Developments in Public Access to Records and Proceedings of Kansas Agencies and Courts

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Public Access to Records and Proceedings of Kansas Agencies and Courts

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Prof. Mike Kautsch reviews legislative developments related to the Kansas Open Records Act and the Kansas Open Meetings Act. He also discusses various statutes, rules and cases that deal with transparency of the Kansas Judicial Branch.

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(updated through May 15, 2016)

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I. Transparency

- In *Telegram Publishing Co. v. Kansas Dept. of Transportation*, 275 Kan. 779, 785 (2003), the Kansas Supreme Court reviewed the state’s public policy under its Sunshine Laws. The Court said:


  “[I]t is of prime importance to focus on the overriding public policy of [KORA], which is set forth in K.S.A. 45–216(a) as follows: ‘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.’

  ‘Our legislatively directed duty has been previously recognized by our court in *State Dept. of SRS v. Public Employee Relations Board*, 249 Kan. 163, 166, 815 P.2d 66 (1991), where we stated: ‘The interpretation of KORA is a question of law and it is our function to interpret the Act to give it the intended effect.’ We went on to set forth our duty in the following manner:

  ‘The Kansas Open Meetings Act, K.S.A. 75–4317 et seq., and KORA were passed by the legislature to insure public confidence in government by increasing the access of the public to government and its decision-making processes. This increases the accountability of governmental bodies and deters official misconduct. The public policy stated in KORA is that all records are “open for inspection by any person unless otherwise provided by this act” K.S.A. 45–216(a).’ ”

  Kansas’ strong promotion of the policy of openness by its governmental bodies to insure public confidence in them is reiterated in K.S.A. 45–218(a), which provides: “All public records shall be open for inspection by any person, except as otherwise provided by this act.”

  KORA does contain specific exceptions to disclosure; but like other statutory exceptions, they are to be narrowly interpreted. See *Allen v. Kansas Dept. of S.R.S.*, 240 Kan. 620, 622, 731 P.2d 314 (1987).
Compliance with the Sunshine Laws has been drawn into question. Below is an excerpt from a column that a number of Kansas newspapers published in March 2016.

Sunshine Week, March 13-19, 2016, is a time to celebrate the Kansas Sunshine Laws. Under these laws, state and local governments generally must open their meetings and records to the public. Under the Sunshine Laws, Kansans have a right to know how officials are exercising their power and find out what the government is up to.

However, the Sunshine Week celebration this year coincides with rising concern about whether government in Kansas is sufficiently transparent. Open-government advocates are calling upon the Legislature to enact improvements in the Sunshine Laws.

Late last year, the Center for Public Integrity, a nonpartisan, nonprofit organization, gave Kansas a grade of F for transparency. The Center flunked Kansas after conducting a national study and concluding that the state did not maintain adequate public access to government information. The F that Kansas received was an abrupt drop from the average grade, a C, that the Center had assigned to the state three years earlier.

II. Sunshine Laws

A. Kansas Open Records Act (KORA), K.S.A. 45-215 et. seq.

1. Litigation


A KORA dispute reached the Kansas Court of Appeals last year and resulted in a ruling in favor of disclosure of public records. In May 2013, the Wichita Eagle submitted a request to Wichita State University, seeking e-mails of university employees who were former and current chairs of the Hunter Health Clinic's board of directors. The newspaper sought the e-mails in connection with its news coverage of Hunter’s financial condition. Hunter sued to prevent disclosure of the e-mails, asserting they were private clinic records. The district court ruled in favor of Hunter. The Eagle appealed, and the court held that KORA “does not create a cause of
action to enforce the purposes of KORA with respect to private records. As a result, given [KORA’s] language focusing on ‘public records,’ Hunter’s claim of statutory standing to make a KORA claim to prevent disclosure of private records is not persuasive.” (Hunter Health Clinic v. Wichita State University and the Wichita Eagle, 52 Kan.App.2d 1, 9 (2015)) The court remanded the case with directions to dismiss.

