNEY  
JANELLE L. WILLIAMS  
ADMINISTRATIVE ASSISTANT  
KARLA D. KEYS  
ADMINISTRATIVE ASSISTANT

January 11, 2001

### MEMORANDUM

**TO: Senate Judiciary Committee**  
**FROM: Kansas Judicial Council**  
**RE: 2001 Judicial Council Bill Requests**

The Kansas Judicial Council respectfully requests introduction of the following bills:

**1. Amendment to K.S.A. 59-605 and new section.**

The Kansas Judicial Council respectfully requests the introduction of a Senate bill amending K.S.A. 59-605 and creating a new statute relating to preparation of an instrument by a person who benefits thereunder. The bill was recommended by the Judicial Council's Probate Law Committee whose members are Gerald Goodell, Chair, Topeka; Cheryl C. Boushka, Overland Park; Hon. Sam K. Bruner, Olathe; Representative Tim Carmody, Leawood; Mike Clutter, Topeka; Peter A. Cotorceanu, Topeka; Martin B. Dickinson, Jr., Lawrence; Jack R. Euler, Troy; Senator Greta Goodwin, Winfield; Mark Knackendoffel, Manhattan; Hon Edward Larson, Topeka; Philip D. Ridenour, Cimarron; and Willard Thompson, Wichita. The bill was then approved by the Kansas Judicial Council.

The Probate Law Advisory Committee undertook a study of K.S.A. 59-605 regarding preparation of a will by a principal beneficiary because of a conflict between the statute and Rule 1.8(c) of the Kansas Rules of Professional Conduct. As amended, K.S.A. 59-605 is expanded to include not only a will, but also a trust. In addition, it takes the approach of not invalidating the entire

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will (as the current statute does) or the entire trust, but rather of invalidating only the provision that violates the statute. Such provisions are valid if the scrivener is related by blood or marriage or if the testator or grantor had independent legal advice.

The Committee also drafted a new statute which makes the same requirements for instruments other than a will or trust. The Committee is of the opinion the same rules should apply to preparation of deeds and other instruments. The Committee prepared a separate section because it is of the opinion the statute referring to deeds and other instruments should not be in K.S.A. Chapter 59.

## **2. Kansas Estate Tax Apportionment Act.**

The Kansas Judicial Council respectfully requests the introduction of a Senate bill to enact the Kansas Estate Tax Apportionment Act. The bill was recommended by the Judicial Council's Estate Tax Apportionment Advisory Committee whose members are Gerald Goodell, Chair, Topeka; Peter A. Cotorceanu, Topeka; Martin B. Dickinson, Jr., Lawrence; Theron E. Fry, Wichita; John R. Luttjohann, Topeka; William Q. Martin, Smith Center; Austin Nothern, Topeka; Timothy O'Sullivan, Wichita; and William P. Trenkle, Jr., Dodge City. The bill was then approved by the Kansas Judicial Council.

This bill would enact a Kansas Estate Tax Apportionment Act. Section 322A, Apportionment of Taxes, Revised Civil Statutes of Texas, was used as the starting point and model for preparation of the Kansas Estate Tax Apportionment Act. The act adopts the general principle of "equitable apportionment." Under equitable apportionment, each person who receives property from a taxable estate is liable for his or her pro-rata share of the tax.

This act is what is known as a "default" statute and will not apply if the decedent specifically provides for some other method of apportionment. Thus, under this proposal, equitable apportionment can be overridden by a provision in a testamentary or inter vivos instrument that specifically addresses the allocation of estate taxes.

In addition to its general apportionment provisions, the statute also addresses the allocation of taxes attributable to several specific types of property. These include so-called "split interests," "special use" property, and "qualified family-owned business" assets.

The statute also contains specific enforcement mechanisms designed to assist personal representatives in collecting estate taxes from beneficiaries. In addition, it allows personal representatives from other states the right to



initiate collection actions in Kansas courts if those states grant a Kansas personal representative a reciprocal right of access to their courts.

**3. Kansas Uniform Trust Code.**

The Kansas Judicial Council respectfully requests the introduction of a Senate bill to enact the Kansas Uniform Trust Code. The bill was recommended by the Judicial Council's Probate Law Committee whose members are Gerald Goodell, Chair, Topeka; Cheryl C. Boushka, Overland Park; Hon. Sam K. Bruner, Olathe; Tim Carmody, Leawood; Mike Clutter, Topeka; Peter A. Cotorceanu, Topeka; Martin B. Dickinson, Jr., Lawrence; Jack R. Euler, Troy; Senator Greta Goodwin, Winfield; Mark Knackendoffel, Manhattan; Hon. Edward Larson, Topeka; Philip D. Ridenour, Cimarron; and Willard Thompson, Wichita. The bill was then approved by the Kansas Judicial Council.

