MEDIA GUIDE FOR
ATTORNEYS AND JUDGES

Editor
Mike Kautsch, Chair
Kansas Bar Association Media-Bar Committee
The mission of the Kansas Bar Association’s Media-Bar Committee is to act “as a liaison between the bar, the bench, and the news media.” The Committee seeks to facilitate “a continuing exchange of views; providing a ready forum to provide education and to consider mutual problems if they arise; and recommends actions to address these issues.”

The Committee’s efforts to fulfill its mission include creation of this Media Guide for Attorneys and Judges. To aid members of the bench and bar in understanding the media, the Guide describes the nature of news. It also describes the purposes and methods of the media. In addition, the Guide includes accounts of laws that affect relationships among journalists, lawyers and judges. The Guide includes a chapter about the Kansas Open Records and Open Meetings acts and provides accounts of the Sunshine Laws in a question-and-answer format. A chapter on public access to Kansas court proceedings and records addresses such topics as statutory amendments in 2014 that, for the first time in 35 years, gave the media and the public access to probable cause affidavits filed in support of arrest and search warrants. Other topics range from procedures for objecting to closure of proceedings and records to the Kansas Supreme Court’s rule on news media coverage of courts. Another chapter analyzes the Kansas statute that grants a qualified privilege to reporters to resist a subpoena that seeks disclosure of a confidential source’s identity. The chapter ends with a note about another source of protection for journalists, namely, the federal Privacy Protection Act of 1980, which restricts the authority of law enforcement agents to search newsrooms.

Finally, the Guide identifies informational resources and provides practical tips to aid members of the bench and bar in working with news reporters.

Although the Guide is published online, it is designed to be suitable for printing. As an online publication, the Committee anticipates that it will be updated and expanded periodically. Suggestions from readers of the Guide for further developing it are welcome.

The authors have granted permission for use of their work in the Guide but otherwise reserve rights. Members of the Kansas Bar Association are free to reproduce and distribute the Guide for educational purposes consistent with the mission of the Committee.

Acknowledgements

Thanks to all members of the Kansas Bar Association’s Media-Bar Committee for supporting the development of this Media Guide for Attorneys and Judges. Members aided in planning the Guide, developing content and reviewing drafts. This version of the Guide replaces the original, which became outdated and was in conventional published form. This new Guide, presented online, seeks to take into account vast changes that have occurred over the years in media technology, the means of gathering and reporting news and the practice of media law. Thanks also to staff members—particularly Beth Warrington and Meg Wickham—for their hard work in producing the guide.

- Mike Kautsch, chair, Media Bar Committee
DOUG ANSTAETT, Kansas Press Association, Topeka (Chapters 2 and 3)
Anstaett has been a reporter, editor and publisher in four states: Kansas, Missouri, Nebraska and South Dakota. He was editor and publisher of the Brookings Register (S.D.) from 1982 to 1987 and then at the Newton Kansan from 1987 to 2003. He won four first-place Inland Press Association awards for editorial writing, including a sweepstakes award. He was president of the KPA board in 2000-01, and became executive director of the KPA on Jan. 1, 2004.

KENT CORNISH, Kansas Association of Broadcasters, Topeka (Chapters 2 and 3)
Cornish is a veteran broadcaster who has served as president/executive director of the Kansas Association of Broadcasters since 2008. His career has included work at television stations in Topeka, Kansas City and Wichita. He has been a reporter and anchor and award-winning member of station management. He holds a bachelor's degree in journalism from the University of Kansas.

CHRIS GRENZ, Bryan Cave LLP, Kansas City, Missouri (Chapter 8 – Part B)
Grenz is a former reporter for The Kansas City Business Journal, a statehouse correspondent for Harris News Service and the statehouse bureau chief for The Topeka Capital-Journal. In 2010, he received a J.D. degree, as well as a Certificate in Media, Law and Policy, from the University of Kansas School of Law. In law school, he was a note and comment editor for the Kansas Law Review. He is an associate of Bryan Cave’s Commercial Litigation Client Service Group.

JOHN HOLT, Fox 4 News, Kansas City, Missouri (Chapter 6)
Holt’s career in television news includes stints at WIBW-TV in Topeka and KSNW-TV in Wichita. He earned a law degree from the University of Kansas, as well as a journalism degree. He has won regional Emmys for investigative, general assignment, feature reporting and anchoring. Media Mix, a professionals group in Kansas City, named him its TV Personality of the Year in 2000, 2006 and 2008. He is active as a volunteer in community service and as a host of charitable events.

MIKE KAUTSCH, University of Kansas School of Law, Lawrence (Chapters 4 – Parts B and C, 5, and 8 – Part C)
Kautsch directs studies in Media, Law and Technology at the University of Kansas School of Law. He teaches about freedom of speech and press, copyright, privacy and tort law. He holds degrees in journalism and law. He has received a number of honors, including an outstanding service award from the Kansas Bar Association. Before joining the law school in 1997, he was a journalist and journalism educator, and served for 10 years as dean of journalism at the University of Kansas.

RON KEEOFVER, Kansas Judicial Branch Office of Judicial Administration (retired), Topeka (Chapter 6)
Keefover worked 15 years as a reporter for The Topeka Capital-Journal, mainly covering courts and police. In 1981, he became the spokesman for the Kansas Judicial Branch and won acclaim for his innovative approach. It included issuance of media advisories regarding the matters on the Kansas Supreme Court’s dockets and live video-streaming of hearings before the Court. He initiated educational programs about freedom of information and, since retiring in 2013, continues to do so as president of the Kansas Sunshine Coalition for Open Government.

W. DAVIS “BUZZ” MERRITT, The Wichita Eagle (retired editor), Wichita (Chapter 1)
After graduating from the University of North Carolina in 1958 with a degree in journalism, Merritt began a 42-year career that included three years as news editor in Knight Newspapers’ Washington bureau. In 1975, he became editor of The
Wichita Eagle and Wichita Beacon. After closure of the Beacon, the Eagle continued as the largest daily paper in Kansas. He became senior editor at the Eagle in 1997 and retired in 1999. He has written three books, including “Public Journalism and Public Life: Why Telling the News is Not Enough” and “Knightfall: Knight Ridder and How the Erosion of Newspaper Journalism is Putting Democracy at Risk.”

JULIE PARISI, Morris Lang Evans Brock & Kennedy Chtd., Topeka (Chapter 4 – Part A)

A 2013 graduate of the University of Kansas School of Law, Parisi practices in the area of civil litigation, specializing in tort and financial services litigation. In the law school’s Media Law Clinic, Parisi researched and wrote about the Kansas Open Records and Open Meetings acts.

RICHARD RALLS, Ralls Law Firm LLC, Kansas City, Missouri (Chapter 7)

Ralls is a 30-year veteran of legal practice who once worked as an award-winning investigative reporter. He earned undergraduate and law degrees from the University of Missouri-Kansas City. His practice areas include divorce, child custody and other aspects of family law. He is a former Johnson County Bar Association president. He has written for The Urban Lawyer, been a media law presenter and served as a city planning commission member. He currently serves as chair and member of the KBA Journal Board of Editors.

WILLIAM P. TRETBAR, Fleeson Gooing Coulson & Kitch LLC, Wichita (Chapter 8 – Part A)

Tretbar’s areas of practice include media law, and he leads Fleeson Gooing’s Employment Law Practice Group. His noteworthy cases include *Wichita Eagle and Beacon Publishing Co. v. Simmons*, 274 Kan. 194 (2002), in which the Kansas Supreme Court ruled for the newspaper and comprehensively analyzed the Kansas Open Records Act. He received his undergraduate degree from the University of Arizona and joined Fleesong Gooing in 1980 after earning his J.D. from the University of Kansas School of Law.
Table of Contents

Chapters
1. The Media Bar Relationship ................................................................. 9
2. Understanding News ........................................................................ 13
3. Inside the News Media ..................................................................... 15
4. Sunshine Laws
   Part A. Overview ............................................................................. 23
   Part B. Kansas Open Records Q-and-A ........................................... 37
   Part C. Kansas Open Meetings Q-and-A .......................................... 50
5. Pretrial Publicity
   Part A. Overview ............................................................................. 55
   Part B. Open Courts ......................................................................... 71
6. When a Reporter Calls ...................................................................... 97
7. When Attorneys Contact the Media ................................................ 103
8. Reporter’s Privilege in Kansas
   Part A. Overview ............................................................................. 107
   Part B. The Kansas Shield Law ........................................................ 117
   Part C. The Privacy Protection Act of 1980 ....................................... 121

Appendix
Contacts ................................................................................................. 125

A list of organizations that can assist attorneys who wish to contact representatives of Kansas media.
Journalists, including those who report on law and the courts, provide a product—news—that is undefined and stubbornly indefinable. They do so without universal, formal rules, and few legal prescriptions or proscriptions.

They conjure up this product about the lives of people and institutions—their fortunes and misfortunes—guided only by the sometimes contradictory conventions of a peculiar culture. For example, conflict as a narrative device always outweighs all other storytelling possibilities, and a reflexive desire for “balance” often distorts rather than illuminates issues.

They employ, under enormous time pressure, the fragile ambiguity of the English language to accomplish their work. And they go home to sleep at night and start all over the next day.

The process involves balancing many competing factors, often at length and agonizingly, but every discussion begins and ends in a culture that values, above all else, making information public; one whose prime directive and fundamental urge is disclosure, even if it is disruptive. As a weary city editor facing a content decision says in Kurt Luedtke’s classic media-law conflict film “Absence of Malice”:

“I know how to print what’s true.

“And I know how not to hurt people.

“I don’t know how to do both at the same time, and neither do you.”

In any equally-weighted collision of those two values, journalism’s strong bias would be to print. In a majority of other institutional, cultural and personal settings, the opposite would be true. As a result, non-journalists often find reason to see journalists as fundamentally different from themselves.

And indeed journalists are different from lawyers in the same sense that judges are different from businesspeople and storekeepers different from school teachers: each is motivated by a distinct combination of values, interests and backgrounds.

Who needs news anyhow?

The core question of democracy is “What shall we do?” For citizens to form an answer, three things are required: shared, relevant information; a place or method for discussing the implications of that information; and some shared values, including at least the value of democracy itself.

From the beginning of our nation, journalists have sought to provide the shared information and at least part of the agora for the discussion. No one appointed or anointed journalists to do that; it’s what they were driven to do by their personal instincts and inclinations. And from the beginning, their role in the new republic was both crucial and controversial.

Thomas Jefferson famously wrote, “… were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.” Journalists quote that often.

Less famously and certainly less quoted by journalists, he also wrote, “A coalition of sentiments is not for the interest of printers. … So (they) can never leave us in a state of perfect rest and union of opinion. They would be no longer useful and would have to go to the plough.”

No matter where other professionals, including lawyers, fall along the spectrum of Jeffersonian opinions, the work of journalists necessarily creates tensions for them because often they do not share journalists’ bias toward disclosure or their judgment about what is newsworthy or useful; often the disagreement is 180 degrees.
Journalism’s new shapes

Lawyers, of course, were at least equally vital to the development of American democracy and at least equally as conscientious and contentious. They shared with journalists a conviction that they should and could have an impact for good. And, for most of the nation’s history up to the present, both have largely succeeded.

But as always in a dynamic democracy, change, some of it disruptive, is altering, and in some cases clouding, the future.

The legal profession has not escaped change. Legal commentators frequently focus on how technology, globalization and other factors are altering the practice of law.1 Still, because the practice is anchored in ancient common law concepts and defined by modern statute, case law and ethical conventions, it changes incrementally and with deliberation.

By contrast, as this is written in 2015, journalism and all its components are being swept by a tsunami set in motion by the development and subsequent explosion of the internet and World Wide Web. The traditional vehicles for journalism—print later joined by broadcast—dominated American journalism for two hundred years because collecting news and disseminating it by press or antennae or wire was expensive, requiring large institutions with income streams to support the reporting, editing and technical staffs necessary to produce it.

Starting with the Progressive era in the early Twentieth Century, most of the owners who provided that support realized that the traditional politicization of their newspapers and broadcasts was no longer in their—or democracy’s—best interest. Why, they reasoned, should we offend half of our audience every day by being openly partisan? Even-handedness, or at least the appearance of it, would be more advantageous.

For every person to contact instantly any other person, to interconnectivity, that they can identify and reach directly people who share political and personal needs and interests. In other words those owners no longer need to rely on the notion of objectivity to accumulate a loyal following. Consequently, the open partisanship of the 19th Century is re-establishing its foothold in mainstream journalism.

Those disruptions are altering the dynamic between the traditional journalism providers and their subjects and consumers in ways not fully understood, nor likely to be for some time. This much is certain: people and institutions, including lawyers, who have need to be concerned with the product and attitudes of journalists who operate in the traditional mode now face an additional and even broader challenge: how to think about and cope with the product and attitudes of a world full of potential and self-anointed news disseminators free to operate wholly by their own rules and predilections and accountable only to themselves. This is now a world where every person with an internet connection can publish instantly to the world at large anything they wish, with no practical, legal or ethical mediation involved. Who is responsible to whom, and for what?

A guide to this guide

This guide is not intended to resolve the tension between traditional journalists and the bar, and indeed that would be neither possible nor necessarily wise. Nor can it address in detail the surging change coming with the digital revolution because there can be no coherent answers for unknown questions.

Rather, our intent—as with the authors of the mirror KBA publication, “Reporter’s Handbook of the Law and the Courts,”—is to help lawyers, judges and others involved in the legal process understand how and why traditional journalists operate as they do and to foster a more open and informed relationship between the professions.

It is designed as both a tutorial and a reference manual on issues common to the two professions.

Chapters 2 and 3 go to the heart of the media-bar relationship, examining the decision of what is or is not newsworthy—the most important, difficult and controversial judgment a journalist makes. There is also a discussion of the dynamics of various news mediums: how they are similar and where they are different.

Chapters 4 and 5 focus on areas where the two professions are often in contact and sometimes in conflict. Because access to government activities and information by journalists and citizens is crucial to democracy, an overview of the Kansas open records and open meetings laws are provided. There is also a review of the issues involved in pretrial publicity.

The next two chapters outline steps that could be taken to improve the dynamics of the media-bar relationship. Chapter 6, “When a Reporter Calls,” provides practical advice on how to respond to inquiries from reporters. Chapter 7, “When Attorneys Contact the Media,” explains the advantages and methods of developing a truly two-way relationship.

Chapter 8 provides an overview of reporter’s privilege and the Kansas Shield Law, which allows journalists to defend against subpoenas for their confidential information.

Footnote

1. See, e.g., The Vermont Joint Commission on the Future of Legal Services, Vt. B.J., Fall 2014, at 8; and Adam Cohen, Is There a “Lawyer Bubble”? The legal profession is facing some fundamental changes, and one former big-firm partner is sounding the alarm, Time (May 07, 2013).
At the end of the guide are supplements to various chapters. A mutually responsible working relationship between the media and the bar is one in which reporters are able to report accurately in a timely manner while attorneys are able to protect the interests of their clients. It is also the climate in which the public’s interests are best served. This handbook is offered as a catalyst to these ends.

Main Points

✓ Both attorneys and reporters play important roles in a free society, but do not always understand each other. Their roles also are often misunderstood by each other and those outside of the two professions.

✓ Because the judicial system is society’s focal point for conflict resolution, attorneys and reporters often cross paths. These encounters need not be adversarial. In fact, attorneys and reporters have many common interests.

✓ This guide was created for attorneys by the Kansas Bar Association as a reference tool to foster a stronger media-bar relationship. It is designed to complement a similar KBA publication produced for reporters.
News is the term used to describe the march of events, controversies and curiosities that daily touch people’s lives or emotions. In any given week, reporters may write stories about high-profile murder investigations, product liability lawsuits, debates over local and national issues, the legal maneuvers surrounding corporate mergers and the details of wrenching child custody battles. These are all stories that involve attorneys, who are called upon to represent people thrust for any number of reasons into the public arena.

For non-journalists, understanding why one event is more newsworthy than another can seem a mystery. Even journalists sometimes struggle at defining “what’s news,” preferring to rely on their training, experience and judgment in deciding what is and is not “newsworthy.” This is an important decision, because it is virtually impossible to cover everything that happens within a given region in a newspaper, magazine or news broadcast. News is a perishable commodity because it loses importance as it gets older. For that reason, reporters and editors pay careful attention to which stories are urgent and which can wait. Understanding how journalists evaluate what events get reported and why can help attorneys more fully understand the needs of reporters when they call.

The advent of the Internet has helped redefine the way news is covered. No longer do newspapers or even broadcast stations wait until the next edition or newscast to report the news. They utilize their own websites, podcasts, Twitter, live chats and Facebook to update the news as it breaks. Bloggers, who often approach the coverage of news from a certain point of view or bias, have also helped redefine how quickly news “hits the wires.” New technologies continue to change the face of news and how it is covered. The traditional news media can no longer afford the luxury of waiting to publish: otherwise, they will be beaten to the punch by a competing website, podcast or other digital media. Such pressures also increase the chance for inaccurate and incomplete information to be disseminated.

News is more than the nuts and bolts coverage of meetings, crimes and accidents — the who, what, where, when and how. Reporters try to explain to their audience why events take place and what they mean. News is also the telling of small dramas that people discuss in elevators, that pluck their heartstrings and ignite their outrage. It’s what people need to know to understand their neighborhoods and world.

Traditional media have broken down into two main categories, hard news and soft news. Hard news stories are fashioned from the serious, factual events of the day. This includes the fast breaking news of fires, shootings, earthquakes, tornadoes and presidential speeches. Reporters face the greatest amount of deadline pressure when covering this kind of story. Hard news also encompasses investigative stories in which reporters interview numerous sources and sort through court and government records to flesh out the stories behind the headlines.

Soft news refers to feature stories, profiles and human interest stories that entertain as well as inform. They are less urgent than the daily hard news stories, though often they require a “news peg,” a recent event or public issue that gives the story a newsworthy angle.

Because of the Internet, however, the traditional media are not exclusive in categorizing news. The Internet enables everyone, including lawyers, to act on their own in finding and sharing information that interests them. If the information is widely shared, then traditional media may treat it as news. For example, a South Carolina mother became a news sensation in late 2014 after a video of her sing-
ing to her 1-year-old daughter went viral on the Internet.

Although it is difficult to come up with a single definition for news, journalists usually judge the newsworthiness of a story by looking for such common characteristics as timeliness, scope, controversy, celebrity, relevance and uniqueness:

- **Timeliness.** Reporters know their audience wants to read or hear about events when they happen, not days later. Reporters are also looking to publish or broadcast stories before their competitors, so the media outlet’s Internet site also comes into play. As events unfold, reporters look for new angles to advance the story and keep the reporting fresh. That’s because what is news today may not be news tomorrow.

- **Scope.** A story’s importance is relative to the number of people upon whom it has an impact. The more people affected, the greater is the audience appeal. Stories that attract a larger audience will beat out those of a narrower focus. A story about a murder has a greater impact than a car theft. A plane crash story is more likely to be published or broadcast than a story about an automobile accident. The more important a story is to more people, the more newsworthy it becomes.

- **Controversy.** Just as complication and resolution provide the structure for novels and movies, controversy provides the grist for most hard news stories. Often, a news story has at least two sides. It may have more. A story that tries to avoid conflict probably fails to address the issues involved.

- **Celebrity.** People are interested in intimate details about celebrities with whom they have a love hate relationship. This is the premise upon which the success of People magazine is based. When celebrities fall from grace, they make news. The drama of a politician’s shoplifting arrest is more newsworthy than the arrest of a transient. A sensational crime can vault both the victim and the accused into the limelight.

- **Relevance.** Stories are considered relevant when they affect people’s lives and beliefs or relate to a current event. Editors know local news stories are more relevant to their audience than stories about foreign locales.

- **Uniqueness.** The unusual is always news: the first space flight, the worst disaster, the most deadly shooting spree, the longest court trial. Reporters are alert for what is uncommon and out of the ordinary.

In the age of the Internet, members of the bar may seize the initiative to tell their own stories, pushing out information about themselves and the legal system via social media, blogs, email and other digital means of communications. Still, a good working relationship between the news media and the bar becomes paramount to ensure that the public consistently receives accurate and timely reporting about the legal system. An ideal relationship is one in which reporters can obtain the necessary facts of a story, and attorneys can ensure an accurate flow of information within an ethical framework. The public also wins in this kind of relationship, getting a more open and balanced view of our legal system.

---

**Main Points**

✔ News is the term used to describe the events, controversies and interests that shape people’s lives. Not surprisingly, the legal profession is a rich source of news.

✔ There is no single definition of what is news. Even journalists may differ in their opinions over the newsworthiness of a story. Common standards used in determining a story’s news value are timeliness, scope, controversy, celebrity, relevance and uniqueness.

✔ “Hard” news stories are those fashioned from the serious, factual events of the day. Reporters face the greatest deadline pressure covering these stories. “Soft” news refers to feature stories, profiles and human interest stories that entertain as well as inform.

✔ A good working relationship between the media and the bar is in the best interests of both parties.

---

**Footnote**

While the definition of news may be general to all traditional media, how the news is covered and reported varies widely among them, and it’s changing every day, because digital communications technology has empowered people to network and share information.

Deadlines have changed drastically since the development of the Internet and the arrival of smartphones, iPods and other personal digital assistants arrived.

In the past, for example, a print reporter may have had a 9 p.m. deadline for the next day’s edition, while a television reporter may have a late afternoon deadline for the 6 p.m. news. A radio reporter would certainly broadcast live if possible, but usually would distill the news for the rush hour crowd.

Now, most newspapers, television stations, radio stations and bloggers feel pressure to break their stories on their websites. Distinctions among print, broadcast and other media remain, news organizations have converged in their use of digital communications technologies. For example, a newspapers find they need to distribute news electronically as well as in printed form. The advent of convergence has changed the rules. A few newspapers have their own video production studios now and generate news programs for cable and their own websites.

The communications revolution changes much of the news-gathering process. You can now expect a telephone call from a reporter within minutes of the occurrence of an event, rather than hours later. The newspaper reporter will want to get a story up on her company website as soon as she can, filling in the details and going more into depth later for the print edition. A television reporter may upload at least some video to the TV website before it goes on the air, and the radio reporter also will use the station’s internet site for breaking news when other scheduled programs are on the air.

Attorneys who understand the different media prepare for calls from reporters. It’s always a good idea to put down your thoughts in writing (for your guidance, not as a handout), anticipate the questions and do the background work necessary to provide answers.

Newspapers

In 1971, when the First Amendment was ratified and guaranteed freedom of the press, newspaper publishing became the only private enterprise to enjoy constitutional protection. The nation’s newspapers then exercised their guaranteed freedom to provided news and commentary that shaped the nation. Over time, though, newspapers lost their singular position of influence. The concept of the press broadened to include radio and television broadcasting, cable TV and eventually the Internet and digital media. With so many kinds of competition, newspaper publishing has struggled to remain profitable and even survive. Nevertheless, national studies indicate that that newspapers continue to play a vital role in informing the public and that publishers are exploring ways to deliver news successfully, not just in print, but through multiple media.1 The nation’s newspa-
pers continue to represent a deep commitment to comprehensive coverage of news—the details, meaning and importance of issues that affect people and institutions, and shape ideas.

Newspapers, especially larger ones, dig for news beyond news releases, breaking events and official announcements. Their larger staffs cover more stories, and, with greater clout, are more willing to challenge the status quo. Courts, police, government, business and politics, all of which involve the law, are staple news reservoirs for large papers and news magazines. They often turn to attorneys as key news sources and as interpreters of the legal system.

While larger newspapers tend to dominate a region, newspapers in small towns and cities are very influential in their local communities. Like the larger papers, they also stress getting the news quickly and thoroughly. But size does create differences. The strength of small newspapers is local coverage: school board decisions, club news and activities of business and community groups. Weekly newspapers place less emphasis on timely news, are more judicious in how they mobilize their small staffs and rely more upon news releases. While unlikely to cover large, breaking news stories, the editors of these smaller newspapers know the importance of legal news and court stories. They are just as likely to call upon attorneys for comment as reporters at a big city newspaper.

Bringing a news story to print

A newsroom is a beehive of activity. At the larger newspapers, it is divided into several subdivisions, each responsible for an area of coverage. National and state news may be handled by one department or “desk” while courts and local government are handled by another. A newspaper’s process of gathering and reporting news may depend on whether the paper is struggling to prevent a shift of its readers and ad revenues. Expertise as interpreters of the legal system.

There are some occasions when the assigning editor works with the newspaper’s advertising department in the development of a special section of the newspaper. Depending on the nature of the story, a photography editor may also assign a photographer to work with the reporter, although today’s newspaper reporter tends to also serve as a photographer because of staff reductions.

A graphics artist may also become involved. Some stories, such as a presidential visit or a local disaster, may warrant the assigning of several teams of reporters, photographers and graphics artists. However, other stories, such as a parade or ribbon-cutting ceremony, may warrant the assignment of a photographer working alone. These decisions are made on the basis of available human resources, expense, time and the press of the day’s events. That is why some events may receive coverage on a slow news day that would, otherwise, not be covered. That is also why some events may not receive any news coverage at all.

The various desk editors gather together several times to discuss that day’s events and decide which stories to cover. These meetings, called “budget meetings,” are most often presided over by the managing editor, who is responsible for the day-to-day operation of the newsroom. The goal is to insert as much news as possible into the newspaper within the confines of a limited amount of newsprint space. That space, known as the “news hole,” is determined by a number of factors, including the amount of advertising that has been purchased for each day’s edition. Stories seen by editors as most newsworthy and interesting to readers are given the most prominence within the newspaper. As the day’s events unfold, decisions on what to include in the newspaper may change. It is not unusual for a story budgeted for the front page during a morning meeting to be moved to an inside page later in the day. Nor is it unusual for the publication of a feature story to be delayed several days to make space for more timely news.

Once a reporter has written a story, it is checked for factual accuracy, grammar and clarity by an assigning editor. The assigning editor may ask the reporter to expand upon portions of the story he or she feels need additional explanation. The assigning editor also may ask the reporter to lengthen or shorten the story to adapt to changes in the news hole. During this process a phrase may be cut or a whole story dropped if it is deemed less important than another story vying for the same space. A quotation may be dropped or reduced to a paraphrase. In making these decisions, editors are always looking for conciseness, importance, credibility and entertainment value. Long quotes that
are loaded down with jargon, ambiguity or statistics are among the first to be edited and simplified. That is why short, to-the-point quotations most often have the best chance to get into a story.

☐ The story is often then sent to a copy editor, who checks it further for grammar, spelling and accuracy. The copy editor also writes the headline for the story.

☐ The next step is the design of the newspaper by the page editor. This is where the story, pictures, headlines and graphics come together into a format easy for the reader to follow. It is important to remember is that the reporter often does not write the headline, nor does the photographer write the picture caption (known to journalists as the cutline). With continuing technical advancements, this design process is performed on computers at most newspapers. The final page design is often now in digital form and sent directly to the production department, where a printing plate is developed.

☐ The printing, assembly and distribution of the newspaper are the final steps in this process. Because this takes time to complete, reporters and editors are faced with fixed technical deadlines. For example, for the morning newspaper to reach your doorstep in time for breakfast, the writing, editing and design must usually be completed long before midnight the night before, unless it is a breaking story that can’t wait until the following day’s newspaper. For an afternoon newspaper, all editorial changes need to be completed before lunch. Once the presses begin their run, it is impossible to make changes in the newspaper without the publisher incurring significant expense.

Again, this is a general description of how newspapers come to life. It varies from newspaper to newspaper. While smaller daily newspapers may have a single editor overseeing a half-dozen or so reporters, large newspapers have a defined hierarchy with multiple layers. Reporters are supervised by assigning editors, who in turn report to managing editors who run the daily news operation. The managing editor answers to the editor, who oversees the entire news operation and often is the newspaper’s liaison with the community. The editor can and does wield an influential hand, often deciding when to pour more resources into reporting a news event.

Separate from the newsroom, but holding the purse strings, is the publisher. This person not only watches the bottom line, but maps circulation figures, tracks advertising revenue and monitors the public perception of the paper. In the case of chain newspapers, the publisher answers to the owners, who often live in another state. The publisher also wields considerable control, but often defers to the managing editor or executive editor’s judgment, only becoming involved when controversial issues or testy situations arise. At the smaller newspapers, of course, the publisher may be the editor, the reporter and the designer of the pages.

Wire services

Wire services, as the name implies, are services where news stories and features are transmitted from a central location to members or subscribers for use in their print publications and broadcasts. However, the term is also misleading. Although some services require telephone lines (i.e. wires) for transmission, most wire services are now satellite delivered. Several major newspapers, such as the Washington Post and the New York Times, provide national and international news to media outlets that do not have the resources to cover these stories on their own. Other wire services, such as the Associated Press and Reuters, serve two primary functions: as news-gathering organizations and as a vehicle for sharing news stories among their subscribers. Wire services usually operate out of one central office and a number of bureaus scattered throughout the nation and world.

The Associated Press, a non-profit membership cooperative founded in 1848, is headquartered in New York, N.Y. It has smaller bureaus throughout the world, including those in Kansas City, Mo., Topeka, Kan., and Wichita, Kan. The AP has 3,700 employees around the world and serves approximately 70 newspapers and 100 broadcast stations in Kansas. Nationally, it serves 1,700 newspapers and 6,000 broadcast stations. Worldwide, it serves 8,500 news outlets in 110 other countries. Because wire service subscribers share news stories, it is possible for a story published or broadcast locally to be republished or rebroadcast in other media outlets throughout the state, nation or world. And with the news aggregators who accumulate news from websites all around the world, news stories can be seen within minutes on thousands of websites.

Magazines

Magazines often provide the most detailed analysis of the news. Because they are published on a weekly, monthly or quarterly basis, they are unable to compete with daily newspapers and broadcasters on the late-breaking developments. However, magazine reporters have a major advantage over their counterparts. Because they do not face daily or hourly deadlines, they can put more time and effort into each story. Because of the quality of the printing process, magazines usually outshine newspapers in the areas of photographs, graphics and overall design. Much more durable than newspapers, magazines printed on quality paper also have a long lifespan and pass-around value.

Much of what has been said for newspapers holds true for magazines. However, there is a major difference in their approaches. Newspapers tend to be mass media, trying to reach a broad audience within a defined geographic area. On the other hand, magazines usually are targeted toward a specific audience characterized by demographic, rather than geographic, attributes. Although the overall reach of magazines may be smaller than those of general circulation newspapers, they tend to be more influential among their targeted audiences. When approached by a magazine writer, an attorney should know what audience the magazine targets and communicate in a manner appropriate to that audience.
Similarities Between Print and Broadcast Journalism

The growth of broadcast (electronic) media has revolutionized journalism. News that once took days to reach the public is now being beamed as it happens to all corners of the earth. First radio, then television and now the Internet have become powerful tools in mass communication. Through an array of electrons transmitted through the ether, the broadcast media have linked countless communities and cultures into a single global village.

Despite different technologies, broadcast news remains firmly rooted in print journalism. The definition of what is newsworthy remains largely the same regardless of the medium. Print and broadcast journalists often come from similar backgrounds, receive much of the same training, and are bound to follow many of the same laws and ethical canons. It is commonplace among journalists in both media to have a goal of moving on to better-paying jobs in larger communities (commonly referred to as markets).

It is also important to remember that radio and television stations, just like newspapers and magazines, operate as businesses and, therefore, are governed by business considerations. Although the bottom line of a financial statement is the ultimate measure of success for both the print and electronic media, a critical measure for both is the size of the audience. The amount each can charge advertisers depends on this figure. For print, this is fairly easy to determine. Circulation figures are easy to determine and are many newspapers are audited independently on a regular basis. For the electronic media, this is not as simple. Telephone surveys or meters installed in the home are used to determine broadcast ratings. The accuracy of these surveys depends on the size and quality of the sample.

Differences Between Print and Broadcast Journalism

These similarities notwithstanding, there are several major differences between print and broadcast journalism. One of the most significant comes in the area of competition. With only a few exceptions, newspapers monopolize their markets. Smaller community newspapers fill in the local coverage that the larger dailies may miss. This is not the case in broadcasting, where several television or radio stations compete in the same market. In an attempt to carve out a niche, radio and television stations will adopt their own style of programming, or format, in an attempt to attract an audience.

Whereas print journalists are challenged over how to best fill a limited amount of space, their electronic counterparts are tested by a finite measure of time. In a sense, the clock is both the greatest ally and worst enemy of the electronic journalist. Unlike print, it is relatively easy to update listeners and viewers about a constantly changing situation. However, the constant deadline pressure of broadcast journalism can make it more difficult for editors to check the accuracy of a story. Detailed information often is sacrificed for speed.

The degree of government regulation is another major difference between broadcast and print. Because of historic precedents and First Amendment protections, the nation’s print media face relatively little government oversight. It is different for broadcasters because of technical considerations. There are a limited number of radio wave frequencies available for public use. To curtail interference, the airwaves over which broadcasters transmit programming are treated as a public utility. Under the Federal Communications Act of 1934, all radio and television stations require seven-year licenses from the Federal Communications Commission. Each licensee must demonstrate a record of service in the public interest before renewal. To a far greater degree than their print colleagues, broadcasters also face a variety of federally mandated regulations covering the distribution and content of programming. Of course, it has only been in recent years that cameras and microphones, the principal tools of the electronic media, have been permitted in many of our nation’s courts and in the principal chambers of the U.S. Congress.

In many ways, radio and television are more intimate than the print media. The sight and sound dynamics of the electronic media are better suited for conveying the emotion of the moment than are printed words or pictures on a page. As with the element of time, this advantage is somewhat of a double-edged sword. It makes the reporter’s role as a neutral observer more challenging. Electronically delivered messages are also fleeting: thus requiring repetition and simplicity for greater comprehension.

Radio

It is no coincidence that the nation’s first radio broadcast on KDKA in Pittsburgh on Nov. 2, 1920, was a news program, featuring coverage of voting results in the Harding-Cox presidential election. Radio is a medium that is married to the reporting of late-breaking news. Although they are often overshadowed by their print and television colleagues, radio reporters continue to play an important role in the journalism mix. Radio’s role is usually greatest in the smaller communities where there are fewer media outlets targeting the needs of local consumers.

Because each station’s programming format targets a specific audience, radio is a very selective medium. Radio also tends to be the fastest of the mass media. All that is needed to place radio live on the scene of a news story is either a cell phone or a two-way radio. Radio is a portable medium, making it convenient for its listeners. With a nationwide average of more than five radios in every household, it is often the most accessible of the mass media.

The periods of heaviest radio listenership are the morning and afternoon “drive times,” the times when people travel in their cars between home and their place of employment. These are most likely to be the times of day that news broadcasts, also known as newscasts, are scheduled. However, in the larger radio markets, some stations schedule newscasts around the clock. In some of the nation’s largest cities, some radio stations broadcast nothing but news. Because there is
a constant turnover of radio listeners, it is likely that a news story will be broadcast several times during the course of a day.

Generally, news is not a major revenue generator for most radio stations. Therefore, radio news departments are usually not as well staffed as other news media, nor are their reporters as well paid. For that reason, radio reporters are often the least-experienced journalists in the community. As they gain experience, they commonly move on to better salaries in bigger markets. Radio reporters also must be generalists who know a little bit about a lot of things. The person who oversees the operations of a station’s news department is known as the news director. Larger news organizations may have as many as a dozen reporters/anchors. However, many stations have no full-time journalists, thus causing them to rely upon news wire services or audio news networks to which they subscribe.

Although radio is very quick getting out a story, time constraints limit the amount of detail that goes into a story. A typical newscast covers six or seven items in two minutes. Some stories are reduced to one or two sentences spoken by the news anchor. Included in that newscast may be one or two actualities or sound bites, short tape recordings of statements made by someone connected to a story. Actualities can run as short as five seconds and rarely are longer than 20 seconds.

Radio’s unique characteristics are especially evident in its coverage of the courts. Because of its immediacy, radio is usually the first to report a crime incident, the first to report a traffic jam caused by an accident, the first to report an arrest and the first to report a verdict. Except where there is either an exceptionally large radio news operation (such as in an all-news station) or an exceptionally high profile case, radio reporters rarely cover legal proceedings from gavel to gavel. Because these reporters are required to cover several unrelated stories during the course of a day, court coverage is often limited to the opening and closing arguments, testimony of key witnesses and the verdict. Many times, radio reporters have little choice but to cover a trial by telephone interviews of attorneys. Although the introduction of microphones in the courtroom has increased and improved legal coverage, there are still limitations. Time constraints will reduce an entire day’s proceedings to a report no more than 45 seconds in length. Out of several hours of tape-recorded testimony, fewer than 20 seconds of it is likely to reach the airwaves.

One area in which radio has become a powerful force in molding modern public opinion is the call-in talk show. Once a local late-night phenomenon, these popular programs now have national followings. Occasionally, these hosts flex their muscles: as in the time Capitol Hill was inundated with millions of tea bags in a latter-day taxpayer revolt. In a sense, radio talk shows have become an electronic equivalent to the Hyde Park soapbox.

Locally, talk radio has often become a real town square of activity. Often, anonymous callers can express their opinions without being identified and can help shape the conversation on certain issues in a community.

Television

Television became an especially powerful mass medium in the 20th century. Like newspaper publishing, however, television news now faces challenges as consumers collect information that interests them online, including video, and share it through digital media. Still, television incorporates the best of other media: the speed of radio, the impact of newspapers and the graphic qualities of motion pictures. To the consternation of the print media, more people in the U.S. get their daily news — at least their national news — from television than any other source. With the increasing use of satellite and fiber-optic technologies, it has become possible to take viewers to every corner of the globe with the flip of a switch.

Edward R. Murrow made television history during the 1950s by showing us live, grainy black and white pictures of the New York skyline and the Golden Gate Bridge in the same frame. Now we receive crystal clear, live, color images from the most remote places: atop Mount Everest, from the America’s Cup yacht races in the middle of the Indian Ocean and from 140 miles above Earth in the space shuttle. In fact, high definition television has revolutionized the viewing experience.

Unlike radio, the sale of advertising within news programming is a major source of income for local television stations. Compared to entertainment and dramatic productions, news is a relatively inexpensive source of programming. That means a higher profit margin. For that reason, the competition between stations serving the same market can be very fierce.

Actually, news and entertainment programs have a symbiotic relationship. A strong schedule of entertainment programming can provide a healthy ratings boost for the local news and vice versa.

Depending on the size of the market, 15 to 100 people work for a local television news operation. At the network and syndication level, these employees may number in the hundreds. The process of developing a newscast is similar to that of publishing a newspaper in many respects. However, there are important differences:

- Because television news organizations typically have several newscasts throughout the day and night, television reporters face more deadlines than their print counterparts. On the positive side, this means that it is easier for a television reporter to update a breaking story. On the negative side, this also means television reporters usually have less time to develop their stories. There are exceptions, of course, but usually television news is more superficial and less in-depth than its print counterpart, simply because of the time involved in a newscast.

- Depending on the time of day and nature of the audience being sought, different newscasts on a station
may have a different character. For example, morning news, which now starts as early as 4am in some markets may be targeted toward busy viewers getting ready for work/school etc while an early-evening newscast may be geared toward those just home from the workplace. That means that several versions of the same story may be broadcast in different newscasts. It also means that an item broadcast at 5 or 6 p.m. may not be repeated at 9 or 10 p.m.

The television reporter and photographer (also known as a videographer) can work as a team in some cases. A large trend in television newsrooms is to hire video journalists – people who both shoot and report. It is the reporter who is seen and heard in the broadcast, but the photographer has significant input into the final product. The photographer often edits the videotape while the reporter writes the story. It is a mistake to ignore the importance of the photographer in the newsgathering process.

The person in charge of a television station news operation is known as the news director. The news director is a member of station/network management and is involved in personnel, logistics and budgeting decisions. As the name implies, he or she sets the direction and tone of an organization’s news programming. The news director is ultimately responsible for all news programming.

There are several mid-level managers within the newsroom. Each news program has a separate producer responsible for bringing all of its elements together. The producer may also assist the reporter in the newsgathering process. The assignments editor is the person responsible for deploying news staff and equipment. There are also persons who oversee the news operation’s graphics art, meteorological, sports, technical support and on-air promotional needs.

The people who read the news are known as anchors. Anchors occasionally perform the duties of a reporter. However, their major responsibility is to present the stories covered by others in a manner that attracts and holds an audience. Because of their visibility, anchors are also heavily involved in the promotion of the organization and its news programming. They are often expected to make public appearances before civic and school groups. The remainder of the news staff comprises reporters, writers, videographers and various technicians.

Television news is, at best, a very brief look at the world. If committed to print, the entire evening newscast would not fill up the front page of the local newspaper. Only 14 minutes of a typical 30 minute local newscast are dedicated to news. The remaining time is set aside for weather, sports and commercials. The longest of news stories typically runs 90 seconds and contains one or two sound bites, each only 10 seconds long.

What television does best is bring the viewer pictures. However, in order to do so, television reporters and camera operators can be very intrusive. A television camera crew requires more space in which to operate than their radio or print counterparts. In news conference settings, they require places to set up camera tripods, microphones and lights. When possible, they seek as much freedom of movement as possible so they can shoot pictures at different angles and distances to aid in the editing process. As the technology advances and the miniaturization of equipment occurs, television’s intrusive nature continues to diminish.

The availability of good pictures or computer graphics can dictate whether a story reaches the airwaves. Strong visual images make it very easy for television to tell the story of a flood, a fire or a traffic accident. The absence of such images makes it difficult to cover complex topics such as the federal budget deficit and the savings and loan scandal. Good public relations practitioners know this and assist the television crew in obtaining pictures.

Tabloid TV: News or Entertainment?

Television is currently in a period of great transition. In its early days, there were only a handful of sources for news programming. The three major networks took care of national and international events while their affiliated stations covered the local and state scene. With the advent of cable and low-power television stations, all of that has changed. There are now, literally, hundreds of channels competing for viewers. With the exception of a few major events, such as the Super Bowl, it is becoming more and more difficult to reach a mass audience. In this respect, television has started to take on an important characteristic of magazines: different channels appealing to audiences that are demographically and psychologically specific. And different channels also appeal more today to those with specific political views. One doesn’t have to watch much television to realize that Fox News is most popular with conservatives, MSNBC with liberals and CNN with those who identify themselves as moderates or independents.

In the mad scramble for ratings, the life blood of the industry, the lines between entertainment and news programming are becoming blurred. The question of when something is news and when it is entertainment is becoming increasingly difficult to answer.

The legal system serves as a focal point for this controversy. Court proceedings that attract reporters because of their news value also attract free-lance journalists and motion picture producers because of their entertainment value. Because of intense public interest in the courts, more attorneys are sought out as legal consultants to the media to explain and analyze proceedings. Court-TV, CNN and C-SPAN often provide live unedited coverage from inside the courtroom.

As the attention the media give our nation’s courts increases, judges, prosecutors and defense attorneys are facing two significant issues: first, how best to differentiate from traditional and tabloid journalists, and second, whether to make such a differentiation at all.
Main Points

✓ Different media cover the same stories in different ways. It is in an attorney’s best interests to understand these differences.

✓ Newspapers and magazines are the most comprehensive sources of news. For that reason, print reporters require more detail than their broadcast counterparts. The circulation, publication schedule and targeted readership of print media play important roles in determining the level of coverage dedicated to legal issues. Reporters are the first link in a chain of individuals who review a story before publication.

✓ Reporters pride themselves in being impartial. However, good reporters will pursue a story regardless of whether a source is willing to be interviewed. The best way to insure that public information is placed in an appropriate context is to make oneself available to talk with reporters.

✓ Although there are many similarities between print and broadcast journalism, there are significant differences. Broadcasters are more regulated than publishers. The electronic media are more intimate and immediate than their print counterparts. However, they do not cover complex issues as well as newspapers and magazines. Television reporters are interested in pictures and graphics that help illustrate and simplify stories. Radio relies heavily upon recorded interviews in covering the news.

