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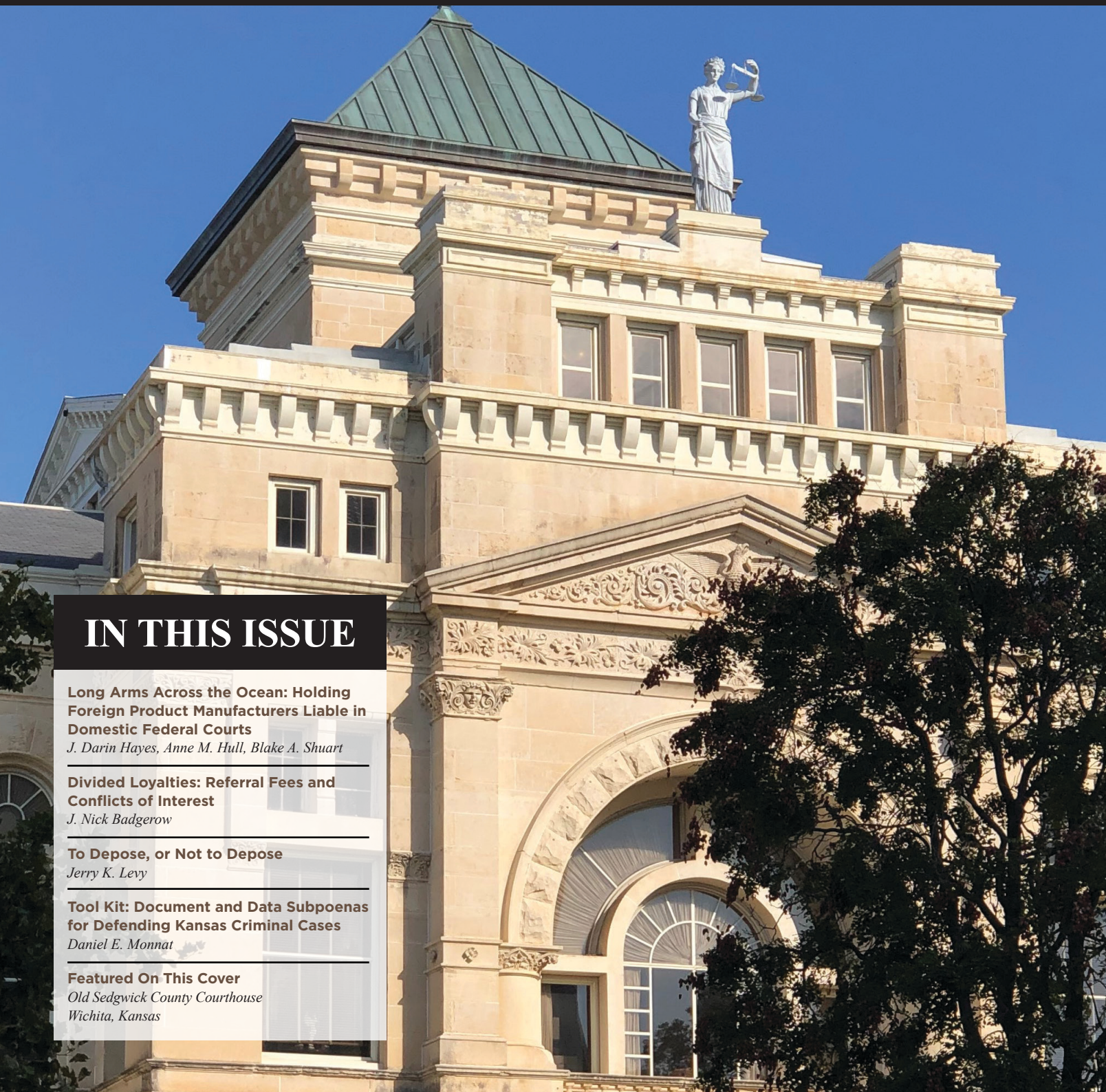