This bill would enact the Kansas Uniform Trust Code which is patterned after the Uniform Trust Code drafted by the National Conference of Commissioners on Uniform State Laws. The Judicial Council Probate Law Committee has reviewed the Code extensively, made modifications as necessary, and recommends that the Code be adopted in Kansas.

The much greater use of trusts in recent years and the rise in the number of day-to-day questions involving trusts led to a recognition by the Uniform Law Commissioners that the existing uniform acts relating to trusts, while numerous, were incomplete.

The primary source of trust law in most states is the Restatement (second) of Trusts and the multi volume treatises by Scott and Bogert, sources which fail to address numerous practical issues and which on others sometimes provide insufficient guidance. The Uniform Trust Code provides specific rules on trust law in a readily available source. Finally, while much of the Uniform Trust Code codifies the common law, the Code does make some significant changes.

Prior to the beginning of drafting by the Uniform Law Commissioners the Judicial Council Probate Law Advisory Committee had begun drafting a Kansas Trust Act. Upon learning there would be a Uniform Trust Code the Committee waited and used the uniform bill as the basis of the Kansas Uniform Trust Code.

**4. K.S.A. Chapter 61 Clean-Up Amendments.**

The Kansas Judicial Council respectfully requests the introduction of a Senate bill containing clean-up amendments to the code of civil procedure for

limited actions as well as forms. The bill was recommended by the Judicial Council's Chapter 61 Subcommittee whose members are Hon. Terry Bullock, Chair, Topeka; Alice Adams, Council Grove; Amy Bertrand, Topeka; Mark V. Bodine, Overland Park; Hon. Ron Rogg, Valley Center; Lawrence R. Rute, Topeka; Walt Scott, Topeka; and Bruce Ward, Wichita. The bill was then approved by the Kansas Judicial Council.

The bill contains clean-up amendments to the new Chapter 61 Code of Civil Procedure for Limited Actions, as enacted by 2000 Legislature. It also contains an extensive set of forms for use under the new code.

**5. K.S.A. Chapter 60 Garnishment Procedure.**

The Kansas Judicial Council respectfully requests the introduction of a Senate bill to make the K.S.A. Chapter 60 garnishment procedure parallel to the procedure used under Chapter 61. The bill was recommended by the Judicial Council's Chapter 61 Subcommittee whose members are Hon. Terry Bullock, Chair, Topeka; Alice Adams, Council Grove; Amy Bertrand, Topeka; Mark V. Bodine, Overland Park; Hon. Ron Rogg, Valley Center; Lawrence R. Rute, Topeka; Walt Scott, Topeka; and Bruce Ward, Wichita. The bill was then approved by the Kansas Judicial Council.

The 2000 Legislature enacted a new Chapter 61 Code of Civil Procedure for Limited Actions which included a new garnishment procedure. This bill would make the Chapter 60 garnishment procedure parallel to the new Chapter 61 garnishment procedure.

ERS

David L. Miller, President  
Jerome A. Gorman, Vice-President  
John M. Settle, Secretary-Treasurer  
Julie McKenna, Past President  
Steven F. Kearney, Executive Director



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Edmond D. Brancart  
Thomas J. Drees  
Christine K. Tonkovich  
Gerald W. Woolwine

## Kansas County & District Attorneys Association

1200 W. 10th Street  
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(785) 232-5822 • Fax: (785) 234-2433

January 11, 2001

Chairman Vratil and members of the Senate Judiciary Committee,

The Kansas County and District Attorneys Association would like to request the following bill introductions:

1. Give the crime of domestic battery its own statute number so that the offense will be identified as such in any pre-sentence investigation.
2. Amend the HIV testing statutes so that the juvenile and criminal statutes are consistent to include testing for hepatitis and to clearly delineate who is to pay for testing.

Thank You,

Susan Bechard  
KCDA

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**KANSAS BAR  
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January 11, 2001

TO: Chairman John Vratil and Members of the Senate Judiciary  
Committee

FROM: Paul Davis, KBA Legislative Counsel

RE: Resolution Introduction

Mr. Chairman and Members of the Committee:

My name is Paul Davis and I serve as Legislative Counsel for the Kansas Bar Association. I am actually here today on behalf of an organization called Kansans for an Independent Judiciary, which is chaired by Prairie Village attorney Fred Logan, a former chair of the Kansas Republican Party, and Wichita businesswoman Jill Docking, the 1996 Democratic U.S. Senate nominee. The mission of Kansans for an Independent Judiciary is to advocate for judicial independence and most specifically the merit selection of judges.