✓ With the growth of new technologies and programming sources, the line between television journalism and entertainment is becoming harder to distinguish. The legal system is often a focal point for this controversy. A trial that attracts journalists writing for traditional media also may attract writers and producers involved in entertainment projects.
I. Purpose of the Kansas Open Records Act and the Kansas Open Meetings Act

In 1972, the Kansas Legislature enacted the Kansas Open Meetings Act (KOMA) to give the public access to governmental meetings and require that officials cast their votes in public view.¹ Eight years later, the Legislature passed the Kansas Open Records Act (KORA) to give the public access to official records and increase public confidence in the government’s decision-making process.² As “Sunshine Laws,” KOMA and KORA were designed to make government transparent, increase the accountability of public officials, and deter them from engaging in misconduct.³ KORA creates a presumption that the records of governmental business are open to the public,⁴ and KOMA establishes a presumption of openness for meetings of government officials.⁵

Although KOMA and KORA clearly mandate open government, the public’s right of access to records and meetings has not been constant. Instead it has ebbed and flowed in response to legislative amendments of KORA and KOMA and judicial interpretations. This chapter describes the public’s right of access as it has evolved and as it is currently stated in KORA and KOMA.

Where Does the Sun Shine?

A. The Kansas Open Records Act (KORA)

In KORA, it “is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.”⁶ In other words, under KORA, a governmental record is “public,” and any person may inspect it, unless it is closed under a specific exemption in the law.

1. Who is subject to the KORA?

KORA requires that public agencies make records accessible.⁷ The term “public agency” is defined in KORA to mean “the state or any political or taxing subdivision of the state or any office, officer, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.”⁸

KORA also expressly exempts private companies and organizations even if they receive public funds in exchange for goods or services.⁹ Public agencies also do not include judges of municipal courts, district courts and courts of appeals, as well as justices of the Supreme Court.¹⁰ Finally, any officers or employees

Footnotes

4. Id.
5. K.S.A. 75-4317(a).
7. K.S.A. 45-218(a).
of the state or political or taxing subdivision are exempt from KORA if their office is not open at least 35 hours a week.\(^{11}\)

\(\text{(a) Not-for-profit corporations}\)

The Kansas attorney general has considered whether a not-for-profit corporation that receives public funding is subject to KORA. In 2004, the attorney general opined that no entity be was subject to KORA solely because it received public funds in exchange for goods or services.\(^{12}\) The opinion examined a not-for-profit corporation, not created by statute or any governmental entity, which provided group living services for a special population.\(^{13}\) The corporation received approximately 10% of its total operating budget from public funds in return for providing that service.\(^{14}\) Further, the bylaws of the not-for-profit provided that the corporation would only operate as a non-political, not-for-profit, sectarian organization and no public figures served or had a role in electing members of the board of directors.\(^{15}\) The opinion cited to cases from other states that invoke a four-part test to determine whether or not a not-for-profit agency should be subjected to an open records act.\(^{16}\) That four-part test requires consideration of: (1) the extent of public funding; (2) whether the funds provide a specific service; (3) whether a government statute created the entity; and (4) whether the entity provides a traditionally governmental service.\(^{17}\) Using that test, the attorney general reasoned that because only ten percent of the not-for-profit’s funds came from a public source and was not created by the government nor controlled by the government, it was not subject to the KORA.\(^{18}\)

In the 2005 Legislative Session, the session that immediately followed that opinion, the Legislature passed Senate Bill 78, which applied KORA to not-for-profit entities\(^{19}\) and imposed certain record-keeping requirements on them.\(^{20}\) Under the law, each non-profit entity that receives public funds of at least $350 per year: (1) must document the receipt and expenditure of the funds; (2) make available upon request a copy of the documentation of all public funds received by the entity; and (3) charge and require advance payment of a reasonable fee for providing the documentation; the fee is to be determined as provided in KORA.\(^{21}\) The record-keeping and disclosure requirements do not apply to any healthcare provider, individual person, for-profit corporation or partnership.\(^{22}\) The Legislature defines “healthcare provider” as a non-profit dental service corporation, a non-profit medical and hospital corporation doing business in Kansas, an indigent health care clinic, and an adult care home.\(^{23}\) KORA also provides generally that an entity is not a public agency “solely by reason of payment from public funds for property, goods or services of such entity.”\(^{24}\) This exemption allows vendors who do no more than sell goods or services to the government to keep their records private.

2. What is a public record?

A public record is “any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency including, but not limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund.”\(^{25}\) Public records do not include those “made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state.”\(^{26}\) Public records also do not include those: (1) “owned by a private person or entity,” and (2) “not related to functions, activities, programs, or operations supported by public funds.”\(^{27}\) Finally, records are not public if they are related to an employer’s “individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement.”\(^{28}\)

\(\text{(a) Recorded information}\)

Under KORA, the “recorded information” that forms the content of public records, regardless of form or characteristics, includes computer files and tape recordings.\(^{29}\) Recorded information also includes diagrams and photographs and, on an individual basis, courts may find that other such items are public records, even if they are not explicitly identified in KORA.\(^{30}\)

\(^{11}\) K.S.A. 45-217(f)(2)(C).


\(^{13}\) Id.

\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) Id. (citing to Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp., 846 A.2d 659 (N.J. 2004) and Lee Publications Inc. v. Dickenson School of Law, 848 A.2d 178 (Pa. 2004)).

\(^{18}\) Id.


\(^{20}\) K.S.A. 45-240.

\(^{21}\) Id.

\(^{22}\) Id.


\(^{25}\) K.S.A. 45-217(g)(1).

\(^{26}\) K.S.A. 45-217(g)(3).

\(^{27}\) K.S.A. 45-217(g)(2).

\(^{28}\) K.S.A. 45-217(g)(3) (which includes an exception that makes KORA applicable to an employer’s “records of lump-sum payments” for contributions “paid for any group, division or section of an agency”).


An email message also may be subject to KORA if it meets the definition of public record.\textsuperscript{31} Whether public officials’ email communications are public records and open to inspection will depend upon whether such the emails are “made, maintained, or kept by or [are] in the possession of a public agency,” and whether any exemptions apply.\textsuperscript{32}

\textbf{i. Draft meeting minutes as recorded information}

In 2013, the Kansas attorney general authored an opinion that responded to an inquiry from a board of county commissioners. The question was whether the public must have access to draft meeting minutes.\textsuperscript{33} In final form, minutes of county commission meetings are public records.\textsuperscript{34} However, KORA does not require a public agency to disclose notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed except where they are publicly cited or identified in an open meeting or in an agenda in the open meeting.\textsuperscript{35} The attorney general concluded that the KORA does not require a public agency to publish or post draft meeting minutes for inspection by the public.\textsuperscript{36} However, the draft minutes must be open to public inspection from the time that either: (1) the draft meeting minutes are publicly cited or identified in an open meeting, or (2) when an agenda of an open meeting is created and it cites or identifies the draft meeting minutes.\textsuperscript{37}

\textbf{ii. Public employee accrued but unpaid leave}

In 2010, the Kansas attorney general published an opinion that answered whether records identifying public employees’ accrued but unpaid vacation and sick leave are exempt from disclosure as “individually identifiable records pertaining to employees” or whether they are open as records of “salary.”\textsuperscript{38} The attorney general concluded that records of unpaid amounts are exempt under KORA, but paid amounts are open.\textsuperscript{39} KORA does not define “salary” records. The Kansas Supreme Court has defined “salary” as only the base amount paid to an employee for services and does not include other compensation.\textsuperscript{40} The attorney general opined that accumulated leave balances are estimates of potential liability contingent upon future events; using one’s leave does not affect the employee’s salary.\textsuperscript{41} As a result, the attorney general concluded that records identifying unpaid accrued vacation and sick leave are individually identifiable records pertaining to public employees, and, as such, may be discretionarily closed.\textsuperscript{42} However, records of payments made to employees for vacation or sick leave are open.\textsuperscript{43}

\textbf{3. Requirements under KORA}

\textbf{(a) How to request an open record}

Public records must be open for public inspection by any person, barring an explicit exception.\textsuperscript{44} As such, any member of the public may request a record from a public agency.\textsuperscript{45} The agency may require that the request be made in writing, although KORA stipulates that the agency “shall not otherwise require a request to be made in any particular form.”\textsuperscript{46} In making a request, an individual need not provide more information than his or her name, address, and the information necessary to determine the records the requester desires access to and the requester’s right of access to the records.\textsuperscript{47} However, an agency may require that the requester provide certain certifications, such as that the records requested will not be used for a commercial purpose.\textsuperscript{48} An agency may not reject or delay a records request “because of any technicality unless it is impossible to determine the records to which the requester desires access.”\textsuperscript{49}

\textbf{(b) Response to an Open Record Request}

KORA gives public agencies latitude in determining how to respond to a request for records. Even when KORA specifically exempts a record from disclosure, the law does not automatically preclude the agency from providing access. KORA states that public agencies “shall not be required to disclose” exempt records, thus allowing the agencies discretion to disclose the records.\textsuperscript{50}

Under KORA, public agencies essentially have a duty to prepare in three ways to receive records requests. First, each public agency must create its own procedures for responding

\textsuperscript{32} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Galindo v. City of Coffeyville, 256 Kan. 455, 464 (1994).
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} K.S.A. 45-218(a).
\textsuperscript{45} Id.
\textsuperscript{46} K.S.A. 45-220(a).
\textsuperscript{47} K.S.A. 45-220(b).
\textsuperscript{48} K.S.A. 45-220(c)(2)
\textsuperscript{49} K.S.A. 45-220(b).
\textsuperscript{50} K.S.A. 45-221(a)
\textsuperscript{51} K.S.A. 45-220(a).
to a request.\textsuperscript{51} Thus, a public agency may create a specific form for use by those who submit requests for the agency’s records, although the agency may not deny access to records if the form was not used.\textsuperscript{52} Second, each public agency must designate a records custodian to assist with a public records request and arrange an area for the public to inspect any records requested.\textsuperscript{53} A records custodian is the officer or employee of a public agency responsible for maintaining the records.\textsuperscript{54} Third, for business days when a public agency does not maintain regular office hours, it must establish “reasonable hours when persons may inspect and obtain copies of the agency’s records.”\textsuperscript{55}

A public agency must allow a requester to “make abstracts or obtain copies of any public record.”\textsuperscript{56} In response to a records request, however, a public agency need not produce copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items unless the agency made them public at a meeting.\textsuperscript{57} Moreover, items need not be produced if they are under the agency’s copyright.\textsuperscript{58} However, an agency may not refuse to produce records on the ground that they are available from an alternative or more “appropriate” source.\textsuperscript{59}

\textbf{i. Public agency contracting with vendors to respond to requests}

In 2009, a Kansas attorney general’s opinion suggested that a public agency may use a private vendor to organize, repackage, and distribute records of that public agency, subject to several conditions.\textsuperscript{60} First, the public agency must continue to furnish the private vendor with copies of newly created or updated records.\textsuperscript{61} Second, the arrangement between the public agency and private vendor may not adversely affect the ability of an individual to obtain the open records.\textsuperscript{62} An adverse effect would include an individual’s inability to receive the records in an electronic format from the private vendor, though available in electronic form from the public agency.\textsuperscript{63} Third, the contract between the public agency and private vendor may not confer upon the private vendor an exclusive license to provide records from the public agency.\textsuperscript{64} Fourth, because private companies are not bound by the KORA, which limits fees to the actual cost for making a record available and copying it, the public agency may not require individuals to use the private vendor where the record is available from the agency.\textsuperscript{65} To that end, the private company may charge its own fee outside of the fee requirements of the KORA.\textsuperscript{66} Fifth, when the public agency provides copies of the public records to the private vendor, the official custodian must review and redact all information required by the KORA.\textsuperscript{67} Finally, a contract between the public agency and private vendor does not relieve the public agency from its KORA requirements to provide access to records in any format available for an individual.\textsuperscript{68}

If these conditions are met, an agency may enter into a contract with a private company to provide remote computer access to copies of agency records.\textsuperscript{69}

\textbf{ii. Certification requirements}

Also in 2009, the Kansas attorney general addressed whether or not an individual needs to sign a certification that he or she would not use any names or addresses contained in the record or derived from the record to sell property or services.\textsuperscript{70} The issue arose when an individual refused to complete a certification form, because he maintained that the records requested did not contain individual names and addresses.\textsuperscript{71} The opinion stressed that, under KORA an agency “may require a written request for inspection of public records but shall not otherwise require a request to be made in any particular form.”\textsuperscript{72} Moreover, if the record requested lacked a list of names and addresses or names and addresses that may be derived from the record, the individual need not complete a certification regarding the use of those names and addresses before he or she may gain access to the record.\textsuperscript{73} However, if the record custodian has a reasonable belief that the individual would use the records to contact individuals or sell services, the records custodian has a duty, before granting access to the records,

\begin{itemize}
  \item 53. K.S.A. 45-218(a).
  \item 54. K.S.A. 45-217(e).
  \item 55. K.S.A. 45-220(d).
  \item 56. K.S.A. 45-219(a) (which includes a stipulation that, if copies are requested, the public agency may require a written request and advance payment of the fee for copying).
  \item 57. Id.
  \item 58. Id.
  \item 59. Simmons, 274 Kan. at 222.
  \item 61. Id.
  \item 62. Id.
  \item 63. Id.
  \item 64. Id.
  \item 65. Id.
  \item 66. Id.
  \item 67. Id.
  \item 68. Id.
  \item 69. Id.
  \item 71. Id.
  \item 72. Id. (quoting K.S.A. 45-220(h).
  \item 73. Id.
\end{itemize}
to require certification that the requester would not engage in such activities.74

iii. Electronic transfer of open records

In 2010, the Legislature passed Senate Bill 369, which amended KORA to address electronic transfer of public records.75 The amendment clarifies that public agencies do not have a duty to accommodate a person who asks to copy public records directly from a computer or other electronic device. Because of the amendment, an agency need not allow a person who has an electronic device to insert, connect, or otherwise attach the device to a computer or other electronic device of the agency.76 Thus the agency may deny a request for direct access to public records by USB port, external hard drive, CD, or other computerized means of transferring data.77

(c) Fees

The public may make copies or abstracts of public records but do so subject to a fee.78 A public agency may in its discretion require a written request and advance payment of the fee.79 While each public agency determines its own fee requirements, they must be reasonable and follow certain policies.80 First, any fees set by the public agency cannot be more than the actual cost of providing the copies, including the staff time required to make the information available.81 Second, if the requester must use a public agency’s computer to inspect the records, the fee only includes the cost of computer services and staff time.82

i. Legislative materials

A statute apart from KORA governs sale and disposition of legislative publications and fees regarding them.83 The Kansas Legislative Coordinating Council possesses the exclusive authority to sell or dispose of copies of publications, documents, or information in any form produced by the Legislature.84 The Coordinating Council fixes the price for the sale, reproduction, and mailing of any copies.85 When the Coordinating Council copies a publication, document, information or record, the director of administrative services or other designated state officer sells and distributes it.86 The funds received then go to the state treasurer who deposits the entire amount in the state treasury and credits it to the legislative special revenue fund.87 The statute does not govern the sale of Kansas Statutes Annotated, the session laws of Kansas, or statutorily exempt documents or papers.88

4. When is a record closed?

Public agencies are not required to disclose records that KORA categorizes as exempt. In KORA, the Legislature has stated that its intent is to create or maintain exemptions “only if: (1) The public record is of a sensitive or personal nature concerning individuals; (2) the public record is necessary for the effective and efficient administration of a governmental program; or (3) the public record affects confidential information.”90 Moreover, the Legislature declared that that the public “has a right to have access to public records, unless an exemption meets the foregoing criteria and the exemption is “significant enough to override the strong public policy of open government.”91 The Legislature bound itself to consider the criteria before enacting any exemption to “strengthen the policy of open government”92 and also to conduct periodic reviews of exemptions.92 Despite the Legislature’s aim to strengthen the policy of openness, the number of exemptions in KORA that close records had increased to 5593 by 2015 from the original number of 35 in 1980.94

The first exemption in KORA includes records that are closed by rule of the Kansas Supreme Court, federal law or state statute.95 The Kansas Revisor of Statutes has identified approximately 400 state statutes that include provisions to close records.96

The second exemption in KORA is for records “privileged under the rules of evidence.”97 Other exempt records concern

74. Id.
76. Id.
77. Id.
78. K.S.A. 45-219(a).
79. Id.
80. K.S.A. 45-219(c).
81. K.S.A. 45-219(c)(1).
82. K.S.A. 45-219(c)(2).
84. K.S.A. 46-1207a(a).
85. Id.
86. Id.
87. Id.
88. Id.
89. K.S.A. 45-219(a).
90. Id.
91. Id.
92. K.S.A. 45-219(b) through (h).
93. K.S.A. 45-221.
95. K.S.A. 45-221(a)(1).
96. Norm Furse, Revisor of Statutes, Open Records Sections Certified June 1, 2004, Under K.S.A. 45-229 (on file with with the Media, Law and Technology Program, University of Kansas School of Law.
97. K.S.A. 45-221(a)(1) (allowing disclosure only if “the holder of the privilege consents to the disclosure”).
such matters as health care,

library patrons,
names of residential utility customers,

conceal-carry gun licensees,
as well as attorney work product,

student financial aid,
testing materials,

and donations.

KORA also includes an exemption for records that contain "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Under KORA, an invasion of personal privacy is "clearly unwarranted" if a record contains information that, if disclosed, "would be highly offensive to a reasonable person including information that may pose a risk to a person or property and is not of legitimate concern to the public."

Also exempt are records related to bidding, data processing software and intellectual property. Some exempt records concern communications by private individuals and businesses with public agencies. Others relate to research or other information that is held by members of an agency individually or preliminarily to official decision-making. Records that relate to public agencies' planned property acquisitions and improvements are exempt, as are records that reveal the locations of archeological sites. A large proportion of KORA's exemptions relate to security and law enforcement. Exempt law enforcement records include records of criminal investigations, although a district court may order that they be disclosed if releasing them would be in the public interest and would meet certain other conditions. Criminal investigation records consist of certain law enforcement data that is "compiled in the process of preventing, detecting or investigating violations of criminal law."

However, KORA stipulates that open law enforcement records include “police blotter entries, court records, rosters of inmates of jails or other correctional or detention facilities or records pertaining to violations of any traffic law other than vehicular homicide.”

In 2011, the Kansas attorney general concluded that persons who remain in the custody of the Kansas Department of Corrections and reside at a facility for the purpose of alcohol or substance abuse evaluation or treatment may not have their address distributed because of federal preemption of Kansas statutes concerning individually identifiable health records or patient identity. The restriction may be waived by the consent of the individual.

In 2010, the Kansas attorney general addressed whether a Kansas agency that delegates by contract the administration and award of assistance to another agency, remains bound by the same requirements of confidentiality. There, the Department of Social and Rehabilitation Services (SRS) (now the Department for Children and Families) asked whether applicants and recipients of Residential Appliance Replacement Program (RAR) are recipients of an SRS assistance program and as such, whether their applications and related information are confidential. The RAR program was part of Low Income Energy Assistance Program (LIEAP) and SRS is the agency responsible for its management. SRS referred the administration of the program to the Kansas Housing Resources Corporation (KHRC) as part of the weatherization program and SRS and KHRC entered into an Interagency Agreement. A legislator requested the names of the recipients of the RAR program. The opinion stated that K.S.A. 39-709b holds "information concerning applicants

98. K.S.A. 45-221(a)(3) and 45-221(a)(35).
99. K.S.A. 45-221(a)(4), 45-221(a)(6), and 45-221(a)(15).
100. K.S.A. 45-221(a)(23).
102. K.S.A. 45-221(a)(53).
104. K.S.A. 45-221(a)(17).
105. K.S.A. 45-221(a)(9).
106. K.S.A. 45-221(a)(7) and 45-221(a)(8).
108. K.S.A. 45-217(b).
109. K.S.A. 45-221(a)(27) and 45-221(a)(28).
110. K.S.A. 45-221(a)(16).
111. K.S.A. 45-221(a)(34).
112. K.S.A. 45-221(a)(14), 45-221(a)(18) and 45-221(a)(49).
114. K.S.A. 45-221(a)(20), 45-221(a)(21), 45-221(a)(22) and 45-221(a)(24).
117. K.S.A. 45-221(a)(12), 45-221(a)(45), and 45-221(a)(54).
118. K.S.A. 45-221(a)(5), 45-221(a)(11), 45-221(a)(29), 45-221(a)(47), 45-221(a)(50), 45-221(a)(51), and 45-221(a)(52).
119. K.S.A. 45-221(a)(10).
120. K.S.A. 45-217(c).
121. Id.
123. Id.
125. Id.
126. Id.
127. Id.
128. Id.
for and recipients of assistance from the secretary shall be confidential and privileged . . . except as set forth in this section." None of the disclosures listed permitted SRS to provide recipient names and addresses to Legislative Research on behalf of a legislator. Although the language refers to secretary of SRS, the attorney general determined that closed records cannot become open by virtue of an agreement by one agency to provide the closed records to another agency.

5. Enforcement

Actions to enforce KORA may be brought in district courts by either the Kansas attorney general or district or county attorneys. If they receive a complaint alleging that a public agency violated KORA, they may issue investigative subpoenas and may file suit in the county where the records are kept.

A civil penalty may be imposed against a public agency if it "knowingly violates any of the provisions" of KORA or "intentionally fails to furnish information as required." For each KORA violation, the penalty may up to $500. Kansas also has a statute that imposes a criminal penalty for the destruction of public records. Specifically, the act of "[a]ltering, destroying, defacing, removing, or concealing any public record is a class A misdemeanor."

Under KORA, a court may award costs and attorney’s fees if a public agency’s denial of access to records "was not in good faith and without a reasonable basis in fact or law." Similarly, where a complainant reports a violation not in good faith, the court may order attorney’s fees to the public agency.

In 2004, the Legislature passed Senate Bill 552, which extends the time frame within which attorney’s fees may be awarded against a party and extends a court’s ability to award costs and attorney’s fees for actions of a party through the appeal process.

Each county or district attorney in the state must report all KORA complaints received during the preceding year by January 15th. The attorney general then publishes a yearly abstract of the information with the name of the agency, the subject of the complaint, and how the complaint was resolved.

B. The Kansas Open Meetings Act (KOMA)

KOMA is rooted in the conviction "that a representative government is dependent upon an informed electorate." To that end, KOMA establishes "that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public." Because of its intended broad reach, the Kansas Supreme Court has held that all provisions of KOMA must be construed liberally and exceptions understood narrowly in order to carry out the broad reach of the law.

1. Who is subject to KOMA?

A public agency is subject to KOMA if that agency is (1) a legislative and administrative body, state agency, or political and taxing subdivisions (2) which receives or expends and is supported in whole or in part by public funds.

State bodies covered by KOMA include the Legislature, legislative committees and subcommittees; state administrative bodies, boards, and commissions; the State Board of Regents; and the State Board of Education. Local governments are also subject to KOMA and include cities, counties, drainage districts, conservation districts, school districts, irrigation districts, townships, groundwater management districts, water districts, watershed districts, fire districts, municipal energy agencies, sewer districts, and any other special district governments.

(a) Subordinate groups

KOMA applies to groups that are subordinate to legislative and administrative bodies, agencies, political and taxing subdivisions. However, the characteristics of a subordinate group that is subject to KOMA are not always apparent. The Kansas Supreme Court has held that so long as a parent state or local body meets the public funding test, subordinate groups are automatically covered by KOMA regardless of degree or existence of public funding. The public funding test requires (1) the group of people meeting must be a "body or agency" under the Act; (2) the group must have legislative or administrative powers or be legislative or administrative in its method of conduct; (3) the body must

129. Id.
130. Id.
131. Id.
132. K.S.A. 45-222(a).
133. K.S.A. 45-228.
134. K.S.A. 45-223(a).
135. Id.
137. K.S.A. 45-222(c).
138. K.S.A. 45-222(d).
140. K.S.A. 75-753.
141. Id.
142. K.S.A. 75-4317.
143. K.S.A. 75-4317.
144. Memorial Hospital Ass’n v. Knutson, 239 Kan. 663, 669 (1986).
145. K.S.A. 75-4318.
146. Id.
147. Id.
148. K.S.A. 75-4318(a) (under which KOMA applies to meetings of "legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof.
be part of a governmental entity at the state or local government, whether it is the governing body or a subordinate group; (4) it must receive or expend public funds or be a subordinate group of a body subject to KOMA; and (5) it must be supported in whole or in part by public funds or be a subordinate group of a body which is so financed.\textsuperscript{150}

In 2007, the Kansas attorney general opined that governing bodies for technical colleges are subject to KOMA, because such bodies qualify as a “legislative and administrative body which receives or expends and is supported in whole or in part by public funds.”\textsuperscript{151} The attorney general issued the opinion in response to a question from a state legislator, who asked whether the board of a technical college could delegate specific decision making authority to the president of a technical college concerning the acquisition of real property or leasing, employment concerns, or paying bills.\textsuperscript{152} The attorney general determined that because the board is subject to KOMA and has final decision-making authority on the delegated matters, it must give final approval of any decision made by the president and any final decision must be done openly, in adherence to KOMA.\textsuperscript{153}

\textbf{i. Not-for-profit corporations}

In 2004, the attorney general examined whether a non-profit corporation called Sheltered Living, Inc., was subject to KOMA. Although Sheltered Living received the majority of its funding from government sources, the attorney general concluded that “receipt of public funds alone does not automatically trigger application” of the law.\textsuperscript{154} In coming to this conclusion, the attorney general applied a three-part test to determine whether a not-for-profit corporation created by private citizens was subject to KOMA.\textsuperscript{155} The test calls for consideration of: (1) whether the corporation receives or expends public funds; (2) whether it is subject to control of government units; and (3) whether it acts as a governmental agency in providing services or has independent authority to make governmental decisions.\textsuperscript{156} Sheltered Living, according to the attorney general, was not subject to KOMA, because private citizens created it, and controlled it entirely, and government had control only to the extent that the corporation was subject to contractual terms or government regulation of the particular type of service.\textsuperscript{157}

\section*{2. How to determine whether a meeting is subject to KOMA}

Under KOMA, “meetings” include all gatherings and stages of the decision-making process.\textsuperscript{158} A meeting subject to KOMA is: (1) any gathering or assembly, in person or through the use of a telephone or any other medium for interactive communication (2) by a majority of a body or agency subject to this act (3) for the purpose of discussing the business or affairs of the body or agency.\textsuperscript{159}

A meeting includes informal discussions that take place before, after, or during recesses of a public meeting if the purpose of the discussion includes business or affairs of the body or agency.\textsuperscript{160}

\textbf{(a) Serial meetings (interactive communication)}

Although KOMA clearly applies when officials meet face to face, the Legislature also found it necessary to address “serial meetings,” which take several forms.\textsuperscript{161} KOMA applies whenever a majority of the members of a public agency convene. In a serial meeting, however, a majority of the members do not gather at a particular place and become subject to KOMA. Instead, they discuss public business in a series of one-on-one meetings or in other ways that keep the number of participants below the number that would require them to meet openly under KORA. A serial meeting may be accomplished by means of a calling tree, whereby members of a public agency telephone one another in a series, so that a majority of the members never discuss public business at one time.\textsuperscript{162} Serial meetings also occur when officials are separate from one another but discuss public business with the help of a staff member who is not subject to KOMA. The staff member communicates with each official individually and then with the others. The staff member serves as a messenger through whom all the officials are able to discuss public business with one another.\textsuperscript{163} The Legislature brought serial meetings under KORA by defining the term meeting to include a gathering of a majority of officials “through the use of a telephone or any other medium for interactive communication.”\textsuperscript{164}

\textbf{i. Email serial communication}

In 2009, the attorney general’s office addressed whether a member of an agency or body violates KOMA when he or she responds to an email or electronic communication and copies all or a majority of other members.\textsuperscript{165} There,
members of a body or agency received an email from a constituent, one member replied to that constituent and in doing so, copied the original message and comments with other members. Any administrative body authorized to exercise quasi-judicial functions when deliberating matters relating to a decision involving quasi-judicial functions, the prisoner review board when conducting parole hearings or parole violation hearings held at a correctional institution, any impeachment inquiry or other impeachment matter referred to any committee of the House of Representatives prior to the report to the full House of Representatives; and if otherwise provided by state or federal law or by rules of the Kansas Senate or House of Representatives.

(b) Social gatherings

Social gatherings are not subject to the KOMA so long as no public business of the majority of a public body occurs.

3. Matters not covered by KOMA

The KOMA expressly excludes four groups from its requirements. Any administrative body authorized to exercise quasi-judicial functions when deliberating matters relating to a decision involving quasi-judicial functions, the prisoner review board when conducting parole hearings or parole violation hearings held at a correctional institution, any impeachment inquiry or other impeachment matter referred to any committee of the House of Representatives prior to the report to the full House of Representatives; and if otherwise provided by state or federal law or by rules of the Kansas Senate or House of Representatives.

4. Requirements under the KOMA

Assuming that a public agency falls under KOMA, the agency must take steps to ensure the public receives access to meetings subject to the KOMA. When a member of the public requests notice of a meeting, a member of the public body must provide notice of the date, time and place of any regular or special meeting of that body. However, if a citizen requests notice by petition, the petition will designate one person to receive notice and notice to that one person constitutes notice to all individuals named in the petition. Where an employee or trade organization requests notice and designates an executive officer, notice to that executive officer satisfies the notice to all members of the organization. Any agenda relating to the business transacted at the meeting must be made available to any requesters of the agenda before the meeting commences.

During the meeting, attendees may use cameras, flash photography and recording devices subject to reasonable rules to maintain orderly conduct of the meeting.

Enumerated requirements aside, whether a meeting is “open” is also a question of fact. The key to determining whether a meeting is “open” is whether it is accessible to the general public, in the sense that it allows the public to listen to the discussion.

In Stevens v. City of Hutchinson, the plaintiff argued the city commission violated the KOMA because members of the commission spoke too softly and did not allow the audience to view the exhibits and documents discussed. There, the Kansas Court of Appeals found that while KOMA does not specify a decibel level members of a public body must speak, “the KOMA hallmark is a meeting ‘open to the public’; and if a meeting is at such an inconvenient location or in a room so small as to make it inaccessible for public attendance, the meeting might effectively be considered improperly closed under the KOMA.” If the public is welcome to view all documents and no one had been refused to approach to view documents, there was no evidence to show Commissioners’ actions or behavior was a subterfuge to prevent the public from hearing or seeing, the meetings were “open.”

In 2011, the Kansas attorney general advised that a public body may conduct meetings outside of Kansas if it complies with KOMA by providing to the general public a means of listening to the discussion and ascertaining how individual members of the public body voted on matters. The attorney general also stated that the public body must show (1) it was reasonably necessary to conduct the business outside of Kansas rather than a subversion of the policy for open public meetings; (2) the public body gave notice to the individuals requesting it; and (3) the meeting did not pose excessive cost or inconvenience to the individuals attending the meeting in person, teleconference or videoconference.

KOMA explicitly allows a meeting to take place via telephone.

166. Id.
167. Id.
168. Id.
169. K.S.A. 75-4318(g).
170. Id.
171. K.S.A. 75-4318(b).
172. K.S.A. 75-4318(b)(1).
173. K.S.A. 75-4318(b)(2).
174. K.S.A. 75-4318(d).
175. K.S.A. 75-4318(e).
179. Id.
180. Id. at 292.
182. Id.
183. K.S.A. 75-4317a.
ensure that the telephonic meeting complies with all of the requirements of KOMA.\textsuperscript{184} In order for there to be an open meeting conducted in whole or in part by use of a telephone system, members of the public must be allowed to somehow listen to the phone conversation.\textsuperscript{185} To satisfy this requirement, public may “tie into” the phone call or be present at an open and public place equipped with a speakerphone which allows members of the general public to listen to the entire conversation.\textsuperscript{186} Further, if a vote is taken in a telephonic meeting, those voting telephonically should individually identify themselves and then state how they vote.\textsuperscript{187}

KOMA does not require a public agency to create an agenda for an open meeting, but if a public agency chooses to create an agenda, it must provide the agenda to a person requesting it before the meeting begins.\textsuperscript{188} If a public body prepares an agenda relating to the business to be transacted and the body plans a topic for information discussion or otherwise, the planned topic should be listed on the agenda.\textsuperscript{189} However, the body is not limited to discuss only those subjects on the agenda; the agenda may be amended at any “and substantial compliance with KOMA’s provisions suffice unless noncompliant acts are taken as subterfuge.”\textsuperscript{190}

In 2005, Senate Bill 78 required that on or before January 15, the county or district attorney of each county report to the attorney general of complaints received during the preceding fiscal year concerning KOMA or KORA.\textsuperscript{191}

5. Executive sessions

Executive sessions essentially close open meetings to the public. Executive sessions allow a public body to close an open meeting to the public when the body must address particular subjects.\textsuperscript{192} Where an open meeting is in session, a member of the body may close the meeting if he or she makes a formal motion that includes a statement of (1) the justification for closing the meeting (2) the subjects to be discussed in the closed executive session and (3) the time and place when the open meeting will resume.\textsuperscript{193} That motion then must be seconded and carried by a member of the body.\textsuperscript{194} The KOMA expressly provides the only topics that may be discussed during an executive session.\textsuperscript{195}

In 2004, the Legislature passed House Bill 2758, which amended KOMA to expand the executive session topic relating to security measures.\textsuperscript{196} Specifically, the bill allowed the closure of meetings pertaining to security measures that (1) protect systems, facilities, or equipment used in the production transmission, or distribution of energy, water, or communication systems; (2) transportation and sewer or wastewater treatment systems; (3) a public body or agency, public building; and (4) private property or persons.\textsuperscript{197}

In 2004, the Kansas attorney general reasoned that a board of trustees of a county hospital is subject to the provisions of KOMA and is required to hold meetings open to the public.\textsuperscript{198} A general discussion of quality of care and staffing issues would not be allowed in an executive session unless the topic concerned an individual staff member, patient, or another subject closed by statute.\textsuperscript{199}

6. Enforcement

The responsibility for investigating alleged violations of KOMA law lies with the attorney general, district attorneys, and county attorneys.\textsuperscript{200} Those investigative bodies may subpoena witnesses, evidence, documents or other material, take testimony under oath, examine documentary material relevant to alleged violations, require attendance during such examination of documentary material and take testimony under oath or acknowledgement in respect to any such material, and serve interrogatories pursuant to any investigation of alleged violations.\textsuperscript{201}

Any member of a body or agency subject to KOMA who (1) knowingly violates the law or (2) intentionally fails to furnish information as required by the law will be subject to a civil penalty.\textsuperscript{202} The statute expressly places the burden of proof on the public agency accused of knowingly violating KOMA.\textsuperscript{203} To knowingly violate KOMA means to purposely do the acts denounced by the law and does not contemplate a specific intent to violate the law.\textsuperscript{204} Each violation carries a civil pen-

\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. (K.S.A. 75-4318(d)).
\textsuperscript{189} Stevens, 11 Kan. App. 2d at 293.
\textsuperscript{190} Id. at 293-94.
\textsuperscript{191} K.S.A. 4302b; also see Kansas Legislative Research Dep’t, 2005 SUMMARY OF LEGISLATION, 2005 Sess. (2005).
\textsuperscript{192} K.S.A. 75-4319.
\textsuperscript{193} K.S.A. 75-4319(a).
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} K.S.A. 75-4319(b).
\textsuperscript{198} Id.
\textsuperscript{200} Id.
\textsuperscript{202} K.S.A. 75-4320(a)-(e).
\textsuperscript{203} K.S.A. 75-4320(a).
\textsuperscript{204} K.S.A. 75-4320b.
\textsuperscript{205} Palmgren, 231 Kan. at 524.
ally of $500. In addition, any binding action taken at a meeting not in compliance with KOMA becomes voidable in any suit brought by the attorney general, county, or district attorney.

Notably, KOMA imposes penalties only where a public body knowingly violates the law. The courts, then, decline to impose penalties for technical violations, and “look to the spirit of the law, and will overlook mere technical violations where the public body has made a good faith effort to comply and is in substantial compliance with KOMA, and where no one is prejudiced or the public right to know has not been effectively denied.”

II. Issues related to the Kansas Sunshine Laws

The Kansas Sunshine Laws have been scrutinized over the years both for going too far and for not going far enough.

A. Fees among issues facing KORA

Fees charged for access to records have been a particular concern. For example, on March 13, 2013, the Senate Federal & State Affairs Committee held a hearing on Senate Bill 10: Open meetings; minutes required; open records; charges limited. The proposed amendment addressed the high fees a member of the public may incur when requesting a public record. The bill incorporated a fee schedule into KORA that would (1) charge no more than $.10 a page for copies of public records; (2) make the first half-hour of staff time free; (3) place limits on the staff time exceeding one hour to $20 per hour for a clerical or secretarial staff, $30 per hour for computer programmers, systems analysts and similar staff; and $50 per hour for attorneys.

Senator Jacob LaTurner urged the passage of the bill, stating “the Kansas Open Records Act allows for governmental institutions to charge excessive fees when it comes to requests.”

James Franko of the Kansas Policy Institute offered written testimony in favor of the bill. Mr. Franko advocated for a uniform fee schedule that, he argued, would create equal access to open government across the state.

Mr. Franko cited an incident where the American Civil Liberties Union requested records from the police department in Kansas City, Hutchinson and Lenexa to highlight the discrepancies in records request fees. The police department in Kansas City charged $83, the Hutchinson police department declined to charge a fee, and the City of Lenexa charged $11,000.

In contrast, Kim Winn, the Deputy Director of the League of Kansas Municipalities, was one of many who offered testimony in opposition to the bill. She argued “because of KORA exceptions and various privacy laws, open records requests can require legal review and days’ worth of work by staff.” She also argued the law currently allows for fees to cover the cost of staff time spent in redacting open from closed information and Senate Bill 10 excludes staff time and other expenses. Finally, she expressed that the type of fee schedule proposed by Senate Bill 10 would result in the taxpayers and community for the expenses for an individual requestor.

Ultimately, the bill failed in committee but highlighted the perhaps unintended barriers post by KORA in its silence on exactly how much may be charged by public agencies to respond to open records requests under KORA.

B. Definition of “meetings” among issues facing KOMA

Fees charged for access to records have been a particular concern. For example, on the 2013 Legislature, for example, directly responded to legislators’ concern about the breadth of KOMA. House Bill 2335 and Senate Bill 200 stemmed from meetings attended by Kansas legislators at Cedar Crest in January 2012, and questions arose about whether the meetings constituted technical, not knowing, violations of KOMA. House Bill 2336 and Senate Bill 200 both proposed to refine “meeting” in KOMA to legalize what were considered technical violations. House Bill 2336 changed the definition of “meeting” to any “prearranged” gathering. Moreover, it provided that a meeting excludes

(a) Occasions when a majority of the membership of a body or agency subject to this act attends social gatherings or otherwise gathers so long as the body or agency does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body or agency at a later date; and

(b) Gatherings of any political party caucus of either house of the legislature.

206. K.S.A. 75-4320(a).
207. Id.
208. Id.
214. Id. (written testimony by James Franko, Kansas Policy Institute, in support of SB-10).
215. Id.
216. Id.
217. Id.
218. Id. (written testimony of Kim Winn, Deputy Director of the League of Kansas Municipalities)
219. Id.
220. Id.
221. Id.
223. Id.
In essence, the bill proposed to allow a majority of a public body, including a legislative committee, to meet in private so long as the gathering would not include deliberation on a topic. KOMA currently subjects gatherings of a majority of a body to its provisions where there is mere discussion of a topic. Senate Bill 200 proposed to redefine “meeting” as well, but went further than HB 2336. Specifically, the bill provided “'Meeting' does not include any gathering or assembly at which discussion of the business of the body is not the central purpose of such meeting and at which no business or policy of the body is formulated or voted on, including, but not limited to, social gatherings, conventions, workshops, press conferences, training or educational programs or ceremonial, religious or civic events.”

The phrase “central purpose” constituted important qualifying language. Under SB 200, a majority of a public body would have been allowed to meet for a social gathering where business is discussed without the application of KOMA requirements.

While neither bill passed during the 2013 legislative session or received a hearing, both posed enormous changes to what constitutes a meeting under KOMA.

III. Resources available to attorneys

In light of the many changes and issues surrounding the Kansas Sunshine Laws, attorneys should be aware of the several helpful resources available to them. These resources help answer questions, explain provisions of the law and provide insight into the issues affecting the Kansas Sunshine Law. This list of resources is by no means exhaustive but provides a glimpse into what is available to clarify changes in the law, illuminate issues currently facing the law or identifying issues that may need to be addressed.

A. KansasOpenGov.org

KansasOpenGov.org, run by the Kansas Policy Institute, provides state and local tax information and publishes how tax dollars are spent. The information published on the site comes directly from Kansas open records.

B. The Kansas Sunshine Coalition

The Kansas Sunshine Coalition for Open Government, found at http://kssunshine.nfoicnet/, is “a group of journalists, educators and interested citizens dedicated to the principle that open government is essential to a democratic society.”

C. Kansas Legislature Briefing Book

The Kansas Legislature Briefing Book composed by the Kansas Legislative Research Department includes an outstanding summary of KOMA and KORA. The Briefing Book includes the important basics of both laws.

D. Kansas Sunshine Law: How bright does it shine now? The Kansas Open Meetings Act

This article, authored by Teresa Nuckolls, provides the foundation of this article. While this article is an update, the original remains a key to understanding the Kansas Sunshine Laws.

E. The Kansas Attorney General’s Office

The Kansas Attorney General’s Office dedicates a portion of its website to the Kansas Sunshine Laws and includes guidelines as well as frequently asked questions.

IV. Conclusion

Attorney general opinions, court decisions and the legislative record shape how the Kansas Sunshine Laws are understood and implemented. Nevertheless, the goal of the laws remains clear and unchanged: to promote an open government and provide for access by the public.

The Kansas Open Records Act (KORA)¹

Who benefits from KORA?
KORA entitles any person to inspect and copy government records.²

What is the purpose of KORA?
The legislature passed KORA “to insure public confidence in government by increasing the access of the public to government and its decision-making processes.”³ The Kansas Supreme Court has stated that “the public policy of the state is that public records are to be open for inspection unless expressly exempted, and that the act is to be liberally construed and applied to promote this policy.”⁴

Public Records:

What is a public record?
KORA defines a public record as “any recorded information, regardless of characteristics or location, which is made, maintained or kept by or is in the possession of: (A) Any public agency; or (B) any officer or employee of a public agency pursuant to the officer’s or employee’s official duties and which is related to the functions, activities, programs or operations of any public agency.”⁵

A “public agency” is one of the following:
• “the state or
• “any political or taxing subdivision of the state or
• “any office, agency or instrumentality thereof, or
• “any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.”⁶

Thus, KORA applies to all state, political, and taxing subdivisions in Kansas including the judicial, legislative, and executive branches.⁷ KORA also applies to an estimated 4,000 other groups and organizations including advisory boards and commissions, non-governmental bodies, and multi-state and regional bodies if they were created or controlled by a public agency or act on behalf of a public agency.⁸

What public records are not open for inspection and copying?
Records are not open if they are:
• “owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds . . .”
• “made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state”
• “records of employers related to the employer’s individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement.”⁹

In addition, KORA identifies three entities whose records are not subject to KORA:
• “[a]ny entity solely by reason of payment from public funds for property, goods or services of such entity; or
• “any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court.”¹⁰

KORA also excludes records of an entity that merely does business with a public agency. An example is the National Collegiate Athletic Association (NCAA). The NCAA is not required to open its records under KORA. The NCAA is simply providing specific services to state colleges and universities in exchange for the public funds it receives.¹¹

III. Access to Public Records:

What records must be open to public inspection?
Public records are open for inspection by any person unless closed by specific legal authority.¹²

Footnotes
1. Kansas Open Records Act, 2013 KAN. SESS. LAWS, chs. 50, 72, 82, 105, 133(to be codified at KAN. STAT. ANN. §§ 45-215 et seq.).
3. See also State Dept. of SRS v. Pub. Emp. Relations Bd., 249 Kan. 163, 170 (1991) (“The stated policy of KORA is that all public records are to be open for inspection unless expressly exempted, and that the act is to be liberally construed and applied to promote this policy.”).
4. Tew v. Topeka Police & Fire Civil Serv. Comm’n, 249 Kan. 163, 170 (1991) (“The state or any political or taxing subdivision of the state or any office, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.”).
7. Id.
10. Id.
What information must a public agency provide upon request for a record?