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Featured On This Cover
Old Sedgwick County Courthouse
Wichita, Kansas

Tool Kit: Document and Data Subpoenas for Defending Kansas Criminal Cases

By Daniel E. Monnat

DANIEL E. MONNAT

Dan Monnat co-founded Monnat & Spurrier, Chartered, in 1985 in Wichita, Kansas. He has extensive experience and success in complex, lengthy jury trials charging such crimes as conspiracy, criminal bank fraud, money laundering and murder. For over 40 years he has defended individuals and companies in high-stakes federal and state jury trials, appeals courts, regulatory proceedings, grand juries, and other investigations with outstanding results. Dan Monnat has been listed as one of the "Top 100" lawyers in the Missouri-Kansas edition of Super Lawyers for more than a decade. Dan is a KTLA Eagle Advocate member.

We live in an era where documents and data[1] proliferate. When our white-collar client is accused of economic crimes, we may wish to access the banking, credit card and prior employment records of any so-called whistleblower in order to expose the same sinister motivations to frame our client as any other informant might conceal. When our client is accused of sex offenses, the criminal defense attorney may wish access to the notes of the alleged victim's psychologist or counselor or the documents and data of the sexual assault nurse examiner. When our client is accused of shaken baby syndrome homicide, we may wish to make sure we have a complete copy of the hospital records, CT scans and nurses' notes involving the diagnosis and treatment of the infant. Or, we may need access to the digital data of third parties stored as cell phone calls, text messages, emails, GPS coordinates or surveillance camera images to establish locations and timelines in a variety of criminal cases. How do Kansas criminal defense lawyers get timely access to the documents and data necessary to defend our clients?

Discovery Statutes and Rules.

True, the trusting criminal defense attorney may simply prefer to rely on the prosecution and law enforcement officers to gather such evidence and turn it over as discovery. But is that likely to always get the defense everything we need and do so in a timely manner? Remember: The constitutional case law, basic Kansas discovery statutes and the Kansas Rules of Professional Conduct only require the prosecution to provide the discovery of certain information "upon request" in the possession or control of the prosecution or law enforcement that is actually, or constructively, known to them.[2] Creative discovery motions may sometimes ferret out the existence of such evidence already in the hands of the prosecution but ignored until illuminated by the motion. But, waiting on the prosecution for this information puts both receipt of the information and the timing of this receipt in the hands of the prosecution alone. Kansas criminal defense attorneys are unlikely to allow the prosecution to control the clock of the case. And, the constitutional case law and statutes guarantee us nothing about exculpatory evidence exclusively in the hands of third parties about which the prosecution has no knowledge of any kind.

Records in the Hands of 3rd Parties.

Thus, examination of important documents and data for defense evidence is the province and duty of constitutionally effective defense counsel.[3] In a state like Kansas where defense

depositions in criminal cases are allowed only in the rarest of circumstances,[4] even private investigators can be of only minimal assistance in dislodging defense evidence exclusively in the hands of third parties; for, ultimately that evidence must be summoned to court, authenticated, and admitted in a legally sound manner. This is when the time-honored *subpoena duces tecum* becomes one of the weapons of choice for the effective Kansas criminal defense attorney.

While the Kansas and United States Constitutions guarantee "in all criminal prosecutions" the right to "compulsory process," [5] Kansas criminal procedure provides, "any person charged with a crime shall be entitled to the use of subpoena and other compulsory process . . . issued and served in the same manner . . . as in civil cases . . . ." [6] So, let's make sure the Kansas criminal defense attorney is familiar with the weapons of that sometimes-unfamiliar realm of "civil cases."

Which Kansas Civil Subpoena Statute Should the Criminal Defense Attorney Use?