In 1997, the Kansas Justice Commission was initiated to conduct a thorough study of our judicial system and make recommendations to the Kansas Supreme Court and the Kansas Legislature. The Justice Commission was co-chaired by Mrs. Docking and the late Governor Robert Bennett, and included both lawyers and non-lawyers. After extensive hearings across the state, the Justice Commission rendered twenty-three recommendations. The first of these recommendations is that the legislature should authorize a vote of the people on a constitutional amendment that would provide for merit selection of judges and the establishment of a Kansas Judicial Evaluation Commission. The basis for this recommendation is that the independence and integrity of the judiciary is comprised by a system where judges are forced to become politicians.

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As you were made aware earlier this week, the Special Committee on Judiciary that met during the interim period studied this issue. Although the interim committee did not render a recommendation on the merit selection issue per se, the committee did indicate a strong interest in discussing issues related to the qualifications of judges and specifically a judicial evaluation system. Even though we want our judiciary to be independent and impartial, we also want some degree of accountability. We strongly believe that the creation of a Judicial Evaluation Commission will ensure that there is accountability in the judicial branch and that the public is given the information that it needs to make informed decisions in judicial retention elections.

This is an important issue that goes to the heart of our democracy. The founding fathers crafted a government with three co-equal branches of government that each check and balance the others. The executive and legislative branches are elected and serve as representative bodies whereas the judicial branch was meant to be independent of the whims of politics.

When we have an opportunity to talk about this resolution in further detail, you will hear from some respected individuals who feel passionately about this issue and have a great deal of insight to offer. We hope you will find that this resolution represents a giant step forward in ensuring that Kansas has an independent judiciary that makes decisions based on the black letter of the law and not because of interest groups, campaign contributions or other political considerations.

I respectfully ask the Committee to approve this resolution for introduction.  
Thank you for your time.

Senate Concurrent Resolution No. \_\_\_\_

By \_\_\_\_\_

A PROPOSITION to amend sections 6 and 7 of article 3 of the constitution of the state of Kansas, relating to the nonpartisan appointment of district judges, and the evaluation of appellate and district court judges on a uniform statewide basis.

*Be it resolved by the Legislature of the State of Kansas, two-thirds of the members elected (or appointed) and qualified to the Senate and two-thirds of the members elected (or appointed) and qualified to the House of Representatives concurring therein:*

Section 1. The following proposition to amend the constitution of the state of Kansas shall be submitted to the qualified electors of the state for their approval or rejection:

Sections 6 and 7 of article 3 of the constitution of the state of Kansas are hereby amended to read as follows:

**“§ 6. District courts.** (a) The state shall be divided into judicial districts as provided by law. Each judicial district shall have at least one district judge. The term of office of each judge of the district court shall be four years. District court shall be held at such times and places as may be provided by law. ~~The district judges shall be elected by the electors of the respective judicial districts unless the electors of a judicial district have adopted and not subsequently rejected a method of nonpartisan selection.~~ The legislature shall provide a method of *for the* nonpartisan *appointment* selection of district judges and for the manner *in which retention elections are held for such district judges.* ~~of submission and resubmission thereof to the electors of a judicial district. A nonpartisan method of selection of district judges may be adopted, and once adopted may be rejected, only by a majority of electors of a judicial district voting on the question at an election in which the proposition is submitted. Whenever a vacancy occurs in the office of district judge, it shall be filled by appointment by the governor until the next general election that occurs more than thirty days after such vacancy, or as may be provided by such nonpartisan method of appointment selection.~~

(b) The district courts shall have such jurisdiction in their respective districts as may be provided by law.

(c) The legislature shall provide for clerks of the district courts.

(d) Provision may be made by law for judges pro tem of the district court.

(e) The supreme court or any justice thereof shall have the power to assign judges of district courts temporarily to other districts.

(f) The supreme court may assign a district judge to serve temporarily on the supreme court.



1           **§ 7. Qualifications of justices and judges; uniform statewide**  
2 ***evaluation of appellate and district court judges.*** Justices of the supreme  
3 court and judges of the district courts shall be at least thirty years of age  
4 and shall be duly authorized by the supreme court of Kansas to practice  
5 law in the courts of this state and shall possess such other qualifications as  
6 may be prescribed by law. *A commission for evaluating judicial*  
7 *performance shall be established, with lawyer and non-lawyer members*  
8 *appointed in equal numbers by the governor and the supreme court, with*  
9 *such terms as shall be prescribed by the legislature. The governor shall*  
10 *appoint one of the members to serve as chairman. The commission shall*  
11 *establish a written uniform statewide plan for evaluating the performance*  
12 *of all appellate and district court judges. It shall adopt rules providing for*  
13 *the dissemination of information to the public on the performance of an*  
14 *appellate or district judge prior to his or her retention election. The*  
15 *public shall be afforded a full and fair opportunity for participation in the*  
16 *evaluation process and the commission by its rules shall establish such*  
17 *procedures as it deems advisable for surveying the opinions of persons*  
18 *who have knowledge of the judge's performance, and for establishing*  
19 *local judicial evaluation committees to assist it.*

20       Sec. 2. The following statement shall be printed on the ballot with the  
21 amendment as a whole:

22       *"Explanatory statement.* The purpose of this amendment is to provide for the  
23 nonpartisan appointment of all district judges. It removes the existing  
24 provision relating to election of district judges and authorizes the  
25 legislature to provide for the manner in which retention elections are held  
26 for those judges. The proposition establishes a commission for evaluating  
27 judicial performance and requires the commission to adopt rules for  
28 evaluating the performance of judges and assuring that the public is  
29 afforded an opportunity to participate in the evaluation process.

