

February 25, 2008

ATTORNEY GENERAL OPINION NO. 2008- 4

Frank E. Kohl  
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Re: Contracts and Promises--Electronic Transactions--Use of Electronic Records and Electronic Signatures; State Agency Written Standards Governing Use of Electronic Signatures; Rules and Regulations Governing Use of Digital Signatures by State Agencies; Application to Criminal Prosecutions

Courts--Supreme Court--Reproduction and Preservation of Court Records; Minimum Standards--Court May Adopt Rules Relating to Court Records--District Courts--Reproduction and Preservation of Court Records

Criminal Procedure--Preliminary Proceedings--Commencement of Prosecution--Issuance of Warrant or Summons; Use of Electronic Signatures for Complaints and Affidavits

Notaries Public and Commissioners--Notarial Acts--Definitions--Notarial Acts--Certificate of Notarial Acts--Short Forms--Unsworn Declarations--Unsworn Declarations; Written Declaration Sufficient, Form; Exceptions; Criminal Complaints and Affidavits

Oaths and Affirmations--General Provisions--Officers Authorized to Administer Oaths--How Administered--Persons Having Conscientious Scruples May Affirm--Form and Commencement and Conclusion of Oaths--Falsifying Oaths or Affirmation; Criminal Complaints and Affidavits

Synopsis: The Uniform Electronic Transactions Act does not authorize the use of an unsworn, electronic digitally-signed complaint to commence a criminal prosecution pursuant to K.S.A. 22-2301 or an unsworn, electronic digitally-signed supporting affidavit to make a probable cause determination for issuing an arrest warrant or summons to appear pursuant to K.S.A. 22-2302.

However, where a district court has adopted local rules meeting the requirements in Kansas Supreme Court Rule 122 and the provisions in K.S.A. 53-601 are met, an electronic unsworn, digitally-signed complaint can be used to commence a criminal prosecution pursuant to K.S.A. 22-2301 and an electronic unsworn, digitally-signed supporting affidavit can be used to make a probable cause determination for issuing an arrest warrant or summons to appear pursuant to K.S.A. 22-2302. Cited herein: K.S.A. 16-1602; 16-1603; 16-1605; 16-1607; 20-159; 20-160; 20-357; 20-3105; 21-3110; 21-3110a; 21-3110b; 21-3805; 22-2201; 22-2202; 22-2301; 22-2302; 53-502; 53-503; 53-508; 53-509; 53-601; 54-101; 54-102; 54-103; 54-104; 54-105; 60-211; and K.S.A. 2007 Supp. 77-201 *Eighteenth*.

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Dear Mr. Kohl:

As Leavenworth County Attorney, you request our opinion whether the Uniform Electronic Transactions Act (UETA), K.S.A. 16-1601 *et seq.*, and the provisions for unsworn declarations in K.S.A. 53-601 authorize: (1) an electronic unsworn digitally-signed complaint to commence a criminal prosecution pursuant to K.S.A. 22-2301; and (2) an electronic unsworn digitally-signed supporting affidavit to make a probable cause determination for issuing an arrest warrant or summons pursuant to K.S.A. 22-2302.

The resolution of your request requires that we review not only the UETA, but several other areas of law. This includes the provisions governing criminal procedure, notary acts, oaths and affirmations, and courts. Our analysis begins with the requirements for a criminal complaint and probable cause affidavit.

### **The criminal complaint and affidavit**

Pursuant to the Kansas Code of Criminal Procedure, K.S.A. 22-2201 *et seq.*, "prosecution shall be commenced by filing a complaint with a magistrate."<sup>1</sup> A complaint is "a written statement under oath of the essential facts constituting a crime"<sup>2</sup> and must "be signed by some person with knowledge of the facts."<sup>3</sup> However, a person who has "conscientious scruples against taking an oath, may affirm with like effect."<sup>4</sup>

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<sup>1</sup>K.S.A. 22-2301(a).

<sup>2</sup>K.S.A. 22-2202(8).