Two of the Kansas civil procedure statutes, K.S.A. 60-245 and K.S.A. 60-245a, seem to provide the criminal defense attorney with different ways by which to obtain documents and data by subpoena. These rules are divided, respectively, by their topic titles: "Subpoenas" and "Subpoena of Nonparty Business Records." Thus, as criminal defense attorneys, the first question we want to answer is which "civil case" statute do we choose to subpoena the documents and data we need to defend our criminal case. The complexity and comprehensiveness of the two statutes does not make a clear-cut choice immediately apparent.

K.S.A. 60-245 Subpoenas

However, generally, the answer to this question is: choose K.S.A. 60-245 "Subpoenas." This statute covers all Kansas subpoenas from their "form and contents" [7] to the form and manner in which any documents or data subpoenaed must be produced.[8] It exhausts the tasks that may be accomplished by any Kansas subpoena in its very first section:

> (a) In general. (1) Form and contents. (A) Requirements; in general. Every subpoena must:
> . . .
> (iii) command each person to whom it is directed to do the following at a specified time and place: Attend and testify; produce designated documents, electronically stored information or tangible things in that person's possession, custody, or control; or permit the inspection of premises.[9]

A Subpoena Under K.S.A. 60-245 Allows Us to Do A Lot About Obtaining Documents or Data.

It is clear from the very first section of K.S.A. 60-245 that it allows a criminal defense attorney to command a "person . . . at a specified time and place: . . . [to] produce . . . documents, electronically stored information, [*i.e.,* data] or tangible things." [10]

Of course, that time and place could be a "deposition, hearing or trial" that the "person" is also commanded to attend by a *subpoena duces tecum*.[11] But, it does not have to be; it could be just a *subpoena*. [12] As criminal defense attorneys, we need to first set aside any preconceived notions that our only mechanisms for examining documents or data are to subpoena them to a hearing or trial, or to obtain them by the methods provided for a "Subpoena of Nonparty Business Records" in K.S.A. 60-245a. By itself, K.S.A. 60-245 clearly provides that a command to produce documents or data may be set out in a separate subpoena from "attendance." [13]

Where Can A Commanded Person Be Required to Appear and Produce Documents and Data?

But, if a subpoena under K.S.A. 60-245 does not need to command a person to "produce designated documents . . . [or data] at a deposition, hearing or trial" [14] where all else might the commanded person be required to appear and produce documents or data? The answer is twofold: nowhere and anywhere.

Nowhere. First of all, section (c) of K.S.A. 60-245 on *"Protecting a person subject to a subpoena"* makes clear that a person commanded to produce documents or data "need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing or trial." [15] Presumably, a person commanded only to produce documents or data may produce them at the specified place of production by courier or any form of actual or electronic mail.[16]

Anywhere. Secondly, K.S.A. 60-245 places no restriction whatsoever on the location of additional in-state "place[s] of production" beyond the mention of where a "deposition, hearing or trial" may take place. It does, however, require special "other state" authorizations where actions under the subpoena are to take place "outside this state." [17] Otherwise, the place of production might be neutral ground (*e.g.,* a reserved conference room at the local county law library) or a place most convenient to the adversary (*e.g.,* the lobby or a conference room of the prosecutor's office or a similar room at the involved local forensic science center) or a place most convenient to the subpoenaing party (*e.g.,* the conference room of the local Public Defender's Office). We might even

envision the "place of production" under K.S.A. 60-245 to be such locations as the office of our private investigator, the laboratory of our retained expert or the conference room of our own private criminal defense law office.

Really? The law allows a criminal defense attorney to subpoena original documents and data to be produced at the office of the defense attorney or his agent and there "inspect[ed], cop[ied], test[ed] or sampl[ed]"? [18] Certainly. Subject to a few important obligations and safety valves.

Obligations Included in a Command to Produce Documents or Data.

Originals. Clearly, the documents and data to be produced under K.S.A. 60-245 should be originals; for, nowhere pertinent does it mention the "production" of "copies." In fact, K.S.A. 60-245a(c) makes explicit that a subpoena under K.S.A. 60-245 "may require the . . . production of original business records." Of course, as a matter of courtesy and strategy, in some cases it may be more economic and less contentious to begin by asking for the production of "copies" of the documents or data sought under either K.S.A. 60-245 or K.S.A. 60-245a.

