

SESSION OF 2021

**SUPPLEMENTAL NOTE ON SENATE BILL NO. 122**

As Amended by House Committee on Judiciary

**Brief\***

SB 122, as amended, would amend various sections within the Kansas Rules of Evidence (Rules), as follows.

***Hearsay Evidence Exception—Business Records***

The bill would amend an exception to the general prohibition on hearsay evidence for business records to replace a requirement that a judge find certain conditions regarding the records with a requirement that the conditions be shown by the testimony of the custodian or other qualified witness or by a certification that complies with self-authenticating certification provisions added elsewhere by the bill for certified domestic records of a regularly conducted activity or certified foreign records of a regularly conducted activity.

***Authentication of a Writing***

Currently, the Rules require authentication of a writing by certain means before it may be received in evidence and provide conditions under which certain documents that are at least 30 years old are sufficiently authenticated.

The bill would replace this provision with language requiring a proponent to produce evidence sufficient to support a finding that an item of evidence is what the proponent claims it is in order to satisfy the requirement of

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\*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

authenticating or identifying the item of evidence. The bill would add a non-exclusive list of examples, with explanations for each, of evidence that would satisfy the requirement. These examples would include:

- Testimony of a witness with knowledge;
- Nonexpert opinion about handwriting;
- Comparison by an expert witness or the trier of fact;
- Distinctive characteristics and the like;
- Opinion about a voice;
- Evidence about a telephone conversation;
- Evidence about public records;
- Evidence about ancient documents or data compilations;
- Evidence about a process or system; and
- Methods provided by a statute or rule.

***Authentication of Copies of Records***

The bill would amend the section of the Rules governing authentication of copies of records to add a list of items of evidence that are self-authenticating and require no extrinsic evidence of authenticity in order to be admitted. The list would include:

- Official publications;
- Newspapers and periodicals;
- Trade inscriptions and the like;

- Acknowledged documents;
- Commercial paper and related documents;
- Presumptions under law;
- Certified domestic records of a regularly conducted activity;
- Certified foreign records of a regularly conducted activity;
- Certified records generated by an electronic process or system; and
- Certified data copies from an electronic device, storage medium, or file.

The list also would include additional explanations of and requirements for certifying the above items of evidence.

### ***Original Document Required as Evidence; Exceptions***

The bill would amend the section of the Rules setting forth the general rule that an original writing is the only evidence that may be offered to prove its contents, subject to certain exceptions. The bill would reword the general rule to provide clarity. Additionally, the bill would add language to include recordings and photographs in the general rule and in the remainder of the section.

The bill would add a provision stating a duplicate is admissible to the same extent as the original, unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

The bill would add a provision allowing the proponent to prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party

against whom the evidence is offered. The proponent would not be required to account for the original.

The bill would reword a provision regarding determinations made by the judge and determinations made by the trier of fact or jury to clarify its organization and wording.

The bill would add definitions for “photograph,” “original,” and “duplicate” to this section.

The bill also would make additional technical amendments to this section to reorganize the section and provide clarity and consistency in statutory references and phrasing.

### ***Effective Date***

The bill would be in effect upon publication in the *Kansas Register*.

### **Background**

The bill was introduced by the Senate Committee on Judiciary at the request of the Kansas Judicial Council. [*Note*: SB 122 contains provisions identical to those of 2020 SB 334].

### ***Senate Committee on Judiciary***

In the Senate Committee hearing on February 9, 2021, a representative of the Kansas Judicial Council testified as a **proponent** on the bill, stating the bill represents the result and recommendations of a Kansas Judicial Council advisory committee study to incorporate provisions from the Federal Rules of Evidence into the Kansas Rules of Evidence to address technological advances and eliminate uncertainty arising from appellate court decisions.

No **opponent** or neutral testimony was provided.

### ***House Committee on Judiciary***

In the House Committee hearing on March 23, 2021, a representative of the Kansas Judicial Council testified as a **proponent** on the bill. No other testimony was provided.

On March 24, 2021, the House Committee amended the bill to make it effective upon publication in the *Kansas Register*.

### **Fiscal Information**

According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the Office of Judicial Administration states enactment of the bill would have a negligible fiscal effect on Judicial Branch operations.

Civil procedure; rules of evidence; authentication