<sup>3</sup>K.S.A. 22-3201(b). *See also* K.S.A. 22-2202(12) (an "information" is "a verified written statement signed by a county attorney or other authorized representative of the state of Kansas presented to a court, which charges the commission of a crime").

<sup>4</sup>K.S.A. 54-103.

To issue an arrest warrant, a judge must make a probable cause determination that the defendant has committed a crime based upon allegations contained in the complaint, the affidavit filed with it, or other evidence.<sup>5</sup> An affidavit is defined as a "written statement, under oath sworn to or affirmed by the person making it before some person who has authority to administer an oath or affirmation."<sup>6</sup>

A complaint and affidavit are essentially a verification, which is a written "statement given under oath [or affirmation] where the declarant must not only refrain from making a knowingly false statement, but must also have affirmative knowledge of the statement's truthfulness."<sup>7</sup> For purposes of this analysis, the focus is on the meaning of the terms "written statement," "oath," and "affirmation." We will first examine the requirements for an oath or affirmation.

### **The oath or affirmation requirement**

The administration of an oath or affirmation is a notarial act,<sup>8</sup> thus, it is governed by the Uniform Law on Notarial Acts, K.S.A. 53-501 *et seq.*, and the Act for Oaths and Affirmations, K.S.A. 54-101 *et seq.* In Kansas, a notary public or other authorized official can administer an oath or affirmation.<sup>9</sup> There are strict statutory formalities that must be followed in giving an oath or affirmation.<sup>10</sup>

Additionally, the notarial officer must determine "that the person appearing before the officer and making the verification is the person whose true signature is on the statement verified."<sup>11</sup> The notarial officer must also complete a signed and dated certificate<sup>12</sup> stating that the written statement was signed and sworn (or affirmed) before the notarial officer by the person making the statement.<sup>13</sup> In doing so, the notarial officer certifies that all

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<sup>5</sup> See K.S.A. 22-2302(1).

<sup>6</sup> *State v. Knight*, 219 Kan. 863, 867 (1976) (emphasis added).

<sup>7</sup> *State v. Green*, 257 Kan. 444, 447 (1995); *Double S, Inc. v. Northwest Kansas Prod. Cred. Ass'n*, 17 Kan. App. 2d 740, 742 (1992). See also K.S.A. 53-502(c) (a verification upon oath or affirmation is "a declaration that a statement is true made by a person upon oath or affirmation").

<sup>8</sup> K.S.A. 53-502(a).

<sup>9</sup> K.S.A. 54-101. See also K.S.A. 20-3105 (district court clerk authorized to administer oaths and affirmations in all cases).

<sup>10</sup> K.S.A. 54-102 (for an oath, declarant's right hand is either laid upon the Holy Bible or uplifted); 54-104 (an oath begins and ends with "'You do solemnly swear' . . . 'So help you God'" and an affirmation begins and ends with "'You do solemnly, sincerely and truly declare and affirm' . . . 'And this you do under the pains and penalties of perjury'").

<sup>11</sup> K.S.A. 53-503(b).

<sup>12</sup> K.S.A. 53-508(a).

<sup>13</sup> K.S.A. 53-508(b)(3)-(4); 53-509(c).

statutory requirements have been met.<sup>14</sup> However, our Supreme Court has not required strict adherence to the statutory formalities.

In *State v. Kemp*,<sup>15</sup> the defendant had been convicted of perjury and contended the testimony showed that the notary did not administer an oath for the affidavit, but only acknowledged his signature. After noting that the affidavit included the notary's certificate, the court stated:

"The notary had before him the certificate to be executed, which if executed, would declare Kemp as sworn. The notary executed the certificate. Manifestly, both parties intended that out of Kemp's visit to the notary there should come what would have the effect of administration of an oath; and the court holds that in the absence of clear proof the ceremony, or lack of ceremony, was designed by the participants to leave Kemp unsworn, the legal effect of what occurred was the same as if Kemp was sworn according to the formalities prescribed for administration of an oath."<sup>16</sup>