Upon request of any person, a public agency must disclose:
- “The principal office of the agency, its regular office hours and any additional hours established by the agency ....”
- “The title and address of the official custodian of the agency's records and of any other custodian who is ordinarily available to act on requests made at the location where the information is displayed.”
- “The fees, if any, charged for access to or copies of the agency’s records.”
- “The procedures to be followed in requesting access to and obtaining copies of the agency's records, including procedures for giving notice of a desire to inspect or obtain copies of records during hours established by the agency ....”
- In addition, public agencies must maintain a register, open to the public, that describes the following:
  - “The information which the agency maintains on computer facilities,” and
  - “the form in which the information can be made available using existing computer programs.”

What is the procedure for requesting access to public records?

Each public agency must adopt procedures for requesting access to its records. The procedures must provide full, efficient, and timely access to the requested records. Standard procedures shall be established and maintained regarding the principal office of the agency and its regular hours and any additional hours, title and address of the official custodian of the agency's records and any other custodian ordinarily available, the fees (if any) charged for access or copying of records, and the procedures to be followed in requesting access or obtaining copies of records. Any officer or employee of a public agency who is responsible for the maintenance of records is an official custodian. If a request for records is not made to an official custodian, the person who receives the request must provide the name and location of the official custodian if known or readily ascertainable.

When must a public agency respond to a request for access?

After receiving a request, an agency must provide access “as soon as possible, but not later than the end of the third business day following the date that the request is received.”

Who is available to assist the media, along with the public, when they seek access to records?

The governing body of every agency, which maintains public records, must have a local freedom of information officer. The duties of the freedom of information officer include the following:
- prepare and provide information about KORA,
- assist in resolving KORA disputes,
- respond to questions about KORA and
- provide a brochure listing the requirements to obtain a copy of public records, rights of a requester, and the responsibility of the public agency.

May a public agency require a written request for records?

An agency has discretion only to require that a request for records be written. It must not require that a request, regardless of whether it is written, be made in a particular form.

What information must a person give to an agency when requesting access to information?

An agency has discretion to require that requesters give their name and address and prove their identity. In addition, the agency may require only enough information to determine which records are being requested and to establish whether the requester does not have a right of access.

How does KORA require public agencies to respond to a request?

The agency's records custodian must respond by:
- granting access within three business days following the date the request is received;
- delaying a decision and giving a detailed explanation of the cause for delay, along with the time, date, and place that the records will be available; or
- denying access and providing a written explanation, if requested, including the specific provision of law under which access is denied.

13. 2013 KAN. SESS. LAWS, ch.72 (to be codified at KAN. STAT. ANN. § 45-220(f)).
14. 2013 KAN. SESS. LAWS, chs. 72, 133 (to be codified at KAN. STAT. ANN. § 45-221).
15. 2013 KAN. SESS. LAWS, ch.72 (to be codified at KAN. STAT. ANN. § 45-220(a)).
16. Id.
17. 2013 KAN. SESS. LAWS, ch.72 (to be codified at KAN. STAT. ANN. § 45-220(f)).
22. KAN. STAT. ANN. § 45-226(b) (2000).
23. 2013 KAN. SESS. LAWS, ch.72 (to be codified at KAN. STAT. ANN. § 45-220(b)).
24. Id.
25. Id.
26. Id. See also 2013 KAN. SESS. LAWS, ch.72 (to be codified at KAN. STAT. ANN. § 45220(c)(1)) (stating that if the purpose for which records may be used is limited, the agency may require the person requesting the records to certify that they have a right of access and do not intend to use them for any improper purpose).
Must an agency grant access to records regardless of the requester’s purpose?

In general, requesters have no right of access to records comprising lists of names and addresses that they intend to use for the purpose of soliciting buyers of goods and services. For example, requesters who plan a commercial solicitation do not have a right of access to a list of voter registrants.

However, if requesters plan to solicit support for an election campaign, they do have a right to voter registration records. Requesters do have a right of access to the names and addresses of motor vehicle registrants for specific purposes enumerated by statute. Requesters may also have access regardless of commercial use to certain lists enumerated by statute including licensed professionals and applicants for a license to practice a profession.

When may a person inspect public records?

A person may inspect public records during the regular office hours of a public agency during any additional hours established by that agency. If the agency does not have regular office hours, it must establish reasonable hours when persons may inspect records. An agency without regular office hours may require up to 24-hour notification from any person who wants to inspect records. However, such notice shall not be required in writing.

May a public agency charge a fee for providing access to records?

An agency may charge a reasonable fee for providing access to public records. The agency may require advance payment of the fee. Specifically, when providing access to computer files, the agency’s fee must only be for the costs of computer services and staff time.

Under KORA, a coordinating council has the authority to prescribe a reasonable fee for access to legislative records. If research of legislative records is done by a staff member of Legislative Administrative Services, the cost is $20 per hour for staff research and $.50 for the first printed page and $.15 for each additional page plus postage and handling.

Agency heads set the fees for access to the records of state administrative agencies. The amount may be appealed to the secretary of the State Department of Administration. A fee equal or less than $.25 per page shall be deemed a reasonable fee.

The Supreme Court has the authority to set access fees for Kansas court records. A court employee’s time costs $12.00 an hour.

Each public agency within the executive branch shall remit all fees received to the state treasurer, unless otherwise provided by law. When a public agency or taxing subdivision collects fees, its treasurer must deposit the money in the agency’s general fund, unless a law specifies otherwise.

Why are public agencies allowed to establish procedures for gaining access to public records?

Public agencies may establish access procedures to:

- fulfill their statutory duty to provide “full access to public records,”
- protect public records from “damage and disorganization,”
- “prevent excessive disruption of the agency’s essential functions,”
- “provide assistance and information upon request” and
- “insure efficient and timely action in response to applications for inspection of public records.”

27. KAN. STAT. ANN. § 45-218(d) (2000).
28. See KAN. STAT. ANN. § 45-230(a) (Supp. 2012) (“No person shall knowingly sell, give or receive, for the purpose of selling or offering for sale any property or service to persons listed therein, any list of names and addresses contained in or derived from public records . . . .”); 2013 KAN. SESS. LAWS, ch.72 (to be codified at KAN. STAT. ANN. § 45-220(c)(2)) (stating that an agency may require persons requesting records to certify that they do not intend to sell any list of names or addresses contained in or derived from the records); KAN. STAT. ANN. § 74-2012(c) (Supp. 2012) (stating that lists of persons’ names and addresses contained in or derived from motor vehicle records shall not be sold for purposes prohibited by the Kansas Open Records Act).
30. KAN. STAT. ANN. § 74-2012(c) (Supp. 2012) (“Lists of persons’ names and addresses contained in or derived from motor vehicle records shall not be sold, given or received for purposes prohibited by K.S.A. 45-230, and amendments thereto, except that . . . .”).
33. KAN. STAT. ANN. § 45-218(b) (2000).
34. 2013 KAN. SESS. LAWS, ch.72 (to be codified at KAN. STAT. ANN. § 45-220(d)).
35. Id.
36. Id.
37. KAN. STAT. ANN. § 45-219(c) (Supp. 2012).
40. KAN. STAT. ANN. §§ 45-219(c) (Supp. 2012); 46-1207a (Supp. 2011).
41. E-mail from Karen Clowers, Office Manager, Kansas Legislative Administrative Services (June 27, 2012).
42. KAN. STAT. ANN. § 45-219(c)(5) (Supp. 2012).
43. Id.
44. KAN. STAT. ANN. § 45-219(c)(4) (Supp. 2012).
46. KAN. STAT. ANN. § 45-219(d)–(e) (Supp. 2012).
47. 2013 KAN. SESS. LAWS, ch.72 (to be codified at KAN. STAT. ANN. § 45-220(a)).
For what reasons may access to a record be denied?
When denying access, custodians may explain that the record is:
- not public or
- may or may not be public, but are nevertheless specifically exempt from disclosure under KORA.48

In addition, custodians have discretion to deny access to records that are public if the request would impose “an unreasonable burden” on an agency or is “intended to disrupt” the agency.50

IV. Copying Public Records:
May an agency require a written request for copying records?
Once the media and the public have access to records, they generally also have the right to make or receive copies of those records.51 An agency has the discretion to require that requests for copies be written.52

May a public agency refuse to make copies of any type of record?
The only requests that may be denied are those for “…radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices unless such items or devices were shown or played to a public meeting of the governing body thereof . . . .”53 The agency is not required to provide copies of tapes and other such materials if it does not own the copyright.54

Must the agency provide a place to make copies?
Copies must be made while records are in a custodian’s possession and control.55 Alternatively, a custodian may delegate responsibility for the records to another person.56 Copies should be made where the records are usually kept.57 If this is impractical, the custodian must allow arrangements for copying elsewhere.58 However, original copies of public records must not be removed from the office of the public agency without the custodian’s written permission.59

V. Closed Records:
What public records does KORA exempt from disclosure?
KORA contains fifty-four exceptions to public disclosure.60 A public agency need not disclose a record if it is identified in the exemptions and if there is no specific legal mandate to open it.61 The exemptions, as set out in the statute, are:

1. Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee [for confirming nongubernatorial appointments] or the disclosure of which is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee [on confirmation oversight to restrict or prohibit disclosure].62

2. Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.

3. Medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients.

4. Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries or actual compensation employment contracts or employment-related contracts or agreements and lengths of service of officers and employees of public agencies once they are employed as such.

5. Information which would reveal the identity of any undercover agent or any informant reporting a specific violation of law.

6. Letters of reference or recommendation pertaining to the character or qualifications of an identifiable individual, except documents relating to the appointment of persons to fill a vacancy in an elected office.

7. Library, archive and museum materials contributed by private persons, to the extent of any limitations imposed as conditions of the contribution.

8. Information which would reveal the identity of an individual who lawfully makes a donation to a public agency, if anonymity of the donor is a condition of the donation, except if the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public officer or employee.

80 Sunflower Laws
9. Testing and examination materials, before the test or examination is given or if it is to be given again, or records of individual test or examination scores, other than records which show only passage or failure and not specific scores.

1. Criminal investigation records, except ... [the district court, in [certain cases], may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure: ...]

2. Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent.

3. Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility.

4. The contents of appraisals or engineering or feasibility estimates or evaluations made by or for a public agency relative to the acquisition or disposal of property, prior to the award of formal contracts therefore.

5. Correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency or records which are the property of a confidential source or undercover agent.

6. Records pertaining to employer-employee negotiations, if disclosure would reveal information discussed in a lawful executive session [as provided by law].

7. Software programs for electronic data processing and documentation thereof, but each public agency shall maintain a register, open to the public, that describes: The information which the agency maintains on computer facilities; and the form in which the information can be made available using existing computer programs.

8. Applications, financial statements and other information submitted in connection with applications for student financial assistance where financial need is a consideration for the award.

9. Plans, designs, drawings or specifications which are prepared by a person other than an employee of a public agency or records which are the property of a private person.

10. Well samples, logs or surveys which the state corporation commission requires to be filed by persons who have drilled or caused to be drilled, or are drilling or causing to be drilled, holes for the purpose of discovery or production of oil or gas, to the extent that disclosure is limited by rules and regulations of the state corporation commission.

11. Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

12. Records of a public agency having legislative powers, which records pertain to proposed legislation or amendments to proposed legislation, except that this exemption shall not apply when such records are: Publicly cited or identified in an open meeting or in an agenda of an open meeting; or distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

13. Records of a public agency having legislative powers, which records pertain to research prepared for one or more members of such agency, except that this exemption shall not apply when such records are:


64. 2013 KAN. SESS. LAWS, chs. 72, 133 (to be codified at KAN. STAT. ANN. § 45-221(a)(10)). See also 2013 KAN. SESS. LAWS, ch. 120 (to be codified at KAN. STAT. ANN. §§ 21-6419 to 6421).

Publicly cited or identified in an open meeting or in an agenda of an open meeting; or
- distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

15. Library patron and circulation records which pertain to identifiable individuals.

16. Records which are compiled for census or research purposes and which pertain to identifiable individuals.

17. Records which represent and constitute the work product of an attorney.

18. Records of a utility or other public service pertaining to individually identifiable residential customers of the utility or service, except that information concerning billings for specific individual customers named by the requester shall be subject to disclosure as provided by this act.

19. Specifications for competitive bidding, until the specifications are officially approved by the public agency.

20. Sealed bids and related documents, until a bid is accepted or all bids rejected.

21. Correctional records pertaining to an identifiable inmate or release, except that:
- The name; photograph and other identifying information; sentence data; parole eligibility date; custody or supervision level; disciplinary record; supervision violations; conditions of supervision, excluding requirements pertaining to mental health or substance abuse counseling; location of facility where incarcerated or location of parole office maintaining supervision and address of a releasee whose crime was committed after the effective date of this act shall be subject to disclosure to any person other than another inmate or releasee, except that the disclosure of the location of an inmate transferred to another state pursuant to the interstate corrections compact shall be at the discretion of the secretary of corrections;
- the attorney general, law enforcement agencies, counsel for the inmate to whom the record pertains and any county or district attorney shall have access to correctional records to the extent otherwise permitted by law;
- the information provided to the law enforcement agency pursuant to the sex offender registration act, shall be subject to disclosure to any person, except that the name, address, telephone number or any other information which specifically and individually identifies the victim or any offender required to register as provided by the Kansas offender registration act shall not be disclosed; and
- records of the department of corrections regarding the financial assets of an offender in the custody of the secretary of corrections shall be subject to disclosure to the victim, or such victim’s family, of the crime for which the inmate is in custody as set forth in an order of restitution by the sentencing court.

22. Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

23. Public records pertaining to prospective location of a business or industry where no previous public disclosure has been made of the business’ or industry’s interest in locating in, relocating within or expanding within the state. This exception shall not include those records pertaining to application of agencies for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.

24. Engineering and architectural estimates made by or for any public agency relative to public improvements.

25. Financial information submitted by contractors in qualification statements to any public agency.

26. Records involved in the obtaining and processing of intellectual property rights that are expected to be, wholly or partially vested in or owned by a state educational institution, as defined [by law,] or an assignee of the institution organized and existing for the benefit of the institution.

27. Any report or record which is made [under certain laws] and which is privileged [pursuant to statute].

28. Information which would reveal the precise location of an archeological site.

29. Any financial data or traffic information from a railroad company, to a public agency, concerning the sale, lease or rehabilitation of the railroad’s property in Kansas.

30. Risk-based capital reports, risk-based capital plans and corrective orders including the working papers and the results of any analysis filed with the commissioner of insurance [as provided by law].

66. 2013 KAN. SESS. LAWS, chs. 120, 127 (to be codified at KAN. STAT. ANN. §§ 22-4901 et seq.).
67. Id.
68. See KAN. STAT. ANN. § 76-711 (1997) (“State educational institution” means the university of Kansas, Kansas state university of agriculture and applied science, Wichita state university, Emporia state university, Pittsburg state university, and Fort Hays state university).
31. Memoranda and related materials required to be used to support the annual actuarial opinions submitted [as provided by law].

32. Disclosure reports filed with the commissioner of insurance [as provided by law].

33. All financial analysis ratios and examination synopses concerning insurance companies that are submitted to the commissioner by the national association of insurance commissioners’ insurance regulatory information system.

34. Any records the disclosure of which is restricted or prohibited by a tribal-state gaming compact.

35. Market research, market plans, business plans and the terms and conditions of managed care or other third-party contracts, developed or entered into by the university of Kansas medical center in the operation and management of the university hospital which the chancellor of the university of Kansas or the chancellor’s designee determines would give an unfair advantage to competitors of the university of Kansas medical center.

36. The amount of franchise tax paid to the secretary of revenue or the secretary of state by domestic corporations, foreign corporations, domestic limited liability companies, foreign limited liability companies, domestic limited partnership, foreign limited partnership, domestic limited liability partnerships and foreign limited liability partnerships.

37. Records, other than criminal investigation records, the disclosure of which would pose a substantial likelihood of revealing security measures that protect:
   - Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services;
   - Transportation and sewer or wastewater treatment systems, facilities or equipment; or
   - Private property or persons, if the records are submitted to the agency.

For purposes of this paragraph, security means measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping. Security measures include, but are not limited to, intelligence information, tactical plans, resource deployment and vulnerability assessments.

38. Any information or material received by the register of deeds of a county from military discharge papers [DD Form 214]. Such papers shall be disclosed: To the military dischargee; to such dischargee’s immediate family members and lineal descendants; to such dischargee’s heirs, agents or assigns; to the licensed funeral director who has custody of the body of the deceased dischargee; when required by a department or agency of the federal or state government or a political subdivision thereof; when the form is required to perfect the claim of military service or honorable discharge or a claim of a dependent of the dischargee; and upon the written approval of the commissioner of veterans affairs, to a person conducting research.

39. Information that would reveal the location of a shelter or a safe-house or similar place where persons are provided protection from abuse or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault.

40. Policy information provided by an insurance carrier [as provided by law]. This exemption shall not be construed to preclude access to an individual employer’s record for the purpose of verification of insurance coverage or to the department of labor for their business purposes.

41. An individual’s e-mail address, cell phone number and other contact information which has been given to the public agency for the purpose of public agency notifications or communications which are widely distributed to the public.

42. Information provided by providers to the local collection point administrator or to the 911 coordinating council pursuant to the Kansas 911 act . . . upon request of the party submitting such records.

43. Records of a public agency on a public website which are searchable by a keyword search and identify the home address or home ownership of a law enforcement officer [as defined by statute] parole officer, probation officer, court services officer or community correctional services officer. Such individual officer shall file with the custodian of such record a request to have such officer’s identifying information restricted from public access on such public website. Within 10 business days of receipt of such requests, the public agency shall restrict such officer’s identifying information from such public access. Such restriction shall expire after five years and such officer may file with the custodian of such record a new request for restriction at any time.

44. Records of a public agency on a public website which are searchable by a keyword search and iden-
identify the home address or home ownership of a federal judge, a justice of the supreme court, a judge of the court of appeals, a district judge, a district magistrate judge, the United States attorney for the district of Kansas, an assistant United States attorney, the attorney general, an assistant attorney general, a district attorney or county attorney or an assistant district attorney or assistant county attorney. Such person shall file with the custodian of such record a request to have such person’s identifying information restricted from public access on such public website. Within 10 business days of receipt of such requests, the public agency shall restrict such person’s identifying information from such public access. Such restriction shall expire after five years and such person may file with the custodian of such record a new request for restriction at any time.

45. Records of a public agency that would disclose the name, home address, zip code, e-mail address, phone number or cell phone number or other contact information for any person licensed to carry concealed handguns or of any person who enrolled in or completed any weapons training in order to be licensed or has made application for such license under the personal and family protection act . . . shall not be disclosed unless otherwise required by law.76

46. Records of a utility concerning information about cyber security threats, attacks or general attempts to attack utility operations provided to law enforcement agencies, the state corporation commission, the federal energy regulatory commission, the department of energy, the southwest power pool, the North American electric reliability corporation, the federal communications commission or any other federal, state or regional organization that has a responsibility for the safeguarding of telecommunications, electric, potable water, waste water disposal or treatment, motor fuel or natural gas energy supply systems.76

What records are generally exempt from public disclosure under Kansas and federal laws and the state Supreme Court rules?

Under the Kansas Open Records Act, the Kansas Legislature periodically reviews enumerated exceptions to disclosure. Exceptions are generally in effect for five years unless reviewed and continued.77 Exceptions currently enforced include:

- Child abuse records and reports.78
- Personally identifiable data and information collected for purposes of legislative redistricting.79
- Individually identifiable drug abuse treatment records.80
- Financial information of an identifiable taxpayer filed with the county appraiser.81
- Criminal history record information.82
- Ballots.83
- Records of DNA samples.84
- Child in need of care reports.85
- Grand jury proceeding records (permanent by statute).86
- Adult Authority pre-parole report and supervision history.87
- Commitment and treatment records of the mentally ill.88
- Long-term care facility residents’ information.89
- Professional peer review records.90
- Adoptions and other Social and Rehabilitation Services records.91
- Income tax reports and returns.92
- Background checks by the Kansas Bureau of Investigation for the Racing Commission.93
- Kansas Department of Health and Environment vital statistics including marriage, birth, and death certificates.94
- Results of inquiries into complaints filed with the Kansas Human Rights Commission.95

75. 2013 KAN. SESS. LAWS, chs. 72, 133 (to be codified at KAN. STAT. ANN. § 45-221(a)(53)). See also KAN. STAT. ANN. §§ 75-7c01 et seq. (Supp. 2012).
76. 2013 KAN. SESS. LAWS, chs. 72, 133 (to be codified at KAN. STAT. ANN. § 45-221(a)(54)).
77. 2013 KAN. SESS. LAWS, chs. 50, 133 (to be codified at KAN. STAT. ANN. § 45-229).
79. KAN. STAT. ANN. § 11-306 (2001) (limited to information collected by the secretary of state, university officials, or military officers).
83. 2013 KAN. SESS. LAWS, ch. 101 (to be codified at KAN. STAT. ANN. § 24-2422).
89. KAN. STAT. ANN. § 75-7310 (Supp. 2012).
91. KAN. STAT. ANN. § 59-2135 (2005); see also KAN. STAT. ANN. § 59-2122 (Supp. 2012).
92. 2013 KAN. SESS. LAWS, ch. 133 (to be codified at KAN. STAT. ANN. § 79-3234(b)).
94. 2013 KAN. SESS. LAWS, ch. 59 (to be codified at KAN. STAT. ANN. § 65-2422d).
• Records and information given to the Crime Victim Compensation Board.
• Certain survey information collected by Veteran’s Affairs.
• Social Security numbers (permanent by statute).

Does a public agency have discretion to allow the inspection and copying of any records that KORA exempts from disclosure?

KORA does not absolutely forbid agencies from allowing the inspection and copying of the records in its fifty-four exemptions. KOR only says that an agency shall “not be required” to disclose exempt records. Both Kansas Supreme Court precedent and published opinions of the Kansas Attorney General support the discretionary power of agencies in determining whether to release exempted records or information. For example, according to the Attorney General’s office, “[t]he official custodian of personnel records possesses discretionary authority to allow or prohibit public access to personnel files.”

VI. Enforcement:

What should the press and public do if they believe a public agency is violating KORA?

An agency violates KORA if it withholds public records that are not exempt from disclosure. In response to a suspected violation of KORA, the press and public may first ask for help from the local freedom of information officer. The information officer’s duties include helping resolve disputes over access to and copying of records.

How should the press and public respond to a denial of a request for access to records?

Whenever records custodians deny access, they must, if requested, state in writing the reasons for their denial within three business days. In their statement, custodians must cite the specific provision of law that served as their basis for denying access.

If an agency wrongfully refuses to permit access to or copying of records, the press and public may file a lawsuit in the district court of the county where the KORA violation occurred. Alternatively, they may complain to the state attorney general, or to the county or district attorney of the county where the violation occurred. The attorney general or county or district attorney then may file a lawsuit in district court of the county where the records are kept.

Do the media and the public have any grounds for seeking access to public records that are included in KORA’s specific exemptions?

The Kansas Supreme Court has said that KORA “does not prohibit disclosure of records contained within these exceptions, but rather makes their release discretionary.” For example, when criminal investigation records are requested, the Supreme Court has said that an agency may exercise its discretion and grant access to exempt records if disclosure would promote the public interest. The specific burden may be to show that disclosure will “in fact promote and serve” the public interest. There must be more than mere “public curiosity.” The public interest must be a matter “which affects a right or expectancy of the community at large and must derive meaning within the legislative purpose” of KORA.

Must a person be represented by an attorney to complain about a KORA violation?

No, KORA says “any person” may go to court to complain about an agency’s decision to deny access to public records or refuse to copy them. There may be a risk, however, for unrepresented complainants who are not familiar with the law and legal procedure. KORA says complainants are liable for the agency’s attorney’s fees if the court finds that they maintained an action “not in good faith and without a reasonable basis in fact or law.”

What are the possible remedies for a KORA violation?

In a lawsuit filed by any person, judges are authorized to issue orders, including an injunction, to prevent violations of KORA or a mandamus requiring compliance with the act.

If a violation is found, a public agency must pay the complainant’s attorney’s fees if the agency failed to act in good
faith and “without a reasonable basis in fact or law.”

In a lawsuit filed by the state attorney general or a county or district attorney, a court may impose a financial penalty upon a public agency. An agency is liable for the penalty if it “knowingly violates” KORA or “intentionally fails to furnish information as required” by the statute. The penalty is civil, not criminal, and may not exceed $500 for each violation.

Where must a lawsuit be filed against a suspected KORA violator?
An action may be filed only in the district court of the county in which a suspected KORA violation occurred. In general, the court must schedule a hearing and trial “at the earliest practical date.” KORA does not specify a time within which a suit must be filed, although Kansas statutes include applicable limitations.

Who has the burden of proof in a KORA lawsuit?
KORA authorizes custodians to deny access to records if producing them would be an “unreasonable burden” or if a requester intends to disrupt the agency’s essential functions. However, when custodians give those reasons for denying access, they must be prepared to defend their denial with a preponderance of the evidence.

When requesters seek access to an exempt public record, they do not bear the burden of proving that the agency should disclose it. Rather, according to the Kansas Supreme Court, “[t]he burden of proving that an item is exempt from disclosure is on the agency not disclosing.”

When requesters seek access to a criminal investigation record that is exempt, they will bear the burden of proving that disclosure would be in the public interest. The agency that denies access, however, must bear the burden of proving that disclosure should not be made. Under KORA, the agency must prove that disclosure would:

- interfere with a prospective law enforcement action,
- reveal the identity of a confidential source or undercover agent,
- reveal confidential investigative techniques or procedures,
- endanger someone’s life or safety, or
- identify a victim of a sexual offense.

In a dispute over whether an agency should disclose an exempt public record, judges are authorized to examine the records in camera—out of public view. They may do so on their own initiative or in response to a motion by either the complainant or the agency.

115. KAN. STAT. ANN. § 45-222(a) (Supp. 2012).
116. KAN. STAT. ANN. § 45-222(c) (Supp. 2012).
118. Id.
119. Id.
120. KAN. STAT. ANN. § 45-222(a) (Supp. 2012).
121. KAN. STAT. ANN. § 45-222(c) (Supp. 2012).
123. KAN. STAT. ANN. § 45-218(e) (2000).
124. Id.
127. Id.
128. Id.; 2013 KAN. SESS. LAWS, chs. 72, 133 (to be codified at KAN. STAT. ANN. § 45-221).
129. KAN. STAT. ANN. § 45-222(b) (Supp. 2012).
I. The Kansas Open Meetings Act (KOMA)

1. Are meetings of Kansas legislative bodies and administrative agencies open to the news media and the public?

In general, yes. The First Amendment to the U.S. Constitution expressly guarantees freedom of speech and of the press. The constitutional guarantee of the freedom to speak and publish, however, does not generally include a right to gather information about the government. The U.S. Supreme Court has “never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”

Thus, state and federal statutes, more than the Constitution, govern the scope of public access to government information.

In Kansas, the right of the public and the press to attend governmental meetings has been created by the Kansas Open Meetings Act (KOMA). The Legislature enacted KOMA, along with the Kansas Open Records Act, to promote an informed electorate. Increasing public access gives the public confidence in government, makes government more accountable, and deters official misconduct.

KOMA creates a presumption that the public, including members of the news media, have a right to attend, observe, and record meetings and proceedings of state and local legislative bodies and administrative agencies.

2. What kinds of meetings by government officials generally must be open to the public?

KOMA allows the public and the media to attend the meetings of public bodies or agencies when they conduct and transact governmental business. Thus, KOMA covers the meetings of “all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof... receiving or expending and supported in whole or in part by public funds.”

Public bodies and agencies include state and local boards, as well as “commissions, authorities, councils, committees, subcommittees, and other subordinate groups thereof.”

3. What are the characteristics of organizations whose meetings must be open?

The public and the media have a right to attend a meeting of a group that:

• is a body or agency of state government or a political and taxing subdivision of the state;

• is a body with legislative or administrative powers or at least is legislative or administrative in its method of conduct;

• is part of a governmental entity at the state or local level;

• receives or expends public funds or is a subordinate group of a body subject to the act; and

• is supported in whole or in part by public funds or is a subordinate group of a body that is so financed.

The Kansas Corporation Commission is an example of an organization that has claimed to be exempt from KOMA. However, a Kansas court has determined that the Commission is subject to KOMA.

4. Are any organizations exempt from KOMA?

KOMA does not apply to courts. Also, an administrative agency is exempt from KOMA if it performs quasi-judicial functions. “[Q]uasi-judicial is a term applied to administrative boards ... empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of judicial nature.” In addition, court rulings have identified two types of entities not subject to KOMA: advisory entities that have no decision-making authority and independent entities that have some connection with, but are not actually created by, government

Footnotes

1. U.S. Const. amend. I.
8. Id.
action. For example, a court found that KOMA did not apply to a nonelected citizen board established by a County Commission to oversee a county hospital.

Thus, KOMA does not cover every group, business, or agency that contracts with or provides services for a governmental agency. However, KOMA does cover entities that have decision-making authority and that are established by governmental agencies. Further, the Kansas Supreme Court has said that the meetings of a non-elected citizen group must be open if the group intentionally is created by a public body “for the purpose of avoiding the light of public scrutiny.” In other words, “[p]ublic bodies cannot be allowed to do indirectly what the legislature has forbidden.”

5. What constitutes a meeting under KOMA?
A meeting occurs if: (1) a majority of the membership of a body subject to KOMA (2) is involved in some type of interactive communication (3) for the purpose of discussing the business or affairs of the body. According to the state attorney general, a meeting may occur, and be subject to KOMA, when members of a public body or agency communicate using e-mail. If a majority of a membership has extensive discussion by electronic means about the body or agency's business, the interactive communication must be accessible to the public. KOMA is not limited to the face-to-face discussions among members of a public body or agency. If the members communicate indirectly by e-mail and cannot meet KOMA's requirement of openness, then the communications “are prohibited.”

6. May a body or agency refuse to permit anyone from recording or photographing a public meeting?
Bodies and agencies must not prohibit the use of cameras, lights, and recording devices. Organizations may do no more than impose “reasonable rules” to insure orderly meetings.

7. Who may request notice of a body or agency’s meetings?
Any member of the public and press may request notice of an upcoming meeting. If the request is made by an individual, notice must be furnished to that individual. A request made in the form of a petition must designate one person to receive notice on behalf of all of the people listed in the petition. Additionally, a body or agency may notify employee or trade organizations by furnishing notice to their executive officer.

8. May a body or agency require that a request for notice be written?
KOMA does not require a written request for notice. However, written requests are clearly preferred. The attorney general’s office has stated, “We have on previous occasions cautioned the public and press to submit requests for notice in writing because of the severe practical problems involved with prosecution of notice violations under the Act where the request is not recorded in black and white.”

9. Who is responsible for responding to a request for notice?
Upon receiving a request, the presiding officer or the person calling the meeting has a duty to furnish notice to those requesting notice.

10. What information must be included in a notice?
Each body and agency covered by KOMA must furnish notice of the date, time, and place of any regular or special meeting to any person requesting such notice. For regularly scheduled meetings, the organization may list them in a single notice. However, the organization separately must notify individuals of any special meetings.

11. Does KOMA specify how and when a body or agency must deliver notice?
KOMA does not specify a manner or time frame for giving notice of a meeting. At the same time, KOMA does not authorize a body or agency to issue notice only in circumstances that seem reasonable and practical. The state attorney general has said, “Notice of all prearranged gatherings subject to the act is required by law.”

---

14. Id. at 672.
15. Cf. id. at 671 (stating that agencies that either have no decision-making authority or were not created by government are not subject to KOMA).
16. Id.
17. Id.
20. Id.
21. Id.
22. Id.
24. Id.
26. Id.
30. Id.
31. K.S.A. 75-4318(c) (Supp. 2012).
32. K.S.A. 75-4318(b) (Supp. 2012).
35. Id.
12. How long is a request for notice valid?
KOMA does not specify how long a request for notice is valid. According to the state attorney general, “A request for notice of public meetings remains valid indefinitely, at least for a reasonable period of time.” 36 

13. May an agency charge a fee for providing notice?
The state attorney general has said, “No charge may be made for providing notice of public meetings.” 39 

14. Does KOMA require public agencies to publish notice of special meetings in local newspapers?
KOMA does not require public agencies to publish notice of special meetings in local newspapers. 40 KOMA merely compels a public agency to provide notice to each person requesting it. 41 

Governmental organizations commonly send notice of meetings to journalists even though they have not requested it. Then, when an emergency or special meeting arises and notice is not provided, journalists may object. Nevertheless, this is not a KOMA violation. Journalists must expressly request notice for meetings. Reporters should send annual written requests for notice to every board or commission they seek to cover. Although the annual requests are not required, they are the most effective way to ensure that each journalist receives notice. In addition, a record of annual requests makes KOMA violations easier to prosecute. 42 

15. Are public agencies required to create agendas?
KOMA does not require agencies to create agendas for public meetings. 43 If an agenda is created, it must be made available to anyone who requests it. 44 However, a government agency “may refuse to mail copies of an agenda for a public meeting to persons requesting such agenda where the agenda is readily available in a public place or can be obtained by submission of a self-addressed, stamped envelope to the [agency] for mailing of the agenda.” 45 

16. Why may a body or agency recess for an executive meeting?
All meetings of bodies and agencies covered by KOMA must be open to the public. 46 KOMA allows organizations to recess for an executive meeting only to discuss the following topics:

a. personnel matters of non-elected personnel;
b. consultation with the agency’s attorney which would be deemed privileged;
c. matters relating to employer-employee negotiations;
d. confidential information relating to financial affairs or trade secrets;
e. matters relating to actions affecting a person as a student, patient, or resident of a public institution except that such person has the right to a hearing if requested;
f. preliminary discussions relating to the acquisition of real property;
g. matters permitted to be discussed in a closed or executive meeting concerning discussions of criminal information by the parimutuel racing commission;
h. matters permitted to be discussed in a closed or executive meeting by legislative committees regarding child care, abuse and neglect;
i. matters permitted to be discussed in a closed or executive meeting by a legislative committee regarding child deaths;
j. matters permitted to be discussed in a closed or executive meeting regarding identifiable patients or health care providers by a Medicaid review board;
k. matters required to be discussed in a closed or executive meeting by a tribal-state gaming compact;
l. matters relating to security measures;

38. Id.
41. K.S.A. 75-4318(b) (Supp. 2012).
42. Letter from Kan. Ass’t Att’y Gen. Steve Phillips to Patrick McAvan, Media Law Clinic, University of Kansas School of Law (Feb. 23, 1998) (on file with the University of Kansas School of Law Media, Law and Policy Program).
44. K.S.A. 75-4318(d) (Supp. 2012).
46. K.S.A. 75-4318(a) (Supp. 2012).
17. **What are security measures?**

Security measures are those that protect against criminal acts intended to (1) intimidate or coerce the civilian population; (2) influence government policy by intimidation or coercion; or (3) affect the operation of government by disruption of public services, mass destruction, assassination, or kidnapping. Security measures include, but are not limited to, intelligence information, tactical plans, resource deployment, and vulnerability assessments.

18. **When can matters relating to security measures be discussed at a closed or executive meeting?**

Matters relating to security measures can be discussed at a closed or executive meeting if two conditions are met. First, the security measures to be discussed must relate to one of the following topics: (1) systems, facilities, or equipment used in the production, transmission, or distribution of energy, water, or communication services; (2) transportation and sewer or waste water treatment systems, facilities, or equipment; (3) a public body or agency, public building or facility, or the information system of a public body or agency; or (4) private property or persons. Second, discussion at an open meeting must pose a risk to the effectiveness of the security measures.

19. **What procedure is required before a body or agency may close a meeting?**

A body or agency must not meet privately without first meeting in public. During a public meeting, a motion must be made, seconded, and carried to recess for an executive meeting. Each motion must contain:

- the justification for the executive recess,
- a brief statement of the subjects to be discussed during the recess, and
- the time and place at which the public meeting will resume.

20. **May a binding decision be made during an executive recess?**

While an organization is in a recess for an executive meeting, it must not take any binding action. To be binding, all government actions must be made during public meetings.

21. **How can the public and press ensure an executive recess is conducted legally?**

Anyone attending a public meeting should voice an objection if the body or agency recesses for an executive meeting without following the procedure required by KOMA. A motion for an executive recess must be included in the organization's meeting minutes and in its permanent records.

22. **What should the press and public do if they believe a body or agency has violated KOMA?**

A body or agency can violate KOMA by failing to honor a request for notice of meetings. Another kind of violation occurs when a majority of a body or agency's membership convenes secretly for a prearranged meeting to discuss public business, even if no binding action is taken. Another kind of violation occurs when an organization recesses for an executive meeting without following KOMA's required procedure. An organization also violates KOMA if it discusses public business or takes binding action during an executive recess.

In response to a violation, the press and public may first ask that the organization reconsider its conduct of a meeting and initiate remedial action. If the organization is unresponsive, the press and public may complain to the county or district attorney for the jurisdiction where the violation occurred. Alternatively, a complaint may be filed with the state attorney general's office. Upon receiving a complaint, a county or district attorney or the state attorney general's office may initiate a lawsuit against a suspected KOMA violator.

23. **Must a person be represented by a lawyer to complain about a KOMA violation?**

Any person may go to court directly rather than complain to a county or district attorney or the attorney general's office. The complainant may proceed with or without a private attorney. There may be a risk, however, for the unrepresented individual who is not familiar with the law and legal procedure. KOMA authorizes bodies and agencies to receive

---

61. Id.
62. Id.
63. Id.
66. Id.
67. K.S.A. 75-4319(c) (Supp. 2012).
68. K.S.A. 75-4318(a) (Supp. 2012).
70. K.S.A. 75-4319(c) (Supp. 2012).
72. K.S.A. 75-4320(a) and 75-4320a(a) (Supp. 2012).
73. K.S.A. 75-4320(a) (Supp. 2012).
74. Id.
75. K.S.A. 75-4320a(a) (Supp. 2012).
court costs from plaintiffs if their action lacks a reasonable basis in fact or law, is not taken in good faith, or is frivolous.\textsuperscript{76}

\section*{24. What are the possible remedies for a KOMA violation?}

If a body or agency takes a binding action in violation of KOMA, that action may be voided if a lawsuit is filed within 21 days.\textsuperscript{77} Also, a civil penalty may be imposed upon anyone who knowingly violates KOMA or intentionally fails to furnish information that must be disclosed.\textsuperscript{78} The penalty is set by the court and it may not exceed $500 for every violation.\textsuperscript{79} Only the county or district attorney or the attorney general's office has authority to seek a $500 civil penalty against a violator of KOMA.\textsuperscript{80} In addition, judges are authorized to issue an injunction to prevent violations of KOMA or a mandamus requiring compliance with the act.\textsuperscript{81} If a violation is found, KOMA does not authorize a judge to require payment of attorney's fees but does allow an order for payment of court costs.\textsuperscript{82}

\section*{25. When and where must a lawsuit be filed against a suspected KOMA violator?}

The county or district attorney or attorney general's office may file an action only in the district court of the county in which a suspected KOMA violation occurred.\textsuperscript{83} In general, the court must place a priority on a suit that alleges a KOMA violation.\textsuperscript{84} If the purpose of a lawsuit is to void a binding action, it must be filed within 21 days.\textsuperscript{85} Otherwise, KOMA does not specify a time within which a suit must be filed, although Kansas statutes include applicable limitations.\textsuperscript{86}

\section*{26. Who has the burden of proof in a KOMA lawsuit?}

In response to a lawsuit, a body or agency has the burden of proof to justify its action.\textsuperscript{87} The organization may assert that it should not be found liable if it complied substantially with KOMA. A Kansas court has stated, “Our courts will look to the spirit of the law, and will overlook mere technical violations where the public body has made a good faith effort to comply and is in substantial compliance with the KOMA, and where no one is prejudiced or the public right to know has not been effectively denied.”\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{76} K.S.A. 75-4320a(d) (Supp. 2012).
\item \textsuperscript{77} K.S.A. 75-4320(a) (Supp. 2012).
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} K.S.A. 75-4320a(a) (Supp. 2012).
\item \textsuperscript{83} K.S.A. 75-4320(c) (Supp. 2012).
\item \textsuperscript{84} K.S.A. 75-4320a(a) and 75-4320a(a) (Supp. 2012).
\item \textsuperscript{85} K.S.A. 75-4320a(c) (Supp. 2012).
\item \textsuperscript{86} K.S.A. 75-4320a(a) (Supp. 2012).
\item \textsuperscript{87} See K.S.A. 60-512 and 60-514 (2005).
\item \textsuperscript{88} Stevens v. Bd. County Comm’rs, 10 Kan. App. 2d 523, 526, 710 P.2d 698, 701 (1985).
\end{itemize}
Kansas trial judges and the news media often have clashed over the meaning of the First and Sixth amendments to the U.S. Constitution. The media assume that the freedom of the press, protected by the First Amendment, gives them the right to report comprehensively on court cases. Thus, the media may publicize information about criminal defendants that is inadmissible as evidence in court. Judges, meanwhile, assume that they have a high duty to protect defendants’ Sixth Amendment right to a fair trial—one in which jurors are impartial and have not been influenced by prejudicial publicity. Judges may try to limit publicity to maintain the fairness of criminal or civil proceedings or to protect the privacy of trial participants. Because of their different outlooks, judges and the media in Kansas can find themselves in sharp conflict.

I. Free press/fair trial landmark cases

Landmark decisions by the U.S. Supreme Court heavily influenced the Kansas approach to protecting trials from the effects of prejudicial publicity.

A. The responsibility of trial judges

In the 1960s, the U.S. Supreme Court handed down two significant rulings regarding trial judges’ responsibility to protect criminal defendants from prejudicial publicity. In a 1965 case, *Estes v. Texas*, Billy Sol Estes had been convicted of swindling. He was a well-known, newsworthy figure, once characterized as a “confidence man who bilked Texas farmers out of millions of dollars.”

After a Texas appellate court affirmed his conviction, Estes appealed to the United States Supreme Court, claiming that his right to due process had been denied because of prejudicial, televised news coverage of his case. After reviewing the record, the Supreme Court found that there indeed had been “[m]assive pretrial publicity” and that the televised trial coverage had resulted “in a public presentation of only the State's side of the case.”

In a five to four decision, the Supreme Court reversed Estes’s conviction. Writing for the majority, Justice Tom C. Clark took a firm stand against televised trials. He stressed that a trial judge's responsibil-

Footnotes

1. Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” U.S. Const. amend. I.
2. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,...” U.S. Const. amend. VI.
6. Id. at 535.
7. Id. at 551.
ity is to “make certain that the accused receives a fair trial.”

In his view, if a judge permits television in the courtroom, it becomes an “ever-present distraction.” The concurring opinion by Chief Justice Earl Warren added that the appropriate use of television cameras “does not extend into an American courtroom.”

Television reporters, he indicated, must leave their cameras at the courthouse door because, inside, they only have the “rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.” In a second concurring opinion, Justice John M. Harlan was less resolute than Justice Clark on the issue of television cameras in courtrooms.

In a dissent, Justice Potter Stewart strongly cautioned against taking a hard line against television coverage of court proceedings. A year after deciding Estes, the U.S. Supreme Court again looked at trial judges’ responsibility to manage newsworthy trials. In Sheppard v. Maxwell, the Supreme Court found that a trial judge had failed to protect the defendant “from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom . . . .” The defendant was Sam Sheppard, a doctor of osteopathic medicine who specialized in surgery.

He had been convicted of fatally bludgeoning his wife in 1954 at their home in Cleveland, Ohio. The Supreme Court, with a lone dissent, held that Sheppard had not received due process and ordered a new trial.

Justice Clark, again writing for the majority, noted that the publicity in Estes “was not nearly as massive and pervasive” as in Sheppard. A dramatic illustration of the intense publicity in Sheppard occurred during a three-day inquest—televised live from a high school gymnasium—featuring a lengthy examination of Sheppard, who was not represented by counsel, and which “ended in a public brawl.” Then, during a nine-week trial, “bedlam reigned” in the courtroom. For example, when the judge met with counsel in chambers, “news media representatives packed the judge’s anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.”