Required Inspection, Copying, Testing, Sampling. Let's keep in mind, a production-only subpoena under K.S.A. 60-245 requires only "production" of the original records at the specified time and place, not the subpoenaing party's unrestrained "possession" of the documents or data. Rather, K.S.A. 60-245 only requires the responding party to "permit" inspection, copying, testing or sampling.[19]

Required Form or Forms of Data. The degree of control envisioned by the statute over the produced data, however, even allows the subpoena to "specify the form or forms in which electronically stored information is to be produced." [20] Without that specification, the statute provides its own directions and, "*Duties in responding to a subpoena . . . Producing documents or electronically stored information."* [21] Mainly, these sections require produced documents to be "as they are kept in the ordinary course of business . . . or organize[d] and label[ed] . . . to correspond to the categories in the [subpoena's] demand." [22] Unless a subpoena specifies a form, data must be produced "in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." [23] If the data is not reasonably accessible because of "undue burden or cost," the court may still "specify conditions for the discovery." [24]

Required Place of Production.
Finally, it is clear there is no language in K.S.A. 60-245 that would exclude a criminal defense attorney's office or that of the attorney's expert or investigator from being an acceptable "place of production" or inspection.[25]

Safety Valves: Notice, Objections, Quashings and Modifications.

There are, of course, safety valves to all these convenient methods of production and inspection. Foremost, if independent of a deposition, the subpoena commands the production of documents or data "before trial, then before it is served, a notice must be served on each party in accordance with subsection (b) of K.S.A. 60-205, and amendments thereto." [26]

While the burdens of notice under K.S.A. 60-245 or service under K.S.A. 60-205 are not great or complex, K.S.A. 60-245 also requires that, "Every subpoena must: . . . set out the text of subsections (c) and (d)." [27] These two sections deal with (c) "*Protecting a person subject to a subpoena"* and (d) *"Duties in responding to a subpoena."*

Thus, the text of sections (c) and (d) in the subpoena alerts the subpoena recipient: First, that unless also commanded to appear for a deposition, hearing or trial, a person commanded to produce documents and data need not appear in person at the place of production or inspection.[28] Second, that "[a] person commanded to produce designated materials or to permit inspection may serve on the party or attorney . . . a written objection to inspecting, copying, testing or sampling any or all of the . . ." documents or data and that, once the objection is made, the acts of production or inspection may thereafter be required only as directed in a "[court] order compelling production or inspection" issued after notice to the commanded person and a hearing.[29] Third, that the subpoena may be quashed or modified based on objections to production and inspection generally related to the subpoena requiring:

- an unreasonable time to comply.[30]
- excessive travel,[31]
- disclosures of privileged or protected matter,[32] or
- undue burden or cost.[33]

In summary, as applied to documents and data, K.S.A. 60-245 allows a criminal defense attorney to subpoena a person to produce the demanded originals or copies, at a deposition, hearing or trial with or without the personal attendance of a record custodian. And, K.S.A. 60-245 also allows a criminal defense attorney to issue a production-only subpoena permitting the attorney at a specified time and place to inspect, copy, test or sample original documents or data. Unless either kind of subpoena is connected to a deposition, if it requires production before trial, then "a notice must be served on each party . . ." before service of the subpoena on a person.[34] Either the notice to parties or the text of the subpoena itself, should assure that anything more than a routine, non-controversial subpoena will be objected to and, only after court review, either upheld, quashed or modified.