Citing *Kemp*, the court followed the above rationale in a perjury prosecution case involving a criminal complaint, stating:

"Surely some weight must be given to the opening statements of the complaint and to the physical acts of the parties even though statutory formalities were not observed and especially is this true in the light of the testimony of the judge that he believed Anderson was swearing to the complaint, and there was no design by either the judge or Anderson to leave Anderson unsworn."<sup>17</sup>

In 1989, K.S.A. 53-601 was enacted to codify the ruling in *Kemp*.<sup>18</sup> K.S.A. 53-601(a) provides:

"Except as provided by subsection (b), whenever a law of this state or any rules and regulations, order or requirement adopted or issued thereunder requires or permits a matter to be supported, evidenced, established or proved by the sworn written declaration, verification, certificate, statement, oath or affidavit of a person, such matter may be supported, evidenced,

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<sup>14</sup>K.S.A. 53-508(c).

<sup>15</sup>*State v. Kemp*, 137 Kan. 290 (1933).

<sup>16</sup>*Id.* at 293 (citations omitted).

<sup>17</sup>*State v. Anderson*, 178 Kan. 322, 327 (1955). *See also, State v. Seven Slot Machines*, 203 Kan. 833 (1969), *cert. denied* 396 U.S. 1037 (1970) (despite the lack of formality in administering oath to support an affidavit for a search warrant, the court, relying upon *Anderson* and *Kemp*, found that the record showed a "complete absence of clear proof that the ceremony or lack of ceremony was designed by the participants to leave the affiant unsworn").

<sup>18</sup>*Double S, Inc. v. Northwest Kansas Prod. Cred. Ass'n*, 17 Kan. App. 2d 740, 744 (1992).

established or proved with the same force and effect by the unsworn written declaration, verification, certificate or statement dated and subscribed by the person as true, under penalty of perjury, in substantially the following form:

. . . .

"(2) If executed in this state: 'I declare (or verify, certify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

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(Signature)"

None of the exceptions listed in subsection (b) include a criminal complaint or probable cause affidavit. Like a false oath or affirmation, a false unsworn declaration under K.S.A. 53-601 gives rise to prosecution for perjury.<sup>19</sup> Thus, a signed unsworn declaration set forth in K.S.A. 53-601 can be used as an alternative to the formal administration of an oath or affirmation.<sup>20</sup> However, we must next address whether an electronic complaint and electronic affidavit constitute a "written statement."

### **The written statement requirement**

The term "written statement" is not defined in the Kansas Criminal Procedure Code or the Kansas Criminal Code.<sup>21</sup> In such instances, "the rules governing the construction of statutes of this state"<sup>22</sup> are used. Those rules define "written" as "printing, engraving, lithography and *any other mode of representing words and letters, excepting those cases where the written signature or the mark of any person is required by law.*"<sup>23</sup>

In other words, an electronic complaint and an electronic probable cause affidavit could meet the definition of a written statement if the law does not require the declarant's manual handwritten signature. The statutes for administering an oath or affirmation indicate that the notary officer must actually witness the declarant signing the verification. However, the statutes governing the criminal complaint, affidavit, and unsworn declaration do not specify

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<sup>19</sup>K.S.A. 21-3805(a)(1)-(2). *See also* K.S.A. 54-105 ("a party who makes a false oath or affirmation is subject "to the pains and penalties of perjury").

<sup>20</sup>*See* Attorney General Opinions No. 2000-42 (the unsworn declaration authorized by K.S.A. 53-601 is an alternative to the sworn affidavit required for a marriage license); 1994-84 (unsworn declaration in K.S.A. 53-601 may be used in lieu of the sworn affidavit required for the tax amnesty program); 1991-21 (unsworn declaration authorized by K.S.A. 53-601 may be used in lieu of a sworn verification for a mechanic's lien statement); and 1990-64 (unsworn declaration authorized by K.S.A. 53-601 may be used in lieu of a sworn verification for a petition seeking to bring a question to an election).