2. Definition of “public record”
   a. Controversy over official e-mails sent on private account

   • A significant controversy erupted last year over e-mails sent by the state budget director to lobbyists. As reported by the Wichita Eagle, the director had sent the e-mails using a private account. (Bryan Lowry, Budget director sent e-mail from private account to lobbyists on proposed budget, Wichita Eagle (January 27, 2015), http://www.kansas.com/news/politics-government/article8345505.html)

   • Public debate ensued over whether e-mails were public records if a public official sent or received them using a personal device or on a private account.

   KORA, in K.S.A. 45-217, states:

   (g)(1) ‘Public record’ means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or 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.

   (2) ‘Public record’ shall not include records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds or records which are 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.

   (3) ‘Public record’ shall not include 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. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.

   KORA, in K.S.A. 45-217(f)(1) defines “public agency” to include an “officer” but does not refer to employees. In (f)2(C), KORA says a “public agency” does not include “any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week.”

2. Definition of “public record” (continued)
   b. Attorney General opinion

   • The Attorney General issued an opinion that e-mails exchanged by public employees using personally owned devices or private accounts were not public records under KORA. The opinion, focusing on the definition of “public record” in KORA, said, “[S]tate employees who
send private emails...are not a “public agency” within the meaning of the KORA. Accordingly, these private emails of state employees are not public records subject to the provisions of the KORA.” (Kan. Atty. Gen. Op. No. 2015-10 (April 28, 2015), http://ksag.washburnlaw.edu/opinions/2015/2015-010.pdf)

- The Attorney General prepared draft legislation “to extend the KORA to apply to the private emails of public employees when used to conduct public agency business.” The draft legislation included “a test for permitting government regulation of state employee speech that is ‘pursuant to official duties.’” The test was drawn from *Garcetti v. Ceballos*, a 2006 U.S. Supreme Court case that did not define the term “public record” and instead concerned whether a public employee’s speech is protected by the First Amendment. (Letter from Attorney General Derek Schmidt to Revisor Gordon Self (May 6, 2015), https://ag.ks.gov/docs/default-source/documents/20150506-gordon-self-ltr-re-kora.pdf?sfvrsn=2)

  *Garcetti* arose from a claim by a deputy district attorney that his employer retaliated against him for writing an internal memorandum to his supervisors about what he regarded as misconduct in an investigation. *Garcetti*, 547 U.S. 410, 413-416. The Court concluded that “his expressions were made pursuant to his duties as a calendar deputy.” *Id.* at 421. Because the deputy district attorney had spoken “as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case,” the First Amendment did not protect his expression. *Id.*

- During the state legislative session in 2015, bills were introduced in the House and Senate to amend KORA along the lines proposed by the Attorney General. For example, SB 306 defined a “public record” to include recorded information such as an e-mail “made, maintained or kept by or is in possession of...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 the public agency.” (SB 306 by Sen. Molly Baumgardner (2015), http://www.kslegislature.org/li/b2015_16/measures/documents/sb306_00_0000.pdf)

  2. Definition of “public record” (continued)
  
  c. Kansas Judicial Council Open Records Advisory Committee

- In the fall of 2015, at the behest of Senate Judiciary Committee Chair Jeff King, the Kansas Judicial Council formed an Open Records Advisory Committee. Chaired by Sen. Molly Baumgardner, the Advisory Committee’s charge was to review definitions of the term “public record” in SB 306 and a related bill—definitions that Sen. King noted were “similar to proposals made by the Attorney General.” The charge also called on the Advisory Committee “to analyze approaches taken by other states and provide insight on their preferred method of balancing privacy concerns versus the need for disclosure” of public records. (Letter from Sen. Jeff King, Chair, Kansas Senate Judiciary Committee, to Nancy J. Strouse, Executive Director, Kansas Judicial Council (May 26, 2015), referenced on the first page of the Report of the Kansas Judicial Council Open Records Advisory Committee on 2015 SB 306/307 Relating to Public Records and Private Email, approved by the Kansas Judicial Council December 4, 2015)

- SB 361 was the result of the Advisory Committee’s study. Under SB 361, recorded information was a public record if it was held by a public agency or by “any officer or employee
of a public agency in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency.” The definition was intended to encompass electronic communications, such as e-mails, that are about public business and are exchanged by public officers and employees using personal devices and private accounts.