K.S.A. 60-245a Subpoena of Nonparty Business Records

On the other hand, K.S.A. 60-245a "Subpoena of Nonparty Business Records" carves out of all the things permitted by subpoenas under K.S.A. 60-245, one specific alternative to its provisions has more to do with authentication and admissibility than it does with compulsory process. Basically, limited to the instance of "nonparty business records" as defined in the statute, K.S.A. 60-245a provides that it is "sufficient compliance with a nonparty business records subpoena . . . ." if, within the time specified by the statute, "a custodian of the business records delivers to the party or attorney requesting them, by mail or otherwise, a true and correct copy of all records described in the subpoena and a completed copy of a declaration or an affidavit that complies with paragraph (3) [of this statute] accompanying the records." [35] The correctly completed affidavit or declaration is designed by statute to authenticate the records it accompanies in a manner that allows it to also be considered as "prima facie evidence that the records satisfy the requirements" of the *"[b]usiness entries and the like"* exception to the hearsay rule.[36] Thereby, the statute offers a discretionary option that may minimize the necessity of a "custodian of the business records" needing to appear and testify in certain instances.

Is it mandatory that we use K.S.A. 60-245a whenever subpoenaing "nonparty business records"? Despite what some prosecutors have been heard to contend, the answer is absolutely not.[37] Each statute in fact describes the discretionary nature of the procedure set forth in K.S.A. 60-245a. The "Subpoenas" statute, K.S.A. 60-245 states, "Subpoena and production of records of a business that is not a party may be in accordance with K.S.A. 60-245a and amendments thereto." [38] The "Subpoena of Nonparty Business Records" statute, K.S.A. 60-245a, says the same thing: "Any party may require the personal attendance of a business records custodian or the production of original business records in an action in which the business is not a party by causing a *subpoena duces tecum* to be issued pursuant to K.S.A. 60-245, and amendments thereto." [39]

Stated another way, if all we want is: "A true and correct copy" [40] of business records— (basically defined as "writings or electronically stored information" [41]) satisfying "prima facie" the business records exception to the hearsay rule [42] —from a "nonparty" without the "personal attendance of a business records custodian," [43] then, we may use K.S.A. 60-245a. For everything else, we must use the more all-purpose provisions of K.S.A. 60-245.

Comparing K.S.A. 60-245 and K.S.A. 60-245a.

Is there any advantage to the criminal defense lawyer in using one rule over the other when it comes to subpoenaing documents and data that are business records? Again, generally, K.S.A. 60-245 is the more versatile rule for the criminal defense attorney wishing to obtain data and documents. To illustrate the advantages and disadvantages of the two rules, below are some prescriptions for the criminal defense attorney seeking documents and data under differing circumstances:

Use K.S.A. 60-245 When the records sought are records of a party or if it is unclear whether they are.
K.S.A. 60-245 is more comprehensive as it may be used to require the production of both party and nonparty "business records." When in doubt about whether the government agency or office being subpoenaed qualifies as a party or nonparty, it makes good sense to avoid the issue by using the more versatile K.S.A. 60-245. In criminal prosecutions, this is not a trivial question. A Kansas criminal action is being prosecuted by either the state or one of its cities. If the agency or office subpoenaed for business records is a subdivision of the prosecuting entity, then, the agency or office too is, in effect, a party to the action and a K.S.A. 60-245a "[s]ubpoena of nonparty business records" is inapplicable to it.[44]

Use K.S.A. 60-245 For Production and Inspection of Original Documents.
By using K.S.A. 60-245, we do not have to settle for "a true and correct copy" [45] of the business records as claimed by a declaration or affidavit as we do under K.S.A. 60-245a. In fact, under K.S.A. 60-245, the responding party can be commanded to produce the original documents, electronically stored information or tangible things at a specified time and place and permit our inspection, copying, testing or sampling of the materials.[46] In our presence, then, original documents can be produced and inspected with copies made that are, in turn, inspected, tested and sampled to assure verbatim accuracy of the copies.