<sup>21</sup>*See* K.S.A. 21-3110, 21-3110a, 21-3110b (definitions for Kansas Criminal Code), 22-2202 (definitions for Kansas Code of Criminal Procedure).

<sup>22</sup>K.S.A. 22-2201(3).

<sup>23</sup>K.S.A. 2007 Supp. 77-201 *Eighteenth* (emphasis added).

whether those documents must use the declarant's actual handwritten signature. For that reason, we will review provisions in other areas of the law for guidance.

### **The UETA**

The UETA was enacted in 2000.<sup>24</sup> Under the UETA, an electronic record is "a record created, generated, sent, communicated, received, or stored by electronic means" and the information in such record must be able to be retrieved in perceivable form.<sup>25</sup> A digital signature is:

"[A] type of electronic signature consisting of a transformation of an electronic message using an asymmetric crypto system such that a person having the initial message and the signer's public key can accurately determine whether:

"(1) The transformation was created using the private key that corresponds to the signer's public key; and

"(2) the initial message has not been altered since the transformation was made."<sup>26</sup>

The UETA defines an electronic signature as "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."<sup>27</sup> You rely upon the following provision in the UETA:

"(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

. . . .

"(c) If a law requires a record to be in writing, an electronic record satisfies the law.

"(d) If a law requires a signature, an electronic signature satisfies the law."<sup>28</sup>

Our first inquiry is whether the scope of the UETA includes criminal cases. Although criminal cases are not expressly excluded from the UETA,<sup>29</sup> it is important to note the UETA

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<sup>24</sup>L. 2000, Ch. 120, §§ 1-20.

<sup>25</sup>K.S.A. 16-1602(h) and (o).

<sup>26</sup>K.S.A. 16-1602(e).

<sup>27</sup>K.S.A. 16-1602(i).

<sup>28</sup>K.S.A. 16-1607.

<sup>29</sup>K.S.A. 16-1603(b).

is in Chapter 16 that governs contracts and promises, not Chapter 22 that governs criminal procedure.

The statute establishing the scope of the UETA provides that it "applies to electronic records and electronic signatures relating to a transaction."<sup>30</sup> Similarly, the statute for the use of electronic records and electronic signatures states that the UETA "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."<sup>31</sup>

The UETA defines a transaction as "an action or set of actions occurring between two or more persons relating to the conduct of business, insurance, commercial or governmental affairs."<sup>32</sup> Other provisions require the adoption of either standards or regulations when a state agency offers or provides the use of an electronic or digital signature "to persons *doing business* with that state agency."<sup>33</sup> Thus, the totality of these provisions appear to indicate the UETA has no application in criminal cases. [Additionally, the legislative history shows the UETA was intended "to enable electronic *commerce* to take place."<sup>34</sup>

### **Supreme Court Rule 122**

You also mention Supreme Court Rule 122 which authorizes district courts to implement electronic filing systems utilizing electronic signatures.<sup>35</sup>

Like the UETA, Rule 122 was adopted in 2000.<sup>36</sup> Rule 122.B explains that "[e]lectronic filing and transmission is the process by which information is delivered by electronic means rather than in the conventional paper form. This includes any documents which normally become part of the case file, whether submitted by the court or litigants." The purpose of Rule 122 is to set mandatory standards that "focus on ensuring the integrity of the court record and providing a capability for filing that is at least as good as existing paper systems."<sup>37</sup>

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<sup>30</sup>K.S.A. 16-1603(a).

<sup>31</sup>K.S.A. 16-1605(b).

<sup>32</sup>K.S.A. 16-1602(t).

<sup>33</sup>K.S.A. 16-1605(g)-(i). Emphasis added.

<sup>34</sup>*Minutes*, House Committee on Judiciary, February 14, 2000. Emphasis added.

<sup>35</sup>Rule 122 (2007 Kan. Ct. R. Annot. 204) ("A district court may, by local rule, require documents to be *filed, signed, or verified by electronic means* that are consistent with technical standards for electronic filing and transmission as approved by the Supreme Court.") Emphasis added.

<sup>36</sup>Rule 122, History.