Where the definition in SB 361 referred to the “transaction” of public business, it was consistent with the purpose of a public records law as described by the Attorney General in a May 6, 2015, letter to the Office of Revisor of Statutes. “The policy principle,” he said, “of course, is simple: recorded information constituting or transacting government business should be subject to the KORA, regardless of whether it is recorded on a public or private email account.” He indicated that a public records law appropriately would encompass “private” e-mails that “actually involve the conduct or transaction of public business.” He also said that a public employee who “uses a private email account to bypass KORA when conducting or transacting public business would be acting ‘pursuant to their official duties’ and the private email would be a ‘public record.’” In addition, he noted that KORA’s purpose has been characterized “as allowing public access of the ‘business workings’ of state and local government and as strongly ‘favor[ing] openness in governmental transactions.’” (Emphasis in the original.) (Letter from Attorney General Derek Schmidt to Revisor Gordon Self (May 6, 2015), https://ag.ks.gov/docs/default-source/documents/20150506-gordon-self-ltr-re-kora.pdf?sfvrsn=2)

The definition in SB 361 has certain wording in common with the definition of “government records” in the state Government Records Preservation Act K.S.A. 45-401 et seq. Like SB 361, the Preservation Act is concerned with records originated, received or held “in connection with the transaction of official business or bearing upon the official activities and functions of any governmental agency.” K.S.A. 45-402(d). The commonality between SB 361 and the Preservation Act recognizes the important link between two obligations of public officials—first, to preserve records and, second, to make the records accessible to the public.

2. Definition of “public record” (continued)

d. Kansas Senate Judiciary Committee

● The Senate Judiciary Committee amended SB 361, substituting the Attorney General’s preferred definition of “public record” for the one recommended by the Advisory Committee.

2. Definition of “public record” (continued)

e. SB 361

● SB 361 amended K.S.A. 45-217 to say:
  (g) (1) “Public record” means any recorded information, regardless of form, 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.


- Policy-makers, police, privacy advocates and news media representatives have taken various positions on the conditions under which audio and video recordings by law enforcement should be publicly accessible. For example, the Radio and Television Digital News Association (RTDNA) believes that law enforcement “body cam” video should be considered public record, similar to other public safety communications, such as police car “dash cam” video, recordings of 9-1-1 telephone calls and arrest records. Under most existing laws, such public records are currently subject to disclosure.

  To exempt body camera video from similar release would significantly defeat the purpose for which the cameras were intended; to provide a clear and unmoderated view of the actions of police officers, suspects and the general public.

  Legitimate concerns over privacy issues can be addressed under existing law. A court could determine if these issues require certain parts of the video be withheld or electronically altered to protect an individual’s right to privacy in a particular circumstance.

  RTDNA believes there must be a general presumption of free and open access to these videos in order to preserve the public transparency necessary to ensure their purpose is accomplished.

(RTDNA, *Coalition backs access to body-worn camera video* (May 22, 2015), [http://rtdna.org/article/coalition_backs_access_to_body_worn_camera_video](http://rtdna.org/article/coalition_backs_access_to_body_worn_camera_video))

- The legislation classifies each audio or video recording made and retained by law enforcement with a body camera or a vehicle camera as a “criminal investigation record.” In K.S.A. 45-217(c) of KORA, the term “‘criminal investigation record’ means records of an investigatory agency or criminal justice agency…compiled in the process of preventing, detecting or investigating violations of criminal law, but does not 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 as defined by K.S.A. 21-3405, prior to its repeal, or K.S.A. 21-5406, and amendments thereto.”

- The legislation provides that the law would expire on July 1, 2021, unless reviewed and reenacted before that date.

- The legislation begins with the following provisions:

  Be it enacted by the Legislature of the State of Kansas: New Section 1.(a) Every audio or video recording made and retained by law enforcement using a body camera or a vehicle camera shall be considered a criminal investigation record as defined in K.S.A. 45-217, and amendments thereto.
The provisions of this subsection shall expire on July 1, 2021, unless the legislature reviews and reenacts this provision pursuant to K.S.A. 45-229, and amendments thereto, prior to July 1, 2021.

(b) In addition to any disclosure authorized pursuant to the open records act, K.S.A. 45-215 et seq., and amendments thereto, a person described in subsection (c) may request to listen to an audio recording or to view a video recording made by a body camera or a vehicle camera. The law enforcement agency shall allow the person to listen to the requested audio recording or to view the requested video recording, and may charge a reasonable fee for such services provided by the law enforcement agency.