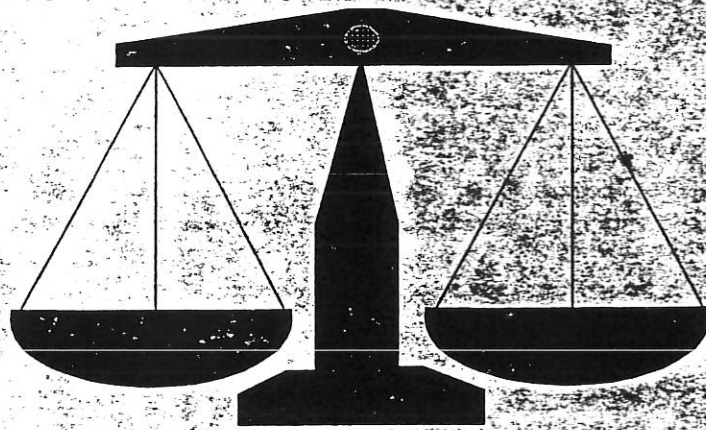
30       *"A vote for this proposition would eliminate the election of district judges*  
31 *and provide for the nonpartisan appointment of all district judges and*  
32 *retention elections for those judges. A commission for evaluating judicial*  
33 *performance would be established and it would adopt a uniform statewide*  
34 *plan to evaluate the performance of all appellate and district court judges*  
35 *and rules assuring participation by the public in the evaluation process.*

36       *"A vote against this proposition would continue in effect the current law*  
37 *which provides for the election of district judges, except where a*  
38 *nonpartisan selection of district judges has been adopted, and which does*  
39 *not provide for a commission for evaluating judicial performance."*

40       Sec. 3. This resolution, if approved by two-thirds of the members elected  
41 (or appointed) and qualified to the Senate, and two-thirds of the members elected (or  
42 appointed) and qualified to the House of Representatives shall be entered on the journals,  
43 together with the yeas and nays. The secretary of state shall cause this resolution to be  
44 published as provided by law and shall cause the proposed amendment to be submitted to  
45 the electors of the state at the general election in November in the year 2002 unless a

1 special election is called at a sooner date by concurrent resolution of the legislature, in  
2 which case it shall be submitted to the electors of the state at the special election.  
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# **KANSAS CITIZENS JUSTICE INITIATIVE**



## **FINAL REPORT OF THE KANSAS JUSTICE COMMISSION**

Approved June 11, 1999



## I. Introduction

The Kansas Citizens Justice Initiative was authorized by order of the Supreme Court of Kansas on June 3, 1997. Members of the Kansas Justice Commission were appointed to undertake the Initiative's work by Chief Justice Kay McFarland of the Kansas Supreme Court, Governor Bill Graves and the leaders of the Judiciary Committees of the Kansas Legislature. In all, 46 members were appointed, including co-chairs Ms. Jill Docking of Wichita, Kansas and the Honorable Robert Bennett of Shawnee Mission, Kansas, and co-Reporters Dean James Concannon of the Washburn University School of Law and Dean Michael Hoeflich of the University of Kansas School of Law. Appendix A lists the members of the Commission and shows by whom they were appointed. The Commission was charged by the Chief Justice to inquire into the state of the justice system in Kansas and to make recommendations as to its improvement. Funds for the expenses of the Commission have been provided by grants and private donations. Donors are acknowledged in Appendix B. No public funding supported the Commission's work.

The Commission met for the first time on September 29, 1997. This meeting was followed by subsequent meetings of the whole Commission on February 9, May 18, October 12, November 16, and December 14 of 1998, and February 15, March 26, and April 23 of 1999. The Commission engaged the Docking Institute at Fort Hays State University to provide technical support for the Commission and to prepare and administer two surveys for the Commission. The first of these surveys was of Kansas citizens randomly selected by the Docking Institute. 1226 of these surveys were returned. The second survey was of Kansas lawyers and judges. 435 lawyers and 191 judges returned the survey. The results of these two surveys were presented to the Commission at its meeting on May 18, 1998. In addition, the Commission held a number of public hearings throughout the state hosted by Commission members. Hearings were held at Topeka, Leavenworth, Junction City, Wellington, Wichita, Lecompton, Iola, Pittsburg, Hutchinson, Hays, Independence, Kansas City, Overland Park, and Olathe. The communities of Garden City, Dodge City, Liberal and Pratt had public hearings together through videoconferencing technology. All of these public hearings occurred during the period of October through December 1997. Nearly 600 Kansans attended one of the hearings and more than 125 individuals submitted written comments. The results of the various hearings were presented to the Commission at its meeting on February 9, 1998. All of the submissions made to the Commission as a result of the public hearings are currently on deposit at the Docking Institute.