Justice Clark noted that “unfair and prejudicial news comment on pending trials has become increasingly prevalent.” Still, the Supreme Court was not willing to place direct restraints on the media’s traditional freedom to report on court proceedings. Justice Clark characterized what happens in a courtroom as “public property.” Nevertheless, he stressed that trial judges are responsible for managing proceedings to protect a defendant’s right to a fair trial. He indicated that judges, to fulfill their responsibility, may take the following measures: question prospective jurors closely during voir dire about their possible exposure to prejudicial publicity; limit reporters to a specified location within the courtroom and prescribe and enforce conduct rules for them; prohibit trial participants, including any lawyer, party, witness, or court official, from divulging prejudicial matters to the media; request that city and county officials prevent any of their employees who have information about a case from disseminating it; warn reporters about the “impropriety” of broadcasting or publishing information that is not admissible as evidence in the proceedings; and when a reasonable likelihood exists that prejudicial publicity will prevent a fair trial, continue the case, change the venue, or sequester the jury.

8. Id. at 548.
9. Id.
10. Id. at 585 (Warren, C.J., concurring).
11. Id. at 586.
12. Id. at 596 (Harlan, J., concurring). Justice Harlan said that conditions eventually could change, so that television coverage of trials may “be subject to re-examination in accordance with the traditional workings of the Due Process Clause.”
13. Id. at 613-14 (Stewart, J., dissenting). Justice Stewart said the record made it “crystal clear” that the trial judge had been in command of the Estes case and that the trial was a “mundane affair.” Id. at 613. He also expressed concern that the majority’s reasoning was “disturbingly alien to the First and Fourteenth Amendments’ guarantees against federal or state interference with the free communication of information and ideas.” Id. at 614.
16. Id. at 40.
17. Id.
18. Id. at 362-63 (majority opinion).
19. Id. at 355.
20. Id. at 354.
21. Id. at 355.
22. Id. at 344.
23. Id. at 362.
24. Id. at 350.
25. Id. (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).
26. Id. at 350-51.
27. See id. at 345, 347 (discussing instances when jurors were exposed to outside influences).
28. Id. at 358.
29. Id. at 361.
30. Id. at 362.
31. Id. at 362.
32. Id. at 363; see also Gannett Co. v. DePasquale, 443 U.S. 368, 441 (1979) (Blackmun, J., dissenting) (citing The American Bar Association Standards Relating to the Administration of Criminal Justice: Fair Trial and Free Press § 8-3.2 (2d ed. 1978) (hereinafter ABA Standards 2d ed.)) (listing continuance, severance, change of venue, change of venire, voir dire, peremptory challenges, sequestration, and admonition of the jury as alternative measures). Regarding Gannett Co. v. DePasquale generally, see infra notes 64-70 and accompanying text.
B. Gag orders as unconstitutional prior restraints

As concern about prejudicial publicity increased throughout the U.S. judicial system, the American Bar Association (ABA) developed standards for the conduct of trials. The ABA standards, published in 1968, placed heavy emphasis on “safeguarding the interests of a fair trial.” In fact, the emphasis on fairness was so heavy that skeptics questioned whether the ABA had “seriously underestimated the interests of a free press.”

Meanwhile, judges across the country were asserting strong control over their courtrooms. As a result, there was “a dramatic rise in the number of broad gag orders issued to enjoin any extrajudicial comment on a pending case.”

Tension over the problem of prejudicial publicity reached a breaking point in 1975 in Nebraska. Authorities charged a man, Erwin Simants, with fatally shooting six members of a Nebraska family. Public interest in the case was high, and the media prepared to cover a hearing on whether Simants should be bound over for trial. A judge, however, issued a gag order, prohibiting the media “from releasing ‘for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing.”

The media appealed, challenging the judge’s order as a prior restraint that violated the First Amendment. The Nebraska Supreme Court modified the order, limiting its scope somewhat, but otherwise denied the media’s appeal. After reviewing the U.S. Supreme Court’s opinion in Sheppard, the Nebraska Supreme Court said it was “clear that the Supreme Court of the United States has never said, in the context with which we are here concerned, that such restraints may never be imposed when necessary to assure trial by an impartial jury.”

In Nebraska Press Ass’n v. Stuart, however, the U.S. Supreme Court found that the gag order in the Simants case was an unconstitutional prior restraint. Writing for the majority, Chief Justice Warren E. Burger said that the order “violated settled principles: ‘[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom.’”

The Court indicated that a gag order against the media is unconstitutional unless prejudicial publicity poses a clear and present danger to the fairness of a trial. Therefore, before issuing a gag order against the media, a trial judge must “determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.”

In reviewing the gag order in the Simants case, the U.S. Supreme Court said that the judge should have determined the “probable extent of publicity” about the case, considered “whether measures short of an order restraining all publication” would have protected the defendant’s right to a fair trial, and assessed the “probable efficacy” of a prior restraint “as a workable method” for maintaining fairness of the proceedings.

C. Closure of court proceedings presumed unconstitutional

Prejudicial publicity continued to be a pressing concern for trial judges throughout the United States. Under Sheppard, judges were required to control their courtrooms to protect defendants’ Sixth Amendment right to a fair trial. Yet, Nebraska Press made clear that judges’ courtroom control was not unlimited. They rarely, if ever, could constitutionally restrain the media from reporting what they learned in open court. Thus, judges turned to an alternative way to prevent prejudicial publicity, which was simply to close the court.

Media challenges to this approach resulted in an important series of U.S. Supreme Court decisions on the openness of courts and on trial judges’ responsibility to protect defendants against prejudicial publicity.

A 1979 case, Gannett Co. v. DePasquale, centered on objections by Rochester, New York newspapers to a judge’s closure of a pre-trial hearing in a highly publicized murder case. The purpose of the hearing was to determine whether incriminating statements that defendants had given to police were involuntary and therefore should be suppressed. The judge granted a motion—made by defense attorneys without objection from the prosecution—to close the hearing because of an “unabated buildup of adverse publicity” about the case.

After hearing objections to his closure order, the judge determined...
that “an open suppression hearing would pose a ‘reasonable probability of prejudice’” to the defendants.\footnote{58} The Supreme Court upheld the trial judge,\footnote{55} finding that the media and the public “have no constitutional right under the Sixth and Fourteenth amendments to attend criminal trials”\footnote{56} and that the judge’s determination to close the pre-trial suppression hearing was “consistent with any right of access the [media] may have had under the First and Fourteenth amendments.”\footnote{57}

The Supreme Court, however, did not treat DePasquale as a controlling precedent a year later in \textit{Richmond Newspapers Inc. v. Virginia}, when the media objected to closure of a trial.\footnote{59} Before the closure, Virginia authorities had placed the defendant, John Paul Stevenson, on trial three times in open court.\footnote{60} In the first trial, he had been convicted of fatally stabbing a motel manager, but won a reversal by claiming improper use of evidence against him.\footnote{61} The state’s second and third attempts to try him on the murder charge ended in mistrials.\footnote{62} Before the fourth trial, the judge granted a defense motion for closure to prevent public disclosures of testimony by witnesses against Stevenson.\footnote{63} The prosecution did not object.\footnote{64}

Writing for the plurality, Chief Justice Burger noted that the issue in \textit{DePasquale} had been whether a judge could constitutionally close a pre-trial proceeding, as opposed to a trial.\footnote{65} He also noted that \textit{DePasquale} had not addressed whether the First Amendment, as opposed to the Sixth, guaranteed a right of the media and the public to attend trials.\footnote{66} Because closure of a trial was directly at issue in \textit{Richmond Newspapers}, Chief Justice Burger seized the opportunity to declare that “the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.”\footnote{67}

Chief Justice Burger characterized the courtroom as “a public place where the people generally—and representatives of the media—have a right to be present.”\footnote{68} Historically, he said, criminal trials were “presumptively open.”\footnote{69} Also noteworthy, he said, was the relationship between the openness of a trial and its “proper functioning.”\footnote{70} The presence of the media and the public “gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”\footnote{71} Judges may close a trial, according to Chief Justice Burger, only if they establish, through findings articulated in the record, that alternatives would not be effective and that there is an “overriding interest” in closure.\footnote{72}

Concurring in the judgment, Justice William J. Brennan stressed the tradition and value of the openness of trials. The First Amendment, he said, “embodies more than a commitment to free expression and communicative interchange for their own sake; it has a structural role to play in securing and fostering our republican system of self-government.”\footnote{73} Justice Brennan explained:

Implicit in this structural role is not only “the principle that debate on public issues should be uninhibited, robust, and wide-open,” but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.\footnote{74}

In four cases between 1982 and 1986, the U.S. Supreme Court further established that criminal proceedings generally would be open to the media and the public. In the first case, \textit{Globe Newspaper Co. v. Superior Court}, the Supreme Court struck down a state statute that mandated closure of trials during testimony by minor rape victims.\footnote{75} Proponents of the statute had asserted that it protected the privacy and psychological well-being of sex-offense victims.\footnote{76} Because the statute protected the victims,
the proponents argued, they would be more willing to come forward and report crimes to the police.76 The Court, however, held that the statute mandating closure of trials was not effective in protecting the victims.77 Nothing prevented the media from learning about the trial through a transcript of the proceedings or from knowledgeable court personnel or others.78 Writing for the majority, Justice Brennan said that trial judges may consider closing trials only on a case-by-case basis, explaining:

[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.79

Then, in Press-Enterprise Co. v. Superior Court (Press-Enterprise I), the Supreme Court reviewed its limitations on closure of criminal court proceedings.80 A defendant had been charged with the rape and murder of a teenage girl.81 During a voir dire examination of prospective jurors—an event that lasted six weeks—the trial judge closed the proceeding to the media and the public, and then denied a newspaper's request for a transcript.82 In his majority opinion, Chief Justice Burger called the extended closure “incredible” and said the judge's order and denial of a transcript were unconstitutional.83 He said:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.84

At the same time, in Walker v. Georgia, the issue of access to suppression hearings reached the Court.85 Georgia authorities had charged several persons with racketeering, gambling, and communicating information related to gambling.86 The defendants moved to suppress certain evidence, including wiretaps.87 In response, the prosecution moved to close a hearing on the suppression motion, arguing that conducting it in the open would expose sensitive investigative information that needed to be protected.88 Despite objections from certain defendants, the trial judge ordered closure of the suppression hearing.89 The Supreme Court reversed the judge's closure order, holding that “under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out” in First Amendment-based precedents, such as Press-Enterprise I.90

Two years later, in Press-Enterprise Co. v. Superior Court (Press-Enterprise II), the Supreme Court ruled broadly in favor of access to preliminary hearings.91 California authorities had accused a nurse of murdering twelve patients by giving them high doses of a heart drug.92 A magistrate closed a preliminary hearing “because the case had attracted national publicity and only one side may get reported in the media.”93 The holding in Press-Enterprise II,94 however, was that the closure order was unconstitutional, because it had not met this standard:

If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.95

II. Prejudicial publicity and fair trials in Kansas A. Claims for mistrial

After the Supreme Court's decisions in Estes and Sheppard, appellants in criminal cases in Kansas began to invoke the two precedents, though generally without success. The appellant in one such case had been found guilty of entering a supply company through a broken skylight and stealing wrenches from a display rack.96 The appellant claimed that he had been a victim of prejudicial publicity generated by two Hutchinson, Kansas radio stations.97 The stations' news broadcasts had included in-
formation or comments about Eldridge’s marriage, performed while he was in jail, and a prior conviction in another state.98

In State v. Eldridge, the Kansas Supreme Court ruled that it would find denial of due process if “publicity is massive, pervasive and results in influences on the jury which are disruptive and prejudicial.”99 The radio broadcasts in Eldridge’s case, however, did not meet the standard. The Kansas Supreme Court said: “There is no showing in this record that a single juror was cognizant of these broadcasts or in any way influenced by them. The decorum in the courtroom appears to have been properly maintained entirely free of pervasive and disruptive influences.”100

The Kansas Supreme Court also ruled against subsequent appellants who invoked the Estes and Sheppard precedents, claiming that they were victims of prejudicial publicity and had been denied due process.101 The rulings tended to impose a heavy burden on defendants to show that they suffered prejudice because of publicity.

For trial judges who are concerned about the prejudicial effects of publicity before trial, the questioning of prospective jurors during voir dire is key. As the Kansas Supreme Court pointed out nearly 40 years ago: “Basically, the purpose of voir dire examination is to enable parties to select jurors competent to judge and determine facts in issue without bias, prejudice or partiality.”102 The trial judge has discretion to decide the extent of voir dire examination103 and an appellate court essentially will not interfere “unless an abuse of discretion is clearly shown.”104

A 2006 case, State v. Hayden,105 illustrated trial judges’ latitude in conducting voir dire when pre-trial publicity is an issue. The defendant in Hayden had been accused of attacking an elderly husband and wife in their home with a shovel.106 The wife died, and the defendant was convicted of second degree murder and other crimes.107 Before trial, his attorney opposed conducting a voir dire examination of the prospective jurors as a group, arguing that they “w[ould] have to be interrogated as to the nature of the publicity [to which they had been exposed], . . . Forthright answers would very likely contaminate the entire venire . . . .”108

On appeal, the defendant claimed that the trial judge had erred by disallowing voir dire examination individually of each prospective juror.109 The Kansas Supreme Court rejected the defendant’s claim,110 however, noting with approval that the trial judge had cautioned the prospective jurors as a group not to give “intemperate” answers to questions during voir dire.111 The court found that “[t]he judge asked very specific questions so that venire members did not blurt out unnecessary prejudicial information, and he dismissed jurors who said they could not put what they had seen or heard in the media out of their minds to decide the case impartially.”112 The court held that in denying the defendant’s request for individual voir dire, the trial judge had not abused his discretion, explaining the standard as follows:

[D]iscretion is abused when judicial action is “arbitrary, fanciful, or unreasonable,” which is another way of saying that discretion is abused only when no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.113

Even when jurors are exposed to arguably prejudicial publicity during a trial, a defendant may have difficulty showing that a new trial is warranted. For many years, the Kansas Supreme Court has appeared reluctant to rule in favor of litigants who complain about prejudicial trial publicity. A case in point occurred in 1905 during a civil dispute in Lyon County, Kansas.114 The plaintiff had sued the defendant over a $10,000 promissory note, and local newspapers published articles that were “distinctly unfavorable” to the plaintiff,
both in style and substance.115 After a week-long trial, the jurors returned a verdict against the plaintiff, and he requested a new trial on the theory that the newspaper articles had prejudiced them against him.116 Four jurors signed affidavits saying that they had read something in the papers about the plaintiff, although eight jurors said they had not.117 The Kansas Supreme Court said that jury misconduct was not to be presumed, the plaintiff had the burden of proof on the issue of prejudice, the contents of the articles read by the four jurors were unknown, and there was “no direct evidence” that would justify setting aside the verdict.118

The spirit of the 1905 case was apparent in subsequent cases. In 1973, in Roy v. State, for example, the Kansas Supreme Court stated:

[This court] has consistently adhered to the well-settled principle applicable both to civil and criminal cases, that a juror’s reading of newspaper articles pertaining to the trial is not grounds for reversal, new trial, or mistrial unless the articles are of such a character that they might have resulted in prejudice to the losing party. To constitute grounds for such action it must affirmatively appear that prejudice has resulted, and the party claiming prejudice has the burden of proof.119

In a 1994 case, State v. Bowen,120 the Kansas Supreme Court reviewed its position on trial publicity in some detail. The defendant in Bowen had been charged with first-degree murder and one count of aggravated battery in connection with a shooting on a Wichita street.121 On the second day of the trial, the Wichita Eagle published an article with this headline: “Witness fingers gunman/Woman defies threats to testify in friend’s slaying.”122 The first paragraph said: “The murder trial of a 20-year-old man who police say is a Los Angeles gang ‘banger,’ or hit man, opened Tuesday in Sedgwick County—rather than the media—was the source of allegedly prejudicial publicity. Bowen had the burden to demonstrate that he was prejudiced.123 Evidence at trial included nothing about the threat that the newspaper had reported.124 In response to concern expressed by the defendant’s attorney about the prejudicial effect of the article, the trial judge conducted an inquiry as follows:

THE COURT: Members of the jury, at this time I want to make an inquiry of you to each of you answer—I want you to answer the question. There was an article in the paper about this particular case. Now, did any of you read that article or see that article? If you did please raise your hand.

MR. LANGE: I saw the article.

THE COURT: You saw what it was about and I didn’t read it.

THE COURT: And, Mr. Patrick Robinson, you also saw it?

MR. ROBINSON: Now, I saw the headline and saw a name and then set it aside.

THE COURT: Did anyone else see the article or read any of it? I see no affirmative answers.

THE COURT: On the basis of merely seeing the headline of the article, I do not see that that would in any way influence the jury. You can’t put blinders on the jurors, and, therefore, I will go ahead with the trial. Is the State ready to proceed?125

The decision of the trial judge to deny a mistrial was upheld as a proper exercise of discretion. The Kansas Supreme Court pointed out that the judge initially had taken a precaution against prejudicial publicity by admonishing the jury to avoid news reports about the case.126 Moreover, the manner in which the judge polled the jury was reasonable.127 The court ultimately concluded:

The fact that a juror has read a newspaper article does not automatically constitute grounds for a mistrial. The two jurors in the instant case who saw the single article in question did not indicate that they had read it in its entirety. The content of the offending headlines is not of such a nature that prejudice should be presumed. Bowen had the burden to demonstrate that he was prejudiced.128

In a 2008 case with an ironic twist, a trial court in Johnson County—rather than the media—was the source of allegedly prejudicial publicity.129 An insurance agent had been accused...
of forgery. During his trial, the court posted the following information on a website about the history of the case: “06/01/2006 FILE STAMP 6/1/2006, MOTION TO ALLOW EVIDENCE OF DEFENDANT’S ADMISSION OF A [sic] GAMBLING AND MONEY PROBLEMS.” The entry referred to evidence that the judge ultimately refused to admit “because it was irrelevant and prejudicial,” but the defendant argued that “jurors had easy access to this statement via the internet from the privacy of their own homes.” After the defendant was convicted, he appealed on grounds that included prejudicial publicity, and he requested a mistrial. His appeal was rejected, however. The Kansas Court of Appeals noted that the declaration of a mistrial is a matter of discretion for the trial judge, and an appellate court will not reverse the judge’s decision “unless an abuse of discretion is clearly shown” and the defendant proves that he or she was “substantially prejudiced.” Regarding mistrials generally, Kansas law gives the trial court the discretion to grant a mistrial when it finds that termination is necessary because “[p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution.” A mistrial will not be granted . . . unless the rights of either the defendant or the State have been substantially prejudiced.

The Kansas Court of Appeals held that the trial judge’s decision not to grant a mistrial was a reasonable exercise of discretion. The record of the case included no indication that any juror saw the court’s website entry or, if any did see it, that the entry caused them to be prejudiced against the defendant.

The outcome of this case is consistent with the trend in Kansas. For criminal defendants who challenge their convictions on the ground of prejudicial publicity, the burden of proof is high. Trial judges appear to run a minimal risk of being reversed when they deny a motion for a mistrial by one who claims to have been a victim of prejudicial publicity. A recent survey identified 105 Kansas cases in which prejudicial publicity was a ground for appeal, but a preliminary analysis of the cases indicated that only one conviction was reversed due to publicity.

B. Gag orders

1. Against the media

Soon after the U.S. Supreme Court decided Nebraska Press in 1976, the Kansas Supreme Court had occasion to follow the decision in a controversy that centered on the Board of Public Utilities of Kansas City, Kansas. A trial court had decided to oust two of the board’s members on grounds that they had mishandled certain financial matters. On appeal, the ousted board members claimed that the trial court should have prohibited the media from reporting witnesses’ testimony. In State ex rel. Tomasic v. Cahill, however, the Kansas Supreme Court upheld the ouster and said that, under Nebraska Press, the media were “quite properly permitted to report proceedings which took place in open court. The need for the public to know what is going on in an ouster proceeding is substantial, and certainly outweighs the remote possibility of prejudice to parties in this civil proceeding.”

Four years later, the court rejected an appeal by a convicted murderer who argued that a gag order should have been issued against the media in his case. The trial judge’s decision not to issue such a restraint was upheld, because no prejudice was alleged or shown.

The Kansas Supreme Court thoroughly affirmed its opposition to prior restraints in a case that originated in 1993 in Atchison, Kansas. A newspaper reporter was attending a pre-trial criminal hearing in a local courtroom. The hearing was open to the public, and the reporter’s presence was ordinary. Nothing portended the confrontation that was about to occur.

As the reporter watched, the judge considered a defense motion to suppress certain evidence. The defense attorney argued that the prosecution should be barred from using or discussing the defendant’s criminal record or outstanding arrest warrants. After granting the motion, the judge asked

130. Id. at 938.
131. Id. at 945.
132. Id.
133. Id. at 944.
134. Id. at 946.
135. Id. at 944 (citing State v. Dixon, 112 P.3d 883 (Kan. 2005)).
136. Id. at 945 (citing K.S.A. 22-3423(1)(c) (2007) (prescribing conditions under which a trial may be terminated and a mistrial ordered)).
137. See id. at 946 (“Because the record in this case fails to indicate that prejudice resulted to Auch from the case history posting, he is not entitled to a mistrial in this case.”).
138. Id.
139. The survey, initiated by the author and conducted with the help of an assistant in December 2008 and January 2009, consisted of an electronic database search. The objective was to identify cases in which Kansas appellate courts had reversed a criminal conviction on the ground of prejudicial publicity. Terms used for the search included “publicity,” “trial,” “reverse,” and “prejudice.” Although further analysis of the results is pending, State v. McDonald, 565 P.2d 267 (Kan. 1977), is the only case found thus far, out of 105, in which a claim of prejudicial publicity was upheld. In that case, the Kansas Supreme Court ruled that the trial judge wrongly denied a defense motion to examine jurors regarding circulation of an inflammatory pamphlet about the defendant.
140. 567 P.2d 1329, 1336 (Kan. 1977).
142. Id.
144. Id. at 683-84.
145. Id.
146. Id. at 683.
147. Id.
whether any other matter needed attention. The attorney then pointed out the presence of the reporter, who worked for the Atchison Daily Globe, and expressed concern that the newspaper might publish a report about the hearing. The judge immediately ordered the reporter to publish neither the defendant's criminal history nor even the existence of the judge's order itself.

The Globe, however, defied the order, publishing a report about what had happened in the courtroom. As a headline put it: “[Judge] imposes gag order on Globe; Tells newspaper not to report order because it might prejudice  . . . jurors.”

Another headline said: “Globe publisher says public has right to know about case; Judge's gag order called unwarranted.”

The report began: “The Atchison Daily Globe defied a gag order placed on the newspaper by [the judge] because the newspaper felt public interest outweighed the reasons for the order . . . .” The report quoted the publisher as saying: “We respect the judicial system and [the judge] and the right for everyone to have a fair trial, but we also believe, based on the First Amendment, we have a right to report the news. In this particular place, a gag order on the Globe is not a necessary thing.”

For its defiance of the gag order, the Globe received a contempt citation, but the newspaper successfully appealed. In State v. Alston, the Kansas Supreme Court reversed the gag order and the contempt order. The court recognized that “those who see and hear what transpired in an open courtroom can report it with impunity,” and “once a public hearing has been held, what transpired there could not be subject to prior restraint.” The court followed the U.S. Supreme Court's rejection of a gag order in Nebraska Press as an unconstitutional prior restraint.

At the same time, the Kansas Supreme Court embraced a line of precedent that preserved the media's defense against “transparently invalid” gag orders. The Globe was subject to prior restraint. The report quoted the publisher as saying: “We respect the judicial system and [the judge] and the right for everyone to have a fair trial, but we also believe, based on the First Amendment, we have a right to report the news. In this particular place, a gag order on the Globe is not a necessary thing.”

For its defiance of the gag order, the Globe received a contempt citation, but the newspaper successfully appealed. In State v. Alston, the Kansas Supreme Court reversed the gag order and the contempt order. The court recognized that “those who see and hear what transpired in an open courtroom can report it with impunity,” and “once a public hearing has been held, what transpired there could not be subject to prior restraint.” The court followed the U.S. Supreme Court's rejection of a gag order in Nebraska Press as an unconstitutional prior restraint.

At the same time, the Kansas Supreme Court embraced a line of precedent that preserved the media's defense against “transparently invalid” gag orders. The Globe was subject to the general rule that persons must obey a judicial order even if they believe it is unconstitutional. Even if they challenge the constitutionality of the order on appeal, they must continue to obey it while awaiting a decision. If they disobey the order and are cited for contempt, they are barred from collaterally attacking the constitutionality of the order during the contempt proceeding. The collateral bar rule has been considered necessary for the “efficient and orderly administration of justice.”

In Alston, however, the Kansas Supreme Court found that the Globe was not bound by the collateral bar rule when it disobeyed a gag order and published news about a pre-trial criminal hearing. The collateral bar rule does not apply when a judicial order is “transparently invalid,” the court said, explaining:

In this case, the . . . order was transparently unconstitutional. The trial court failed to make the requisite Nebraska Press findings. The [newspaper had based its news report on information that was available from] the court’s records and in open court prior to the gag order. The order was issued without a full and fair hearing with all the attendant procedural protection.

The court found that the Globe had disobeyed the gag order in good faith. “In the course of two hours, the Globe received notice of the order, contacted the judge, and attempted to contact its attorney and the attorney for the Kansas Press Association . . . .” Relief through the judicial system, however, was not available before the newspaper’s publication deadline. According to the court, “[o] nly where timely access to an appellate court is not available can the newspaper publish and then challenge the constitutionality of the order in contempt proceedings.” Alston established that a newspaper “seeking to challenge an order it deems transparently unconstitutional must concern itself with establishing a record of its good faith effort.”

148. Id. at 684.
149. Id.
150. Id.
151. Id. (quotation marks omitted).
152. Id. (quotation marks omitted).
153. Id. (quotation marks omitted).
154. Id. (quotation marks omitted).
155. Id. at 692.
156. Id.
157. Id. at 688.
159. Alston, 887 P.2d at 692.
160. Id. at 691 (citing In re Providence Journal Co., 820 F.2d 1342, 1347-48 (1st Cir. 1986), modified on reh’g, 820 F.2d 1354 (1st Cir. 1987)).
161. Id. at 690.
162. Id. at 691-92.
163. See id.
164. Id. at 691.
165. Id. at 691.
166. Id.
167. Id. at 691-92.
168. Id. at 691.
169. Id. at 692.
170. Id. at 691.
171. Id.
2. Against trial participants

To judges, issuing gag orders against trial participants—those from whom journalists seek newsworthy information and comment—has appeared to be a reasonable and practical alternative to imposing a prior restraint on the media. Lucy Dalglish, director of the Reporters Committee for Freedom of the Press in Arlington, Virginia, has noted that restraints on trial participants’ speech have increased. As she put it: “Are we seeing more gag orders? Absolutely. In general they are a tool that was used by courts depending on the jurisdiction, but once they catch on they spread like wildfire.”

Gag orders against trial participants generally have not been as controversial in Kansas as in some other jurisdictions. U.S. District Judge Sam A. Crow, however, was the central figure in two noteworthy cases that involved gag orders in Topeka, Kansas. In United States v. Walker, a defendant had been charged with cocaine possession, and he requested an “order directing the United States Attorney, his assistants, law enforcement officers, and any other persons associated with the above-referenced case to refrain from making any extrajudicial statements about this case.” The defendant said a gag was necessary, because publicity “indicating that he was the leader of the Topeka Black Gangster Disciples gang jeopardized his ability to obtain a fair trial.” Judge Crow denied the request, however, saying:

Though the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens or on the press, the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant’s right to a fair trial. This Court has stated that before a district court issues a blanket prior restraint, it must, inter alia, “explore whether other available remedies would effectively mitigate the prejudicial publicity,” and consider “the effectiveness of the order in question” to ensure an impartial jury.

Less restrictive alternatives to an injunction against speech include such possibilities as a change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors. Judge Crow concluded that a fair trial could be achieved without a gag order. He favored such less restrictive alternatives as “a probing voir dire and the use of proper jury instructions.”

In a high-profile civil case in 1998, however, Judge Crow imposed a gag order with unusually broad scope against trial participants. He was presiding over Koch v. Koch Industries Inc., a complex case that had begun in 1985. The plaintiffs were stockholders who claimed that they had been victims of misrepresentation by principals in the second-largest, privately held corporation in the United States. As the time for trial drew near, Judge Crow issued a gag order to minimize publicity about the case. Through his order, he prevented any parties, or their agents or representatives, “from contacting or polling, for any purpose, any person listed as a prospective juror”; precluded “all parties, counsel and witnesses from making extrajudicial statements to the news media”; forbade any party, or any business, association, entity or commission controlled by a party, from advertising through newspapers, radio, or television in the seventeen counties within the court’s jurisdiction; and required prospective jurors to make “every effort” to avoid reading newspaper or magazine articles, listening to any radio programs, or viewing any television programs that could relate to the case.

Before issuing his gag order, Judge Crow did not hold a hearing specifically to give news organizations an opportunity to register objections. He then denied a motion by the media to intervene and object after he issued the gag order. Although he acknowledged that a judge should not impose a prior restraint on speech without first conducting a hearing, he characterized Koch as an “atypical” case, and said he had raised the subject of the gag order in open court during a status conference. He further stated:

[All parties agreed that the court had provided the relief that they had requested. Lead counsel for both sides expressed great enthusiasm for the order entered by the court, as the news media had previously been playing one side off the other in an effort to pry information from the litigants or their counsel. In short, all litigants eschewed any desire to talk with the news media about this case.

173. Id.
175. Id.
176. Id. at 957 (citations omitted).
177. Id.
178. Id.
179. 6 F. Supp. 2d 1185 (D. Kan. 1998), aff’d, 203 F.3d 1202 (10th Cir. 2000).
180. See Sarah Landay, Judge Rejects Much of Suit Against Koch: Both Brothers Claim Victory as Key Parts of Suit by Bill Koch Still Remain Against Charles Koch, Company, Wichita Eagle, July 16, 1997, at 1A.
182. Id.
183. Id. at 1189.
184. Id. at 1189-90.
185. Id.
186. Id. at 1190.
In light of First Amendment values and the presumption of openness established by the U.S. Supreme Court, trial judges are expected to follow procedures with care before issuing gag orders against trial participants. For example, media in Ohio once objected to a gag order that a trial judge had issued without prior notice, without evidence, and without a hearing.\textsuperscript{187} The order, issued before a murder trial, forbade “prosecutor’s staff and personnel, including the prosecutor, all defense counsel staff and personnel, including both primary defense counsel, and all law enforcement agencies and personnel” from making “any extra judicial statement by means of public communication other than ‘no comment’.”\textsuperscript{188} The Ohio Supreme Court invalidated the gag order, saying:

[\textit{W}e] hold that a gag order cannot issue unless “specific, on the record findings” are made demonstrating that a gag order is “essential to preserve higher values and is narrowly tailored to serve that interest.” If the interest asserted is the right of the accused to a fair trial, the gag order may issue only if “specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that . . . [the gag order] would prevent and, second, reasonable alternatives . . . cannot adequately protect the defendant’s fair trial rights . . . .” Moreover, “representatives of the press and general public must be given an opportunity to be heard on the question . . . .”\textsuperscript{189}

Federal courts have imposed gag orders against attorneys and other trial participants under various standards. In a 1969 case, the Tenth Circuit held that a gag order constitutionally may be “based on a ‘reasonable likelihood’ of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial.”\textsuperscript{190} Some other circuits are more restrictive, permitting a gag order against trial participants only if there is a “clear and present danger” or a “serious and imminent threat” to fairness of a trial.\textsuperscript{191} Despite varying standards, the First Amendment can prevent sweeping, judicially imposed restraints on comments by trial participants. For example, a trial judge may try to bar journalists from interviewing jurors after a trial has ended. However, as one court concluded, “restrictions on post-trial interviews must reflect an impending threat of jury harassment rather than a generalized misgiving about the wisdom of such interviews.”\textsuperscript{192}

The First Amendment may protect pre-trial participants as well. When a Florida newspaper reporter was called before a grand jury, a state statute generally prohibited grand jury witnesses from ever disclosing their testimony.\textsuperscript{193} The U.S. Supreme Court, however, held that “insofar as the Florida law prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution.”\textsuperscript{194}

First Amendment protection may not be available, however, to witnesses who seek to disclose information they gained about grand jury proceedings in the course of testifying. In \textit{Hoffmann-Pugh v. Keenan}, the Tenth Circuit supported enforcement of grand jury secrecy rules against an aspiring author.\textsuperscript{195} The plaintiff was a housekeeper for the parents of JonBenet Ramsey, the child whose 1996 murder in Colorado attracted extraordinary national attention.\textsuperscript{196} After the housekeeper became involved in a grand jury investigation of the murder, she planned to write a book about her experience.\textsuperscript{197} Colorado grand jury secrecy rules did not prevent the housekeeper from disclosing information she possessed before her grand jury appearance.\textsuperscript{198} The secrecy rules prohibited her, however, from disclosing matters that she had “learned from her participation in the grand jury process, at least so long as the potential remains for another grand jury to be called to investigate an unsolved murder.”\textsuperscript{199}

\textbf{C. The presumption of openness}

In a 1981 case, the Kansas Supreme Court faced the question of whether a trial judge constitutionally could close a
criminal proceeding. The case, *Kansas City Star Co. v. Fossey*, arose when a juvenile who had been certified as an adult faced trial for murdering his thirteen-year-old stepbrother in Miami County, Kansas. After selection of the jury, the trial judge, Leighton A. Fossey, acted on his own motion to schedule a hearing on whether incriminating statements that the defendant had made to the police were involuntary and should be suppressed. When Judge Fossey indicated in open court that he would exclude the press and public from the suppression hearing, a Kansas City Times reporter objected by reading a prepared statement. She requested that the judge hold a hearing on whether to close the courtroom, Judge Fossey, however, rejected the request, closed the courtroom and conducted the suppression hearing. He ruled that the defendant’s incriminating statements would be admitted into evidence at the trial and that he would permit reporters covering the trial to read the defendant’s statements only after they were introduced into evidence. Judge Fossey’s reasoning was that he “did not want the jury exposed to any more publicity than necessary.”

The Kansas City Star Co., which published the Kansas City Times, responded by filing a motion to intervene. The Star asked that the closure order be vacated and also requested a transcript of the suppression hearing. Judge Fossey denied the motion to vacate, yet ruled that the Star could receive a copy of the transcript from a court reporter. The murder trial went forward and resulted in a guilty verdict, but the Star filed a mandamus action with the Kansas Supreme Court, challenging Judge Fossey’s closure of the suppression hearing.

Even though the hearing had occurred after the jury was impaneled, the Kansas Supreme Court chose to view it as a pre-trial proceeding and consequently found *Richmond Newspapers* inapplicable. Instead, the court relied on *DePasquale* and upheld the closure of the hearing, saying such action is justified when “necessary to insure a fair trial for the defendant.”

As for the future, however, the court announced that a trial judge may close a pre-trial criminal proceeding “only if (i) the dissemination of information from the pretrial proceeding and consequently found *Pasquale*.

The court derived its two-part test from standards for the conduct of criminal proceedings that the ABA approved in 1978, which replaced the standards the organization had first published in 1968. The 1978 standards were more favorable to First Amendment interests than the original and tended to be consistent with the U.S. Supreme Court’s holding in *Richmond Newspapers*. The standards called for “a strong presumption in favor of open judicial proceedings.” The standards did not limit the general principle of openness to pre-trial proceedings; rather, openness extended “to every phase of judicial proceedings in a criminal case.” As the Kansas Supreme Court acknowledged in *Fossey*:

In recent years, there has been a great deal of discussion on the subject of “fair trial and free press” and the right of the public and news media to attend court proceedings. There is almost universal agreement among the courts and writers who have considered the issue that access to court proceedings should be limited only in exceptional circumstances. It has been said that the reason for requiring all court proceedings to be open, except where extraordinary reasons for closure are present, . . . is to enhance the public trust and confidence in the judicial process and to insulate the process against attempts to use the courts as tools for persecution.

The public interest in access to courts, according to the Kansas Supreme Court, “is at least as strong as the first amendment policy against prior restraints.” Before restricting access, a trial judge must conduct a hearing and make findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision. Such a procedure will protect both the right of the defendant to a fair trial and the right of the public and news media to have access to court proceedings.
The Fossey decision explicitly applied the presumption of openness to any pre-trial proceeding, including a bail hearing. In addition, because of Fossey’s implicit endorsement of court access generally and because of other precedents, most other proceedings—ranging from voir dire to expungement hearings—are presumptively open in Kansas.

In 2005, the Kansas Supreme Court again reviewed the limitations on judges’ authority to close court proceedings. A defendant had been convicted of two murders and other charges in connection with an explosion and fire at an apartment building. The trial judge closed the courtroom to the media and spectators during an announcement of the jury’s verdict. The purpose of the closure was to prevent news of the verdict from reaching jurors who had been selected to sit in a pending, related criminal case.

In State v. Dixon, the Kansas Supreme Court indicated that the process by which the trial judge had decided to close the proceeding complied with Press-Enterprise I, observing that “the trial court went to great lengths to articulate the interest to be served by closure as well as its findings on reasonable alternative means.” Nevertheless, after taking Waller into account, the court concluded that closure of court proceedings must be consistent with both the First and Sixth amendments. As was explained in Dixon:

Here, the trial court considered the advocated interests and the alternatives. The trial court exercised care in striking a balance of those interests. But the court’s decision was made in response to intervention by area newspapers, whose interests were the First Amendment interests of media freedom. Although defense counsel made a simple statement of objection to closing the courtroom, the Sixth Amendment interest in a public trial seems not to have been pressed. It was [the defendant’s] right to a public trial that is at issue here.

The closure, the court held, “was inconsistent with the substantial right of Dixon to a public trial and not harmless error.”

Access to post-trial proceedings, including plea hearings, generally has been presumed throughout the United States in light of such precedents as Press-Enterprise II. For example, in 1986, in In re Washington Post Co., the Fourth Circuit addressed whether the media and the public have a First Amendment right of access to hearings on sentencing, as well as pleas. The conclusion was in favor of openness:

Sentencing can occur before the termination of the trial proceeding, and, even if it occurs in a separate hearing, it clearly amounts to the culmination of the trial. Moreover, even if plea hearings and sentencing hearings are not considered a part of the trial itself, they are surely as much an integral part of a criminal prosecution as are preliminary probable-cause hearings, suppression hearings, or bail hearings, all of which have been held to be subject to the public’s First Amendment right of access.

In addition, historical and functional considerations weigh in favor of finding a First Amendment right of access here. Sentencings have historically been open to the public; while plea hearings do not have the same long tradition, they are typically held in open court. As to both, public access serves the important function of discouraging either the prosecutor or the court from engaging in arbitrary or wrongful conduct. The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence.

D. Access to civil proceedings

In Richmond Newspapers, the U.S. Supreme Court observed “that historically both civil and criminal trials have been presumptively open.” Since then, lower courts have held that civil trials should be no less accessible to the press and public than criminal proceedings. For example, in Publicker Industries Inc. v. Cohen, the Third Circuit said that “the civil trial, like the criminal trial, ‘plays a particularly significant role in the functioning of the judicial process and the government as a whole.’” Other points made in Publicker included these:

- “[P]ublic access to civil trials ‘enhances the quality and safeguards the integrity of the factfinding process.’”

220. Id. at 1182.
221. See State v. Dixon, 112 P.3d 883, 907 (Kan. 2005) (citing Press-Enterprise I, 464 U.S. 501, 513 (1984) (holding that voir dire is presumed to be open, and noting that “[the judge at this trial closed an incredible six weeks of voir dire without considering alternatives to closure”)).
222. Stephens v. Van Arsdale, 608 P.2d 972, 985 (Kan. 1980) (“The public or press are free to attend the original trial or the sentencing hearing or any post-judgment hearings or the expungement proceeding itself.”).
223. Dixon, 112 P.3d at 889.
224. Id. at 906.
225. Id.
226. Id. at 908.
227. Id. at 910-11.
228. Id. at 910.
229. Id.
230. See 807 F.2d 383 (4th Cir. 1986).
231. Id. at 389.
234. Id. (quoting Globe Newspaper, 457 U.S. at 606).
• Openness is associated with fairness and “heightens public respect for the judicial process.”

• Access to civil proceedings “permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.”

• “Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs.”

In Kansas, state courts have focused on access to criminal matters, although a federal court in the state has ruled in favor of open civil proceedings. A defendant in Mike v. Dymon Inc. allegedly breached an employment contract by making an unauthorized disclosure about a business. The defendant, without objection from the plaintiff, asked that the courtroom proceedings “be closed to unauthorized personnel during presentation or discussion of ’competitive confidential’ or ’confidential’ information.” In rejecting the request for closure, the judge recognized “that members of the public possess both a common law and First Amendment right of access to civil trials.” One cited precedent said:

[W]hat happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.

III. Courtroom control

A. Use of cameras as a privilege

When the media are present in courtrooms, their use of cameras and recording equipment can be a concern to trial judges who aim to minimize the effects of publicity on a defendant’s right to a fair trial. Even so, the Kansas Supreme Court has granted the news media a “privilege” to photograph and record court proceedings.

The privilege, however, “does not limit or restrict the power, authority or responsibility of the judge to control proceedings or to ‘exclude the media or the public at a proceeding or during the testimony of a witness.” The rules say that “[o]nly audio or visual equipment which does not produce distracting light or sound may be used to cover a court proceeding.”

In Fossey, in 1981, the Kansas Supreme Court noted the responsibility of trial judges to manage their courtrooms, saying:

To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution’s pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.

Douglas County District Judge Robert Fairchild is among Kansas judges who are open to the presence of cameras in the courtroom. In 2005, he allowed CBS’s 48 Hours to videotape the trial of then-Vice President Dick Cheney’s former chief of staff, Scooter Libby, on charges of perjury and obstruction of justice, a federal judge took an unprecedented step by allowing bloggers to be present alongside mainstream media representatives. Since then, some judges elsewhere, including Kansas, have begun permitting journalists to use laptop computers or other portable devices to record and report on court proceedings.
C. Court premises

The Kansas Supreme Court’s rule on media court coverage prohibits recording of “interviews for broadcast in the hallways immediately adjacent to the entrances to the courtroom if passageways are blocked or judicial proceedings are disturbed thereby.” The rule also forbids photographers from taking pictures “through the windows or open doors of the courtroom,” and authorizes judges to “ban cameras from the entire floor on which a proceeding is conducted.” Such rules exist in many states, and judges who enforce them can find themselves locked in First Amendment battles with the media. During a trial in Detroit, Michigan, for example, a judge cited a newspaper photographer for taking a picture of a witness outside the courthouse. The judge also cited the photographer’s editor. A different judge who reviewed the contempt citations dismissed them. Lawyers for the newspaper had taken the position that, because the photographer had not used his camera inside the courthouse, he was in compliance with applicable rules. They said that punishing the photographer for taking a picture on the public grounds outside the courthouse would violate the First Amendment.

IV. Conclusion

The trend of judicial decisions over many years in Kansas, as well as nationally, clearly has favored media and public access to court proceedings and records. The U.S. Supreme Court has recognized that courts historically have been open and that the benefits of openness are significant. Openness leads to public confidence in the judicial system. It enables the media to illuminate how the justice system works and to perform a checking function, holding judges and law enforcement accountable for their exercise of power and authority. A theme of court precedents nationally and in Kansas is that trial judges should take a broad view of their responsibilities. They do not serve merely to protect the fair trial rights of criminal defendants or the privacy interests of civil litigants. They also have an obligation to be as transparent as possible and facilitate a free flow of information and discourse about the judicial system.

The appellate courts have provided considerable guidance to judges and journalists on the free press/fair trial issue. When the Kansas Supreme Court made its decision in Fossey in 1981, for example, it established a plain, workable standard for determining whether a restriction on court access may be warranted. Basically, court proceedings and records must be open unless disclosure of information would pose “a clear and present danger to the fairness of the trial, and . . . the prejudicial effect [of openness] cannot be avoided by reasonable alternative means.”