(c) Any of the following may make a request under subsection (b): (1) A person who is a subject of the recording; (2) a parent or legal guardian of a person under 18 years of age who is a subject of the recording; and (3) an attorney for a person described in subsection (c)(1) or (c)(2).

(d) As used in this section: (1) "Body camera" means a device that is worn by a law enforcement officer that electronically records audio or video of such officer's activities.

4. Cost of access to public records/copies of audio-visuals—SB 98

- Under K.S.A. 45-219(c) of KORA, public agencies generally “may prescribe reasonable fees for providing access to or furnishing copies of public records.” However, at a legislative hearing in 2014, concerns were aired about whether agencies were charging reasonable fees. As was reported:
  
  Topeka Capital-Journal reporter Aly Van Dyke testified that she requested records of inspections the state Board of Cosmetology performed in Shawnee County and the board charged the newspaper $1,600 up front.
  
  The board later refunded $1,200 when fulfilling her request took far less time than initially estimated, but Van Dyke said the initial price tag would have scared off many private citizens, who are also entitled to records under the KORA.
  
  “Governments can’t ask them to spend that kind of money on top of their taxes,” Van Dyke said in written testimony. “It’s unreasonable.”
  
  The House Federal and State Affairs Committee also heard from a private citizen, Jeffrey Jarman, who said he and his wife spent almost $1,000 to get records from the Maize school district as they sought to have their daughter placed in a different high school.
  
  Jarman said the original bill didn’t include an itemization of the charges and the final bill “included 16 hours of work by an administrative assistant who produced zero pages of material.”
  
SB 98 was intended to resolve issues about fees charged for access to public records. The Kansas Press Association’s executive director, Doug Anstaett, explained SB 98 as follows:

Public records provide the written record of what government has done and plans to do. Citizens of the state of Kansas have a right to review those records without being charged an arm and a leg for it.

Senate Bill 98 tries to bring some sanity to this often perplexing situation. Placing limits on what can be charged and whose salaries can be included in the research costs is sorely needed.


SB 98, as amended, began with these provisions:

New Section 1(a) Charges for public records requests under the Kansas open records act shall be subject to the following:

(1) Charges for copies of public records which may be provided on black and white standard size pages shall not exceed $.25 per page; (2) all other public records provided shall be charged at no more than the cost to the public agency to provide the public records to the records requestor; and (3) staff time shall be charged at the lowest hourly rate of the person who is qualified to provide the public records.

(b) "Standard size" means 8 1/2 x 11 inches or 21.59 x 27.94 centimeters


Agencies that receive numerous public records requests from businesses have opposed legislation that would limit fees the agencies can charge. (See, for example, written testimony by Betty Jo Swayden regarding SB 10, a predecessor of SB 98), Barber County Register of Deeds (March 17, 2014), http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_fed_st_1/documents/testimony/20140319_13.pdf) If SB 98 were designed like the federal Freedom of Information Act, it would include a fee waiver or limit applicable to records requesters who serve the public interest rather than business interests. (5 (U.S.C. 552 (a)(4)(A)(i-ii))

K.S.A. 219, which includes the provision that permits agencies to charge fees for access to public records, also authorizes agencies generally to deny requests for copies of their audio/visual records. In K.S.A. 219(a), KORA says,

A public agency shall not be required to provide 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 such items or devices were shown or played to a public meeting of the governing body thereof….

Technologies for copying audio/visual records are more readily available than when KORA was enacted in 1984. Georgia is an example of a state that does not exempt does not
limit copying. In that state, Ga. Code Ann., § 50-18-71 encompasses photographs and other such material as public records and provides that:

At the time of inspection, any person may make photographic copies or other electronic reproductions of the records using suitable portable devices brought to the place of inspection. Notwithstanding any other provision of this chapter, an agency may, in its discretion, provide copies of a record in lieu of providing access to the record when portions of the record contain confidential information that must be redacted.