Use K.S.A. 60-245 to Require the Attendance of a Custodian or Analyst of the Records.
K.S.A. 60-245 alone allows us to issue a *subpoena duces tecum* to a witness or records custodian to appear at a deposition, hearing or trial and produce specified records. K.S.A. 60-245a provides no such mechanism for a subpoena under that rule to require the personal attendance of a witness or records custodian to explain or conclusively authenticate [47] documents or data. In fact, for attendance, K.S.A. 60-245a(c) specifically refers us back to K.S.A. 60-245.

Use K.S.A. 60-245 If Time Is of the Essence as It Requires Substantially Less Notice to Parties if Production Sought Before Trial.
If, under K.S.A. 60-245, "independently of a deposition, the subpoena commands the production of" business records before trial, then both statutes, in effect, require that all parties receive notice of the subpoena "before it is served." [48] However, K.S.A. 60-245a additionally requires the notice "[n]ot less than 14 days before issuance" of the subpoena.[49] Also, K.S.A. 60-245a requires a second "reasonable notice to the parties" if, after delivery of the records, a party "desir[es] to inspect or copy them." [50]

Use K.S.A. 60-245a To Require Proof the Business Has None of the Records Required by the Subpoena.
Imagine. Under K.S.A. 60-245 we subpoena a person to produce designated business documents or data at a specified place and time and the person shows up and says, or sends word that, the business has no such documents. The provisions of K.S.A. 60-245 contain no procedure for requiring documentation of the subpoenaed person's claim that the business possesses no such documents. In this one instance, K.S.A. 60-245a, outperforms its competitor by requiring "If the business has none of the records described in the subpoena, a custodian of the records of the business must submit a declaration . . . or an affidavit, stating that fact." [51]

Besides these relative advantages, the two statutes are otherwise approximately equal:

Both Statutes Allow State-Wide Service of Subpoenas for Production of Records.
Both statutes allow us to serve a subpoena for the production of business records "anywhere within this state" and any statutory objection based on "travel [of] more than 100 miles" is nullified as long as the subpoena under K.S.A. 60-245 is not also requiring the appearance of a person.[52]

Both Statutes Provide for the Payment of the Costs of Production.
K.S.A. 60-245 provides that a party or attorney "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" [53] including the ability to impose special conditions such as "ensur[ing] that the subpoenaed person will be reasonably compensated." [54] Similarly, K.S.A. 60-245a provides specifically for "*[c]osts for copying the records"* going as far as to permit the producing party to delay producing any copies until "reasonable costs" are paid.[55] However, where costs are prohibitive to a criminal defendant, counsel will wish to consider the effect, if any, of K.S.A. 22-3214(3).[56]

Both Statutes Are the Same re: "Protecting a Person Subject to a Subpoena" and "The Duties in Responding to a Subpoena."
Since K.S.A. 60-245, requires that, "Every subpoena must . . . set out the text of subsections (c) and (d)," [57] the provisions of these two subsections on *"Protecting a person subject to a subpoena"* and *"the duties in responding to a subpoena"* govern subpoenas under either K.S.A. 60-245 or 60-245a the same way.

Neither Statute Allows the Subpoenaing of Out of State Documents or Data.
Neither statute allows us to serve a subpoena for records out of state.[58]

Neither Statute Requires the Attendance of a Person Where Only the Production of Records is Sought.
Both statutes are clear on this issue. As stated above, the essence of K.S.A. 60-245a is to substitute an affidavit or declaration for the testimony of a records custodian. K.S.A. 60-245 is similarly explicit: "A person commanded to produce designated documents, electronically stored information or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing or trial." [59]

Neither Statute Requires Notice to a Nonparty Person to Whom Records Pertain.
Curiously, unlike one provision of the federal rule on subpoenas in a criminal case, neither Kansas statutory provision requires any notice to any nonparty person or entity to whom the records sought may pertain.[60] With any subpoena for documents or data, the conscientious criminal defense attorney will wish to consider whether any other provisions of law mandate notice to a person or entity whose private records are sought by subpoena from a third party.[61]

Conclusion.