After the public hearings and the surveys were completed, the Commission divided itself into five committees in order to prepare preliminary recommendations and rationales therefore. The committees were chaired by the Honorable Steve Leben, the Honorable Nelson Toburen, Ms. Gloria Farha Flentje, Mr. John Jurcyk, Jr., and Ms. Marilyn Scafe. The reports of these committees were presented to the Commission at its meetings in October and November 1998 and its meetings in February and March 1999. During the course of these four meetings the Commission as a whole discussed and voted upon the recommendations and rationales developed by the committees. In January 1999 the Reporters presented to the Commission an "interim report" on recommendations discussed and approved by the Commission during 1998. At its meeting in March 1999 the

Commission finished the preliminary approval process of the various committee reports and directed the Reporters to prepare a draft incorporating all of the recommendations and rationales approved by the Commission. That draft was presented to the Commission at its meeting on April 23, 1999, at which various amendments were approved. The draft final report adopted at that meeting was then submitted to the general public for written comment. Public comments were considered at the Commission's final meeting June 11, 1999, in Wichita.

The final report which follows contains twenty-three recommendations. These recommendations and rationales reflect changes made at the meeting of the Commission on June 11, 1999, and represent the findings of the Commission as a result of the public hearing, surveys, and meetings of the Commission and its subcommittees during the life of the KCJI. The order in which the recommendations are presented was determined by the Reporters and should not be interpreted as a determination by the Commission of the relative priority of the recommendations.

The following recommendations require action by the Kansas Legislature: 1, 4-11. The following recommendations require action by the Kansas Supreme Court: 2-3, 10, 13-23. The following recommendations require action by the Kansas Bar Association or other groups: 15, 16, 21, 23.

Submitted by the Reporters:

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Dean James Concannon

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Dean Michael Hoeflich

### III. Rationale

#### **Recommendation 1: Methods of Selecting and Evaluating District Court Judges.**

**(a) Kansas should adopt by a constitutional amendment a uniform method of non-partisan selection of district court judges statewide.**

#### Rationale

In the American democracy, violence and governmental crises are averted through submission of disputes to courts for resolution. This works based upon a simple principle that is not found in many other places in the world: there is a shared attitude of acceptance among the public of the results of court proceedings, which itself is based upon respect for the *integrity* of the judicial process. We believe that partisan elections have become so expensive that they necessarily erode public faith in the integrity of the judicial system; that the election system can erode the independence of the judiciary, as judges are supposed to defend and uphold our constitutional rights regardless of public opinion; and that promoting oneself based on popular sentiments is contrary to the judge's job description. We also believe that Kansas should complete the transition it began in the 1970's to a single, unified court system by adopting a uniform method of judicial selection — merit selection.

All appellate judges in Kansas are appointed through non-partisan selection and are subject to periodic retention votes. Kansas is one of twelve states that has a bifurcated system in which local districts choose between electing their judges in partisan elections and having judges chosen through a non-partisan selection process. About half of the judicial districts in the state presently use each system: 14 of 31 judicial districts, covering 53 counties, elect their judges in partisan elections, while 17 of 31 judicial districts, covering 52 counties, use the non-partisan selection process. The four largest counties are evenly divided: Johnson and Shawnee counties use merit selection; Sedgwick and Wyandotte counties use partisan elections.

The non-partisan selection system presently used in Kansas provides for substantial public input. In fact, in many ways, it actually increases the extent to which informed public input can guide judicial selections. Half of the members of each nominating commission are non-lawyers appointed by the elected members of the local county commission (or, in multi-county districts, by each county commission in the district). The other half of each nominating commission consists of lawyers elected by the lawyers in the judicial district. News releases are routinely sent out soliciting public input regarding nominees, and letters from the public regarding nominees are received and considered. The commission then interviews the nominees, in addition to considering the comments it has received. Once the commission sends three names to the Governor, who must choose one as the new judge, there is once again an opportunity for substantial public input to the Governor, who is elected by all of the people. Thus, the non-partisan system provides for knowledgeable, public participation, while judicial elections often receive much less publicity — and generate much less voter interest — than elections for other public offices. Voters in partisan judicial elections often

are forced to make uninformed choices because candidates for judge are prohibited by rules of judicial ethics from stating how they would rule on legal issues or decide cases.