5. Live streaming audio of legislative hearings—HB 2573 / Passed as House Substitute for Senate Bill No. 249,

- Citizens can be skeptical of the Legislature’s commitment to transparency. For example, in 2015, the Topeka Capital-Journal pointed out a practice by legislators to introduce bills “without putting their names on them,” making the Legislature the “most anonymous” in the nation. (Celia Llopis-Jepsen, Kansas legislation is most anonymous in nation/Legislators file most bills without putting their names on them, http://cjonline.com/news/2015-10-25/kansas-legislation-most-anonymous-nation)

- HB 2573, however, was a step toward openness in the Legislature. A supplemental note with the bill (HB 2573, by Representatives Whitmer and B. Carpenter, http://www.kslegislature.org/li/b2015_16/measures/documents/hb2573_01_0000.pdf) states that, as amended, it would allow the live audio streaming of legislative proceedings. The bill would place the Director of Legislative Administrative Services, under the direction of the Legislative Coordinating Council, in charge of administering and supervising live audio streaming. The bill would require the Director of Legislative Administrative Services to work with the Information Network of Kansas, Inc. (INK). Furthermore, INK would provide and agree to implement services the Director determines are necessary for live audio streaming. The bill would amend the statutorily required duties of INK to provide for live streaming of certain legislative proceedings to be executed within existing resources. (Supplemental Note on House Bill No. 2573, As Amended by House Committee on Appropriations http://www.kslegislature.org/li/b2015_16/measures/documents/supp_note_hb2573_01_0000.pdf)

B. Kansas Open Meetings Act (KOMA), K.S.A. 75–4317 et seq.

1. Issues surrounding executive sessions

- Citizens often question whether officials are complying with KOMA requirements that meetings generally be open. Early this year, for example, the Attorney General’s office
determined that city officials in Liebenthal “violated the KOMA on three occasions by failing to comply with procedural requirements for entering into executive session and by using executive sessions for subject matter not recognized by law.” (AG Schmidt announces settlement with City of Liebenthal over KOMA/KORA violations, Attorney General’s office (January 20, 2016), http://ag.ks.gov/media-center/news-releases/2016/01/20/ag-schmidt-announces-settlement-with-city-of-liebenthal-over-koma-kora-violations)

2. SB 360/487

• The proposed legislation was intended to modify procedures for officials to following before entering into an executive session of an open meeting. A motion to enter into an executive session must include justifications that are specified in the bill. (SB 487, Senate Committee on Ways and Means (2016), http://www.kslegislature.org/li/b2015_16/measures/documents/sb487_00_0000.pdf)

III. COURTS


• In 2014, the Legislature amended two statutes—K.S.A. 22-2302 and K.S.A. 22-2502—that prescribe procedures for issuance of probable cause affidavits in support of arrests and searches. The amendments provided for public access to affidavits after they have been executed. Under the statutes as amended, any person may request an affidavit and, within 10 business days, a judge must order that the affidavit be disclosed in full or with redactions or that it be sealed.

• HB 2545 was introduced to require that, if a judge orders disclosure of an affidavit to a requester, it then be placed in an open court file, available to subsequent requesters. Amendments to the bill would expand grounds on which a judge may redact or order redactions of an affidavit or seal it.

• As passed, HB 2545 includes, not only the provision that a disclosed affidavit be placed in an open court file, but also additional grounds for redacting or sealing an affidavit to protective privacy and other interests.

B. Judicial restraints on media and trial participants

• In recent years, Kansas media have challenged judicial restrictions on access to information in a number of criminal cases. The challenges are based on precedents that recognize a strong presumption in favor of openess.

• In Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976), the U.S. Supreme Court considered whether a trial judge could impose a prior restraint on publication by ordering the media not to report on criminal proceedings. The Court placed “a constitutional ban on such orders unless proper inquiry and findings are made by the trial judge in advance of entering the
order. In determining whether a judicial order of prior restraint is permissible, a judge must examine the evidence and determine: (1) the nature and extent of the pretrial news coverage; (2) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (3) how effectively a restraining order would operate to prevent the threatened danger.”