253. Id.
256. Judge Clears 2 At Paper That Ran Trial Photograph, supra note 500.
257. Id.
258. Detroit’s Papers Under Fire At Trial of Officers in Beating, supra note 500.
259. Id.
260. See supra Part II.
262. Id. at 1182.
The information below is adapted from The Open Courts Compendium: A guide to press and public access to the courts, a Web publication by the Reporters Committee for Freedom of the Press in Arlington, Virginia. The Compendium is intended to provide general information to lawyers while also being helpful to journalists. One chapter in the Compendium consists of an account of Kansas law that applies to courts, plus a description of relevant federal and state laws. The account of Kansas law was written by Professor Mike Kautsch of the University of Kansas School of Law. With some minor revisions, his account of Kansas law follows. The account is in the format of the Kansas chapter as it appears in the Compendium at: http://www.rcfp.org/kansas-open-courts-compendium.

The information below is adapted from The Open Courts Compendium: A guide to press and public access to the courts, a Web publication by the Reporters Committee for Freedom of the Press in Arlington, Virginia. The Compendium is intended to provide general information to lawyers while also being helpful to journalists. One chapter in the Compendium consists of an account of Kansas law that applies to courts, plus a description of relevant federal and state laws. The account of Kansas law was written by Professor Mike Kautsch of the University of Kansas School of Law. With some minor revisions, his account of Kansas law follows. The account is in the format of the Kansas chapter as it appears in the Compendium at: http://www.rcfp.org/kansas-open-courts-compendium.

I. Introduction: Access rights in the jurisdiction

A. The First Amendment presumption of access

Closure of Kansas criminal court proceedings is allowed “only if (i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and (ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.” Kansas City Star Co. v. Fossey, 630 P.2d 1176, 1182 (Kan. 1981), quoting Fair Trial and Free Press: Standard 8-3.2 of the American Bar Association’s Standing Committee on Association Standards for Criminal Justice (August, 1978).

The Fossey court said:

“arsonal interest in access to courts, “is at least as strong as the first amendment policy against prior restraints.” Id. at 1183, quoting the ABA Standards.

B. The common-law presumption of access

Before the Kansas Supreme Court embraced a presumption of openness in Kansas City Star Co. v. Fossey, 630 P.2d 1176 (Kan. 1981), it acknowledged the common law right of access to records in Stephens v. Van Arsdale, 608 P.2d 972 (1980). The Court said that a judge had discretion to deny access to court records if they are to be used “to gratify private spite or promote public scandal” through the public disclosure of the details of a divorce case or for the publication of libelous statements for press consumption, or as sources of business information that might harm a litigant’s competitive standing.” Id. at 982, quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978).

C. Overcoming a presumption of openness

The presumption that courts are open in Kansas can be overcome only if the trial judge “affirmatively concludes” that “the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial,” and that “the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.” Kansas City Star Co. v. Fossey, 630 P.2d 1176, 1182-1183 (Kan. 1981), quoting Fair Trial and Free Press: Standard 8-3.2 of the American Bar Association’s Standing Committee on Association Standards for Criminal Justice (August, 1978).

D. Statutes and court rules

The U.S. Supreme Court has observed that, in many jurisdictions, the common law right of access to court records “has been recognized or expanded by statute.” Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 n.7 (1978). To the extent that the Kansas Legislature has codified common law access, it has done so principally through the Kansas Open Records Act (KORA). See Kan. Stat. Ann. (K.S.A.) 45-215 et seq. In KORA, the Legislature declared that openness of public agencies’ records is presumed. See K.S.A. 45-216. The presumption of openness controls unless a requested record falls within an exemption specified in KORA. If a record is specifically exempt, public agencies “shall not be required to disclose” it. K.S.A. 45-221(a).

that, by statute, some kinds of records are not subject to disclosure. The statement also notes that records may be closed by rule of the Court. KORA acknowledges the Court’s authority to close records in K.S.A. 45-221(a)(1).

The Kansas Judicial Branch gives notice on its website that open court records include “case files and transcripts” and “[f]inal civil and criminal judgments.” See Kansas Judicial Branch Appellate Clerk, A Guide to Judicial Branch Open Records Requests, http://www.kscourts.org/appellate-clerk/general/open-records-act/default.asp. The Judicial Branch’s Web site also points out that some records are not accessible “pursuant to judicial order or caselaw” and that KORA “recognizes that some records contain information that is private in nature.” Id.

Records that are private include records of judges themselves, as opposed to records associated with court proceedings. KORA exempts “any municipal judge, judge of the district court, judge of the court of appeals or justice of the Supreme Court” from the requirement that public agencies make their records available. K.S.A. 45-217(f)(2)(B). The exemption, for example, applies to long distance telephone records of judges, even if the records are on file with a public agency. See Op. Kan. Att’y Gen. No. 96-77 (Sept. 12, 1996).


E. Procedural prerequisites to closure

Before restricting access to proceedings, a trial judge in Kansas must conduct a hearing and “make findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision.” Kansas City Star Co. v. Fossey, 630 P.2d 1176, 1184 (Kan. 1981).

The Kansas Supreme Court said that requiring the trial judge to state the findings and basis for them “will protect both the right of the defendant to a fair trial and the right of the public and news media to have access to court proceedings.” Id. at 1184.

American Bar Association standards that the Court adopted included comment providing

“that any motion to close a pretrial proceeding or seal court records be made with the consent of the defendant. The motion, however, cannot be granted unless the court affirmatively concludes that the requirements of the clear and present danger and least restrictive alternative tests have been met. The burden of proof is on the party making the motion.”


Since Fossey, the Supreme Court has emphasized that, only after making “specific findings,” may a judge interfere with the media’s opportunity to report on court proceedings. State v. Alston, 887 P.2d 681, 692 (Kan. 1994).

II. Procedure for asserting right of access to proceedings and records

A. Media standing to challenge closure

In Kansas City Star Co. v. Fossey, 630 P.2d 1176 (1981), when the Kansas Supreme Court ruled in favor of open court proceedings, the media’s standing to intervene and object to a trial judge’s closure order was not in question. In Fossey, the media had filed a motion to intervene, asking the judge to vacate his order to close a proceeding and also requesting a copy of the transcript of the proceeding. After a hearing on the motion, the judge declined to vacate his closure order but granted the media’s request for a transcript of the closed proceeding. The media then petitioned the Court for mandamus, seeking a declaration that the judge’s closure of proceedings had violated the First Amendment. Although the Court denied the petition for mandamus, the Court established the presumption of openness that would apply in future cases.

In Wichita Eagle Beacon Co. v. Owens, 27 P.3d 881 (Kan. 2001), the Court reviewed Fossey and affirmed the media’s standing to intervene and challenge a restriction on access to court proceedings and records. In Owens, the media had challenged a judge’s order that sealed records in five high-profile criminal cases, which were primarily related to two quadruple homicides. The Court said:

We believe an integral part of the rule announced in Fossey . . . is the need for a trial court, when considering the sealing of a record or the closure of a proceeding, to consider also the societal interest the public has in open criminal proceedings and records . . . . The news media, as a member of the public, should be permitted to intervene in a criminal case for the limited purpose of challenging a pretrial request, or order, to seal a record or close a proceeding in that case, even without an express statutory provision allowing such intervention.

Id. at 883.

The Court listed several benefits of allowing intervention by the media in a criminal case. As the Court said:

Allowing the news media to intervene in a criminal case . . . may provide a trial court with the benefit of argument on the question of closure by an advocate of First Amendment and common-law interests. Such an argument would not necessarily be made by the State or the defense and might otherwise go entirely unnoticed. The news media may identify, or at least be the strongest proponent of an argument that there are . . . “reasonable alternative means” to closure that would avoid the prejudicial effect on the defense or prosecution of the dissemination of information contained in the record or revealed during a proceeding. Other benefits to
be derived from permitting the news media to intervene include: (1) allowing the court that is most familiar with events that may be unfolding rapidly in the case and in the community in which the case is pending to make a fully informed closure decision in the first instance, (2) less disruption in the processing of the criminal case because an appellate court would not be called upon prematurely to resolve a challenge by the news media while the criminal case is stayed pending the appellate court’s decision, (3) an increase in judicial economy, and (4) a more efficient use of judicial resources.

Id. at 883.

B. Procedure for requesting access in criminal cases

An informal request for access may be raised during a criminal proceeding at the point when a judge announces that it will be closed. For example, a newspaper reporter’s objection to closure of a courtroom led to the key Kansas precedent, Kansas City Star Co. v. Fossey, 630 P.2d 1176 (Kan. 1981), on access to courts. The reporter, who worked for the Kansas City Times, heard the trial judge indicate in open court that he would exclude the public and the media from a hearing on whether to suppress certain evidence. Along with two other reporters, the Times reporter stood and identified herself. She then read a statement objecting to closure of the hearing. The Times had prepared and given her the statement for use on just such an occasion. Reading the statement, the reporter requested that the judge hold a hearing on whether to close the courtroom and summarized legal standards for closing a criminal proceeding. The judge rejected the request, closed the courtroom and conducted the suppression hearing. The next day, the Kansas City Star Company, which owned the Times, moved to intervene and vacate the closure order. The judge declined to vacate the order. Soon thereafter, in response to the Star Company’s filing of an original proceeding in mandamus, the Kansas Supreme Court ruled that openness of Kansas courts henceforth would be presumed. See id. at 1181-1184.

News reporters in Kansas, like in other states, have learned to be alert if they are present when a judge considers a closure order. Reporters generally have been advised to be prepared to stand, respectfully request to be heard, and voice an objection. Following is a statement of objection that illustrates the kind a Kansas reporter may make:

I am (name), a reporter for (name of news organization). On behalf of both myself and my organization, I respectfully object to closure of this proceeding to the public and the media, and I request an opportunity to be heard through counsel before any closure is ordered.

I understand that, under the First Amendment to the United States Constitution (and, if in state court, the state Constitution), the public and the media rightfully may attend court proceedings. At the very least, the law requires that a hearing be held before closure may be ordered. I respectfully request an opportunity to arrange for counsel to be present at such a hearing.

In Kansas, filing a motion to intervene is an accepted method of challenging a trial judge’s closure of criminal proceedings. See II. Procedure for asserting right of access to proceedings and records/A. Media standing to challenge closure, supra, and D. Obtaining review of initial court decisions, infra.

However, requests for access need not be formalized in an adversarial proceeding. The Kansas Judicial Branch’s Web site includes information for those who seek access to state district and appellate courts, and a central resource is the Kansas Supreme Court’s Office of Judicial Administration. The judicial administrator’s responsibilities include providing public information about the courts. See You and the Courts of Kansas – Judicial Administrator, at: http://www ks courts. org/kansas-courts/general-information/you-and-the-courts/default.asp. Also see XII. Restrictions on participants in litigation/B. Contact information for courts in the jurisdictions for references to Kansas Judicial Branch offices that can respond to access questions, infra.

C. Procedure for requesting access in civil matters

The media successfully have intervened in criminal proceedings under Kansas City Star v. Fossey, 630 P.2d 1176 (Kan. 1981), and Wichita Eagle Beacon Co. v. Owens, 27 P.3d 881 (Kan. 2001). See II. Procedure for asserting right of access to proceedings and records/A. Media standing to challenge closure, supra.

Intervention in civil proceedings based on Fossey and Owens may be attempted, although these precedents thus far only have applied criminal matters. An alternative source of authority for intervention in civil proceedings would be Kansas Rules of Civil Procedure, in K.S.A. 60-224. This provision states that, on “timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter substantially impair or impede the movant’s ability to protect its interest.”

As a means of dealing with access issues in the civil context, mandamus has served as an effective measure. See II. Procedure for asserting right of access to proceedings and records/D. Obtaining review of initial court decisions, infra. The Kansas Supreme Court has said that mandamus, prescribed in K.S.A. 60-801, is an appropriate method for gaining “an authoritative interpretation of the law for the guidance of public officials in their administration of public business” and that:

although a district judge’s discretion cannot be controlled by mandamus, if the judge’s order threatens to deny a litigant a right or privilege that exists as a matter of law and there would be no remedy by appeal, mandamus may be invoked. This court may also exercise its original jurisdiction and settle a question through mandamus if the petition presents an issue of great public importance and concern.
**Alpha Medical Clinic v. Anderson**, 128 P.3d 364, 375 (Kan. 2006), citing precedents. See also **Kansas Medical Mut. Ins. Co. v. Svaty**, 244 P.3d 642 (Kan., 2010), holding that a writ of mandamus was warranted in connection with a challenge to a discovery order in a medical malpractice action.

**D. Obtaining review of initial court decisions**

In **Kansas City Star Co. v. Fossey**, 630 P.2d 1176 (Kan. 1981), the Kansas Supreme Court recounted the procedure for seeking review of a trial judge's closure of court proceedings. After the trial judge denied access to a suppression hearing, the media's attorneys filed a motion to intervene. They argued that the judge should vacate his closure order. The judge then ordered that a complete transcript of the suppression hearing be made available to the media, but declined to reverse his closure order. *Id.* at 1184.

The transcript the judge released was of proceedings that had occurred April 27-28, 1981. On May 1, 1981, the day the trial ended, the media petitioned the Court for mandamus, challenging the closure order. The Court directed the trial judge to respond to the petition, and the state attorney general appeared on his behalf. The attorney general filed a motion to dismiss the petition for mandamus. The attorney general's arguments included an assertion that the matter was moot, because the judge had released the transcript of the closed proceedings. Nevertheless, the *Kansas* Court decided that the matter required its attention, explaining that the public interest justifies the court in considering the case on its merits. On occasions, this court, when confronted with significant issues of statewide concern, has broadened the availability of mandamus in order to expeditiously resolve such issues. *Id.* at 1179.

In **Wichita Eagle Beacon Co. v. Owens**, 27 P.3d 881 (Kan. 2001), the Supreme Court also reviewed the procedure by which the media formally may object to a trial judge's restriction on court access. *Owens* arose when a judge denied a motion by the media to intervene and object to his sealing of certain criminal records. The media then filed a petition with the Court seeking a writ of mandamus and challenging the judge's denial of the motion to intervene.

In K.S.A. 60-801, mandamus is defined as “a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law.” *Owens*, the Supreme Court approvingly noted that the media's mandamus petition included the motion to intervene and certified transcripts of the trial court proceedings related to the motion. The Court granted the media's petition and held “that the news media, as a member of the public, may intervene in a criminal case for the limited purpose of challenging a pretrial request or order to seal a record or to close a proceeding.” *Id.* at 883.

In *Owens*, the Court said: There is no disputed issue of material fact in the case, and we believe the public interest justifies our considering the case on its merits. Accordingly, we accepted jurisdiction in this case to provide guidance to the parties, to the news media, and to the trial courts of our state. The record before us includes all of the arguments by the State, defense, and the media, as well as Respondent's legal reasoning supporting his decision to deny the motion to intervene. We conclude that neither additional briefing nor oral argument is necessary or would be helpful for the appropriate resolution of this issue. *Id.* at 882.

In addition, a 1994 decision by the Supreme Court on prior restraint illuminates steps for obtaining review of a trial judge's closure order. In **State v. Alston**, 887 P.2d 681 (Kan. 1994), the Court reversed a gag order that a judge had issued to prevent publication of a newspaper reporter's account of court proceedings that he had attended. The Court also reversed a contempt citation against the newspaper. The Court said that the gag order was an unconstitutional prior restraint, explaining that “those who see and hear what transpired in an open courtroom can report it with impunity,” and “once a public hearing has been held, what transpired there could not be subject to prior restraint.” *Id.* at 688.

At the same time, the Court embraced a line of precedent that preserved the media's defense against “transparently invalid” gag orders. *Id.* at 691, citing **In re Providence Journal Co.**, 820 F.2d 1342, 1347-48 (1st Cir. 1986), modified on reh'g, 820 F.2d 1354 (1st Cir. 1987). As noted in *Alston*, a newspaper is subject to the general rule that persons must obey a judicial order even if they believe it is unconstitutional. Even if they challenge the constitutionality of the order on appeal, they must continue to obey it while awaiting a decision. If they disobey the order and are cited for contempt, they are barred from collaterally attacking the constitutionality of the order during the contempt proceeding. The collateral bar rule has been considered necessary for the “efficient and orderly administration of justice.” *Id.* at 690.

In *Alston*, however, the Court found that the newspaper was not bound by the collateral bar rule when it disobeyed the gag order. The collateral bar rule does not apply when a judicial order is “transparently invalid,” the court said, explaining:

In this case, the . . . order was transparently unconstitutional. The trial court failed to make the requisite . . . findings. The [newspaper had based its news report on information that was available from] the court's records and in open court prior to the gag order. The order was issued without a full and fair hearing with all the attendant procedural protection. *Id.* at 691.

The Court found that the newspaper had disobeyed the gag order in good faith. “In the course of two hours, the [news-
paper] received notice of the order, contacted the judge, and
attempted to contact its attorney and the attorney. . . .” Id.
Relief through the judicial system, however, was not available
before the newspaper’s publication deadline. According to
the court, “[o]nly where timely access to an appellate court is
not available can the newspaper publish and then challenge
the constitutionality of the order in contempt proceedings.”
Id. at 692. Alston established that a newspaper “seeking to
challenge an order it deems transparently unconstitutional
must concern itself with establishing a record of its good
faith effort.” Id. at 691.

In 2005, a dispute over a gag order illustrated how a pe-
tition for mandamus may be used to seek expedited review.
The gag order was issued to prevent a television station from
broadcasting a news report that the judge said jeopardized
the privacy of a cosmetic surgeon’s patients. After unsuccess-
fully challenging the restraining order in the lower court, the
station filed an “emergency petition for a writ of mandamus.”
The petition stated that:

The Kansas Supreme Court has original jurisdiction
over proceedings in mandamus under Article 3, Section
3 of the Kansas Constitution. Mandamus is a manner
of compelling a public officer to perform a clearly de-
fin
ed duty imposed by law. K.S.A. 60-801; State v. Beck-
er, 264 Kan. 804, 807 (1998). This power includes the
right to control the actions of a lower court. See State ex
particular, mandamus is appropriate if a lower court’s or-
der destroys or denies a right or privilege that exists as a
matter of law with no remedy for appeal. Wesley Medical

Moreover, mandamus is the only effective remedy to
timely right the constitutional wrong that continues to
occur every day the prior restraint order remains in effect
. . . .

Meredith Corporation d/b/a KCTV5 v. The Hon. Kevin P
Moriarty, Petition for Mandamus, Kansas Supreme Court,
Case No. 2005-94734. Note: The matter was dismissed as

III. Access to criminal proceedings
A. In general

Kansas trial judges who consider whether to close a crim-
inal proceeding generally are guided by Kansas City Star Co.
v. Fossey, 630 P.2d 1176 (Kan. 1981). In Fossey, the Kansas
Supreme Court ruled essentially that criminal proceedings
shall not be closed except to prevent a clear and present dan-
ger to fairness and a prejudicial effect that cannot otherwise
be avoided. Id. at 1182, citing The American Bar Associa-
tion Standards Relating to the Administration of Criminal
the statement of the standard in Fossey, see I. Introduction:
Access rights in the jurisdiction/A. The First Amendment
presumption of access, supra.

B. Pretrial proceedings

In Kansas City Star Co. v. Fossey, 630 P.2d 1176 (Kan.
1981), the Kansas Supreme Court made clear that a pre-
sumption of openness applies to pretrial proceedings. Stan-
dards on fair trials that the Court adopted include reference
to “a preliminary hearing, bail hearing, or any other pretrial
proceeding, including a motion to suppress.” Id. at 1182,
quoting The American Bar Association Standards Relating
to the Administration of Criminal Justice: Fair Trial and Free

C. Criminal trials

In State v. Dixon, 112 P.3d 883 (Kan. 2005), the Kansas
Supreme Court reversed a trial judge’s closure of a courtroom
during the announcement of a jury verdict. The defendant
was convicted of two murders and other charges in connec-
tion with an explosion and fire at an apartment building. The
purpose of the courtroom closure was to prevent news of the
verdict from reaching jurors who had been selected to sit in a
pending, related criminal case.

The Court indicated that the process by which the tri-
al judge had decided to close the proceeding complied
with standards set in Press-Enterprise Co. v. Superior Court
(Press-Enterprise I), 464 U.S. 501 (1984), observing that “the
trial court went to great lengths to articulate the interest to
be served by closure as well as its findings on reasonable alter-
native means.” Dixon at 908. The Court also said that closure
of proceedings must be consistent with both the First and
Sixth amendments. As the court explained:

Here, the trial court considered the advocated interests
and the alternatives. The trial court exercised care in
striking a balance of those interests. But the court’s deci-
sion was made in response to intervention by area news-
papers, whose interests were the First Amendment inter-
ests of media freedom. Although defense counsel made a
simple statement of objection to closing the courtroom,
the Sixth Amendment interest in a public trial seems not
to have been pressed. [It was] [the defendant’s] right to a
public trial that is at issue here.

Id. at 910.

The closure, the court held, “was inconsistent with the
substantial right of the defendant to a public trial and not
harmless error.” Id.

Note: State v. Dixon was disapproved on other grounds
by State v. Wright, 224 P.3d 1159 (Kan. 2010).

D. Post-trial proceedings

In 1980, in Stephens v. Van Arsdale, 608 P.2d 972, the Kan-
sas Supreme Court concluded that the presumption of open-
ness includes proceedings that follow a trial. The Court said
that the public and the media “are free to attend the original
trial or the sentencing hearing or any post-judgment hear-
ings.” Id. at 985. The Court said that open post-trial pro-
ceedings include a hearing before a judge on whether to ex-
unge a defendant’s criminal conviction from court records.
Id.
In 1981, in Kansas City Star Co. v. Fossey, 630 P.2d 1176, when the Court adopted American Bar Association Standards on fair trials, it extended the presumption of openness “to every phase of judicial proceedings in a criminal case.” Id. at 1182, quoting The American Bar Association Standards Relating to the Administration of Criminal Justice: Fair Trial and Free Press § 8-3.2 (2d ed. 1978).

E. Appellate proceedings
Access to appellate courts, as well as trial courts, is presumed under Kansas case law. See I. Introduction: Access rights in the jurisdiction, supra, concerning the presumption of openness. A codification of the presumption occurred in 2008, when the Kansas Legislature enacted a statute that authorizes a judge or any party in a criminal or civil case to call for hearing on whether to redact or seal court records or proceedings. See K.S.A. 60-2617(a). The statute provides that, after a hearing, a judge may authorize redaction, sealing or closure, but only by written order for “good cause.” K.S.A. 60-2617(b). A “good cause” for restricting access to proceedings or records is defined as a finding by the judge “on the record that there exists an identified safety, property or privacy interest of a litigant or a public or private harm that predominates the case and such interest or harm outweighs the strong public interest in access to the court record and proceedings.” K.S.A. 60-2617(d). The judge cannot impose an access restriction without recognizing “that the public has a paramount interest in all that occurs in a case.” K.S.A. 60-2617(c). The statute, K.S.A. 60-2617, originated in response to “two sealed, abortion-related lawsuits before the Kansas Supreme Court.” See Bill inspired by sealed abortion cases approved, The Associated Press/Lawrence Journal-World (March 1, 2008).

The statute requires that notice of a hearing to restrict access be given to all parties and, any criminal case, to “the victim, ifascertainable.” K.S.A. 60-2617(a). However, the hearing does not require that notice of a hearing be given to any non-party, including the news media. As a result, the parties to a case may gain an access restriction under the statute without the public’s knowledge. In 2014, the media intervened in a capital case after learning that a judge had acted under the statute to impose a blanket seal on court records. The prosecution and defense had agreed that the records should be sealed. The media’s intervention was based on the presumption of openness established in Kansas City Star v. Fossey, first cited in I. Introduction: Access rights in the jurisdiction, supra. As a consequence of the intervention, the judge conducted hearings in open court, which included argument by the media’s counsel, and unsealed a number of records. For a news report about the intervention, see Judge rescinds order sealing court records in Parsons quadruple murder case/Plaintiffs included Parsons Sun, Montgomery County Chronicle and KOAM, Topeka Capital-Journal (July 26, 2014).

IV. Access to criminal court records
A. In general
The presumption that criminal court records are open, established in Kansas City Star Co. v. Fossey, 630 P.2d 1176, 1182 (Kan. 1981), was reaffirmed in Wichita Eagle Beacon Co. v. Owens, 27 P.3d 881 (Kan. 2001). As the Kansas Supreme Court said,

In Fossey, we held that a trial court . . . may seal the record of . . . proceedings. However, such closure is permitted only if the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means. Id. at 883.

The U.S. Court of Appeals for the Tenth Circuit, whose jurisdiction includes Kansas, recognized a First Amendment access right to court records, although only in a limited way. A district judge in Colorado had sealed records in connection with the criminal proceedings that followed the 1995 bombing of the Murrah Federal Building in Oklahoma City, Oklahoma. In United States v. McVeigh, the Tenth Circuit noted that, under the common law, court records “are presumptively available to the public, but may be sealed if the right to access is outweighed by the interests favoring nondisclosure.” McVeigh, 119 F.3d 806, 811 (10th Cir. 1997), citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 602 (1978). The common law, it also was noted, provides that a judge’s decision to seal records may be reviewed for abuse of discretion.

Before sealing the records in the Oklahoma City bombing case, however, the Colorado district judge had applied a First Amendment standard rather than the common law. The Tenth Circuit observed that, in a number of other federal courts, “the logic of Press-Enterprise II[, 478 U.S. 1 (1986).] extends to at least some categories of court documents and records, such that the First Amendment balancing test there articulated should be applied before such qualifying documents and records can be sealed.” McVeigh at 811. The Tenth Circuit declined to hold that the media generally have a First Amendment-based right of access to court records. Nevertheless, in its review of the media’s request for records in the Oklahoma City bombing case, the court assumed that access in that specific case was “governed by the analysis articulated in Press-Enterprise II.” Id. at 812. The court explained:

In determining whether a particular type of document is included within the First Amendment right of access, courts engage in a two-pronged inquiry in which they ask: (1) whether the document is one which has historically been open to inspection by the press and the public; and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” This two-part inquiry is referred to as the test of “experience and logic.”

If the qualified First Amendment right of access is found to apply to the documents under the “experience and logic” test, [a] court may then seal the documents only
if “closure is essential to preserve higher values and is necessary to serve that interest.” McVeigh at 812-13.

The court upheld the district judge's sealing of the records, concluding that when records are closed to the extent permissible under the First Amendment, the closure necessarily also satisfies the common law standard.

B. Arrest records

Access to law enforcement records is governed by the Kansas Open Records Act (KORA), K.S.A. 45-215 et seq. In general, arrest reports and mug shots may be withheld as criminal investigation records. However, other kinds of information related to a criminal offense are open, including jail rosters and police blotters. See Kan. Atty. Gen. Op. No. 87-25.

Under KORA, public records are defined as “any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency . . . .” K.S.A. 45-217(g)(1). A public agency is “the state or any political or taxing subdivision of the state or any office, officer, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.” K.S.A. 45-217(f)(1).

When recording information about reported criminal activity, law enforcement agencies use a Standard Arrest Report (SOR), a form that was designed by the Attorney General’s Office and the Kansas Bureau of Investigation. As has been explained by the Attorney General’s Office, the front page of the SOR contains: a description of the offense; the type of injury; a description of any property involved in the crime, and identification of the reporting officer. The back page of the SOR contains: a description of the offense; the number, employer's address, relationship to any suspect, and Social Security number, Social Security number, employer, work telephone number, date of birth, driver’s license number, Social Security number, employer, work telephone number, employer's address, relationship to any suspect, and the type of injury; a description of any property involved in the crime, and identification of the reporting officer. The back page of the SOR contains additional details about the offense, including how it was committed, and information about suspects and evidence. Kan. Atty. Gen. Op. No. 98-38. The front page of the SOR is considered generally open, but the back page is closed.

To the extent that limitations are imposed on access to the SOR, they are derived in part from two KORA provisions. One is K.S.A. 45-221(a)(10), which exempts criminal investigation records from disclosure, and the other is K.S.A. 45-221(a)(30), under which a public records custodian is not required to disclose information that “would constitute a clearly unwarranted invasion of personal privacy.” Because of these provisions, the front page of the SOR is closed to the extent that it includes information considered private, i.e. Social Security numbers and the identities of victims of certain sex crimes, and the back page is entirely exempt from disclosure as a record of a criminal investigation.

Information that would be invasive of personal privacy is defined as that which “would be highly offensive to a reasonable person, including information that may pose a risk to a person or property and is not of legitimate concern to the public.” K.S.A. 45-217(b).

According to KORA, criminal investigation records are “compiled in the process of preventing, detecting or investigating violations of criminal law.” K.S.A. 45–217(c). Mug shots may be regarded as criminal investigation records, and law enforcement agencies consequently are not required to disclose them. As the Attorney General’s Office has explained, “The photos of persons who have been arrested are compiled, generally in the form of a book, to aid in identification.” Kan. Atty. Gen. Op. No. 87-25.

When recording information about arrests, law enforcement agencies use a Standard Arrest Report form, which is treated as a criminal history record. Under K.S.A. 22-4707, a criminal history record is not open. However, information related to an arrest may be available under K.S.A. 22-4707, which says:

[A] criminal justice agency may disclose the status of a pending investigation of a named person, or the status of a pending proceeding in the criminal justice system, if the request for information is reasonably contemporaneous with the event to which the information relates and the disclosure is otherwise appropriate.

Information related to arrests also may be obtained from police blotters. The Kansas Supreme Court has characterized a police blotter as a record of “the names of persons arrested by police officers and the nature of the charge on which they are arrested and the date of arrest, amount of bond required and posted, and other information, . . . .” Hill v. Day, 215 P.2d 219, 221 (Kan. 1950). KORA specifies that open law enforcement records include “police blotter entries.” K.S.A. 45-217(c). KORA also specifies that, in addition to court records, open law enforcement records include “rosters of inmates of jails or other correctional or detention facilities or records pertaining to violations of any traffic law other than vehicular homicide as defined by” statute. K.S.A. 45–217(c).

Records exempt from disclosure are specified in K.S.A. 45-221. Even so, a public agency may exercise discretion to treat exempt records as open. Under K.S.A. 45-221, a public agency is not flatly prohibited from making a disclosure; rather it “shall not be required to disclose” records identified in the exemptions.

C. Dockets

Dockets are presumed to be open records in light of Kansas City Star Co. v. Fossey, 630 P.2d 1176 (Kan. 1981). The Kansas Supreme Court acknowledged “that access to court proceedings should be limited only in exceptional circumstances” and “that the reason for requiring all court proceedings to be open, except where extraordinary reasons for closure are present, [ ] is to enhance the public trust and confidence in the judicial process and to insulate the process against at-
tempts to use the courts as tools for persecution.” *Id.* at 1181. The Court embraced “a strong presumption in favor of open judicial proceedings and free access to records in a criminal case.” *Id.* at 1182, quoting Fair Trial and Free Press: Standard 8-3.2 of the American Bar Association’s Standing Committee on Association Standards for Criminal Justice (August, 1978).

Also noteworthy is the state Legislature’s codification of a requirement that state courts conduct a hearing before they seal records or close a proceeding. K.S.A. 60-2617. See III. Access to criminal proceedings/E. Appellate proceedings, supra. In addition, the Kansas Judicial Branch has shown its commitment to openness by publicizing a comment by a former chief justice of the Supreme Court:

“Sunshine is the strongest antiseptic—its rays may penetrate areas previously closed . . . . This is not to say that all documents in public offices are open to inspection; only those by law to be kept and maintained must be made available. The latter, however, must be open for inspection under penalty of law.”

– Former Chief Justice Robert H. Miller,

*State ex rel Stephan v. Harder,*


Dockets and other records are available directly from clerks of Kansas courts. Contact information for the courts is available on the Kansas Judicial Branch’s website. See District Court Contacts, http://www.kscourts.org/kansas-courts/general-information/contacts.asp, and Appellate Court Contacts, http://www.kscourts.org/kansas-courts/general-information/appellate-court-contacts.asp.

The Kansas Judicial Branch is developing a system for electronic filing of court records. As the Judicial Branch has explained, “E-filing will move the judiciary from a system based on paper documents to one utilizing electronic documents. The move from hard copy to e-filing will save both time and money. The statewide program will be put into service as funding is available.” Kansas Judicial Branch, Kansas Electronic Filing, http://www.kscourts.org/Kansas-Courts/E-filing/default.asp.


**D. Warrants, wiretaps and related materials**

A Kansas statute criminalizes unauthorized disclosures of arrest and search warrants before they are executed. K.S.A. 21-5906 (formerly K.S.A. 21-3827). For years, even after warrants were executed and became public, Kansas statutes imposed exceptional restrictions on access to the affidavits that established probable cause for the warrants. One statute, K.S.A. 22-2302, presumed closure of affidavits pertaining to arrests, and another, K.S.A. 22-2502, imposed the same restriction on affidavits related to searches.

In 2014, however, by a nearly unanimous vote, the Kansas Legislature amended the two statutes to presume openness rather than closure of affidavits.

The catalyst for the amendments was publicity about an aggressive search in 2012 by a sheriff’s deputies of a Kansas couple’s home. The search yielded no evidence of a crime. Afterward, the couple complained that they and their young children had been held at gunpoint and severely traumatized. To learn the reason for the search, the couple requested the probable cause affidavit that had been filed in support of the search. However, their request was denied. Intense media coverage ensued, followed by legislative action to make probable cause affidavits accessible to the public For accounts of the controversy, see *Documents: Evidence flimsy in Leawood drug raid,* KCTV-5/Associated Press (May 06, 2013), and *Four Kansas honored for efforts on open government,* Kansas Press Association (July 26, 2014).

As amended, the statutes regarding an affidavit for an arrest or search, require that, after authorities execute a warrant, the supporting affidavit must be made available to “any person, when requested.” K.S.A. 22-2302(c)(1)(B) and 22-2502(e)(1)(B). However, an affidavit is not automatically produced immediately upon request. The statutes include a procedure under which the clerk of court receives the request for the affidavit and then notifies the judge, the prosecutor and defendant or defense attorney of the request. After receiving notice, the prosecutor and the defense review the requested affidavit and may ask a judge to seal or release it with redactions. A prosecutor and defendant or defense attorney who proposes to restrict access to the affidavit must provide “the reasons supporting” redaction or sealing. K.S.A. 22-2302(c)(3)(A) and (B); 22-2502(e)(3)(A) and (B). The statutes allow up to 10 days for a response to the request for the affidavit.

The judge may order redaction or sealing if disclosure of the affidavit “would” cause any of nine harms listed in the statutes, K.S.A. 22-2302(4) and K.S.A. 22-2502(4). The harms range from jeopardy to the safety of a crime victim or a witness to revelation of a Social Security number or other such personal information.

The statutes as amended became effective July 1, 2014. Access to affidavits issued before that date may be requested under a provision of the Kansas Open Records Act that allows, but does not require, non-disclosure of a criminal investigation record. K.S.A. 45-221(a)(10). Under this provision, a judge may order disclosure of an affidavit issued before July 1, 2014, if doing so would serve the public interest and under certain other conditions.

Before the statutory amendments that presume openness of arrest and search affidavits, Kanas was considered to be “out of step with most other states in keeping probable cause affidavits... under seal even after a case has gone to trial.” Steve Painter, *Opening Arrest Records Splits Prosecutors, Media,* Wichita Eagle, Feb. 8, 2006. An editor of the Wichita
Eagle said that criminal proceedings “should not be conducted behind a curtain. When they are, citizens are denied a critical opportunity to assess the effectiveness of the criminal justice system.” Id.

Apart from statutes, a federal district court in Kansas in 1992 adopted a position taken in the Fourth Circuit that access to warrant papers may be sought as a matter, not of First Amendment right, but rather of common law. The Kansas court declined to grant access under the common law because of the “sensitive nature of the information contained” in affidavits, the fact that a criminal investigation was ongoing, and a need to protect the identities and the “privacy interests and safety” of persons mentioned in the affidavits. In re Flower Aviation of Kan., Inc., 789 F. Supp. 366, 368 (D. Kan. 1992). The Fourth Circuit case adopted in by the Kansas court said that a judge must consider “all of the relevant facts and circumstances” in deciding whether to file warrant papers under seal or determining that secrecy is not justified. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989).

Kansas law also has maintained secrecy of procedures related to wiretapping. Disclosures outside of law enforcement about wiretaps, and apart from court proceedings, are proscribed under K.S.A. 22-2515 and K.S.A. 22-2516.

E. Discovery materials

In 1984, the U.S. Supreme Court considered whether a newspaper, while defending itself against civil claims for libel and invasion of privacy, could publicize information it sought from the plaintiff through discovery proceedings. The Court held that, in this circumstance, a judge could impose a protective order against the newspaper. The Court said that “pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice.” Seattle Times Company v. Rhinehart, 467 U.S. 20, 33 (1984).

Kansas appellate courts have not had occasion to apply the U.S. Supreme Court’s ruling in Seattle Times Company v. Rhinehart, 467 U.S. 20 (1984) that discovery materials are not open. However, the issue has received attention in federal courts with jurisdiction in Kansas. In U.S. v. Gonzales, 150 F.3d 1246 (N.M.,1998), the Tenth Circuit Court of Appeals denied a newspaper’s request for access to transcripts and materials, saying “Discovery proceedings are fundamentally different from other proceedings to which courts have recognized a First Amendment right of access.” Id. at 1260. In this case, 23 persons had been indicted by a grand jury in New Mexico for drug distribution, murder and other offenses. In denying the newspaper’s request for access to records, the Tenth Circuit observed that, “in many contexts, courts have rejected a constitutional right of access” to such documents as presentence reports; pre-indictment search warrant affidavits; documents considered by the court in ruling on civil discovery motions, and evidence ruled inadmissible by the court in suppression hearings. Id. at 1261. The Tenth Circuit reasoned that such materials may be withheld because of the need to maintain “effective, efficient, and fair procedures.” Id.

One issue addressed by Kansas state courts is whether a plaintiff may compel disclosure of a coroner’s records. In Burroughs v. Thomas, 937 P.2d 12 (Kan. App. 1997), the court considered whether a husband could gain access to records of an autopsy performed on his decedent wife. The coroner who had performed the autopsy claimed that the records were exempt from disclosure. However, the court’s ruling included findings that the records were subject neither to an exemption for medical records nor to an exemption for investigative materials that the coroner had gathered before issuing a final, official report. The court said “no exemption exists for work papers once a report becomes a public record.” Id. at 15.

F. Pretrial motions and records

As noted in I. Introduction: Access rights in the jurisdiction/E. Procedural prerequisites to closure, supra, the Kansas Supreme Court has adopted a presumption of openness that applies to pretrial matters. The Court’s position is that:

“Before pretrial proceedings can be closed or any record sealed, the…moving party must establish that: (1) a clear and present danger to the fairness of the trial would exist if the information were publicly disclosed, and (2) the prejudicial effect of such information on the fairness of the trial cannot be avoided by reasonable alternative means….”


G. Trial records


H. Post-trial records


However, the presumption may be overcome by specific statutory exemptions, such as K.S.A. 22–3711, which exempts various kinds of correctional documents from disclosure, including records of “supervision history” of inmates. The Act provides that:

The presentence report, the preparole report, the pre-postrelease supervision report and the supervision
history, obtained in the discharge of official duty by any member or employee of the Kansas parole prisoner review board or any other employee of the department of corrections, shall be privileged and shall not be disclosed directly or indirectly to anyone other than the parole prisoner review board, the judge, the attorney general or others entitled to receive the information, except that the parole board, secretary of corrections or court may permit the inspection of the report or parts of it by the defendant, inmate, defendant's or inmate's attorney or other person having a proper interest in it, whenever the best interest or welfare of a particular defendant or inmate makes the action desirable or helpful.

In Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons, 50 P.3d 66 (Kan., 2002), the scope of K.S.A. 22-3711 was at issue. In Simmons, the newspaper requested records that included:

1. documents which identify by name all inmates, parolees and/or others supervised by the Department of Corrections who have been charged with murder or manslaughter during 1996, 1997, 1998, and 1999;
2. documents containing details regarding the crimes of which these individuals have been accused;
3. minutes of the meetings of any serious incident review board in which the crimes or alleged crimes of these individuals are discussed; and,
4. notes, decisions, reports, and/or documents reflecting decisions or actions taken by any of the serious incident review boards which have considered the above-referenced crimes and parolees.

Id. at 79.

The Department of Corrections claimed that some of the requested records were exempt from disclosure, and the newspaper filed a mandamus action to compel the Secretary of Corrections to provide access to them. The Supreme Court considered the extent to which the exemption, in K.S.A. 22-3711, for records of “supervision history” was in conflict with a disclosure provision in the Kansas Open Records Act (KORA), K.S.A. 45-221(a)(29), which mandates that a releasee’s “name; photograph and other identifying information; sentence data; parole eligibility date; custody or supervision level; disciplinary record; supervision violations; conditions of supervision ...; location of facility where incarcerated or location of parole office maintaining supervision and address ... shall be subject to disclosure.”

Simmons at 83.

The Court found that the KORA disclosure provision, K.S.A. 45-221(1)(29), was not in conflict with the exemption for correctional records in K.S.A. 22-3711. The Court said the exemption “restricts disclosure of the supervising parole officer’s personal observations, sensitive personal information about the offender and third parties, contacts, conversations, observations, investigations, and interventions concerning a particular offender.” Id. Also exempt is “information concerning parole requirements for mental health or substance abuse counseling is not subject to disclosure. Id. However, a record of “pending criminal charges filed against a supervised individual is subject to disclosure.” Id.

The Court also considered the scope of a KORA provision that exempts public agencies from disclosing:

Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

K.S.A. 45-221(a)(20).

The Court said that the exemption did not apply to the newspaper’s request for “access to minutes of the meetings of serious incident review boards discussing the crimes or alleged crimes of supervised individuals and records reflecting decisions or actions taken by any of the serious incident review boards in regard to murders and manslaughters committed by parolees from 1996 through 1999.” Simmons at 83. The Court explained that the newspaper specifically had not sought records of proposed policies or actions, which were exempt under K.S.A. 45-221(a)(20), but rather had requested “records reflecting decisions or actions already taken by the serious incident review boards.” Id. The Court stressed that the exemption “does not extend to records on policies currently in place or actions already taken.” Id.

I. Appellate records


Appellate cases and opinions are available through the Kansas Judicial Branch website. See Cases and Opinions, http://www.kscourts.org/Cases-and-Opinions/default.asp.

J. Other criminal court records issues

Procedures for gaining access to court records are based on the Kansas Open Records Act (KORA), K.S.A. 45-215 et seq. Under the procedures, persons who request records may be required to submit the request in writing. If the request is made by telephone, the requester may be asked for a fax number or address where the request form can be sent.

The requested records should be produced within three days of the request, or a notice of delay or denial should be provided to the requesting party. . . .
If the court has a public access terminal, the requesting party should be encouraged to use it to obtain the information needed. If there is not a public access terminal, but the court’s indexes are readily accessible, requesting parties are encouraged to make use of those to obtain information.


Under KORA, records that need not be disclosed include those that: are privileged under the rules of evidence; would reveal the identity of any undercover agent or any informant reporting a specific violation of law; are about criminal investigations, although a court may order disclosure if it would serve the public interest and meet certain other conditions; are software programs for electronic data processing, although a registry must be available about the nature of computerized information; are the work product of an attorney; identify an inmate of a correctional inmate, with certain exceptions and that may be an invasion of personal privacy if disclosed. *See generally* K.S.A. 45-221. KORA also includes an exemption for records that are protected from disclosure by other state statutes, federal law, or rule of the Kansas Supreme Court. K.S.A. 45-221(a)(1).

If records are in audio/visual form, a person may claim a right to inspect them under KORA. K.S.A. 218(a). However, KORA does not require officials to make copies of “radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices,” unless the materials were shown publicly and are not subject to copyright protection. K.S.A. 45-219(a).