This issue is one on which the baseline opinions of those who work within the system are greatly at odds with those held by the general public. Those within the system strongly favor the non-partisan system.

<b>How District Judges Should Be Selected</b>	<b>Judges</b>	<b>Attorneys</b>	<b>General Public</b>
Appointed by Governor	77%	77%	35%
Partisan Election	23%	23%	65%

Although we do not doubt that the baseline public opinion favors election, it probably is not as strong as the Justice Commission survey suggests. There simply is no way, in the context of a telephone survey on this subject, to provide sufficient detail about the process to the person answering the survey. Our question asked: “There are people who argue that state and local judges should run for office in a competitive election as candidates of a political party, while others believe that these judges should be appointed by the governor with citizens voting every four years on whether or not to retain the appointed judge. For [local trial judges], please indicate whether you think the judges should be elected or appointed by the governor.” The question did not provide information regarding the existence of nominating commissions, or the screening procedures used by those commissions. In a fuller presentation of the issue – something simply unattainable in a telephone survey – we think the baseline view of the public would be much closer.

We believe that this difference in viewpoint can be narrowed or eliminated through a well-conceived discussion of the issue as part of the election process in which a proposed constitutional amendment would be considered. The Commission’s recommendation is supported by members who reside in both election and selection districts. Majorities of voters in the districts that already use the non-partisan system approved that change in the past, and some counties have turned down attempts to switch back. In Shawnee County in 1984, 64 percent of voters chose to retain non-partisan selection after the issues were widely discussed in a visible campaign. We believe that these results are examples of effective education campaigns about the inherent problems of partisan elections, something with which judges and attorneys are much more familiar.

Contested, partisan elections require substantial fund-raising by committees supporting the judges seeking election. Who would contribute to judicial elections? The answer is simple: lawyers and others who have frequent business before the courts. This relationship leads parties before the court to question the fairness and integrity of the process. If your lawyer gave nothing to the judge, and the other lawyer gave \$500, will you suspect unfair influence when you lose? What if the opposing lawyer was the judge’s campaign chairperson? Will you try to settle the case because you



fear that you will not be able to get a fair hearing? Unfortunately, these are not abstract, hypothetical questions. That is one of the things that judges and attorneys know about the system.

Election of Judges Creates Potential for Conflict of Interest When Attorneys or Parties Have Supported		
Judge	Judges	Attorneys
Strongly Agree	55%	40%
Agree	24%	38%
Neutral	8%	9%
Disagree	11%	9%
Strongly Disagree	3%	5%

Appointment of Judges Leads to a More Impartial Judiciary		
	Judges	Attorneys
Strongly Agree	37%	53%
Agree	32%	27%
Neutral	14%	13%
Disagree	7%	5%
Strongly Disagree	9%	2%

The problems inherent in judicial elections were well summarized by Stacie Sanders, whose father is a district judge, in her Note: “Kissing Babies, Shaking Hands, and Campaign Contributions: Is This the Proper Role for the Kansas Judiciary?” 34 Washburn L.J. 573 (1995). In addition to the conflict of interest and appearance of impropriety issues, she provides testimonial evidence of the time investment required for retail politics: door-to-door campaigning, fund-raising and advertising, all while carrying on a full-time job that has a docket that does not go dormant. Unlike the legislative branch of government, the judicial branch does not have a season when it is not in session. The expense of these campaigns is also quite significant. Even in a rural district, in which the expenses might be the least, the Sanders article reports expenditures of twenty percent of the judge’s annual salary for a contested race. In Sedgwick County, one campaign committee spent approximately \$57,000. This, too, is an impediment to obtaining the best possible judges. To campaign full-time, the lawyer in private practice will necessarily work less hard on the income-producing aspects of the practice and will spend substantial sums of his or her own funds in a contested race in which the result cannot be guaranteed. If he or she wins, there is a possible election loss looming only four years away, and if the incumbent loses, he or she no longer has a private practice base with ongoing clients to which to return. Lawyers typically apply in greater numbers for a judicial vacancy when non-partisan selection is used than when they are forced to run as a Republican or a Democrat in a partisan election.

The central issue, though, in our view, is the inherent conflict between the independence, integrity and impartiality a judge must display and represent and the need to raise funds and engage in retail partisan politics. This conflict has led the Kansas Commission on Judicial Qualifications – the group that receives, reviews and acts upon ethical complaints against Kansas judges – to take the rare step of writing to the Kansas Justice Commission in support of merit selection of judges. Its letter noted “that some of the most difficult issues involving judicial ethics ... [relate] to [what is] appropriate political activity for those judges subject to partisan election.” Its comments, made after considering election-related ethical complaints and issues over many years, are compelling:

Kansas has removed its Supreme Court Justices and Court of Appeals Judges from the political process. Electors in seventeen of the state’s thirty-one judicial districts have likewise voted to remove their district judges from the political process. Judges in those seventeen judicial districts are subject to a nonpartisan selection process.