(State v. Alston, 887 P.2d 681, 686 (Kan. 1994))

- In State v. Alston, 887 P.2d 681 (Kan. 1994), the Kansas Supreme 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 [newspaper] 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 *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), In 1991, the U.S. Supreme Court considered the constitutionality of a state disciplinary action against an attorney who had held a press conference about a criminal indictment of his client. The Court held that attorneys may be prohibited from making extrajudicial comments that they know or reasonably should know pose a “substantial likelihood of material prejudice” to the fairness of a trial. (*Id. at , 1075*) That standard is invoked by judges who want to minimize extrajudicial comment by trial participants. For example, it was applied by a Kansas district court in a 2010 high-profile criminal case. The court ordered that counsel, members of law enforcement and other participants “shall make no extra-judicial statement that a reasonable person should know would have a substantial likelihood of materially prejudicing this criminal proceeding.” The court specified comments that would not violate the restraint, such as “statements concerning…the general nature of the claim or defense;…scheduling issues;…[r]esults of hearings or trials; requests for assistance in obtaining evidence and information necessary thereto;…[t]he identity of investigation and arresting officers and agents.” (*State v. Longoria*, Barton County District, Court Case No. 2010 CR 231, September 10, 2010) The defendant in the case was convicted of murder and other charges. The defendant filed an appeal, based in part on a claim that extensive pre-trial publicity had prejudiced jurors against him. However, the Kansas Supreme Court ruled that evidence was insufficient to support the defendant’s claim. (*State v. Longoria*, 301 Kan. 489 (2015))

- In *Journal Publishing v. Mechem*, 801 F.2d 1233 (10th Cir., 1986), the media contested a restraint imposed by a judge on extrajudicial comments by trial participants. The 10th Circuit Court of Appeals held that a newspaper has standing to intervene if it has “alleged an injury in fact because the court's order impeded its ability to gather news, and that impediment is within the zone of interest sought to be protected by the first amendment.” (*Id. at 135*)
Although the Kansas Rules of Professional Responsibility 3.6 and 3.8 constrain extrajudicial comment by attorneys, the rules allow such comment under certain circumstances.

Rule 3.6(a) says: “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.” However, Rule 3.6(c) adds that “a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.” (KRPR 3.6, http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+discipline+of+Attorneys&r2=29)

Rule 3.8(f) states that prosecutors must “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.” However, Ru. 3.8(f) includes an exception “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.” (KRPR 3.8, http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+discipline+of+Attorneys&r2=27)

### C. Judicial closure of court records/proceedings

- *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), established a presumption that criminal trials are open to the public. An opinion by 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.” He said criminal trials historically were “presumptively open.” He also emphasized a relationship between the openness and its “proper functioning” of a trial. 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.” The Chief Justice wrote that judges may close a trial 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. *(Id. at 569- 581)* (See also *Media Guide for Attorneys and Judges*, Kansas Bar Association (2015), https://www.ksbar.org/default.asp?page=mediaguide.)

- Kansas trial judges who consider whether to close a criminal 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 danger to fairness and a prejudicial effect that cannot otherwise be avoided. *(Id. at 1182)*, citing The American Bar Association Standards Relating to the Administration of Criminal Justice: Fair Trial and Free Press § 8-3.2 (2d ed. 1978).

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 *Fossey* decision. 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. (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.

The presumption of openness that the Kansas Supreme Court adopted in Fossey extends “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)) (See also Media Guide for Attorneys and Judges, p. 34, Kansas Bar Association (2015), https://www.ksbar.org/default.asp?page=mediaguide.)

● In Wichita Eagle Beacon Co. v. Owens, 27 P.3d 881(Kan.,2001), the Kansas 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.”

In Owens, the 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 *Owens*, after reviewing *Fossey*, the Court 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) (See also Media Guide for Attorneys and Judges, Kansas Bar Association (2015), [https://www.ksbar.org/default.asp?page=mediaguide](https://www.ksbar.org/default.asp?page=mediaguide).)

D. Courtroom management—Kansas Supreme Court Rule 1001
The Kansas Supreme Court rule titled, *Media Coverage of Judicial Proceedings Rule 1001 Electronic and Photographic Media Coverage of Judicial Proceedings*, begins with a statement of policy as follows:

(a) Preface.