Regarding electronic access to records, *see IV. Access to criminal court records/C. Dockets, supra.*

**V. Access to civil proceedings**

**A. In general**

Since the U.S. Supreme Court recognized a presumption of openness for criminal trials in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the presumption has applied in civil proceedings as well. Examples include *Publificer Indus., Inc. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984) and *Westmoreland v. CBS*, 752 F.2d 16 (2nd Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 F.2d 337 (Cal. 1999), and *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988).

Kansas courts have not had occasion to rule specifically that the presumption of openness established in a criminal context, in *Kansas City Star Co. v. Fossey*, 630 P.2d 1176, 1182 (Kan. 1981), also applies to civil proceedings. However, the Kansas Judicial Branch maintains a policy of openness that applies to civil, as well as criminal, proceedings. *See, for example, A Guide to Judicial Branch Open Records Requests*, http://www.kscourts.org/appellate-clerk/general/open-records-act/default.asp.

Although Kansas courts have focused on openness in criminal cases, a federal court in the state has ruled in favor of open civil proceedings. A defendant in *Mike v. Dymon, Inc.*, No. 95-2405-EEO, 1997 WL 38111 (D. Kan. 1997), allegedly breached an employment contract by making an unauthorized disclosure about a business. The defendant, without objection from the plaintiff, asked that the courtroom proceedings “be closed to unauthorized personnel during presentation or discussion of ‘competitive confidential’ or ‘confidential’ information.” *Dymon*, 1997 WL 38111, at *1. In rejecting the request for closure, the judge recognized “that members of the public possess both a common law and First Amendment right of access to civil trials.” *Id.*, citing *Publificer Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-71 (3rd Cir. 1984) The judge quoted *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992), saying: “What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.”

**B. Pre-trial proceedings**

Kansas rules on civil procedure do not specify that proceedings other than trials must be open. To the extent that the rules address the issue of accessibility apart from trials, they only say that “[a]ll other acts or proceedings, including the entry of a ruling or judgment, may be done or conducted by a judge or judge pro tem in chambers, without the attendance of the clerk or others.” K.S.A. 60-104.

As for depositions, the rules, in K.S.A. 60-230(h), limit attendance to the “officer before whom the deposition is being taken,” along with the deponent, the parties and their attorneys, and the attorneys’ paralegals or legal assistants, and the person recording the deposition.

**C. Trials**

Federal trial are open under procedural rules. *See Fed. R. Civ. Proc. 77(b)*, which says trials “on the merits must be conducted in open court and, so far as convenient, in a regular courtroom.” Also, *Fed. R. Civ. Proc. 43(a)* says testimony by witnesses “must be taken in open court,” unless an exception is required under other rules.

Kansas civil procedure provides that “[a]ll trials on the merits must be conducted in open court.” K.S.A. 60-104. Judges must conduct trials “in a regular courtroom” or may use alternative, “suitable facilities.” K.S.A. 60-104 and K.S.A. 20-347.

**D. Post-trial proceedings**

Openness of post-trial proceedings is presumed. *See V. Access to civil proceedings/A. In general, supra.*
E. Appellate proceedings
Openness of post-trial proceedings is presumed. See V. Access to civil proceedings/A. In general, supra.

VI. Access to civil records
A. In general
Rulings by the Kansas Supreme Court have favored openness of court records generally. See I. Introduction: Access rights in the jurisdiction/B. The common-law presumption of access/D. Statutes and court rules, supra, and IV. Access to criminal court records/G. Trial Records, supra.

Moreover, a presumption of openness applies to court records, regardless of whether they are criminal or civil, under the Kansas Open Records Act, 45-215 et seq., as implemented by the Kansas Judicial Branch. See Kansas Judicial Branch, Administrative Order No. 156, Administration of the Kansas Open Records Act, http://www.kscourts.org/rules-procedures-forms/open-records-procedures/156.asp.

Also, one Kansas statute allows a court to seal or redact records only after a hearing held at the best of the judge or the parties in a case. The court may restrict access only after finding that a safety, property, or privacy interest “outweighs the strong public interest” in having access to information. K.S.A. 60-2617(d). See III. Access to criminal proceedings/E. Appellate proceedings, supra.

The Kansas Judicial Branch website includes links to court records in civil, as well as criminal, cases. The records are accessible under these headings: Recent and Published Opinions, Appellate Case Inquiry System, Search District Court Records by County ( Fee $), Supreme Court Docket and Court of Appeals Docket. See Kansa Judicial Branch, Featured Links, http://www.kscourts.org/.

B. Dockets
Dockets are among records presumed to be open in Kansas courts. See VI. Access to civil records/A. In general, supra.

C. Pretrial motions and records
The Kansas Judicial Branch reports that court case files are among commonly requested records, and Judicial Branch policy presumes openness of the file contents, including transcripts. See A Guide to Judicial Branch Open Records Requests, http://www.kscourts.org/appellate-clerk/general/open-records-act/default.asp; also see VI. Access to civil proceedings/A. In general, supra.

D. Dispositive motions and records
Dispositive motions and records are presumed open in Kansas courts. See VI. Access to civil records/A. In general, supra.

E. Discovery materials and motions
Kansas appellate courts have not had occasion to rule, on the basis of Seattle Times Company v. Rhinehart, 467 U.S. 20 (1984), that pretrial discovery documents are not open. Regarding Rhinehart, see IV. Access to criminal court records/E. Discovery, supra. Even so, in Kansas courts, discovery documents are subject to a wide range of protections. In a defamation case brought by a man against his former wife, a Court of Appeals judge observed that discovery documents include “confidential or otherwise sensitive material, such as medical records, tax and financial information, or proprietary trade or research data.” Purdam v. Purdam, 48 Kan. App. 2d 938, 746 (2013), Hon. G. Gordon Atcheson, dissenting and citing K.S.A. 2012 Supp. 60–226(c). The Kansas Code of Civil Procedure, the judge said, “recognizes multiple ways of protecting that sort of documentary evidence through protective orders or other judicial control.” Id.

The accessibility of discovery documents has been addressed by federal courts in Kansas. For example, in a dispute over free speech rights of police in Topeka, Kansas, a federal magistrate judge considered whether plaintiffs could release a defendant police chief’s deposition to the public. The judge noted that, under a court rule, a deposition “shall not be filed with the clerk unless ordered by the court.” Eaton v. Harsha, 2006 WL 5316792, at *2 (D. Kan. 2006) The judge said “depositions (as well as other pre-trial discovery materials) are not public components of civil litigation until filed under court order or introduced into evidence,” but “such materials may be disseminated to third parties unless sealed by a valid protective order.” Id. Once a protective order is issued, it “prohibits the party from disseminating information obtained through pre-trial discovery unless the information is ‘gained through means independent of the court’s processes.’” Id. (Related cases are Eaton v. Harsha, 2006 WL 963960 (D. Kan. 2006); Eaton v. Harsha, 2006 WL 3335791 (D. Kan. 2006), and Eaton v. Harsha, 505 F. Supp. 2d 948 (D. Kan. 2007))

In 2000, in a Kansas federal district court, a dispute arose over whether a litigant should be allowed to publicize videotaped depositions. The judge did not limit the plaintiff’s use of his own videotaped deposition but did limit his use of a defendant’s taped deposition.

The dispute began when a Kansas state court upheld an injunction that prevented a television broadcaster’s former employee and her husband from picketing or threatening to picket the broadcaster’s advertisers. Drake v. Benedek Broadcasting Corp., 983 P.2d 274 (Kan. App. 1999). The husband contested the outcome by claiming violation of his civil rights and filing suit in federal court against the broadcaster and others. Drake v. Benedek Broadcasting Corp., 2000 WL 528059 (D. Kan. 2000). When the plaintiff prepared to videotape a defendant’s deposition, the defendant submitted evidence indicating that the plaintiff planned to create and sell a documentary based on the litigation.

The judge then imposed conditions on the plaintiff’s videotaping of the defendant’s deposition, so that it would “be used solely for purposes of the lawsuit.” Drake v. Benedek Broadcasting Corp., 2000 WL 156825, at *2 (D. Kan. 2000), citing Paisley Park Enterprises, Inc. v. Uptown Productions, 54 F. Supp. 2d 347, 349-350 (S.D.N.Y.,1999), in which parties were ordered to select a neutral custodian to take possession of the original videotape and were prohibited from making copies.

When the plaintiff prepared to videotape his own deposition, the defendant asked the judge to limit use of the depo-
sition to purposes related to the litigation. The judge, howev-
er, denied the request, saying the plaintiff had “made it clear
that he is not concerned with protecting any privacy interests
he may have.” Drake v. Benedek Broadcasting Corp., 2000 WL

The U.S. Court of Appeals for the Tenth Circuit has rec-
ognized a litigant’s freedom to release discovery documents
but also a judge’s prerogative to prevent third-party access
to them. The court ruled against a newspaper that sought
access to discovery documents in a case that involved a hospi-
tal association and a state agency. Citing Seattle Times Co. v.
Rhinehart, the court said it “may be conceded that parties to
litigation have a constitutionally protected right to dissemi-
nate information obtained by them through the discovery
process absent a valid protective order. However, the court
said, it “does not follow that they can be compelled to dis-
seminate such information” to the media or others. Oklaho-
ma Hosp. As’n v. Oklahoma Publishing Co., 748 F.2d 1421,
1424 (10th Cir.1984), cert. denied, 473 U.S. 905 (1985).

F. Trial records

Trial records are presumed to be open in Kansas courts. See
VI. Access to civil records/A. In general, supra.

G. Settlement records

Kansas statutes include one that prescribes certain condi-
tions under which a court may seal or redact records. The
conditions include a finding that a safety, property, or pri-
vacy interest “outweighs the strong public interest” in having
access to information. K.S.A. 60-2617(d). See III. Access to
criminal proceedings/E. Appellate proceedings, supra.

In an interpretation of the Kansas Open Records Act, the
Kansas Attorney General has said that a settlement agree-
ment entered into by a city is a public record, and it can-
contractual provision attempts to close the conditions of the
settlement agreement, it “is void as against public policy.” Id.

H. Post-trial records

Post-trial records are presumed to be open in Kansas
courts. See VI. Access to civil records/A. In general, supra.

I. Appellate records

In Kansas courts, appellate records are presumed to be open.
See VI. Access to civil records/A. In general, supra.

J. Other civil court records issues

As noted in I. Introduction: Access rights in the jurisdic-
tion/D. statutes and court rules, supra, procedures for gain-
ing access to Kansas court records are based on the Kansas
Open Records Act (KORA), K.S.A. 45-215 et seq. If records
are in audio/visual form, a person may claim a right to in-
spect them under KORA. K.S.A. 218(a). However, KORA
does not require officials to make copies of such materials,
unless the materials were shown publicly and are not subject
to copyright protection. K.S.A. 45-219(a). See IV. Access to
criminal court records/J. Other criminal court records issues,
supra.

VII. Jury and grand jury access

A. Access to voir dire

In State v. Dixon, 112 P.3d 883 (Kan. 2005), cited in III.
Access to criminal proceedings/C. Criminal trials, supra, the
Kansas Supreme Court reaffirmed a presumption in favor
of access to court proceedings and approvingly cited Press
Enterprise I, 464 U.S. 501 (1984), which held that voir dire
is presumed to be open.

Note: State v. Dixon was disapproved on other grounds
by State v. Wright, 224 P.3d 1159 (Kan. 2010).

B. Anonymous juries

The Kansas Supreme Court has prescribed when a trial
judge may grant anonymity to jurors in criminal trials:

Empaneling an anonymous jury is viewed as a drastic
measure which should be undertaken only under certain
limited circumstances. The trial court must balance the
need to ensure juror safety against the defendant’s right to the preemption of innocence and the ability to conduct an effective voir dire. This balancing test is met where (1) there is strong reason to believe the jury needs protection and (2) the court takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure his or her fundamental rights are protected.


The Court noted that states generally follow federal prac-
tice in requiring that a jury be anonymous only for “a comp-
pelling reason.” Id. The court said a finding that a jury needs
protection may be based on the following factors:

(1) the defendants’ involvement in organized crime; (2)
the defendants’ participation in a group with the capac-
ity to harm jurors; (3) the defendants’ past attempts to
interfere with the judicial process or witnesses; (4) the
potential that, if convicted, the defendants will suffer a
lengthy incarceration and substantial monetary penal-
ties; and, (5) extensive publicity that could enhance the
possibility that jurors’ names would become public and
expose them to intimidation and harassment.

Id., citations omitted

C. Jury records

As noted in VII. Jury and grand jury access/B. Anonymous
juries, supra, the Kansas Supreme Court has specified limited
circumstances in which jurors may be anonymous. See State
v. Brown, 118 P.3d 1273 (Kan. 2005). In Brown, the Court
approvingly cited State v. Tucker, 657 N.W.2d 374 (2003),
which said, “A jury is typically deemed ‘anonymous’ when
juror information is withheld from the public and the parties
themselves. [Citation omitted.]”

Regarding information about juries generally, the Court
has a rule that states: “A juror questionnaire is not a public
record under the Kansas Open Records Act.” See Kan. Sup.
K.S.A. 22-3012. Kansas appellate courts have not specifically addressed whether K.S.A. 22-3012 is intended to silence participants in proceedings of a Kansas grand jury generally are prohibited from making disclosures. They “may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury,” K.S.A. 22-3012. Kansas appellate courts have not specifically addressed whether K.S.A. 22-3012 is intended to silence participants in proceedings of a Kansas grand jury generally are prohibited from making disclosures. They “may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.”

Illegible text...
ports to their news agencies” in the vicinity of the grand jury on “any day in which it was in session.” Id. at *2.

After a session is completed, grand jurors may assert a First Amendment right to speak to the press. The same is true of petit jurors upon completion of a trial. The scope of their right to speak has received conflicting treatment by courts. In fact, however, petit jurors not uncommonly make headlines. See Nancy S. Marder, Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors, 82 Iowa L. Rev. 465 (1997) (which includes references to such other sources as Tim A. Baker, Note, Grand Jury Secrecy v. The First Amendment: A Case for Press Interviews of Grand Jurors, 23 Val. U. L. Rev. 559, 563 (1989)).

VIII. Proceedings involving minors
A. Delinquency

* * *

The Kansas juvenile code provides that, in general, “[a]ll hearings shall be open to the public . . . .” K.S.A. 38-2353(a). A hearing may be closed only if a judge determines that opening it “is not in the best interests of the victim or of any juvenile who at the time of the alleged offense was less than 16 years of age.” (Id.) The rule in favor of openness applies to “detention, first appearance, adjudicatory, sentencing and all other” juvenile hearings. Id.

In a 2008 case, the Kansas Supreme Court observed that the Legislature generally had “eliminated the presumption of confidentiality” for juvenile hearings, and also acknowledged various ways in which juvenile records have been open. In re L.M., 186 P.3d 164, 170 (Kan. 2008), citing K.S.A. 38-2353. The official file in a juvenile case is open, with an exception for juveniles under the age of fourteen, if a judge finds that closure is in their best interests. Id., citing K.S.A. 38-2309(b). Also, law enforcement records and municipal court records for juveniles age fourteen and over are open on the same terms as records for adults. Id., citing K.S.A. 38-2310(c). Confidentiality applies only to the law enforcement and municipal records of juveniles under the age of fourteen. Id., citing K.S.A. 38-2310(a).

The juvenile code makes clear that a judge may close a hearing only after he or she “determines” that an open hearing would not be in the best interest of a juvenile or victim who was under sixteen years of age at the time of the offense. K.S.A. 38-2353(a).

B. Dependency

Kansas statutes define a “child in need of care” as a person under 18 years of age who is “without adequate parental care, control or subsistence,” has been abused or abandoned or is otherwise at risk in specified ways. See K.S.A. 38-2202. The statutes provide for confidentiality of records related to a child in need of care. For example, in K.S.A. 38-2209, “pleadings, process, service of process, orders, writs and journal entries reflecting hearings held and judgments and decrees entered by the court” are contained in an “official file,” which is categorized as confidential. The statute requires that the official file “shall be kept separate from other records of the court.” Access to child-in-need-of-care files is limited to persons listed in K.S.A. 38-2211, although a court may authorize conditional access by “[a]ny other person.” According to K.S.A. 38-2212(b) and (c), officials involved in child-of-care cases may exchange information that is “reasonably necessary to carry out their lawful responsibilities, to maintain their personal safety and the personal safety of individuals in their care, or to educate, diagnose, treat, care for or protect a child alleged to be in need of care.” However, under K.S.A. 38-2212(d)(3):

Information from confidential reports or records of a child alleged or adjudicated to be a child in need of care may be disclosed to the public when:

(A) The individuals involved or their representatives have given express written consent; or

(B) the investigation of the abuse or neglect of the child or the filing of a petition alleging a child to be in need of care has become public knowledge, provided, however, that the agency shall limit disclosure to confirmation of procedural details relating to the handling of the case by professionals.

Also, K.S.A. 38-2212(c) provides that, after in camera inspection, a court may order disclosure of certain confidential records “pursuant to a determination that the disclosure is in the best interests of the child who is the subject of the reports or that the records are necessary for the proceedings of the court and otherwise admissible as evidence.”

In addition, K.S.A. 38-2212(f)(1) provides that, under certain conditions, if child abuse or neglect results in a child fatality or near fatality, child-in-need-of-care records become public.

In general, adjudicatory proceedings related to a child-of-care case are open. K.S.A. 38-2247 allows “attendance by any person unless the court determines that closed proceedings or the exclusion of that person would be in the best interests of the child or is necessary to protect the privacy rights of the parents.” K.S.A. 38-2247(a)(2) specifies that members of the news media who attend an adjudicatory proceeding must comply with Kansas Supreme Court Rule 1001 regarding use of cameras in courtrooms. See Kan. Sup. Ct. R. 1001, Media Coverage of Judicial Proceedings, http://www.kscourts.org/rules/Media_Coverage/Rule%201001.pdf.

However, under K.S.A. 38-2247(b), a proceeding that pertains specifically “to the disposition of a child adjudicated to be in need of care” must be closed except to “the parties, the guardian ad litem, interested parties and their attorneys, officers of the court, a court appointed special advocate and the custodian.” Additional persons may attend if a court determines that their presence during the proceeding “would be in the best interests of the child or the conduct of the proceedings.” K.S.A. 38-2247(b)(1).

C. Other proceedings involving minors

Under the Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 et seq., records of adoptions “shall not be
open to inspection or copy by persons other than the parties in interest and their attorneys and certain others, absent an order of the court. K.S.A. 59-2122(a). However, the Act sets forth a procedure for “genetic parents” to contact the adoptive parents through the state Department of Social and Rehabilitation Services. K.S.A. 59-2122(b).

Under the Kansas Parentage Act, K.S.A. 23-2201 et seq., court findings that form the basis for a new birth registration, as well as the original birth certificate, “shall be kept in a sealed and confidential file and be subject to inspection only in exceptional cases upon order of the court for good cause shown” or in connection with child support enforcement services. K.S.A. 23-2222(c).

Kansas law does not close records in divorce cases. As a state agency reports, “Divorce information is open to the public at the county district court level.” Kansas Department of Health and Environment, Divorce Certificates, http://www.kshs.org/rules/Media_Coverage/Rule%201001.pdf.

D. Prohibitions on photographing or identifying juveniles

Under Kansas Supreme Court Rule 1001(e)(7), a trial judge must prohibit photographing of a juvenile, as well as audio recording, unless the juvenile is being prosecuted as an adult in a criminal proceeding as authorized by K.S.A. 38-2347. However, even though the rule permits photographing of a juvenile who is tried as an adult, it allows a judge to issue a “directive to the contrary” Kan. Sup. Ct. R. 1001, Media Coverage of Judicial Proceedings, http://www.kscourts.org/rules/Media_Coverage/Rule%201001.pdf.

In a 2005 murder case in Douglas County, Kansas, a judge objected to coverage by a sketch artist. The judge ordered the Lawrence Journal-World newspaper not to publish the artist’s sketches of adult witnesses in a murder trial. The judge concluded that “courtroom rules limiting photography of certain witnesses also apply to drawings by sketch artists.” Eric Weslander, Judge bars sketches from publication, Lawrence Journal-World (June 17, 2005). The judge later reversed her order, allowing publication of the sketches of the adults, but she separately ordered the newspaper not to publish sketches of two young teenagers who testified in the case.

After filing a motion for reconsideration, which the judge denied, the World Company, publisher of the Journal-World, petitioned for mandamus in the Kansas Supreme Court. The World Company argued that the judge’s order was erroneous because the rules regarding cameras in the courtroom are silent about sketch artists. Memorandum in Support of Petition for Writ of Mandamus at 2, World Co. v. Martin, No. 05-94706-S (Kan. June 17, 2005).

The World Company also asserted that the judge’s order was a prior restraint and was imposed without a hearing as constitutionally required. The World Company further argued that there was no need for the order, because an artist’s sketch provides information to the public but yet is not sufficiently accurate to make witnesses identifiable and therefore does not jeopardize their privacy interests. The World Company moved for an expedited hearing, but was unsuccessful. The Court denied the World Company’s petition about two months after the trial had ended. Denial of Petition for Writ of Mandamus, World Co. v. Martin, No. 05-94706-S (Kan. Sept. 20, 2005); see also Lawrence Man Gets Life Term in Wife’s Murder, WIBW-TV (July 21, 2005).

E. Minor testimony

Kansas allows victims of crime under 13 years of age to testify in court via closed-circuit television or a video recording. K.S.A. 22-3434. To qualify a minor to give televised or video-recorded testimony, “The state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unavailable to testify.” K.S.A. 22-3434(b). When the child is before a camera giving testimony, no one may be present in the room except for the defendant’s attorneys, the prosecution, the equipment operators, and “any person whose presence would contribute to the welfare and well-being of the child.” K.S.A. 22-3434(c)(1).


IX. Interests often cited in opposing a presumption of access

A. Fair trial rights

In State v. Dixon, 112 P.3d 883 (Kan. 2005), the Kansas Supreme Court approved of a trial judge’s care in balancing interests before he decided to close court proceedings. Nevertheless, the Court found fault with the closure, because the judge failed to take into adequate account the defendant’s interests. The Court said that the closure “was inconsistent with the substantial right of [the defendant] to a public trial.” Id, at 910. The Court approvingly cited a statement by the U.S. Supreme Court in Waller v. Georgia, 467 U.S. 39, 45 (1984) that:

the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care.

Id., at 907.

For other references to Dixon, see III. Access to criminal proceedings/C. Criminal trials, and VII. Jury and grand jury access/A. Access to voir dire, supra.

Note: State v. Dixon was disapproved on other grounds by State v. Wright, 224 P.3d 1159 (Kan. 2010).
The Kansas Supreme Court has said the law was aimed at eliminating a common defense strategy of trying the complaining witness rather than the defendant. The result of the strategy was harassment and further humiliation of the victim as well as discouraging victims of rape from reporting the crimes to law enforcement authorities.

A Supreme Court rule, 7.043, on record-keeping by appellate courts says in section (a) that it is designed to limit identification of persons “to avoid unnecessary trauma and unwarranted stigma from publicity inherent in an appellate proceeding and to maintain statutory requirements of confidentiality.” Section (b) requires that a child not be fully
identified in cases brought under the codes for care of children or juveniles and in cases that involve adoption. Section (d) requires that a motion, brief, or opinion or order of the appellate court “refer to a juror or member of the venire by initials only, by juror number, or by given name and last initial.” Kan. Sup. Ct. R. 7.043, Reference to Certain Persons, http://www.kscourts.org/rules/Appellate_Rules/Rule%207.043.pdf, which appears in Rules Adopted by the Supreme Court/General and Administrative, http://www.kscourts.org/rules/Appellate_Court.asp.

Also, a Kansas Supreme Court Rule states that juror questionnaires are not a public record. See VII. Jury and grand jury access/C. Jury Records, supra.

X. Special Proceedings
A. Tribal courts in the jurisdiction

In Kansas, tribal courts are maintained by the Iowa Tribe of Kansas and Nebraska, the Kickapoo Tribe in Kansas, the Prairie Band Potawatomi Nation, and the Sac and Fox Nation of Missouri in Kansas and Nebraska. The Prairie Band Potawatomi Nation has made its Law and Order Code available online, and it includes the following provisions:

Section 2-2-13. Records

(D) All Court records shall be public records except as otherwise provided by law.

Section 2-2-14. Files.

(A) Except as otherwise provided by law, Court files are generally open to the public. Any person may inspect the records of a case and obtain copies of documents contained therein during normal business hours.


According to the administrative office of the Prairie Band Potawatomi Nation’s Judicial Council, the tribal court proceedings generally are open. Records and proceedings that may be closed include such matters as juvenile cases, children in need of care, adoption, and tribal enrollment or disenrollment, as well as domestic disputes at the request of a party. Also, records of employment dispute may be closed.

According to judicial administrators for the other Kansas tribes, their courts also generally are open with exceptions like those of the Prairie Band Potawatomi Nation.

Judicial administrators may be contacted through main tribal offices as follows:

Iowa Tribe of Kansas and Nebraska
3345 B Thrasher
White Cloud, KS 66094
Phone: 785-595-3258
Fax: 785-595-6610
Web: http://casinowhitecloud.org/iowatribe.html

Kickapoo Tribe in Kansas
828 K-20 HWY
Horton, KS 66439

Toll Free: (877) 864-2902
Phone: (785) 486-2662
Fax: (785) 486-3607
Web: http://ktik-nsn.gov/nation_tribal_district_court.htm

Prairie Band Potawatomi
Government Center
16281 Q Road
Mayetta KS 66509-8970
Phone: (785) 966-4000
Fax: 785/966-2242
Web: http://www.pbpindiantribe.com/

Sac and Fox
305 N Main
Reserve, KS 66434
Phone: 785-742-7471
Fax: 785-742-3785

B. Probate

The Kansas Probate Code, K.S.A. 59-101 et. seq., specifies that proceedings and records are open to the public, although with certain exceptions. K.S.A. 59-212(a)(1) provides that courts shall keep appearance dockets “under the name of the decedent, ward, conservatee, mentally ill person, or other person involved, all documents pertaining thereto and in the order filed.” Under K.S.A. 59-214, court records of probate proceedings are “open to inspection by all persons at all times.”

However, the Probate Code specifically closes proceedings involving adoption and the care and treatment of mentally ill persons. For these proceedings, courts must maintain “separate appearance dockets, not open to public inspection.” K.S.A. 59-212(a)(1). Under K.S.A. 59-214, the closure of proceedings that involve mentally ill persons is specifically to protect patients of mental health treatment facilities as defined in K.S.A. 65-5601. These facilities are: “a community mental health center, community service provider, psychiatric hospital and state institution for people with intellectual disability.” Id. Under limited circumstances, mental health patient records may be disclosed under K.S.A. 59-2979. For example, the head of a treatment facility may consent to disclosure if it “is necessary for the treatment of the patient.” Id.

C. Competency and commitment proceedings

Commitment proceedings of “mentally ill persons” or “persons with an alcohol or substance abuse problem” are governed by the “care and treatment” acts in Kansas. K.S.A. 59-2945; K.S.A. 59-29b45. Other than participants in the proceeding such as the judge, witnesses and counsel, hearings in such matters are closed to the extent desired by the parties. “All persons not necessary for the conduct of the proceedings may be excluded.” K.S.A. 59-2959(c); K.S.A. 59-2962; K.S.A. 59-2965(c); K.S.A. 59-29b59(c); K.S.A. 59-29b62; K.S.A. 59-29b65(c).
Records in care and treatment proceedings involving mentally ill persons are "not open to public inspection." K.S.A. 59-212(a)(1).

In Kansas, a person is "incompetent to stand trial" when he or she "is charged with a crime and, because of mental illness or defect is unable: (a) To understand the nature and purpose of the proceedings against him; or (b) to make or assist in making his defense." K.S.A. 22-3301(1). As competency in this context involves criminal proceedings, the public has access to the court file even when competency is at issue. However, "no statement made by the defendant in the course of any examination provided for by [law], whether or not the defendant consents to the examination, shall be admitted in evidence against the defendant in any criminal proceeding." K.S.A. 22-3302(3). Further, under certain circumstances, the evaluation and treatment are conducted as a care and treatment case for mentally ill persons and therefore subject to those confidentiality requirements. K.S.A. 22-3303(1) and (2). Likewise, the records in cases where persons subject to commitment for being "sexually violent predators" pursuant to K.S.A. 59-29a01 are open except when predators are subject to an involuntary commitment as mentally ill persons.

Records in guardianship and conservatorship actions pursuant to K.S.A. 59-3050 et seq. are also open to public inspection. K.S.A. 59-212(a)(1).

D. Immigration proceedings

In Kansas, immigration status may be a factor in whether one is eligible to receive a driver’s license (K.S.A. 8-237), be a lawful employee (K.S.A. 21-6509), be registered to vote or qualify to vote (K.S.A. 25-2309 and K.S.A. 8-1324), and pay college tuition and fees at the rate for residents of the state (76-731a).

In open court, issues frequently arise related to the immigration status of a participant in proceedings. Examples include: State v. Sarabia-Flores, 300 P.3d 644 (Kan. App. 2013), focusing on deportation due to a plea of guilty to drug charges; Fernandez v. McDonald’s, 292 P.3d 31; (Kan. 2013, addressing whether immigration status prevented receipt of workers’ compensation claim), and In re Link, 279 P.3d 720 (Kan. 2012), concerning disciplinary action against attorney who represented immigrants.

E. Attorney and judicial discipline

Kansas Supreme Court rules regarding attorney discipline provide that, when a complaint is made against an attorney, proceedings, reports, records of investigations and hearings are “private and shall not be divulged in whole or in part to the public.” However, the complaint can become public if a disciplinary committee reviews it and “finds by a majority vote that there is probable cause to believe there has been a violation of the Attorney’s Oath or the disciplinary rules of the Supreme Court.” See Kansas Judicial Branch, Rules Relating to Discipline of Attorneys, http://www.kscourts.org/rules/Rules-Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys &r2=296, Rule 210(c), http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys &r2=283, and Rule 222(d), http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys &r2=296.


F. Arbitration

Arbitration documents filed with a court would be subject to the Kansas Open Records Act, 45-215 et seq., which applies by authority of the Kansas Supreme Court. See Kansas Judicial Branch, Administrative Order No. 156, Administration of the Kansas Open Records Act, http://www.kscourts.org/rules-procedures-forms/open-records-procedures/156.asp.

Also, by statute, a court may seal or redact records only after a hearing and finding that a safety, property, or privacy interest “outweighs the strong public interest” in having access to information. K.S.A. 60-2617(d). See III. Access to criminal proceedings, E. Appellate proceedings, supra.

Arbitration proceedings themselves, however, may not be open. In Johns Const. Co., Inc. v. Unified School Dist. No. 210, Hugoton, 664 P.2d 821 (Kan. 1983), the Supreme Court considered whether the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq., applied to proceedings before an arbitration board. The proceedings concerned a contractual dispute related to the construction of a school building. The Court said KOMA did not apply, explaining that:

The Kansas Open Meetings Act...applies only to agencies of the state and political and taxing subdivisions thereof, receiving or expending and supported in whole or in part by public funds. The arbitration board in this case was created by a contract entered into between the school district and a private contractor. The arbitration board was not a public agency as contemplated by the statute, and, hence, was not subject to the provisions of the Kansas Open Meetings Act.

Johns, at 823.

In addition, the Kansas Attorney General has opined that a confidentiality provision in the Dispute Resolution Act, K.S.A. 5-501 et seq., applies to court-referred mediations, as well as to any mediation conducted by persons who are registered to do so in accordance with state law. See K.S.A.

G. False claims act proceedings

The Kansas False Claims Act (KFCA), K.S.A. 75-7501, et. seq., was crafted with language “largely drawn from § 3729 of the federal False Claims Act.” Report of the Judicial Council False Claims Act Advisory Committee on 2008 HB 2943, approved December 9, 2008, http://www.kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/Recent%20Reports/HB_2943_False_Claims_Act.pdf. However, the KFCA differs in key respects from the federal law. One noteworthy difference is that, unlike the federal law, the KFCA does not provide for individuals to bring their own cameras into a courtroom. The KFCA also does not provide for in camera filing of a complaint. Under the KFCA, the attorney general is authorized to investigate and bring a civil action in a district court against one accused of submitting a false claim. K.S.A. 75-7504 and K.S.A. 75-7510. See also Daniel E. Lawrence and Stephen E. Robison, Introducing the Kansas False Claims Act: A Primer, 79 J. Kan. B. Ass’n 24 (October 2010).

XI. Cameras and other technology in the courtroom

A. Authorization

Media coverage of Kansas judicial proceedings is addressed by Kansas Supreme Court Rule 1001. A preface states that the rule applies to “various electronic devices including phones, tablets, and other wireless communication devices” in courtrooms. The preface includes an acknowledgement that “such electronic devices have become a necessary tool for court observers, journalists, and participants.” According to the preface, courts “should champion the enhanced access and the transparency made possible by use of these devices.” At the same time, however, the preface states that courts must take care to protect “the integrity of proceedings within the courtroom.” Kan. Sup. Ct. R. 1001, Media Coverage of Judicial Proceedings, http://www.kscourts.org/rules/Media_Coverage/Rule%201001.pdf.

Cameras have been allowed in Kansas courtrooms since 1981. Eric Weslander, “48 Hours” Sets Up for Murray Trial, Lawrence Journal-World, February 16, 2005.

B. Circumstances where cameras are permitted

Kansas Supreme Court Rule 1001 applies to all types of judicial proceedings, and it prohibits use of laptops, cell phones and other electronic devices unless permitted by the presiding judge or justice. Rule 1001(e) specifies that the judge or justice may permit the “news and educational media and others” to use electronic devices. The permissible users are individuals “such as a publisher, editor, reporter, or other person employed by a newspaper, magazine, news wire service, television station, or radio station who gathers, receives, or processes information for communication to the public, or an online journal in the regular business of newsgathering and disseminating news or information to the public.” Those who want to use a device “must request specific permission in advance,” if they want “to record and transmit public proceedings, including real-time coverage, in Kansas courts.” In section (e)(2), the rule states that one who plans to request permission “to bring cameras, recording equipment, or other electronic communication devices into the courtroom” is required to give a week’s notice, although a judge may waive the requirement “for good cause.” According to section (e)(2), when individuals receive permission to use electronic devices, they may record video or audio, take photographs or otherwise engage in electronic communications “only for the purpose of education or news dissemination.” Kan. Sup. Ct. R. 1001, Media Coverage of Judicial Proceedings, http://www.kscourts.org/rules/Media_Coverage/Rule%201001.pdf.

C. Limitations on use of footage

Kansas Supreme Court Rule 1001 does not impose particular limits on use of electronic devices to video-record or photograph evidentiary exhibits, although a judge has discretion to prescribe limits. Under section (e)(3), the rule makes clear that the judge has “power, authority, or responsibility to control the proceedings.

The rule includes restrictions on where devices may be used in a courtroom. According to section (e)(13), audio-visual equipment and operators “ordinarily should be restricted to areas open to the public.” They must stay within an area authorized by the judge and “may not move about the courtroom for picture-taking purposes during the court proceeding.”

In addition, section (e)(4) states: “Audio pickup and audio recording of a conference between an attorney and client, or among cocounsel, counsel and opposing counsel, or among attorneys and the judge are prohibited regardless of where conducted.” However, the rule does not prohibit photographing of such a conference. Section (e)(5) prohibits “[f]ocusing on and/or photographing materials on counsel tables or in designated areas.”

Section (e)(12) applies to pool coverage of court proceedings. The rule states that: “When more than one television station, still photographer, or audio recorder desires to cover a court proceeding,” a court-appointed coordinator will designate a pool photographer and audio recorder. In case of a dispute about the designation and operation of a pool, “no audio or visual equipment will be permitted at the proceeding.” A representative of the pool is to receive requests for copies of audio recordings, video, or photographs and to supply copies to the media at no more than actual cost. Participation in a pool is not required of individuals “who provide text accounts via approved electronic devices.”

Various provisions of the rule apply to electronic devices that can be used to take photographs or audio- or video-record witnesses or other participants in proceedings. Section (e)(3) provides that a judge’s “authority to disallow possession of electronic devices at a proceeding or during the testimony of a particular witness extends to any person” who is subject to the rule.
Section (e)(6) Prohibits photographing of jurors. The rule states that: “In a courtroom in which photography is impossible without including the jury as part of the unavoidable background, photography is permitted as long as no close-ups identify individual jurors.”

Under section (e)(7), a trial judge “must prohibit the audio recording and photographing of a participant in a court proceeding if the participant so requests and (a) the participant is a victim or witness of a crime, a police informant, an undercover agent, or a relocated witness or juvenile, or (b) the hearing is an evidentiary suppression hearing, a divorce proceeding, or a case involving trade secrets. Subject to a court directive to the contrary, the news media may record and photograph a juvenile who is being prosecuted as an adult in a criminal proceeding as authorized by K.S.A. 38-2347.”

Section (e)(9) prohibits photographing or any recording of a criminal defendant who is in restraints while being escorted to or from a court proceeding.

In addition, section (e)(9) imposes some limits on use of electronic devices outside of the courtroom. The rule prohibits recording of an interview for electronic transmission, including broadcast, “in a hallway immediately adjacent to a courtroom entrance if a passageway is blocked or a judicial proceeding is disturbed thereby.” The rule also prohibits taking photographs “or other recording through a window or open door of a courtroom.” Kan. Sup. Ct. R. 1001, Media Coverage of Judicial Proceedings, http://www.kscourts.org/rules/Media_Coverage/Rule%201001.pdf.

D. Still cameras


E. Webcasting

Although Kansas Supreme Court Rule 1001 on media coverage of court proceedings does not mention Webcasting specifically, a judge may allow it the same as television broadcasting. Oral arguments before the Kansas Supreme Court are streamed in real time. Kansas Judicial Branch, Supreme Court Goes Live on Internet, August 21, 2012.

Webcasting of at least two trials had been allowed by Kansas District Court judges as of October 2013, according to Ron Keeover, former information-education officer for the Kansas Judicial Branch. One trial was for a defendant charged with murder and arson in Kingman County, and the other was a murder case in Barton County. (News reports available online about the two cases include these, respectively: Hurst Laviana, Brett Seacat sentenced to life for wife’s murder, The Wichita Eagle, August 5, 2013, http://www.kansas.com/2013/08/05/2925655/brett-seacat-sentenced-to-life.html, and Deb Farris, Adam Longoria found guilty of capital murder, KAKE-TV, April 6, 2012, http://www.kake.com/home/headlines/Closing_Arguments_Planned_In_Longoria_Murder_Trial_146415695.html.) Regarding use of electronic devices generally, see Kan. Sup. Ct. R. 1001, Media Coverage of Judicial Proceedings, http://www.kscourts.org/rules/Media_Coverage/Rule%201001.pdf.

F. Liveblogging and Twittering


XII. Restrictions on participants in litigation

A. Media standing to challenge third-party gag orders

In 1998, a U.S. District Judge in Kansas analyzed the conditions under which the media may intervene in federal court. The media sought to object to a gag order that he had issued against trial participants, and the judge acknowledged that the media had a right to intervene under certain conditions. Koch v. Koch Industries, Inc., 6 F. Supp. 2d 1185, 1188 (D. Kan. 1998), aff’d, 203 F.3d 1202 (10th Cir. 2000). He said that, in challenging a gag order, the media “must allege an injury in fact—that the court’s order impeded their ability to gather news and that impedment is within the zone of interest sought to be protected by the first amendment.” Id. at 1190, quoting Journal Publ’g Co. v. Mechem, 801 F.2d 1233, 1235 (10th Cir. 1986). In addition, he indicated that the media’s standing to challenge a gag order banning advertising by parties to the case would depend on the ban’s impact on their financial interest.

The judge emphasized First Amendment protection for press freedom, saying:

[An]y inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint. If a court order burdens constitutional rights and the action proscribed by the order presents no clear and imminent danger to the administration of justice, the order is constitutionally impermissible. A court may impose a prior restraint on the gathering of news about one of its trials only if the restraint is necessitated by a compelling governmental interest. Moreover, the court must narrowly tailor any prior restraint and must consider any reasonable alternatives to that restraint which have a lesser impact on first amendment rights. These requirements apply for criminal trials as well as civil trials.

Koch at 1188-89, citations omitted.
The media argued that the gag order impaired their First Amendment interest in gathering and reporting news and engaging in commercial speech and also prevented them from gaining revenue from advertising sales. The judge, however, ruled that the media did not have standing to intervene, although he made his decision only after balancing “the parties and public’s interest in a fair trial against the competing interest in freedom of speech.” Id. at 1189. He found that the media lacked standing, in part, because the parties to the litigation had requested the gag order and said they did not want to talk to reporters. The media has no standing to intervene, he concluded, if the affected parties are not willing to speak publicly and be sources of news. He also decided to dissolve his ban on advertising.

B. Gag orders on the press

The Kansas Supreme Court firmly declared its opposition to prior restraints against the media in a case that originated in 1993 in Atchison, Kansas. State v. Alston, 887 P.2d 681 (Kan. 1994), cited in I. Introduction: Access rights in the jurisdiction/E. Procedural prerequisites to closure, supra, and II. Procedure for asserting right of access to proceedings and records/D. Obtaining review of initial court decisions, supra.

A newspaper reporter was attending a pre-trial criminal hearing in a local courtroom. The hearing was open to the public, and the reporter’s presence was ordinary. Nothing portended the confrontation that was about to occur.

As the reporter watched, the judge considered a defense motion to suppress certain evidence. The defense attorney argued that the prosecution should be barred from using or discussing the defendant’s criminal record or outstanding arrest warrants. After granting the motion, the judge asked whether any other matter needed attention. The attorney then pointed out the presence of the reporter, who worked for the Atchison Daily Globe, and expressed concern that the newspaper might publish a report about the hearing. The judge immediately ordered the reporter to publish neither the defendant’s criminal history nor even the existence of the judge’s order itself.

The Globe, however, defied the order, publishing a report about what had happened in the courtroom. For its defiance of the gag order, the Globe received a contempt citation, but the newspaper successfully appealed. In Alston, the Court reversed the gag order and the contempt citation. The Supreme Court recognized that “those who see and hear what transpired in an open courtroom can report it with impunity,” and “once a public hearing has been held, what transpired could not be subject to prior restraint.” Id. at 688.

At the same time, the Supreme Court embraced a line of precedent that preserved the media’s defense against “transparently invalid” gag orders. Id. at 691, citing In re Providence Journal Co., 820 F.2d 1342, 1347-48 (1st Cir. 1986), modified on reh’g, 820 F.2d 1354 (1st Cir. 1987). The Globe was subject to the general rule that persons must obey a judicial order even if they believe it is unconstitutional. The Supreme Court said:

In this case, the . . . order was transparently unconstitutional. The trial court failed to make the requisite . . . findings. The [newspaper had based its news report on information that was available from] the court’s records and in open court prior to the gag order. The order was issued without a full and fair hearing with all the attendant procedural protection.

Alston at 690.

The court found that the Globe had disobeyed the gag order in good faith. According to the court, “only where timely access to an appellate court is not available can the newspaper publish and then challenge the constitutionality of the order in contempt proceedings.” Alston at 621.

C. Gag orders on participants


Rule 3.6(a) states:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.


Rule 3.8(f), in restricting comment by prosecutors, states: except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.


In a high-profile criminal case in 2011, a judge in Reno County, Kansas, prohibited ‘attorneys, ‘their respective agents and employees,’ law enforcement and the defendants from making extrajudicial statements that a ‘reasonable person’ should know would likely prejudice the cases against” two defendants. The judge said “attorneys in the case fol-
Billy-Craig-motion--gag-order--1.

Attorneys, staff, law enforcement and defendants were prohibited from making extrajudicial statements about:

• The reputation or criminal records of witnesses, or their expected testimony;
• Alleged criminal acts charged or uncharged;
• The possibility of a guilty plea;
• The existence of any statements by the defendants or witnesses;
• The result of any examination or test, or identity of any physical evidence to be presented;
• Any opinion on the guilt or innocence of the defendants; and
• Any information likely to be inadmissible at trial.

The order, however, allowed comments about the “general nature of the claim or defense” and public records, including the results of hearings or trials, the identity of investigators and arresting officers, and scheduling issues.” Id. The order was modeled after one issued in 2010 by a Barton County, Kansas, judge in a capital murder case. Id.