Judges in the remaining fourteen judicial districts who are elected through a partisan political process find themselves enmeshed in the political system to attain and retain an office founded on impartiality and independence. The conflict is inherent in the system.

Modern-day elections, including judicial elections, require large commitments of money and time. Family members, friends, fellow church members, clients and others are routinely requested to provide work and money for these campaigns, but normally those most interested in who will be elected judge are the attorneys who work in that court. It is a fact of life that a judge who must raise money and enlist help to conduct a campaign to attain the office is under obligation to someone and usually to many. As a result, that judge's impartiality is subject to question anytime a party or an attorney comes before the judge who is known to have contributed to the judge's election campaign. The judge then becomes subject to disqualification in that case if the judge's impartiality might reasonably be questioned. The more successful the judge is as a fund-raiser, the more significant the impact on the judge's ability to perform his or her job. However, it is no less problematic when the judge goes in debt to conduct the campaign and has to engage in fund-raising activities to retire the debt after the election. The public does not understand this dilemma and the election process significantly diminishes the impartial appearance of all judges, no matter how circumspect their conduct.

It is a tribute to the integrity of the Kansas judiciary that relatively few serious disciplinary complaints are filed against judges. In presenting this position paper in support of nonpartisan selection, the Commission on Judicial Qualifications does not impugn the integrity of individual judges but rather suggests that judges and the public would be well served by removing judges from the political process.

We agree with the Kansas Commission on Judicial Qualifications and with the judges and attorneys who work in our judicial system on a daily basis. The system needs to be changed to protect its integrity and independence. We ask Kansas to adopt a constitutional amendment expanding the current, non-partisan selection system to the entire State. Members of the Commission are committed to lead the educational effort to explain to voters why this change is so important to the continued integrity of – and public confidence in – our judicial system.

**(b) To increase the information available to voters, the constitutional amendment adopting non-partisan selection of district court judges should authorize creation of a Kansas Judicial Evaluation Commission. The Commission would prepare and make available to the public evaluations of each judge prior to each judicial retention election. The Commission should include lawyer and non-lawyer members, appointed in equal numbers by the Governor and by the Kansas Supreme Court.**

Rationale

All public officials should be accountable to the citizens of this State. The work done by judges is uniquely difficult for the public to evaluate. The actions of a judge over his or her term of office take place in hundreds of individual cases. Most of the time, no one other than the parties is present. Finding out whether a judge is generally fair, knowledgeable, polite to litigants, or is otherwise doing a good job cannot be accomplished by a trip to the library, a single visit to the courthouse, or even several courthouse visits. When voters are asked whether a judge should be retained in office, they should be given some solid information upon which they might make that decision.

In addition to public accountability, most workers benefit from some supervision and feedback regarding their work. Judges generally do not receive any. Each judge is assigned a docket of cases and is responsible for handling them. No one systematically reviews the judge's work and provides feedback. Comments made to the judge by attorneys or litigants are always suspect: if such comments are negative, they may just be sour grapes regarding a particular decision; if positive, they may just be an attempt to curry favor with a judge the attorney or litigant is likely to see again in the future.

At least four states – Alaska, Arizona, Colorado and Utah – have well-established, statewide judicial performance evaluation programs in place. These programs provide a comprehensive review of each judge's performance prior to retention elections. Some of them also provide interim reports to the judge during his or her term of office, allowing private feedback to be exchanged and, hopefully, acted upon.

The American Judicature Society, which since 1913 has supported improvement of the nation's courts and efficient administration of justice at all levels, recently completed an extensive study of these judicial performance evaluation programs, conducting voter exit surveys during the 1996 election and also conducting surveys of judges and judge evaluators. Especially after such programs have been in place for more than one election, voters were aware of the evaluation process and many voters indicated they obtained information specifically from those reports. In Alaska, where two decades of information was available, there was a direct correlation between the ratings of the judges in the evaluations and their votes in the retention elections. Judges reported that the reviews were fair and that the reports would help them in improving their job performance.

Kansas lawyers strongly support implementing some formal method of judicial evaluation. Kansas judges, by a sizeable plurality, also support such evaluations.