The increasing use of various electronic devices including phones, tablets, and other wireless communication devices continually challenges a court’s legitimate concerns for courtroom security, participant distraction, and decorum. These electronic devices are redefining the news media, the informational product disseminated, and the timeliness of the content. They also result in new expectations for the court and participants for immediate access to information. Policies developed to address the court’s concerns should include enough flexibility to take into consideration that electronic devices have become a necessary tool for court observers, journalists, and participants and continue to rapidly change and evolve. The courts should champion the enhanced access and the transparency made possible by use of these devices while protecting the integrity of proceedings within the courtroom.

(Rule 1001, http://www.kscourts.org/rules/Media_Coverage/Rule%201001.pdf)

E. Marriage licensing information—Kansas Supreme Court Rule 106

- In 2015, the Kansas Supreme Court invited public comment on a proposed change in Rule 106, which relates to management of court records. The proposal was to limit public access to marriage licensing information in district court records. Objections to the proposal were submitted by genealogical researchers, among others. (See, for example, *Proposed Change to Kansas Supreme Court Rule 106 Redacting of personal information in Marriage Licenses*, a statement by James A. Alpert, chair, Records Preservation & Access Committee, Austin, Texas, (March 27, 2015) to the Kansas Supreme Court, http://www.fgs.org/rpac/wp-content/uploads/2015/04/RPAC-letter-Kansas-Supreme-Court-Rule-106.pdf.)

- After receiving comments, the Court modified Rule 106, which now reads as follows:
  (d) Marriage Licensing Documents. Except for marriage records identified in subsection (d)(3) and K.S.A. 65-2422d(h), marriage licensing documents in the custody of a district court are confidential and are not subject to disclosure under the Kansas Open Records Act, K.S.A. 45-215 et seq.
    (1) Marriage licensing document defined. A marriage licensing document refers to the following: (A) the confidential cover sheet for the uniform marriage license application prescribed by the judicial administrator; (B) the uniform marriage license application prescribed by the judicial administrator; (C) a document containing the personal and statistical information the Kansas Department of Health and Environment requires on forms issued under K.S.A. 23-2509; and (D) the license for individuals to enter a marriage under K.S.A. 23-2505.
    (2) When disclosure permitted. Unless otherwise ordered by the court, marriage licensing documents may be disclosed only to the court, a court
employee assigned to the case, the Kansas Department of Health and
Environment, or a person to whom the marriage license was issued. A
person making a request for his or her own marriage licensing documents
must display government-issued photo identification, which is sufficient
proof of identity for purposes of this subsection.

(3) Limited marriage license record. District courts must make publicly
available a limited marriage license record which contains only the uniform
marriage license application prescribed by the judicial administrator. The
uniform marriage license application must not include the following
personal information: (A) an applicant’s Social Security number; (B) an
applicant's date or city of birth; (C) an applicant's mother’s maiden name; or
(D) any information expressly designated as confidential on forms
promulgated by the Kansas Department of Health and Environment under
K.S.A. 23-2509.

(4) Existing marriage licensing documents. Marriage licensing
documents created before October 1, 2015, may be closed in whole or in
part by redaction at the discretion of the chief judge of a judicial district or
in accordance with an applicable exception to the Kansas Open Records
Act. An applicant whose marriage licensing documents remain open may
petition the court for closure of the documents, and any judge of the district
court may rule on the petition for closure.

[History: Am. effective September 8, 2006; Am. (b) effective August 28,
2008; Restyled rule and amended effective July 1, 2012; Am. effective October 1,
2015.] (Rule

F. Anti-SLAPP—Substitute for House Bill 2054 / Passed as Senate Bill No. 319, effective
July 1, 2016,

● SLAPP (Strategic Lawsuits Against Public Participation) are “used to silence and
harass critics by forcing them to spend money to defend these baseless suits. SLAPP filers don’t
go to court to seek justice. Rather, SLAPPs are intended to intimidate those who disagree with
them or their activities by draining the target’s financial resources.” (FAQs about SLAPPS,
Anti-
SLAPP laws have been enacted in 28 states, the District of Columbia, and one U.S. territory.
slapps)

● The legislation is called the “Public Speech Protection Act.” The purpose of the law
“is to encourage and safeguard the constitutional rights of a person to petition, and speak freely
and associate freely, in connection with a public issue or issue of public interest to the maximum
extent permitted by law while, at the same time, protecting the rights of a person to file
meritorious lawsuits for demonstrable injury.”