Gag orders against trial participants have received only passing attention from Kansas appellate courts. For example, in State ex rel. Tomanic v. Cahill, 567 P.2d 1329 (Kan. 1977), the Kansas Supreme Court, while upholding a trial court’s refusal to impose a gag order against the media, observed, without objection, that the trial court had imposed a gag on witnesses. Cahill involved an ouster of two members of a city utilities board on grounds that they had mishandled certain financial matters. The Court upheld the ouster and said that the media were “quite properly permitted to report proceedings which took place in open court. The need for the public to know what is going on in an ouster proceeding is substantial, and certainly outweighs the remote possibility of prejudice to parties in this civil proceeding.” Id. at 1336.

Federal courts have given significant attention to the standards under which gag orders appropriately may be issued against trial participants. In United States v. Walker, 90 F. Supp. 954 (D. Kan. 1995), a defendant had been charged with cocaine possession, and he requested an “order directing the United States Attorney, his assistants, law enforcement officers, and any other persons associated with the...case to refrain from making any extrajudicial statements about this case.” Id. at 956. The defendant said a gag was necessary, because publicity “indicating that he was the leader of the Topeka Black Gangster Disciples gang jeopardized his ability to obtain a fair trial.” Id. The judge denied the request, however, saying:

Though the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens or on the press, the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant’s right to a fair trial. This Court has stated that before a district court issues a blanket prior restraint, it must, inter alia, “explore whether other available remedies would effectively mitigate the prejudicial publicity,” and consider “the effectiveness of the order in question” to ensure an impartial jury.

Less restrictive alternatives to an injunction against speech include such possibilities as a change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors.

The same judge imposed a gag order with unusually broad scope against trial participants in a high-profile 1998 civil case. Koch v. Koch Industries, Inc., 6 F. Supp. 2d 1185 (D. Kan. 1998), aff’d, 203 F.3d 1202 (10th Cir. 2000), cited in XII. Restriction on participants in litigation/A. Media standing to challenge third-party gag orders, supra. As the time for trial drew near, the judge issued a gag order that: prevented any parties, or their agents or representatives, “from contacting or polling, for any purpose, any person listed as a prospective juror”; precluded “all parties, counsel and witnesses from making extrajudicial statements to the news media”; forbade any party, or any business, association, entity or commission controlled by a party, from advertising through newspapers, radio, or television in the seventeen counties within the court’s jurisdiction; and required prospective jurors to make “every effort” to avoid reading newspaper or magazine articles, listening to any radio programs, or viewing any television programs that could relate to the case. Id. at 1187.

The judge denied a motion by the media to intervene and object after he issued the gag order. Id. at 1189-90. Although he acknowledged that a judge should not impose a prior restraint on speech without first conducting a hearing, he characterized Koch as an “atypical” case. He said he had raised the subject of the gag order in open court during a status conference. Id. He further stated:

[All parties agreed that the court had provided the relief that they had requested. Lead counsel for both sides expressed great enthusiasm for the order entered by the court, as the news media had previously been playing one side off the other in an effort to pry information from the litigants or their counsel. In short, all litigants eschewed any desire to talk with the news media about this case.

Id. at 1190.

D. Interviewing judges

Kansas judges may agree to be interviewed about the judicial system. A procedure for requesting an interview with a district judge may be indicated in a court media advisory. See, for example, Douglas County District Court, Information Especially for the News Media, http://www.douglas-coun-
Appellate judges readily have participated in programs on courts and media. See, for example, a Kansas Press Association’s archived account of the November 9, 2012, *Montgomery Symposium*, http://kspress.com/397/montgomery-symposium. However, judges generally take a firm position that they must not comment on a pending case. They are bound by Kansas Rules Regarding to Judicial Conduct, which prohibit them from making comment that “might reasonably be expected to affect” the outcome of a pending proceeding “or impair its fairness.” The rules also prohibit judges from making “any nonpublic comment that might substantially interfere with a fair trial or hearing.” Court personnel under the judges’ control also are subject to the rules. Judges, however, are permitted to comment publicly in the course of performing their official duties, and they publicly may explain court procedures. See *Rules Regarding to Judicial Conduct /Kansas Canons of Judicial Conduct Rule 3(B) 9*, at: http://www.kscourts.org/pdf/Code%20of%20Judicial%20Conduct.pdf. 

**E. Restriction on interviews on courthouse grounds**

Kansas judges have not limited interviews on courthouse grounds, so far as can be determined. Judges, however, have been known to impose restrictions on interviews in hallways adjacent to courtrooms. Kansas Supreme Court Rule 1001 on media coverage of judicial proceedings specifically prohibits use of electronic equipment to record interviews in a location that would interfere with passage in and out of a courtroom or be a distraction to those inside. See XI. Cameras and other technology in the courtroom/C. Limitations on use of footage, supra. Regarding limitations on access to grant juries, see VII. Jury and grand jury access/F. Interviewing petit jurors and grand jurors, supra. See also Kan. Sup. Ct. R. 1001, *Media Coverage of Judicial Proceedings*, http://www.kscourts.org/rules/Media_Coverage/Rul%201001.pdf.

**XIII. Tips for covering courts in the jurisdiction**

A source of tips for covering Kansas courts is the Kansas Judicial Branch’s public information/education office. See XIII. Tips for covering courts in the jurisdiction/B. Contact information courts in the jurisdiction, infra.

**A. Structure of the court system**

Municipal court cases involve violations of city ordinances, mainly traffic and other minor offenses. 

District courts have general original jurisdiction over criminal cases, as well as civil cases, including divorce, probate and administration of estates, guardianships, conservatorships, care of the mentally ill, juvenile matters, and small claims. District courts also hear appeals from municipal courts. In addition, district courts review administrative actions as provided by law. The courts operate in 31 judicial districts in 105 counties. 

Appeals from district courts are heard by the Court of Appeals, except for cases that by law must be appealed directly to Supreme Court or that are reviewable in district court. The Court of Appeals has original jurisdiction in habeas corpus and reviews administrative actions as provided by law. Thirteen judges sit on the Court of Appeals. The Supreme Court hears appeals from district courts in capital cases and in cases in which a statute is declared unconstitutional. The Supreme Court takes cases transferred from the Court of Appeals, has discretion to review cases decided by the Court of Appeals, and also hears appeals from the Court of Appeals when a constitutional question arises for the first time as a result of its decision. The Supreme Court also has original jurisdiction in quo warranto, mandamus, and habeas corpus. 


**B. Contact information for courts in the jurisdictions**

A primary source of information about the state’s courts is: Education-Information Office

Kansas Judicial Center
301 W. 10th
Topeka, KS 66612
(785) 296-4872
Fax (785) 296-7076

An alternative contact is:

Office of Judicial Administration
Telephone: 785.296.2256
Fax: 785.296.7076
Email: info@kscourts.org
Web: http://www.kscourts.org/default.asp


**C. Obtaining transcripts**

Once transcripts are filed with an office of the clerk of district courts, copies should be made available pursuant to the Kansas Open Records Act, which restricts charges to a reasonable amount. The amount has been $25 per page. There is a provision for an hourly staff charge in instances requiring long periods of copying. The charge has been $12 per hour, the lowest salary of a court employee. See Kansas Judicial Branch, *A Guide to Judicial Branch Open Records Requests*, http://www.kscourts.org/rules-procedures-forms/open-records-procedures/explanatory-information.asp.

**D. Covering high-profile cases in the jurisdiction**

The Information-Education office of the Kansas Judicial Branch is a source of information and advice to media on high-profile case requirements as they develop. Procedures for
coverage of high-profile cases historically have been set up on an ad hoc basis, with no set protocol, according to Ron Keefover, former Kansas Judicial Branch information-education officer. See XIII. Tips for covering courts in the jurisdiction/B. Contact information for courts in the jurisdictions, supra.

E. Tips on decorum in courts within the jurisdiction

Under Kansas Supreme Court Rule 1001 on media coverage of court proceedings, judges are responsible for the “integrity” of proceedings, and they maintain control over all activities in the courtroom and to some extent outside of it. In sections (c)(1) and (2), the rule allows observers in the courtroom to possess laptops, cell phones and other devices, as long as they are turned off and put away out of sight. Possession of the devices is a qualified privilege, though. Under section (e)(3), a judge is authorized to disallow possession by any observer during a proceeding. Moreover, observers are prohibited from activating and using the devices unless specifically permitted by the judge under sections (e)(1) and (2). Kan. Sup. Ct. R. 1001, Media Coverage of Judicial Proceedings, http://www.kscourts.org/rules/Media_Coverage/Rule%201001.pdf. Section d(2) provides for confiscation of a device that is used in a courtroom without permission. For more information about Rule 1001, see XI. Cameras and other technology in the courtroom/A. Authorization, through F. Liveblogging and Twittering, supra.


F. Suggested resources on courts in the jurisdiction?

A primary source of information is the Kansas Judicial Branch website, http://www.kscourts.org/. The website includes the following resources:

2. You and the Courts of Kansas (an online pamphlet about the state’s court system), http://www.kscourts.org/kansas-courts/general-information/you-and-the-courts/default.asp
Notwithstanding the fact that almost every attorney gets a call from a reporter, there still is a feeling by many in the profession that dealing with members of the news media is not unlike snake-handling—that it is far safer to avoid them at all cost, lest they inflict the sting and venom that can be fatal to one’s career. A riddle puts it another way: What do flies and legal careers have in common? Answer: Both can be killed by newspapers.

The disconnect between the media and attorneys arises from the fear, if not actual disdain, of the media interview, that fateful day when the phone rings and it is a reporter asking about a case you are involved in. The first inclination used to be, and still is in many law offices, to grab a hard hat and run for the nearest bunker. But, times are changing, especially in light of the ever proliferation of “citizen journalists” and online news blogs. For there seems to be some recognition that not responding to the query may not be the answer; the reporter is going to write the story anyway. In point of fact, the response will be from someone who is available—most likely a party from the opposite of your case, someone with an ax to grind or a position to promote.

**First, A word (or two) about bloggers**

Everyone it seems, is blogging. And no two blogs are alike. But they present special peril for attorneys and cases, if not properly monitored and in some cases, answered.

Some blogs are posted by print, broadcast, or web journalists. They allow reporters to expand on stories and provide analysis. If you are the subject of a story by a reporter, you might be wise to ask if they plan to blog about the story as well, so you can at least be aware of how the story is handled there.

Often more challenging, are citizen blogs. These blogs are posted, not by trained journalists, but by everyday folks who may have an angle, an agenda, or just a fascination with a particular subject. The danger: they are usually not formally trained as journalists, may not be interested in “balance”, and may not even call you for comment or to verify facts. They are at liberty, in their view, to publish rumor, innuendo, and opinion.

You may or may not have a way to respond. Often bloggers provide contact info, and if you find yourself the subject of a blog, you can offer to clarify or provide information within the bounds of professional rules to the blogger via that route. Sometimes blogs only allow comments. That might, should you choose to do so, be your only way to refute or clarify a posting short of issuing a news release.

It’s best to keep it positive and not try to get in a “war of words” with bloggers. But it is important to know that while they may have a small audience, their reach can be broadened with posted links on social media sites and via e-mail. So a simple clarification or comment may be critical to you and your client.

If you are unable to respond, and perhaps even if you are, you might want to contact journalists you have worked with to ensure they are not relying on a blog you believe is inaccurate. A good reporter would make that call to you first, but don’t hesitate to be preemptive.

Blogs serve a useful purpose, but they are also a new and risky reality for many professions. Lawyers are of no exception.

**When a reporter calls**

When the reporter calls, there are a couple of possible reasons. First, and the easiest call, is when a reporter is simply looking for an expert to assist on a legal story or topic. Perhaps it’s a general story, or
perhaps it’s to analyze another case. Either way it’s a terrific opportunity to build relationships, and get your legal expertise in the public eye.

The second, more difficult call, is the one involving your client or your case. The news may not be good, but as a “counselor,” you owe it to your client to consider the importance of the public light they are cast in, and how it can impact management of your case.

Keep in mind, reporters are people too, and they value relationships as much as you do in your legal practice. Building good relationships can benefit both you and the reporter.

If you or your firm’s designated spokesperson refuse to offer the interviewer any information, even if only to describe the procedural posture of the case, your chances of appearing in a less than flattering light when the story hits the newspapers increases exponentially. A “no comment” often looks a great deal more damaging in print or on camera than a response, even when the response offers little information. If you make yourself available when the reporter first calls, you have a better than even chance of having your case or position presented in an accurate and informative manner. What’s more, that initial positive report many times will generate equally quality coverage by other media outlets that are inspired to do their own stories on the case.

There have been numerous guidelines for handling media interviews written over the years, sometimes containing conflicting advice (e.g. During a television interview, does one consistently look at the interviewer and avoid looking at the camera, or is it wise to look directly into the camera on occasion? Media relations experts have advised both ways.) Be that as it may, the fundamental decision to make in advance of the reporter’s call is who will speak for your office. Following is a checklist for dealing with the media interview:

**Checklist for dealing with the media interview**

1. Always take a minute to return media calls, or ask someone on your staff to do so, even if simply to say that you unfortunately are too busy to speak with the reporter at this time. (If possible, you can suggest an alternative contact person.) Respecting a reporter’s deadlines goes a long way toward fostering positive relationships with the media.

2. When speaking to the reporter, find out the following information:
   - The reporter’s name and affiliation;
   - The reason for the call and what issues will be discussed.

3. Determine if you are the right person to be interviewed. If you believe someone else is a better choice, let the reporter know.

4. Establish the ground rules for the interview and define the topic to be discussed in as much detail as possible.

5. Establish who the audience will be for this particular interview, and how the information will be used.

6. Determine exactly what the reporter needs from you before you proceed, and what else, besides your interview, will be incorporated into the finished product (news story or article.) Will you be quoted? Is the reporter simply seeking background information? Who else is being interviewed? Will this be a feature, or hard news, story? When will it run?

7. If the interview is being planned for the future, find out:
   - Will the interview be taped, either on camera or audio?
   - Will you be on camera live?
   - Where will the interview be conducted?
   - How long the interview is expected to last?

8. If the issue is straightforward, and you are comfortable with the subject matter, you can respond to the reporter’s questions on the spot. Simply be accurate, truthful, and brief.

9. If the issue to be discussed is more complex, tell the reporter you are tied up, but will be available in, say, an hour, and that you will return the call. (Of course you are tied up; you have to think of the correct responses to his or her questions.) Ask for the reporter’s deadline, and be sure to call back by then. Use that time to prepare.

**Before the interview**

1. Prepare three to five points to get your key messages across as briefly as possible (preferably 10 seconds or less.) Some questions to ask yourself:
   - What is the issue?
   - What is your involvement in the issue?
   - Why is it important?
   - What is the historical perspective?

2. Gather background information and facts that prove your messages and make them credible. Don’t try to “wing it” — be prepared.

3. Think of tough topics and sensitive questions you may be asked, and formulate responses that include your key messages.

4. Know your audience — determine who reads the publication or tunes into the program and tailor your messages for them.

5. Practice.

**During the interview**

- Assess the reporter’s level of understanding for the issue to be discussed, and brief him or her, if necessary.
- Get your message across. Take the initiative; be prepared to give information, answer a question and go on with the kinds of comments you have practiced.
- Be informative, not conversational. Beware the reporter who remains silent, encouraging you to ramble or dilute your original message. Don’t feel compelled to fill those silences.
Interview tips in general

- Don’t go “off the record.” Off-the-record comments may not be attributed to you directly, but reporters often will use the information to confirm a story with other sources. (See the appendix for definitions commonly used by journalists for “off-the-record,” “not for attribution,” “background,” etc.)

- Don’t be bullied by the interviewer. Instead, address your responses to the public, especially when being interviewed for radio or television. Remember that you are being judged by your impact on the audience, not the interviewer.

- Feel free to redefine the question. This allows you to address the real issues that underlie the reporter’s questions.

- Be brief — keep your responses to questions clear and concise. Reporters generally are looking for “quotable quotes” which will fill three lines of newsprint or 20 seconds of airtime. Don’t use technical jargon or “legalese.”

- Try using the rhetorical device of antithesis to come up with that quotable quote. (e.g. John Kennedy’s oft quoted: “Ask not what your country can do for you; rather, ask what you can do for your country.” “More work, not words, is needed.” etc.)

- Don’t say “no comment” or “I can neither confirm nor deny.” Instead, explain that you are unable to comment and why. For example, you might say, “The Rules of Professional Responsibility prohibit me from commenting on that point. However, I can discuss generally the case events relating to this situation.”

- Substitute positives for negatives. If the reporter asks a question in the negative, don’t repeat it. Instead, when you reply, phrase your response as a positive.

- Put the story in perspective with understandable examples.

- Don’t answer wildly speculative or “hypothetical” questions. Instead, you can say, “I’d be happy to answer any questions, but only on the facts as they occurred.”

- If you don’t know the answer to a question, say so, and offer to get back to the reporter with an answer later.

- During the interview, work in your three key points, and repeat them as often as possible. You can get your message points into the interview by “bridging.” This technique involves acknowledging the reporter’s question, and quickly moving on to the issue you want to discuss by using a transitional phrase such as “yes, and in addition to that...”

Interview tips in general

- Get a clear understanding in advance of what the interview will cover.

- Have a thorough knowledge of the topic(s).

- Develop one or two key messages you want to get across—that you can state quickly and succinctly.

- Have on hand background materials for the reporter to help ensure understanding and accuracy.

- Determine whether the interview will be by telephone or in person.

- If the interview is to be in person, select a location and environment you feel comfortable with.

- If it is to be a telephone interview, consider the following:
  - Clear your desk of anything that might keep you from focusing on the interview.
  - Stand up during the interview. You will be more likely to breathe from your diaphragm, which will help keep you from taking shallow breaths and give your voice more authority.
  - Face a wall or close your eyes. That will help you to concentrate more on the questions and your answers.
  - Offer to send background materials to the reporter, including if possible any publicly filed documents. Helping a reporter obtain documents they can legally obtain but that might require additional legwork goes a long way toward building good relations.

- Listen carefully to each question and think before answering. Repeat, rephrase and recap your key message(s) at every opportunity.

- KISS (keep it simple, stupid). Use simple language. Although the reporter might be very intelligent and highly educated, the media write for readers and viewers with all levels of education. Keeping your language conversational and simple will reach more of them!

- If the interviewer asks a series of questions, pick the one you want to answer and ignore those you would rather avoid.

- Define, don’t defend.

- If someone has made a mistake, don’t try to weasel around it. Admit it, get it over with and move on immediately to your positive messages.

- Focus the interviewer’s attention on what you want her or him to hear by flagging your messages with such phrases as “This is really important,” “Something really important I want you to know is...,” or “Here are three main points.” And follow up with your sound bite.

- Lead the interviewer to your message by ending your answer to one question in a way that might prompt the reporter to ask a question you want asked, such as, “Yes, that was a tragic situation, but we now have a program in place that will keep that from happening again.”

- Avoid trigger words or negatives, which are words in the question that you don’t want to repeat in your answer, such as “embezzle,” “mismanaged,” “I am not a crook.”
• One-to-one interviews work better than press conferences because you have more control and you won’t be responding to several agendas.

• In-person interviews are better than telephone interviews because the result in better accuracy and both you and the interviewer become real people instead of disembodied voices.

• Try to have someone else present during the interview or at least tape-record it. This puts the reporter on notice that s/he had better get it right.

Ambush interviews or no notice calls

• Buy time. Ask for an idea of what the reporter wants to know, say you need a few minutes to take care of something that needs immediate attention, then use that time to prepare.

• Jot down the most difficult 10 questions they can ask and try to frame positive answers.

Some “nevers”

• Never say “no comment.” (An alternative is, “I can’t tell you that, but here’s what I can tell you.”)

• Never lie.

• Never guarantee anything.

• Never exaggerate.

• Never run from or slam the door on a camera.

• Never slug a cameraman or photographer.

On the air

When the TV producer or reporter calls, there are some special factors to consider. Unlike the internet or newspaper reporter, the TV reporter likely wants a personal audience. Phone interviews are fine for print or web, but television is looking for video and viewers want to see the interview subject.

Typically such interviews take less time than might be imagined. TV reporters are often on tight deadlines, turning around stories for that evening’s broadcast. Sometimes reporters have the luxury of doing interviews well in advance of a story airing, but it’s likely the reporter needs you ASAP, and won’t linger long. Typically it will be a two person crew: reporter and photographer. But there are stations hiring what are known as “video journalists” or V-Jays, who act as a one-person crew.

Do your best to understand these limits and make yourself or someone else available. It will go a long way toward building a good relationship with reporters.

The other likely close encounter with TV reporters is on the courthouse steps, perhaps as you are leaving a trial or hearing. Be aware these moments happen quickly, and you’ll want to have your thoughts prepared before you descend the courthouse steps. It may be one reporter, or a group, with rapid-fire questions. Address the reporter asking the question, and remember that even if the cameras back out for cutaways, what you’re saying may still be recorded on video, or in the reporter’s notepad.

Specific tips for the TV interview

• Have someone help you in advance with a practice interview using a video camera, review the video and take note of things that distract from clarity and that might connote uncertainty, discomfort or irritating habits, such as punctuating every other word with “uh,” “you know” or “I mean,” shifting eyes, repeatedly clearing of throat, verbose answers.

• Wear clothes that are dark, but not black, and solid. Avoid large or busy prints. Avoid large, flashy jewelry.

• Maintain eye contact with the interviewer.

• Talk casually, as if in conversation with a friend.

• If you don’t know something, don’t guess. Offer to provide the information after the interview.

• Use small (not sweeping), natural hand gestures to make your point.

• If you’re to be seated in the interview, avoid swivel chairs.

• If you’re to be standing, place one foot in slightly in front of the other and shift your weight to the forward foot.

• If you feel crowded, take a deep breath and one step back.

• Maintain good body posture.

Special suggestions for the televised interview

1. Once the camera is in the room, assume it is turned on. Most TV reporters will not use statements in unguarded moments, but some do. Avoid joking or relaxed off-the-cuff remarks before or after the actual interview.

2. Be totally unflappable in the face of negative or hostile questions. TV is a visual medium so it looks for reactions, signs of emotional reactions even if your words are neutral or positive.

3. If necessary, use your lawyer skills as if in cross-examination. If you feel you are being set up, it is not unfair to answer a question with a question to put the reporter on the spot. But do so calmly and matter-of-factly. For example, if you are asked about something in a pending case, you might respond, “Now you know perfectly well that to insure the fundamental fairness of the trial for the public and the parties, I am prohibited by the ethical rules from discussing matters in a pending case, so why are you asking me a question you know I am prohibited from answering? Is this just an attempt to make me look bad?”

4. If you have responded and the reporter simply sits silently, resist the urge to embellish on what you already have said. It is not your job to fill in the void. Do not let silence push your answers beyond what you want to say. Any silent gaps will be edited out.
5. Have good posture during the interview. Lean slightly forward to convey interest, energy and sincerity in the process.


7. If you do not know the answer, say so. Reporters and viewers generally have an inherent sense of when people are blowing smoke.

8. Do not look directly into the camera. Your responses should be directed to the reporter so look him or her squarely in the eye in a confident manner.

9. Practice hypothetical interviews with colleagues or friendly media professionals periodically to obtain and keep the basic skills.

In summary, while dealing with the media can be a perilous process fraught with minefields, it can also prove to be a critical part of your duty as a counselor to your client. Developing good solid relationships and building trust, just as you do with opposing counsel, can go a long way to reduce the problems, and benefit all, including the news consumer!

---

**Appendix**

**Talking to Reporters: A Glossary of Terms**

Below is a list of general terms you may encounter when dealing with print, broadcast, and internet reporters. Please bear in mind, there are no hard and fast rules here, and thus the importance as discussed earlier in developing good relationships. When you build those relationships and trust, you have a better understanding of what each of these terms means to each reporter you deal with. Just be sure you know the ground rules going in, assuming you’ve built that trust.

- **Off the record.** This means different things to different reporters. Officially, however, it means the information, whether written or oral, may not be published or broadcast. Period. Do not go off the record with anyone unless you know that person’s track record. Not everyone honors off the record. Sometimes a reporter’s promise gets overruled by an editor.

- **Not for attribution.** The information may be published or broadcast, but without identifying the source by name. Nail down exactly how the reporter will attribute the information, such as “a member of the bar association’s two-member Task Force on Complaints Against the Judiciary,” or “a KBA official,” or “a source” said.

- **Background.** Means much the same as off the record. The information is not attributed to the interviewee in any way. May be used to provide a tip for reporter to start looking into in order to get information independent of interviewee. Again, first find out what the reporter thinks that means.

- **Deep background.** Not much different from background. Just greater care and secrecy to protect the source. Unless you’re a whistle-blower, you should never have to use.

- **Just between us.** That and other ambiguous phrases have no universal understanding and generally mean nothing to reporters. Don’t use them.

- **Check it with me before you use it.** While reporters rarely allow you to read or review a completed story before publication or airing, some will agree to check quotes and/or specific facts with you. If you get that opportunity, you can correct errors and misunderstandings, but not retract statements you now regret.

- **Read it to me or let me read it before you publish/air it.** A reporter might agree to do that, but the only benefit to you is advance warning of what the story says. You have no right to change anything.
Developing a media list
In order to successfully deal with the media, you need to know the people who make the news their business.
Start with a list of relevant news organizations and identify potential contacts within those organizations. If your interests are strictly local, it is only necessary to develop a list of media within your local community. However, if your issue has regional or national implications, your media list should be appropriately broad.
After determining which media outlets to approach, identify key contacts within each. In larger news organizations, your key contact should be the reporter who regularly covers legal issues. In smaller operations where there is no designated legal reporter, start with the assignment editor whose job it is to assign reporters to stories. As you develop relationships with individual reporters, add their names to your contact list.
Each entry on your media list should include the name of your contact(s), address, telephone numbers (office, after-hours and fax), email addresses and web site information. Develop this list by doing what reporters do: call up and ask for the information.
Finally, be prepared. Develop your media list before you need it so you are ready when the need arises.
Defining purpose and audience
Know your purpose before you contact the media. What are you trying to accomplish? Who is your audience? Tailor your message accordingly.
Targeting your audience is also essential. Select a media outlet that is credible to the intended audience. For example, if your message is directed toward other attorneys, a bar journal or newsletter would be a good choice. If you want to reach the financial community, choose a business or financial publication.
Keep in mind that all media contacts are subject to ethical and professional conduct considerations, so keep your communications within appropriate boundaries. Review the rules before you involve the media.
Ways to reach the media
The telephone and email are the primary means of initiating media contact. Contact the person or publication most likely to be receptive to your message, and be prepared to field questions and sell your subject.
News releases are the who, what, where, when, why and how of your message in narrative form. They resemble news stories and are best used when conveying precise or detailed information. Lead with the most important information, using subsequent paragraphs to fill out the details. News releases should be double-spaced and include the date, a title and the name and telephone number of someone who may be called if the reporter needs additional information. Try to limit the news release to 250 words. It is the reporter’s prerogative to determine whether the information supplied is used and the form it takes. Make sure that the information you are providing is accurate and ready to become public immediately; nothing sours a media relationship more quickly than distorted, inaccurate information.
The Internet has made vast amounts of information instantaneously available to anyone at any time. Email, websites, search engines make the Internet a handy tool for both gathering and distributing
information. Online coverage is gaining market share, with many people now using the Internet as their primary source of news.

Where once only radio and television controlled immedi-

ancy, today's print media is online and on time with its cov-
gerage. Websites are constantly updated, with breaking news
being published as it happens.

Media websites contain valuable contact information. Consider whether an email is the best way to begin getting your story published.

Reporters and editors can learn of a story idea through voicemail messages and email contacts. Use both, and leave enough relevant and interesting information regarding your news event to draw a return contact. Reporters and editors welcome an emailed news release, as it is easy to edit and publish. But always provide contact information for follow-up questions.

A **media advisory** is a shortened, less formal version of a news release for those who lack the time and/or talent to write a narrative. Media advisories are most often used when promoting an upcoming event. In a memorandum format, simply outline the who, what, where, when, why and how of the message. As is the case with the news release, include the date, a title and the name and telephone number of someone who may be called if the reporter needs additional information. A media advisory is most effective when this information is brief and to the point.

The **media kit** is a packet of information that provides useful and detailed information to reporters. Included on separate sheets of paper are biographical information (attorneys and clients), backgrounds (reports detailing the history and implications of specific issues), an explanation of the law (if applicable), information about the firm or organization and a cover memorandum that includes the name and telephone number of someone who may be called if the reporter needs additional information. This information may be compiled in a portfolio. Media kits are cost-effective because the kit can be changed and updated electronically, or amended with individual sheet inserts without having to reprint all of the contents.

The **news conference** is an effective way to gain access to a large number of media at the same time. However, in order to draw media interest, one must have real news to announce or have a human-interest story to tell. If the topic of a news conference is not truly newsworthy, or if the conference is called on a day when it is competing with more significant news, reporters may not show up. For that reason, use this tool sparingly and if possible, save for a slow news day. If a news conference is appropriate, it must be conducted at a time, place and in a setting convenient to reporters. Tables and chairs suitable for taking notes should be provided. A lectern or table that will comfortably hold both the speaker’s notes and microphones should be placed at the front of the room. Select a suitable background for the speaker with no windows or distracting features. If there is a reason to limit reporter’s access to the news conference participants, select a room where the participants and reporters enter through separate doors. If there are ground rules for the news conference, such as its time length or limits on questioning, establish them at the beginning. Be on time, even if some reporters aren’t. Most of all, be patient and remember your purpose and audience.

The **background briefing** is very much like a news conference with one significant difference: news conferences provide reporters with the story lead and quotations, while background briefings provide reporters the details needed to complete their story. Briefings may be held on a periodic basis to update reporters about an evolving situation. Sometimes conducted either off-the-record or not-for-attribution, background briefings can last two or three times longer than a typical news conference and often involve a large number of participants. The considerations described for news conferences also hold here, especially the critical decision on whether to conduct one at all.

**One-on-one interviews.** Often a relaxed, face-to-face meeting in a comfortable setting will convey a strong message and give prominence to your topic. However, don't get too relaxed. The purpose of the interview and the audience toward which it is directed should always be in the forefront. Small talk can be the source of big headaches. For that reason, always remember that a reporter cannot report what you do not say.

**Media tours.** This is a “walk and talk” version of a news conference used when the surroundings can supplement your message. For example, to demonstrate the need for new public housing, walk through a dilapidated housing project. Because of their visual nature, media tours are more likely to attract newspaper, magazine and television interest. However, they should be carefully planned to avoid unexpected (and unwelcome) surprises. Because media tours rarely involve late-breaking news, care should be taken to avoid scheduling them at a time when reporters may be needed elsewhere to cover more pressing events.

**When to reach the media**

Reporters and editors operate on deadlines. Be aware of the deadlines of the news organization to which you are pitching your story. The earlier you advise a reporter or assignment editor of a story idea, the more likely it is that someone can cover it. Be available to the media to answer questions or confirm information. News stories often die if the reporter cannot reach the source to verify information or get more details.

**Specialized media and other options**

The news media is not the only way attorneys can target communications toward a specific audience. Alternate methods include:

**Speeches/personal appearances.** An always effective form of communication is personal communication. By speaking at various forums, an attorney can deliver his or her message directly to the intended audience, with no third party edit-
ing. As always, consider your audience and purpose before hitting the speaker’s circuit.

**Professional publications.** These publications provide an excellent avenue to communicate your message to a specific audience. Legal publications are an obvious choice, but other publications might also work depending on the nature of your practice. For example, a bankruptcy lawyer might publish a guest column in the local business magazine or daily newspaper, explaining details of recent bankruptcy legislation.

**Newsletters.** Whether distributed internally among employees or externally to clients, newsletters are an effective, cost-efficient way to keep in touch with people important to a firm’s success. Once again, audience and purpose will dictate the content and tone of the newsletter. Resist the temptation to produce a single newsletter to serve multiple audiences. While such an approach may be efficient, it may not be effective. If there are different audiences with different interests, tailor a separate newsletter for each audience.

**Reference materials.** It is sometimes appropriate to distribute printed materials for later review. Brochures are an example of this type of reference material. The content may vary from general information about the firm to specific information about your practice. Portfolios are another type of reference material that can be distributed. The advantage of a portfolio is its flexibility. Different elements, such as fact sheets and biographies, can easily be updated without much expense. It is also possible to tailor the contents of a portfolio to specific situations. Portfolio covers can be specially printed with a firm’s logo, or a business card could simply be attached to a plain folder.

**Community relations activities.** One time-tested way for a firm to demonstrate its civic responsibility is to get involved in the community. Actions can include organizing public forums, sponsoring scholarships and charitable events, volunteerism, visiting schools, welcoming interns, or opening facilities for use by civic organizations. This is not charity for charity’s sake. It is a conscious effort to communicate a specific message, as well as an effort to market a person or organization. Many law firms are now hiring public relations specialists, either as employees or as independent contractors.

**In Closing**

Savvy lawyers are not bashful about notifying the media as to a news or human interest topic or a new case filing. However, the Rules of Professional Conduct, particularly Rule 3.6, control the handling of publicity. Remember your boundaries, and at the same time, know that members of the news media are professionals and have their own boundaries. And, yes, those pesky deadlines.
Few topics have produced more spirited debate within legal and journalistic circles than questions regarding the reporter's privilege. Can a reporter be forced to identify a confidential source of information? Can he or she be compelled to disclose notes, documents, unpublished photographs or other unpublished information, confidential or otherwise? Is a litigant seeking such information required to make any particular showing as a prerequisite to compelling its production?

There are misconceptions on both sides of the issue. Some journalists believe the First Amendment establishes a cocoon of editorial privacy, within which the press may gather and report the news free from any obligation to answer questions or provide information regarding their activities. The legal shortcomings of this view are best illustrated by the lengthy jail sentences handed out to reporters who have refused to identify news sources in a number of recent high-profile cases. See, e.g., In re Grand Jury Subpoena, 438 F.3d 1141 (D.C. Cir. 2006) (New York Times reporter Judith Miller jailed for contempt for refusing to identify source of information identifying Valerie Plame as CIA agent); In re Grand Jury Subpoenas, 438 F. Supp. 2d 1111 (N. D. Ca. 2006) (San Francisco Chronicle reporters Mark Fainaru-Wada and Lance Williams jailed for contempt for refusing to identify source of sealed grand jury testimony regarding BALCO steroid investigation). See also Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005) (upholding $500 per day contempt fine assessed against reporters who refused to disclose source of information regarding government espionage investigation of computer scientist Wen Ho Lee); Commonwealth v. Bowden, 576 Pa. 151, 838 A.2d 740 (2003) (vacating contempt fine of $100 per minute assessed against reporters because of manner in which it was imposed, but declining to hold that amount was excessive).

On the other hand, some lawyers and judges have contended – with a fervor approaching that of the reporters described in the preceding paragraph – that there is no reporter's privilege at all, and that litigants are free to compel the production of information from publishers and broadcasters at will. In Kansas, anyone who has held this kind of view now must adjust to the reality that the state Legislature has codified a reporter's privilege. Moreover, anyone in Kansas who held the view that no reporter's privilege existed at all did so despite the decisions of the Kansas Supreme Court and the Tenth Circuit U.S. Court of Appeals that plainly recognized the existence of a reporter's privilege, and have been on the books for almost three decades. See State v. Sandstrom (In re Pennington), 224 Kan. 573, 581 P.2d 812 (1978), cert. denied, 440 U.S. 929 (1979); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

As is often true, the opinions of most onlookers surveying the reporter’s privilege landscape are driven by the role the privilege has the potential to play in one’s own life and pursuits. Journalists can make a compelling case that if no privilege is available, sources of information important to the public would refuse to share it with reporters, and news stories based on such information would never be published. This “chilling effect” has the potential to impede effective self-government, because:

... so many decisions in a democracy require wise voters to make wise decisions, which can only happen if voters are fully aware of all the pros and cons regarding public issues and public officials.

On the other hand, a number of legal commentators regard the reporter’s privilege as an unnecessary exception to the general rule that parties to litigation should have the fullest possible access to relevant information. Professor Wigmore, for example, commenting on the earliest of the press shield statutes, characterized Maryland’s shield law as “as detestable in substance as it is crude in form,” and predicted that it would “remain unique.”


The goal of this article is simply to provide practitioners with historical perspective on the nature and scope of the reporter’s privilege, to discuss the cases establishing the privilege as it is applied in Kansas before enactment of the shield law this year, and to discuss possible trends in the evolution of the concept of reporter’s privilege.1

Unlikely origins

It was probably inevitable that some measure of confusion would attend the development of the reporter’s privilege, given that the seminal event in its history is a U.S. Supreme Court decision in which a majority of the court held that no such privilege exists.2 The issue in the cases consolidated for decision in Branzburg v. Hayes, 408 U.S. 665 (1972), was whether reporters could be required to appear before grand juries to testify regarding criminal conduct observed in the course of their newsgathering activities. In each case, the reporter in issue had direct contact with the alleged criminals, and was allowed to witness criminal activity – the manufacture of illegal drugs and certain planning activities of the Black Panther Party – only after pledging not to disclose the identity of the participants. In a 5-4 decision, the Supreme Court held that the First Amendment did not stand in the way of the prosecution’s effort to compel the reporters to disclose this information to a grand jury.

Writing for the majority, Justice White began his analysis by noting, in an oft-quoted passage, that:

We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

408 U.S. at 681 (emphasis supplied).

Whatever the nature of the “First Amendment protection” to which this passage refers, however, it was the majority’s ultimate view that representatives of the press are not entitled to special treatment under the law – neither in general nor when it comes to the obligation of all citizens to furnish relevant information to a grand jury:

... (reporters possess) no special immunity from the obligation of general laws ... (V)alid laws serving substantial public interests may be enforced against the press as against others, despite the burden that may be imposed.

408 U.S. at 683.

In a nutshell, the Branzburg majority felt that whatever burden might be associated with requiring the reporters to testify was outweighed by the compelling governmental and public interest in investigating criminal activity. Accordingly, the court denied the reporters relief. See 408 U.S. at 701-02.

In the closing portion of its opinion, the majority again suggested that newsgathering activities are protected by the First Amendment, and again did so without providing much in the way of guidance regarding the sort of protection it had in mind:

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

408 U.S. at 707-08.

It is difficult to judge whether the majority would have opposed the recognition of a qualified First Amendment privilege for reporters had the question arisen in a different context. A number of Justice White’s comments suggest that the court’s thinking was driven to a considerable extent by the fact that the reporters had first-hand information regarding criminal activity:

(W)e cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.

***

Footnotes


2. The first high-profile decision in which a reporter claimed a First Amendment-based privilege to refrain from identifying a confidential source was Garland v. Torre, 259 F.2d 545 (2nd Cir. 1958); however, the idea that such information is worthy of protection can be traced at least as far back as 1896, when the Maryland legislature enacted the nation’s first shield statute. See, e.g., Lightman v. State, 15 Md.App. 713, 294 A.2d 149, 152 (1972).
(A)greements to conceal information relevant to com-
mission of crime have very little to recommend them
from the standpoint of public policy.

408 U.S. at 692, 696.

**The lower courts go their own way**

As launching pads for great shifts in constitutional thought
go, the majority decision in *Branzburg* is an unlikely can-
didate. Nevertheless, a strange thing happened in the lower
courts in the years that followed: a clear majority of lower
courts faced with reporter subpoena issues held that report-
ers are protected by a qualified privilege based on the First
Amendment, and that the qualified privilege is based on the
decision in *Branzburg*. How did this come about?

The development of this body of law is usually attributed to
the brief concurring opinion of Justice Powell in *Branzburg*,
which served as the swing vote in the case. Justice Powell stat-
ed that his purpose in writing separately was “to emphasize
the limited nature of the Court’s holding.” 408 U.S. at 709.
The heart of his views regarding the rights and obligations of
reporters appears in the following passage:

The Court does not hold that newsmen, subpoenaed to
testify before a grand jury, are without constitutional
rights with respect to the gathering of news or in safeg-
guarding their sources. Certainly, we do not hold, as sug-
gested in Mr. Justice Stewart’s dissenting opinion, that
state and federal authorities are free to ‘annex’ the news
media as ‘an investigative arm of government.’ . . .

. . . If a newsmen believes that the grand jury investi-
gation is not being conducted in good faith he is not
without remedy. Indeed, if the newsmen is called upon
to give information bearing only a remote and tenuous
relationship to the subject of the investigation, or if he
has some other reason to believe that his testimony im-
plicates confidential source relationship without a le-
gitimate need of law enforcement, he will have access
to the court on a motion to quash and an appropriate
protective order may be entered. The asserted claim to
privilege should be judged on its facts by the striking
of a proper balance between freedom of the press and
the obligation of all citizens to give relevant testimony
with respect to criminal conduct. The balance of these
vital constitutional and societal interests on a case-by-
case basis accords with the tried and traditional way of
adjudicating such questions.

408 U.S. at 709-10.

Of equal importance in the development of the reporter’s
privilege was the dissenting opinion of Justice Stewart. He
contended that the First Amendment should, indeed, be in-
terpreted as providing reporters with a qualified privilege to re-
sist subpoenas, and advocated a three-part test for determining
whether the privilege has been overcome in a particular case:

Accordingly, when a reporter is asked to appear before
a grand jury and reveal confidences, I would hold that
the government must (1) show that there is probable
cause to believe that the newsmen has information that
is clearly relevant to a specific probable violation of law;
(2) demonstrate that the information sought cannot be
obtained by alternative means less destructive of First
Amendment rights; and (3) demonstrate a compelling
and overriding interest in the information.

408 U.S. at 743.

Most of the decisions recognizing the reporter’s privilege
in the wake of *Branzburg*, including *State v. Sandstrom (In
re Pennington)*, 224 Kan. 573, Syl. 1, 581 P.2d 812 (1978),
have relied on a combination of the points raised in the ma-
ajority decision, the concurring opinion of Justice Powell and
Justice Stewart’s dissent. Many follow a similar pattern: the
author cites the statements in the *Branzburg* majority opinion
suggesting that newsgathering is entitled to some unspecified
measure of “First Amendment protection,” and then segues
into a discussion of Justice Powell’s concurring opinion and
its advocacy of a balancing process to determine whether the
reporter’s information is privileged in a particular case. In
this manner, the holding in *Branzburg*, which was adverse to
the reporters involved, can be limited to its particular facts,
I.e., to reporters summoned to testify before grand juries re-
garding criminal activity they have actually witnessed.

Perhaps the most surprising aspect of the various lower court
decisions following in the wake of *Branzburg* is how many
have adopted some variation on the three-part test advocated
by Justice Stewart for determining whether the qualified opin-
ion has been overcome in a particular case. A “clear majority”
of the courts that have spoken on the qualified privilege since
*Branzburg* have implemented some version of the approach
advocated by Justice Stewart in his dissent, in which a litigant
seeking information from a reporter must first show that it is
crucial to the litigation and unavailable from other sources.

See Greenwald, Malone & Stauffer, supra note 1, at § 8.5.

**The Tenth Circuit weighs in**

A qualified First Amendment-based reporter’s privilege
was recognized by the U.S. Court of Appeals for the Tenth
Circuit in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th
Cir. 1977), a decision which continues to represent the con-
trolling precedent on this issue in the federal courts of Kan-
sas. See, e.g., *Heartland Surgical Specialty Hospital, L.L.C. v.
In *Silkwood*, the personal representative of Karen Silkwood,
a deceased Kerr-McGee employee who had been active in
efforts to publicize the dangers of nuclear energy, brought a

---

3. The U.S. Courts of Appeals for the Sixth and Seventh Circuits and several state appellate courts have rejected the idea that reporters are protected by a qualified privilege based on the First Amendment. See *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987) and *McKeever v. Fallaich*, 339 F.3d 530 (7th Cir. 2003). For an up-to-date listing of the status of privilege law throughout the United States, see the Privilege Compendium published by The Reporters Committee for Freedom of the Press and accessible at http://www.rcfp.org/privilege.
In holding privilege itself. Its decision reflects what can fairly be characterized as a rather loose interpretation of the U.S. Supreme Court's decision in *Branzburg*:

In determining the scope and extent of the privilege, the guiding light is the decision of the Supreme Court in *Branzburg*, supra. The actual problem in that case was whether a reporter was free to avoid altogether a grand jury subpoena. The Supreme Court in rejecting his claim required him to appear and testify before the grand jury, and ruled that the grand jury subpoena had to be obeyed. The actual decision of the Supreme Court is not surprising nor is it important in the solution of our problem. But the Court's discussion in both the majority opinion of Justice White and the concurring opinion of Justice Powell recognizing a privilege which protects information given in confidence to a reporter is important. The Court said that the First Amendment occupies a preferred position in the Bill of Rights. (Citations omitted.) It was then careful to point out that any infringement of the First Amendment must be held to a minimum that it is to be no more extensive than the necessities of the case. (Citation omitted.)