<b>Some Form of Evaluation Should Be Implemented</b>	<b>Judges</b>	<b>Attorneys</b>
Strongly Agree	15%	41%
Agree	33%	34%
Neutral	35%	14%
Disagree	9%	7%

We agree that such a program should be established in Kansas. Good examples of such programs are found in each of the states listed above. Alaska has had the longest experience, having started retention evaluations in 1976. Its commission conducts a professional survey of lawyers, police officers and probation officers; sends a questionnaire to each judge; surveys jurors; reviews performance-related data (such as case handling statistics); sends a separate questionnaire to selected lawyers who have recently appeared before the judge; and seeks general public input. The commission then publishes the result of each survey, along with its recommendation of whether the judge should be retained in office. Similar processes, with some variations, are used in each of the states. Sample reports from other states are found in Appendix C.

The establishment of a judicial performance evaluation program is not without accompanying costs. To provide a credible evaluation, with appropriate public input, is an involved process.

These programs can have several potential benefits. First, they provide meaningful information that voters can use when evaluating whether a judge should be retained in office. Second, they can be a powerful mechanism for removing the rare judge who proves unfit for the bench. This can occur either by voters acting upon an unfavorable recommendation or by a judge choosing not to seek retention after learning that he or she will be receiving an unfavorable review. Third, they provide meaningful information for judges to use in improving their own performance. At present, Kansas judges do not receive any systematic feedback about their job performance.

State	1996 Budget
Alaska	\$107,550
Arizona	\$256,400
Colorado	\$17,000
Utah	\$121,750

We propose including this recommendation in the same constitutional amendment package that would make merit selection a uniform, statewide method of selecting judges. We think the two recommendations go hand in hand, and that guaranteeing the citizens a useful judicial performance evaluation process would be quite helpful in justifying support for the nonpartisan, merit selection system. Indeed, we doubt that the judicial evaluation process we propose could be implemented fully in districts where judges are elected since it would be unfair to publicize the evaluation of an incumbent judge but provide no evaluation for the opponent.

- Notes:
1. Utah figure based on 1997-98 budget request; 1996 data not available.
  2. Colorado figure apparently excludes separate funding of local commissions.

We suggest that the constitutional provision not attempt to provide detailed procedures for the judicial evaluation commission to follow. The methodologies will, no doubt, need to be developed and refined over time. This can best be done, in our view, under rules adopted by the Kansas Supreme Court. Arizona's program, for example, operates primarily under rules established by the Arizona Supreme Court. Some others establish their own rules or operate under statutory directives. The Kansas Supreme Court has the constitutional mandate to supervise the lower courts of the State. In addition, through its staff and its own training, the Kansas Supreme Court is uniquely qualified to design and implement a judicial performance evaluation program. A variety of helpful resources are available. Accordingly, we recommend that the constitutional amendment



authorize creation of the performance evaluation commission, while leaving the rules governing its operation to be established by court rule.

**Recommendation 2: Timeliness of Decisions.**

**The Kansas Supreme Court should provide, by rule, additional procedures for tracking the timeliness of decisions made by trial judges.**

Rationale

It has often been said that justice delayed is justice denied. This is so because, in many cases, a remedy that is not made available on a timely basis may no longer be effective when ultimately provided.

K.S.A. 60-252a and Kansas Supreme Court Rule 166 presently require that decisions in contested non-jury civil trials be rendered within 90 days; that decisions on summary judgment motions be made within 60 days; and that decisions on all other motions be made within 30 days. If the judge does not meet these time standards, the judge is required to file a report with the Judicial Administrator within five days. However, compliance with these rules does not appear to be uniform, and there is no mechanism in place for tracking the matters taken "under advisement" by the judge that are pending decision.

We cannot say how widespread problems of slow issuance of decisions may be. There simply is no data available but there are anecdotal reports of some cases that have taken inordinately long for an opinion to be issued. There are reasons why some decisions may be delayed. Trial judges face pressures that often make it difficult to work on pending opinions due to other matters that must be heard. Criminal cases must receive priority. Statutory provisions require expedited hearings as well in several other areas, as do the exigencies of individual cases. However, at some point, a decision simply must be made, as recognized by the current Supreme Court rule setting time standards for issuing decisions.

We propose that each Chief Judge of the district be required to establish a mechanism for tracking cases under advisement for compliance with the time standards. We suggest that the mechanism for doing so be determined in each judicial district, since each district has a different computer system and other mechanisms for docketing and tracking cases.

When a case has been under advisement beyond time standards established by the Supreme Court, the Chief Judge of the district would provide notice to the Supreme Court or the Judicial Administrator and to the judge involved. That notice would inform the judge that if a decision is not rendered within 30 days, the matter may be referred to the Kansas Commission on Judicial Conduct for investigation of whether the judge is meeting the obligation under the Judicial Code of Conduct to "dispose of all judicial matters promptly, efficiently and fairly." If the decision is not rendered within 30 days from the transmittal of that notice, referral to the Commission on Judicial Conduct by the Supreme Court or the Judicial Administrator would be discretionary, as there may in some cases be a clearly appropriate reason for the delay.