<sup>37</sup>Rule 122.A.

To file documents electronically, the person must first enroll in the district court's electronic filing system and obtain authorization from the district court to use it.<sup>38</sup> Once authorized, the electronic document must comply in form and content with the applicable rules of the Kansas Supreme Court and the receiving court; have the capability to be printed as a paper document without losing content or appearance; be either stored in or converted to a format that can be archived as required in Rule 108; and be stored in the electronic format in which it was submitted.<sup>39</sup> A record of the electronic transmission must also be retained by the submitting party so that a full copy of the document can be made if requested by the court or other party.<sup>40</sup>

Additionally, Rule 122 adopts the UETA's definition of an "electronic signature" and "digital signature" and states that a digital signature "may be accepted as a substitute for, and, if accepted, shall have the same force and effect as, any other form of signature."<sup>41</sup> The electronic signature on an electronic court document "will be treated as an original signature and has the assurances of a signature under K.S.A. [ ] 60-211."<sup>42</sup> That statute requires the party or the attorney representing the party to sign the pleading "provided for by this article"<sup>43</sup> and prohibits the filing of frivolous pleadings.<sup>44</sup> "This article" refers to the rules of civil procedure that is a part of the Kansas Code of Civil Procedure.

Although it references the civil procedure code, Rule 122 does not prohibit its application to criminal cases. We are unaware of any judicial interpretation of this rule being applied to documents filed in criminal cases. Thus, we will also review the court's statutory authority to implement Rule 122.

### Courts

K.S.A. 20-160 authorizes the Kansas Supreme Court to adopt rules governing "the reproduction, preservation, storage and destruction of courts of this state, not inconsistent with this act." One reason for authorizing the reproduction of court records is to "promote efficiency in the office."<sup>45</sup>

Pursuant to the Act, the Supreme Court can authorize a judicial district to reproduce "any of the court records, papers or documents which are by law placed in the courts of that judicial district . . . and to acquire, maintain and use all such appropriate . . . methods as

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<sup>38</sup>Rule 122.E.

<sup>39</sup>Rule 122.C.1-4.

<sup>40</sup>Rule 122.I.

<sup>41</sup>Rule 122.D(1)-(3).

<sup>42</sup>Rule 122.D(5).

<sup>43</sup>K.S.A. 60-211(a).

<sup>44</sup>K.S.A. 60-211(b).

<sup>45</sup>K.S.A. 20-159.

shall be necessary to accommodate and preserve" such reproductions.<sup>46</sup> The selected method must accurately reproduce all details of the original and can "include the digital storage and retrieval of official court records."<sup>47</sup>

These statutory provisions clearly apply to all district court documents that are filed in both civil and criminal cases and authorize the Supreme Court to implement Rule 122. Pursuant to that rule, a district court can adopt local rules governing "documents to be filed, signed, or verified by electronic means that are consistent with the technical standards for electronic filing and transmission as approved by the Supreme Court."<sup>48</sup> Thus, if a district court has done so, an electronic or digital signature can be used on an electronic complaint and probable cause affidavit.

### Summary

Based upon the above analysis, we conclude that the Uniform Electronic Transactions Act does not authorize the use of an unsworn, electronic digitally-signed complaint to commence a criminal prosecution pursuant to K.S.A. 22-2301 or an unsworn, electronic digitally-signed supporting affidavit to make a probable cause determination for issuing an arrest warrant or summons to appear pursuant to K.S.A. 22-2302. However, where a district court has adopted local rules meeting the requirements in Kansas Supreme Court Rule 122, an electronic unsworn, digitally-signed complaint can be used to commence a criminal prosecution pursuant to K.S.A. 22-2301 and an electronic unsworn, digitally-signed supporting affidavit can be used to make a probable cause determination for issuing an arrest warrant or summons to appear pursuant to K.S.A. 22-2302.

Sincerely,

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<sup>46</sup>K.S.A. 20-159. *See also* 20-357.

<sup>47</sup>K.S.A. 20-159.

<sup>48</sup>Rule 122.