*The scope and breadth of the protection is fully discussed. . . .*

The majority also makes clear that it is not requiring the press to publish its sources of information or indiscriminately to disclose them on request. From this discussion we infer that the present privilege is no longer in doubt. In holding that a reporter must respond to a subpoena, the Court is merely saying that he must appear and testify. He may, however, claim his privilege in relationship to particular questions which probe his sources.

563 F.2d at 437 (emphasis supplied).

With due respect to Judge Doyle, who authored the opinion in *Silkwood*, it is difficult to find a statement in the majority opinion in *Branzburg* from which one can “infer that the present privilege is no longer in doubt.” His suggestion that “the scope and breadth of the protection is fully discussed” in *Branzburg* is just as puzzling. A clue as to the “discussion” to which this passage refers appears in the portion of the opinion that suggests how the privilege is to be applied in individual cases. The court identified the same criteria for overcoming the privilege as were proposed by Justice Stewart in his *Branzburg* dissent.1 Judge Doyle observed that:

The weakness of our case is that there has been a failure to weigh the various factors which have been announced in the cases. Indeed it has been impossible to conduct

4. The circumstances of Ms. Silkwood's life and death became a focal point of the anti-nuclear movement, and were the subject of “Silkwood,” a feature film released in 1983 starring Meryl Streep, Kurt Russell and Cher, among others, which received five Academy Award nominations.

5. The court also spoke approvingly of the four-part test for overcoming the privilege articulated by Justice Stewart, then a circuit judge, in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958), which requires courts reviewing privilege claims to consider:

1. Whether the party seeking information has independently attempted to obtain information elsewhere and has been unsuccessful.

2. Whether the information goes to the heart of the matter.

3. Whether the information is of certain relevance.

4. The type of controversy.

563 F.2d at 438.

The language that would require litigants opposing a privilege claim to show that the information in issue “goes to the heart of the matter” has proven to be a popular phrase for expressing the level of need that must be demonstrated. See Greenwald, Malone & Stauffer, supra note 1 at § 8.15.
any weighing process because the record does not disclose anything as to the nature of the evidence sought, as to the effort to obtain it from other sources, as to the necessity for appellee to have it, and as to its relevance, all of which are highly important criteria. In view of this lack of evidence in the record and the consequent failure to evaluate it, we are compelled to reverse the judgment and remand the case for further proceedings.

The trial court is empowered to compel the parties to catalog: in the case of appellee, the evidence that it is seeking to the extent of its knowledge plus a showing of its efforts to obtain the information from other sources; in the case of appellant, a description which does not reveal information which is claimed to be privileged of the various documents and a description of the witnesses interviewed sufficient to permit the court to carry out a weighing process in accordance with the decisions above decided. Once the parties have done their work, the trial court can come to grips with the merits.

563 F.2d at 438.

The Tenth Circuit revisited the privilege issue in an unusual context ten years later in *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987). *Grandbouche* was a civil action brought against various representatives of the Internal Revenue Service brought by a tax protester. Plaintiff claimed the defendants illegally seized documents and other information from his office, and then used the information to harass and intimidate members of an organization he headed, and to persuade others not to join the organization. The defendants submitted a request for production of the organization’s membership list, as well as other documents identifying members active in the organization’s affairs. The plaintiff objected on the ground that requiring the disclosure of these items would infringe his right of association under the First Amendment. The district court overruled the plaintiff’s objections, holding that “the First Amendment has no application to discovery orders in private litigation.” When plaintiff persisted in refusing to produce the requested information, the district court dismissed the case and imposed sanctions on plaintiff. 825 F.2d at 1465-66.

On appeal, the Tenth Circuit reversed. The court held that:

In *Silkwood*, this court announced that when the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure. *Silkwood*, 563 F.2d at 438. Among the factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information. The trial court must also determine the validity of the claimed First Amendment privilege. Only after examining all of these factors should the court decide whether the privilege must be overcome by the need for the requested information.

825 F.2d at 1466.

The court remanded the matter “for application of a balancing test under the standards set forth in *Silkwood* and in this opinion.” 825 F.2d at 1467.

The decisions in *Silkwood* and *Grandbouche* continue to govern reporter’s privilege issues in the federal courts of Kansas today. See, e.g., *United States v. Foote*, 2002 WL 1822407 (D. Kan. 2002) (nonconfidential statements made by criminal defendant to newspaper reporter); *Heartland Surgical Specialty Hospital, L.L.C. v. Midwest Division, Inc.*, No. 05-2164-MLB-DWB, 2007 WL 852521 (D. Kan. March 16, 2007) (First Amendment privilege claim of Kansas Hospital Association with respect to activities of its members; plaintiff’s motion to compel discovery denied). 6

**Kansas courts – The Pennington case**

Representing reporters in privilege disputes in the state courts of Kansas was a bracing experience, owing to a single enigmatic passage in the only appellate decision that addresses the reporter’s privilege issue, *State v. Sandstrom (In re Pennington)*, 224 Kan. 573, Syl. 1, 581 P.2d 812 (1978):

A newspaper person has a limited privilege of confidentiality of information and identity of news sources. The existence of the privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter’s need for confidentiality.

A measure of unpredictability attended the resolution of privilege disputes in this state because questions raised by this passage were not resolved at the appellate level.

Joe Pennington, a reporter employed by KAKE-TV in Wichita, investigated the circumstances surrounding the shooting death of a prominent Topeka broadcast executive. The victim’s wife was eventually charged with committing the murder. During the wife’s trial, her attorney served a subpoena on Pennington, to force the reporter to disclose the name of a confidential news source – an individual who claimed to have been present when one of the state’s witnesses reportedly threatened to kill the victim. Pennington refused to identify his source, and was sentenced to 60 days in jail for contempt. 224 Kan. at 574.

On appeal from the contempt conviction, the Kansas Supreme Court upheld the district court’s decision. In doing so, however, the court clearly and unequivocally signaled its recognition of a qualified First Amendment privilege that protects the activities of reporters in Kansas:

> *We believe a newspaper person has a limited privilege of confidentiality of information and identity of news sources, although such

---

6. “This is a civil matter and the requested information is not central to the litigation because of its minimal relevance. Therefore, Heartland has not shown a truly compelling need for the information. In addition, the nature of the information sought is privileged and ‘central to first amendment values.’ (citation omitted). This suggests that the subpoena for the KHA documents may be a ‘fishing expedition.’ *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).” 2007 WL 852521 at *6.
The U.S. Supreme Court recognized the privilege in *Branzburg v. Hayes*. The majority opinion in *Branzburg* was written by Mr. Justice White, who was joined by three other justices. In its holding the court recognized the importance of the free flow of information to insure the viability of the freedom of the press, but recognized that a grand jury may require a news reporter to give testimony on all relevant matters which the grand jury is investigating, just as any other citizen is required to do. In a concurring opinion, Mr. Justice Powell sought to explain the holding of the majority, stating:

“... The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.” (p. 710).

Courts applying *Branzburg* to criminal cases have generally concluded that the proper test for determining the existence of a reporter’s privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter’s need for confidentiality. (citations omitted). Whether a defendant’s need for the confidential information or the identity of its source outweighs the reporter’s privilege depends on the facts of each case. As a general rule, disclosure has been required only in those criminal cases where it is shown the information in the possession of a news reporter is material to prove an element of the offense, to prove a defense asserted by the defendant, to reduce the classification or gradation of the offense, or to mitigate or lessen the sentence imposed. When the information sought has a bearing in one of these areas, the newsperson’s privilege must yield to the defendant’s rights to due process and a fair trial. (See *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974), cert. denied, 419 U.S. 966, 95 S. Ct. 229, 42 L. Ed. 2d 182).

While courts recognize that a news reporter’s privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case. If that were true, no privilege would exist for a news reporter summoned in a criminal case. Nor does the privilege evaporate because the defendant is charged with murder.

Had the discussion ended at this point, lawyers and judges facing privilege issues in the years that followed would have been spared a great deal of controversy. Unfortunately, the opinion continued as follows:

“The proper test enunciated by the *Branzburg* majority is whether the information sought is relevant to the issues before the tribunal. Mr. Justice Powell’s concurring opinion and the vast majority of criminal cases since *Branzburg* dealing with this issue recognize this feature as a primary requirement, but further suggest a test of balancing the need of the defendant for the information or the identity of the news source against the privilege of the news reporter. The trial court in this case stated that if the balancing test were applied, the need for the information outweighed the news reporter’s privilege of confidentiality.

224 Kan. at 576 (emphasis added).

The highlighted statement suggested that to overcome the reporter’s privilege, a litigant needed only show that the information he or she sought was “relevant.” The obvious problem with this was that relevance was presumably the qualifying threshold of *all* subpoenas and, indeed, *all* evidence under Kansas law. See, e.g., K.S.A. 60-407(f) (“all relevant evidence is admissible”); K.S.A. 60-226(b)(1) (“parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter ... ”); *State, ex rel. Stephan v. Clark*, 243 Kan. 561, 568, 759 P.2d 119 (1988) (“Generally speaking, a subpoena duces tecum may be used to compel the production of any proper documentary evidence ... which is desired for the proof of an alleged fact relevant to the issue before the court or issuing the subpoena, provided that the evidence which it is thus sought to obtain is competent, relevant, and material.” [quoting 97 C.J.S. Witnesses § 25(e)]. If the reporter’s privilege could be overcome simply by demonstrating relevance, there was no privilege. It seems obvious from the opinion as a whole—which discusses a balancing test and a requirement that the information sought relate to certain specific subjects—that this was not what the Supreme Court intended. Unfortunately, the discussion concluded in a manner that left the reader to guess at the parameters of the protection the court had in mind for Kansas journalists.

On balance, it seems likely the court was thinking in terms of a privilege similar to that discussed in the Vermont and Virginia cases it cited in the passage quoted above, *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974), and *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, cert. denied 419 U.S. 966 (1974). Both decisions articulate a rule that would require a litigant seeking information from a reporter to demonstrate (a) a compelling need for the information, and (b) that the information is unavailable from other sources; in other words,

7. In *St. Peter*, the Vermont Supreme Court, held that:

... when a newsgatherer, legitimately entitled to First Amendment protection, objects to inquiries put to him in a deposition proceeding conducted in a criminal case, on the grounds of a First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate to the judicial officer appealed to that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence. If such a showing cannot be made to a measure consistent with the overriding of any First Amendment concern, the deponent cannot properly be compelled to answer the question.

315 A.2d at 256 (emphasis supplied).
a rule similar to that adopted by the Tenth Circuit and numerous other courts throughout the United States. Unfortunately, Pennington did not make this clear, and several factors often conspired to make this argument a tough sell.

Privilege disputes have been relatively rare in Kansas, and any district court judges before whom a reporter may appear will be tackling the issue for the first time under the state’s new shield law. Before enactment of the shield law, however, the starting point for any discussion regarding the privilege was Pennington; however, for the reasons noted above, a reading of Pennington was likely to leave the court puzzled as to the scope of the protection afforded by the privilege and the nature of the showing required to overcome it.

Where to next? The next logical step was the decision in Branzburg, which obviously influenced the Kansas Supreme Court when it decided Pennington, and represents the views of the U.S. Supreme Court regarding a question of federal constitutional law in any event. The problem is that reading Branzburg may exacerbate, rather than eliminate, the confusion one encounters in attempting to apply Pennington. Media attorneys in this setting could expect a question from the court along the following lines: “Counsel, I’ve read the majority opinion in Branzburg, twice, and I’m not finding the qualified privilege you’re talking about. Where exactly is it discussed?”

For the various reasons summarized above, this question does not lend itself to a neat, concise answer. The correct answer—that the reporter’s privilege is actually the product of post-Branzburg interpretation by dozens of lower courts, in hundreds of reported decisions throughout the United States (including that of the Kansas Supreme Court in Pennington)—requires considerable explanation, and may not satisfy the first-time listener. To compound matters, Kansas is a relatively conservative jurisdiction in which the press is not necessarily admired in all quarters, judicial or otherwise. In other words, there are judges on the bench who are not troubled at the prospect of a “chilling effect” on the free flow of information to publishers and broadcasters. Many district judges also perceive that (a) a judge’s primary obligation is to the litigants in the dispute before the court; (b) recognizing a reporter’s claim of privilege means that one side will not be able to present all the evidence believed to be relevant; and (c) an appellate court is not likely to reverse the judgment of a district court in the matter in suit based on the denial of a reporter’s claim of privilege. The bottom line is that the laxity of the decision in Pennington opened the door to decisions based on expediency and outcome-driven discretion.

The bottom line was that it was extremely difficult for lawyers to predict the outcome of privilege disputes in state court. The difficult process of explaining the birth and growth of the law began anew with each subpoena. Because Kansas appellate court clarified the rule in Pennington, Kansas district judges were left to continue making educated guesses in many privilege disputes, and would continue to err on the side of ordering disclosure in many cases the Pennington court was probably attempting to qualify for protection.

The future of the privilege – To shield or not to shield?

At this writing, Kansas has become one of 38 states, along with the District of Columbia, that have enacted “shield” statutes granting reporters certain rights with respect to the confidentiality of their sources and information acquired in the course of newsgathering. As journalists invoke the new shield law, the task of Kansas courts will be to determine exactly how it is to be construed and applied.

Apart from state courts, one issue will be whether reporters can rely on the Kansas shield law if they are served with a subpoena in a case pending in federal court. The short answer is that this is likely to depend on the nature of the case. The federal rules of evidence provide that:

8. The court in Weathers v. American Family Mutual Insurance, No. 87-2557-O, 1989 U.S. Dist. LEXIS 18300, at *2 (D. Kan. Sept. 26, 1989), found the approach in Pennington to be indistinguishable from that in Silkwood: The Kansas courts recognize the newsmen’s privilege as one based on the First Amendment, rather than statute or common law. See In re Pennington, 224 Kan. 573, 581 P.2d 12 (1978). The Tenth Circuit also recognizes that the newsmen’s privilege is based on the U.S. Constitution, First Amendment. See Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1978). Thus the applicable federal and state law would both look to the First Amendment of the U.S. Constitution to define and determine the newsmen’s privilege. Both federal and Kansas cases, moreover, follow the same course. In Pennington, the court held a balancing test must be followed. This is basically the same approach adopted in Silkwood by the Tenth Circuit Court of Appeals.

9. In contrast to the practice in state court, reporters are rarely subpoenaed by federal prosecutors, owing to a policy implemented by the U.S. Justice Department in 1980 governing “the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of members of the news media.” 28 C.F.R. § 50.10. The policy generally limits the issuance of subpoenas to situations in which the Department can make a showing of need and unavailability of the character described by Justice Stewart in his Branzburg dissent and by the Tenth Circuit in Silkwood. Id. In addition, the guidelines state “the use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.” 28 C.F.R. § 50.10(f)(4).

10. There are obviously numerous other judges who take First Amendment claims very seriously. The Reporter’s Committee for Freedom of the Press has referred to an “image problem” from which the press suffers in this context:

Outside of journalism circles, the reporter’s privilege suffers from an image problem. Critics often look at reporter’s shield laws and think that journalists are declaring that they are “above the law,” violating the understood standard that a court is entitled to “every man’s evidence,” as courts themselves often say.


12. In the 2010 Kansas legislative session, the shield law was passed as Sen. Sub. for H.B. No. 2585, and it was signed into law on April 15. See Governor Parkinson signs reporter shield law, http://votesmart.org/public-statement/499094/governor-parkinson-signs-reporter-shield-law.
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.


As a general proposition, this means that the shield law should apply in claims based exclusively on state law, in which the court's jurisdiction is predicated on diversity of citizenship, and that the federal common law privilege, i.e., the rule articulated in Silkwood, should apply in most other cases. If a civil claim features both federal and pendent state law claims, the federal common law of privilege is customarily applied. See, e.g., Case v. Unified School District No. 233, 1995 WL 358198 (D. Kan. 1995). Having said this, it must be noted that there hundreds of reported decisions in which a federal judge has struggled with the issue of whether state or federal privilege law applies in a particular case. An extended treatment of this issue would be beyond the scope of this discussion.

Happily (for journalists), the federal common law that applies in Kansas provides for a reporter's privilege that is very similar to the rule embodied in the new statutory shield law.

Outside of Kansas, shield laws vary widely from state-to-state. In some states, the statutory protection is confined to the identity of confidential sources. See, e.g., 735 ILCS 5/8-901 to 8-909 (Illinois); Ala. Code § 12-21-142 (Alabama). In others, the shield statute protects virtually any information reporters may acquire, whether confidential or otherwise, as well as tangible items such as notes, unpublished photographs and video out-takes. A number provide a near-absolute privilege with respect to the identity of confidential sources. See, e.g., Neb. Rev. Stat. §§ 20-144 through 20-147 (Nebraska); Md. Cts. & Jud. Proc. Code Ann. § 9-112 (Maryland); ORS 44.510 through 44.540 (Oregon). Generally speaking, the rights established by shield statutes supplement the protection attributable to qualified privilege rules recognized in the case law of the various jurisdictions as a matter of federal constitutional law.

At the federal level, a bipartisan effort has been underway in both the U.S. Senate and House of Representatives to codify reporter's privilege. The effort included a bill titled the Free Flow of Information Act of 2007 (FFIA), which was based in large part on the guidelines voluntarily adopted by the U.S. Department of Justice in 1973 and published at 28 C.F.R. § 50.10. (See supra note 9). The FFIA applied to any entity or employee of the judicial or executive branch or any administrative agency of the federal government with the power to issue a subpoena. It afforded protection to individuals “engaged in journalism.” “Journalism” was defined as: . . . the gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing of news or information that concerns local, national or international events or other matters of public interest for dissemination to the public.


The privilege that was afforded by the FFIA was qualified. To overcome the privilege in cases involving confidential sources, the litigant seeking the information needed to show that the information was required “to prevent imminent and actual harm to national security,” to “prevent death or significant bodily harm,” to identify individuals who have disclosed trade secrets, private health information or personal financial information, or that “nondisclosure of the information would be contrary to the public interest.” As is true under the Department of Justice Guidelines, the FFIA instructed litigants to attempt to limit requests for testimony from a journalist to such testimony as is needed for “the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information.” The FFIA also limited efforts to obtain the telephone, email and Internet records of journalists, again consistent with the Department of Justice Guidelines.

Although Congress did not enact the FFIA of 2007, it has continued to consider various versions of it. Regardless of the FFIA's fate, it is important to remember that no shield law can eliminate all situations in which a reporter's work product is potentially exposed to an effort to compel its production. No matter how taut a shield statute may be written, one can be virtually certain there will continue to be cases in which the courts conclude that the interest of a litigant attempting to compel the production of information from a reporter outweighs the interest of the reporter in preserving editorial privacy.

Common law vs. constitutional privilege

It has been nearly 40 years since the Branzburg case was decided. The U.S. Supreme Court has had a number of opportunities to revisit the reporter's privilege issue since then, but has agreed to hear only two cases, neither of which involved
the service of subpoenas on non-party journalists to learn the identity of a confidential source or other confidential information. See Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (First Amendment grants no protection from search warrants); Herbert v. Lando, 441 U.S. 153 (1979) (First Amendment does not preclude questioning of journalist-defendant in libel action regarding editorial decision-making).

In more recent times, one can detect a measure of skepticism regarding a First Amendment basis for the reporter's privilege in some decisions coming out of the federal circuit courts of appeal. See, e.g., In re Grand Jury Subpoena, 438 F.3d 1141 (D.C. Cir. 2006) (contempt conviction of New York Times reporter Judith Miller); Lee v. Department of Justice, 413 F.3d 53 (2005) ($500 per day contempt fine in case involving Wen Ho Lee). It is difficult to find a champion of the First Amendment among the current members of the U.S. Supreme Court, causing concern in some quarters that if given the opportunity, the court would hold that the qualified reporter's privilege that has developed in the wake of Branzburg is not required by the First Amendment.

These concerns have provoked an assessment by some commentators of whether the Supreme Court's decision in Jaffee v. Redmond, 518 U.S. 1 (1996) can provide a distinct path to recognition of a reporter's privilege that is more palatable to the high court than the First Amendment analysis that has followed Branzburg. See, e.g., Fargo & McAdoo, supra; see also Greenwald, Malone & Stauffer, supra note 1, at § 8.5, pp. 8-22.

In Jaffee, the court created out of whole cloth a privilege of confidentiality covering communications between psychotherapists and their patients in federal court. The decision is based on the authority conferred by the Rule 501 of the Federal Rules of Evidence. Rule 501 provides that some privileges are based on the authority conferred by the Rule 501 of the Federal Rules of Evidence. This is nothing less than a direction to federal courts to “continue the evolutionary development of testimonial privileges.” 518 U.S. at 9 (quoting Tammel v. United States, 445 U.S. 40, 47 (1980)). The factors that control the question of whether a new privilege should be recognized include: whether the proposed privilege fosters significant public and private interests; whether these interests outweigh any burden on a court's search for truth; and whether the proposed privilege is widely recognized by the states. 518 U.S. at 9-14.

Proponents of a reporter's common law privilege based on Federal Rule 501 argue that even if the U.S. Supreme Court were to unequivocally declare that the First Amendment does not give rise to such a privilege, the proliferation of lower court decisions holding to the contrary over the course of the past 35 years, together with the adoption of reporter's shield laws in two-thirds of the states, demonstrate that the proposed privilege is widely recognized. Moreover, the public has a significant interest in streamlining the free flow of information from journalists to the public, an interest that would be fostered by recognition of the privilege.

The most significant problem that appears to stand in the way of recognizing a new privilege pursuant to Rule 501 is the vexing question of to whom it applies, i.e., who will qualify as a “journalist.” Unlike the psychotherapists covered by the decision in Jaffee, reporters and journalists are not required to be licensed, and the number of individuals who might be covered increases with the publication of each new “blog” and “e-zine.” It may be that reference to the definition of “journalism” in the proposed Free Flow of Information Act of 2007, quoted above, is sufficiently specific to allay a court's potential concerns.

An approach similar to that suggested in Jaffee may also be useful to proponents of the reporter's privilege in the Kansas appellate courts, if and when a privilege question is again presented for decision. The Kansas Supreme Court has recognized common law privileges to foster societal interests on several occasions in the past. See Berst v. Chipman, 232 Kan. 180, 189, 653 P.2d 107 (1982) (information generated by NCAA in investigation of athletic recruiting infractions); Adams v. St. Francis Regional Medical Center, 264 Kan. 144, 160, 955 P.2d 1169 (1998) (medical peer review information). The reporter's privilege would appear to be an appropriate candidate for similar treatment.

Conclusion

To insure the future of reporter's privilege, journalists of all stripes would be well-advised to do a better job of educating the public and the courts that they do not view themselves as above the law. It will be equally important to remind non-journalists that society benefits from an independent, objective and neutral press, and that the best way of preserving the needed independence is by insuring that journalists are immune from scrutiny in court under all but the most compelling circumstances.
The Kansas Shield Law

An article by Christopher C. Grenz, published in June 2012 by the University of Kansas Law Review, detailed the legislative history of the Kansas shield law, K.S.A. 60-480 et. seq. The article also included an analysis of the shield law. Below is an excerpt, printed with permission of the author and the Kansas Law Review. Grenz received his J.D. degree and Certificate in Media, Law and Policy in 2010 from the University of Kansas School of Law and is an associate with Bryan Cave LLP in Kansas City, Missouri.


Excerpt from Into Battle Without a Shield

[D.] 2. The Policy Contained Within the New Shield Law

One of the more revolutionary parts of the Kansas shield law, as compared to those in other states, is that the Kansas law defines “journalist” to include not only a “publisher, editor, reporter[,] or other person employed by a newspaper, magazine, news wire service, television station[,] or radio station who gathers, receives[,] or processes information for communication to the public,” but also an “online journal in the regular business of newsgathering and disseminating news or information to the public.” 385 The change means that it “seems to cover bloggers and other non-traditional journalists so long as they engage in ‘regular’ journalism.” 386

The centerpiece of the new Kansas shield law, however, is the protection it affords to those who fall under its definition of journalist. Under the law, no journalist can be compelled to turn over notes or unpublished information, and no court may hold a journalist in contempt for refusing to do so, unless certain narrow circumstances exist. 387 The key to reaching compromise on the law’s passage was the inclusion of the shield law’s protection. 388 The only way to overcome the shield is for the party seeking the information to prove “by a preponderance of the evidence” that the information being sought: “(1) [i]s material and relevant to the proceeding for which the disclosure is sought; (2) could not, after a showing of reasonable effort, be obtained by readily available alternative means; and (3) is of a compelling interest.” 389

The statute defines “compelling interest” as “evidence likely to be admissible and [that] has probative value that is likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists.” 390 Such evidence “includes, but is not limited to: (1) [t]he prevention of a certain miscarriage of justice; or (2) an imminent act that would result in death or great bodily harm.” 391 The statute goes on to specify that “[i]nterests that are not compelling include, but are not limited to, those of parties whose litigation lacks sufficient grounds, is abusive[,] or is brought in bad faith.” 392

The statute outlines the procedure that litigants and courts must follow when determining whether the qualified privilege protects a journalist from a subpoena. According to the statute, as well as interviews with those who wrote it, the process would proceed as follows: After the issuance of a subpoena, a journalist would file a motion to quash it. 393 Alternatively, in a civil case, the party receiving a subpoena of nonparty business records may file objections, including the protections afforded by the Kansas shield law. 394 A subpoenaed journalist would then produce the records only following the issuance of an order by the court on motion of the party seeking the records. 395 After a motion to quash or an order to compel (in a civil case), the court would conduct an open hearing during which neither side would disclose the confidential information. 396 Rather, the court would assess the arguments of both sides, with the party seeking disclosure bearing the burden of proof. 397

Footnotes

384. K.S.A. 60-480(a) (Supp. 2011); see also Arcamona, supra note 383 (“While a Kansas court will have to authoritatively define the term ‘online journal,’ the [law] seems to cover bloggers and other non-traditional journalists so long as they engage in ‘regular’ journalism. This question, whether bloggers should be protected by shield laws, has provoked vigorous debate surrounding the proposed federal shield law.”).

385. Arcamona, supra note 383.

386. K.S.A. 60-481 to -482.

387. Id. 60-482(a).

388. Id. 60-482(a)(1)-(3).

389. Id. 60-482(b).

390. Id. 60-482(b)(1)-(2).

391. Id. 60-482(b).

392. Id. 60-483; see Bruce Interview, supra note 326; Schmidt Interview, supra note 324.

393. K.S.A. 60-245a(b).

394. Id.

395. K.S.A. 60-483; Bruce Interview, supra note 326; Schmidt Interview, supra note 324.

396. K.S.A. 60-482 to -483; Bruce Interview, supra note 326; Schmidt Interview, supra note 324.
party seeking disclosure must meet the three-element test set out in section 60-482(a) by a "preponderance of the evidence." After the hearing, the court, in its discretion, could order the journalist to turn over the evidence for an in camera inspection to determine if such disclosure is admissible.

According to [Senator Terry] Bruce [from Hutchinson]:

[T]he court could immediately say yes or no, [it is] clear cut; otherwise the court could say, "I need to look at the evidence myself in chambers." . . . The court could make a determination that [an in camera inspection is] not necessary, but I suspect the court will hold a hearing and then apply the arguments to the evidence at hand.

At the conclusion of the initial hearing—or following the in camera inspection, if the court chooses to avail itself of that option—the court can order the disclosure of the evidence only if the court "specifically finds" that the evidence sought "is admissible and that its probative value outweighs any harm to the free dissemination of information to the public through the activities of journalists." The court may make such a determination only after weighing whether the evidence sought is relevant, of a "compelling interest" and could not be obtained by alternative means. [Senate Majority Leader Derek] Schmidt [from Independence] understood that, "[a]t the end of the day, this is always going to be a balancing process. . . . And that has to be, ultimately, a case-by-case, fact-specific process. We have just provided the courts with a little more . . . And that has to be a case-by-case, fact-specific process. . . ."

The statute also specifies that if either the party seeking disclosure or the party invoking the privilege did not have a "reasonable basis" for their respective position, then the court can order them to pay the other side's attorney's fees. Finally, the statute itself mandates that it should "not be construed to create or imply any limitation on or to otherwise affect a privilege guaranteed by the constitutions of the United States or the state of Kansas.

E. Putting the New Media Shield Law to the Test

1. Tragedy in Wichita

It did not take long for a Kansas court to take the new statutory reporter's privilege for a test drive. The first . . . application of the state's new shield law arose in a civil action filed in the wake of a five-year-old boy's death at an indoor playground in Wichita. According to [Senator Terry] Bruce [from Hutchinson]:

[T]he court could immediately say yes or no, [it is] clear cut; o[r] the court could say, "I need to look at the evidence myself in chambers." . . . The court could make a determination that [an in camera inspection is] not necessary, but I suspect the court will hold a hearing and then apply the arguments to the evidence at hand.

At the conclusion of the initial hearing—or following the in camera inspection, if the court chooses to avail itself of that option—the court can order the disclosure of the evidence only if the court "specifically finds" that the evidence sought "is admissible and that its probative value outweighs any harm to the free dissemination of information to the public through the activities of journalists." The court may make such a determination only after weighing whether the evidence sought is relevant, of a "compelling interest" and could not be obtained by alternative means. [Senate Majority Leader Derek] Schmidt [from Independence] understood that, "[a]t the end of the day, this is always going to be a balancing process. . . . And that has to be, ultimately, a case-by-case, fact-specific process. [We have] just provided the courts with a little more guidance about how the balance has to be struck." The statute also specifies that if either the party seeking disclosure or the party invoking the privilege did not have a "reasonable basis" for their respective position, then the court can order them to pay the other side's attorney's fees. Finally, the statute itself mandates that it should "not be construed to create or imply any limitation on or to otherwise affect a privilege guaranteed by the constitutions of the United States or the state of Kansas.

Not surprisingly, the victim's family wanted to use the information provided by the former employees in a lawsuit against the owner and operator of Pure Entertainment. But first, the family's attorney, Todd Shadid, needed their names. Shadid issued a business records subpoena to the Eagle.

One employee told the Eagle that the manager told employees to operate the ride in a manner it was not intended to be used, in such a way that the employees would "launch the kids, and [they would] go flying in the air." The employees, who provided their age but not their name “because of concerns for their safety and future employment,” told the reporter that they “honestly did not feel comfortable doing it, but [that is] the way he [the manager] showed us.”

2. The Analysis in Ruggiero v. Moonwalks for Fun, Inc.

Not surprisingly, the victim's family wanted to use the information provided by the former employees in a lawsuit against the owner and operator of Pure Entertainment. But first, the family's attorney, Todd Shadid, needed their names. Shadid issued a business records subpoena to the Eagle.

The employees, who provided their age but not their name “because of concerns for their safety and future employment,” told the reporter that they “honestly did not feel comfortable doing it, but [that is] the way he [the manager] showed us.”

The subpoena, served on the Editor and Vice President of the Eagle, sought records that “pertain to reporting by Suzanne Perez Tobias..."
on the death of Matthew Branham, and Moonwalks for Fun, Inc. and Pure Entertainment.”414 Specifically, the subpoena sought the name, address, and phone number of the employees Tobias interviewed and quoted anonymously, all notes and statements in connection with the interview of the two employees, all notes and statements in connection with other interviews of named employees of Pure Entertainment, all photographs of the ride in question, and contact information for other customers interviewed by Tobias and quoted in her story.415

a. The Wichita Eagle’s Objections

In briefs and oral arguments following the subpoena, the arguments and analysis played out almost precisely as those interviewed for this Article had predicted they would—albeit after a slight procedural hiccup. The Eagle filed objections to the subpoena, claiming the information sought was privileged, pursuant to both the new media shield law and existing First Amendment common law precedent in Kansas.416 In an interview months later, Vix said that rather than reply to his objections with a Motion to Compel, Shadid simply set the dispute for a hearing before Sedgwick County District Court Judge William Wooley.417 Vix wanted to brief the matter before going in front of the judge to argue, so he filed what he titled a “Memorandum in Support of Objections of Wichita Eagle and Beacon Publishing Company, Inc., to Subpoena of Business Records.”418 In a footnote, Vix wrote that “plaintiff has not filed a motion and therefore the Eagle can only speculate as to the arguments she might raise in response to the objections. This is particularly curious given the fact that plaintiff bears the burden of establishing grounds sufficient to overcome the asserted privileges.”419

Notwithstanding the procedural irregularities, the underlying content of each side’s argument appeared to unfold as the shield law’s authors anticipated. The Eagle based its objection to the business records subpoena on the test outlined in the new shield law, which the memorandum quoted at length.420 The Eagle’s brief underscored language in the shield law, which notes that “[t]he rights and privileges protected by [the shield law] are in addition to any other rights guaranteed by the constitutions of the United States and the State of Kansas.”421 The brief then outlined Branzburg, In re Pennington, and Silkwood.422 Finally, the brief went on to argue that “an extensive constitutional analysis was unnecessary because “[a]ll of the information sought is plainly protected by the shield law.”423

Although the Eagle argued that it was “not compelled to do so by the shield law or otherwise,” the Eagle undertook to outline in general terms what information it had that was responsive to the subpoena.424 The heart of the dispute concerned the names of the employees who were quoted anonymously.425 The Eagle conceded that while the individuals’ identities “might be material and relevant in the present proceedings, it is far less clear that such information is of a compelling interest as required” by the shield law.426 The Eagle argued that “a ‘compelling interest’ is present when the information in question is of such importance that the inability to obtain it will result in a ‘certain miscarriage of justice.’”427 But here, the newspaper article itself said the two individuals quoted “were not present when the accident at issue in this case occurred. The information they could provide, therefore, could not help establish any element of the plaintiff’s case.”428

Finally, the Eagle argued that the Plaintiff simply had not done enough to try to learn the information she sought through the subpoena.429 Specifically, the Eagle argued that the newspaper article contained the ages of the two employees.430 The Eagle’s brief went on to criticize the Plaintiff’s strategy:

With even the most minimal of discovery efforts[,] plaintiff could obtain a list of defendants’ past and present employees. . . .

It does not appear that plaintiff has done anything to try to learn the identities of the former employees before issuing a subpoena to the Eagle. This is precisely the sort of lazy litigation practice that gave rise to shield laws in the first place. Plaintiff’s lack of effort, in and of itself, compels that the Eagle’s objection be sustained.431

415. Id. at 1-2.
416. See Objections Memorandum, supra note 413, at 1-2.
419. Id. at 11 n.7.
420. Id. at 4-5 (quoting 2010 Kan. Sess. Laws 928 (codified as K.S.A. 60-482 (Supp. 2011))).
421. Id. at 5 (quoting 2010 Kan. Sess. Laws 928 (codified as K.S.A. 60-485)).
422. Id. at 6-9.
423. Id. at 9.
424. Id. at 11-15.
425. See Id. at 12.
426. Id.
427. Id.
428. Id.
429. Id. at 13.
430. Id.
431. Id.
The Plaintiff responded with a brief that framed the issue as follows:

A journalist must disclose information that is material and relevant to pending litigation, not readily available by other means, and is of a compelling interest. Plaintiff’s lawsuit asserts that defendants improperly set up and misused an inflatable ride causing the death of a child. The Wichita Eagle reported that two former employees said defendant taught them to misuse the inflatable ride. Should the Wichita Eagle disclose the identity of the two former employees?

The brief then contended that Plaintiff had met its burden. The Plaintiff argued the information sought was “material and relevant[,] . . . not obtainable by readily available alternative means[, and] . . . of compelling interest.” The Plaintiff’s six-page brief, in mostly conclusory statements, argued that the information was “not obtainable by readily available alternative means” because the Plaintiff would “have to contact every former employee and hope that each one responds truthfully. Such effort is not reasonable and does not guarantee identification or discovery of the information sought” from the newspaper. The brief argued that the information that the anonymously quoted employees could provide was of a compelling interest because it had “enormous probative value” and the lawsuit concerned “a public safety issue.” The brief did not address any information sought by the subpoena other than the identities of the anonymously quoted employees.

c. Oral Arguments and the Judge’s Ruling

During oral arguments, Vix, a member at the Wichita law firm of Fleeson, Gooing, Coulson & Kitch, L.L.C. and the Eagle’s longtime attorney, relied on the idea that the acquisition of a reporter’s unpublished notes through a subpoena cannot provide a shortcut for litigants. He recalled quoting from his brief, which quoted a Texas case that held:

The law is clear that compulsory disclosure of a reporter’s confidential sources should be the last resort for obtaining information; all other means must first be exhausted. Respondent must fulfill his obligation to exhaust alternative sources even though he fears that the investigation may be time consuming, costly, and unproductive.

Vix argued that the very discovery that the Plaintiff was trying to avoid was the exact discovery required to overcome the protection of the shield law. In the end, Judge Wooley ruled in favor of the Eagle, sustaining their objections to the subpoena in a curt, handwritten Order scrawled on a minute sheet, stating simply: “objections of Eagle are sustained without prejudice.”

433. Id. at 4.
434. Id. at 5.
435. Id.
436. See Vix Interview, supra note 417.
438. Vix Interview, supra note 417.
In addition to the Kansas shield law, journalists are covered by the federal Privacy Protection Act of 1980 (PPA), 42 U.S.C. § 2000aa et seq. The purpose of the statute essentially is to prevent law enforcement from intruding directly upon the media’s process of informing the public through First Amendment-protected publication of news. The statute limits the conditions under which agents may obtain warrants to search for journalists’ 'work product materials' or 'documentary materials.’ Exceptions in the statute allow searches for materials related to national security and child pornography and in certain other limited circumstances. If agents conduct a search in violation of the statute, they are subject to civil liability.

Police, prosecutors and judges are not always aware of the Privacy Protection Act of 1980. For example, in 2007, University of Kansas campus police obtained a search warrant seeking access to computers at the Lawrence Journal-World. With the warrant, the police aimed to determine the identity of a Journal-World reader who anonymously had posted a comment on the newspaper's website about a KU student's death. The anonymous poster was known only by the pseudonym “a2thek.” The warrant to search Journal-World computers for a2thek’s identity had been approved by the Douglas County District Attorney's Office and a District Court Judge. However, the newspaper’s management resisted execution of the warrant, asserting that it violated the PPA. The newspaper condemned a police search in the newsroom as “a gross attack on First Amendment provisions that protect newspaper files and sources – and an attempt to unnecessarily invade Journal-World files.” The newspaper pointed out that issuance of a subpoena for documents is an alternative to a police search within the newsroom. The newspaper indicated it could have responded to a subpoena, because it was a far less intrusive investigative tactic than a search warrant.

The anonymous comment by a2thek on the Journal-World’s website was a response to news about an unattended death in one of KU’s residence halls. Police who investigated the death, the newspaper reported, had found no signs of foul play and were seeking to determine the cause of death.

Following the Journal-World’s news coverage, a2thek posted a comment on the newspaper’s website suggesting that the student’s death had been due to a heroin overdose. Upon seeing the post, the police swiftly acted to obtain the warrant to search the newspaper’s computers for a2thek’s identity. Objecting to the police’s attempt to search the computers, the newspaper’s attorney said that it was “the type of practice you used to see in the old Soviet Union.”

The Journal-World took the position that the information that KU police sought was protected as the newspaper’s “work product” under the PPA. The newspaper regarded a2thek’s purpose as being to inform the newspaper’s readers. In the Journal-World’s view, even if the posted comment failed to meet the PPA’s definition of “work product,” it was protected by the PPA as electronically recorded “documentary” material at the newspaper.

The matter ultimately was resolved without a search of the Journal-World's newsroom. In the course of the controversy, a significant development was that a2thek added a comment on the newspaper’s website apologizing for giving out “mis-information.” The added comment in effect withdrew a2thek’s original attribution of the KU student’s death to heroin, saying: “This information is not 100% correct and I would like to take some time to apologize for any mis-information. The guy that works with me I overheard in the bathroom making this speculation of what actually happened so I don’t know if it’s actual fact or hearsay. I do once again don’t want to draw any lines or conclusions being I really don’t know anything about all of it and I think the guy at work was just an acquaintance and went to school with the guy and that’s what he heard. I guess when a autopsy is performed that will get you the answers that your looking for. Sorry for all the misleading info once again.” (The quoted text is the same as it appeared on the Journal-World’s website.)


Selected provisions of the Privacy Protection Act follow on the following page.
42 U.S.C.A. § 2000aa. Searches and seizures by government officers and employees in connection with investigation or prosecution of criminal offenses

(a) Work product materials

Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if--

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: Provided, however, That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of Title 18, or section 2274, 2275, or 2277 of this title, or section 783 of Title 50, or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, 2252, or 2252A of Title 18);

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being;

(3) there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials; or

(4) such materials have not been produced in response to a court order directing compliance with a subpoena duces tecum, and--

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.

(c) Objections to court ordered subpoenas; affidavits

In the event a search warrant is sought pursuant to paragraph (4)(B) of subsection (b) of this section, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.42 U.S.C.A. § 2000aa-7


(a) Right of action

A person aggrieved by a search for or seizure of materials in violation of this chapter shall have a civil cause of action for damages for such search or seizure--

(1) against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this chapter, or against any other governmental unit, all of which shall be liable for violations of this chapter by their officers or employees while acting within the scope or under color of their office or employment; and
(2) against an officer or employee of a State who has violated this chapter while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1).

(b) Good faith defense
It shall be a complete defense to a civil action brought under paragraph (2) of subsection (a) of this section that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct.

(c) Official immunity
The United States, a State, or any other governmental unit liable for violations of this chapter under subsection (a)(1) of this section, may not assert as a defense to a claim arising under this chapter the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(d) Exclusive nature of remedy
The remedy provided by subsection (a)(1) of this section against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this chapter, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(e) Admissibility of evidence
Evidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this chapter.

(f) Damages; costs and attorneys’ fees
A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000, and such reasonable attorneys’ fees and other litigation costs reasonably incurred as the court, in its discretion, may award: Provided, however, That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment.

(g) Attorney General; claims settlement; regulations
The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this chapter by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee, if warranted.

(h) Jurisdiction
The district courts shall have original jurisdiction of all civil actions arising under this section.

§ 2000aa-7. Definitions
(a) “Documentary materials”, as used in this chapter, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically1 or electronically recorded cards, tapes, or discs, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

(b) “Work product materials”, as used in this chapter, means materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense, and--

(1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person;

(2) are possessed for the purposes of communicating such materials to the public; and

(3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

(c) “Any other governmental unit”, as used in this chapter, includes the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of State government.
Following is a list of organizations that can assist attorneys who wish to contact representatives of Kansas media.

**Kansas Association of Broadcasters**
214 SW 6th Ave., #300
Topeka, KS 66603
Kent Cornish, President
(785) 235-1307
http://www.kab.net/

**Kansas City Press Club**
Kansas City, Missouri
Debra DeCoster, President
djd44wr@aol.com
http://www.kcpressclub.org/contact-us/

**Media-Bar Committee**
Kansas Bar Association
1200 SW Harrison St.
Topeka, KS 66612-1806
Mike Kautsch, Chair
mkautsch@ku.edu
(785) 864-5377

**Kansas Press Association**
5423 SW 7th St.
Topeka, KS 66606
Doug Anstaett, Executive Director
http://kspress.com/

**Kansas Sunshine Coalition for Open Government**
Topeka, Kansas
Ron Keefover, President
ronkeefover@gmail.com

**Society of Professional Journalists**
Kansas Pro Chapter
825 E. Douglas
Wichita, KS 67202
Molly M. McMillin, President
Wichita Eagle
(316) 269-6708