In this increasingly document and data driven world, Kansas public defenders and private criminal defense attorneys often find themselves in emergency need of subpoenas long before they ever become attuned to the nuances of procedure in "civil cases." Hopefully, this article provides some initial direction to criminal defense attorneys seeking to quickly get up to speed on which of the two big Kansas civil subpoena statutes we should use when it comes to examining the documents and data we need to defend the human beings we are privileged to represent. True, our efforts to unearth the sometimes-uncomfortable details necessary to make our client's defense are often met with furious objections of privacy, privilege and irrelevancy. And true, our quest to examine original documents and data and, then, get them into evidence, often encounters some of the time-consuming roadblocks posed by the two subpoena statutes discussed. But it is also true that, while such obstacles are always formidable and daunting, they are often easily overcome by the criminal defense attorney's midnight oil, devotion to client and constant credo: "The defense never rests."

This article first appeared in the November 2019 issue Journal of the Kansas Trial Lawyers Association. Reprinted with the permission of the Kansas Trial Lawyers Association.

1 This article generally concerns what the two involved statutes, K.S.A. 60-245 and K.S.A. 60-245a, refer to as "documents" and "electronically stored information." Herein, for the sake of brevity, the author will refer to the latter as "data" except for when directly quoting the statute.

2 K.S.A. 22-3212(a)(2) ("the existence of which is known, or by the exercise of due diligence may become known . . . ."); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). *See State v. Lewis*, 50 Kan.App.2d 405, Syl ¶1 (2014) (holding the duty to provide discovery is governed by K.S.A. 22-3212, K.S.A. 22-3213 and the prosecutor's constitutional obligations under *Brady v. Maryland*, 373 U.S. 83 (1963)); *See also* KRPC 3.8(d) ("The prosecutor in a criminal case shall: . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . .").

3 *Armstrong v. Kemna*, 534 F.3d 857 (8th Cir. 2008); *Honors v. State*, 752 So.2d 1234 (Fla. 2d DCA 2000); *State v. Boudreaux*, 132 So.3d 381 (La. 2014); *In re I.R.,* 124 S.W.3d 294 (Tex. App.—El Paso 2003). *See also* U.S. Const. amend. VI; Kan. Const. B. of R. §10.

4 K.S.A. 22-3211(1) permits defense depositions only when it appears "a prospective witness may be unable to attend or prevented from attending a trial or hearing . . . ." Because this limitation is so different from the liberal use of depositions in civil cases, this statutory discovery option in a criminal case is not further discussed herein.

5 U.S. Const. amend. VI; Kan. Const. B. of R. §10.

6 K.S.A. 22-3214(1).

7 K.S.A. 60-245(a)(1)(A).

8 K.S.A. 60-245(d).

9 K.S.A. 60-245(a)(1)(A)(iii).

10 *Id.*

11 K.S.A. 60-245(a)(1)(C).

12 A subpoena is "[a] writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply." Black's Law Dictionary (11th ed. 2019), subpoena. "*Duces tecum*" comes from the Latin, "bring with you." *Id.*, subpoena duces tecum. Therefore, a *subpoena duces tecum* is "[a] subpoena ordering the witness to appear in court and to bring specified documents, records, or things." *Id.*, subpoena.

13 *See* K.S.A. 60-245(a)(1)(C).

14 K.S.A. 60-245(c)(2)(A).

15 *Id.*

16 *Cf.* 9 Daniel R. Coquillette, Gregory P. Joseph, Georgene M. Vairo & Chilton Davis Varner, *Moore's Federal Practice §45.40,* 45-69 (Matthew Bender Elite Products 3d Ed. 2019) (re similar provision of the Federal Rules of Civil Procedure Rule 45(d)(2)(A)).

17 K.S.A. 60-245(a)(2)(B)-(C).

18 K.S.A. 60-245(a)(1)(D).

19 *Id.*

20 K.S.A. 60-245(a)(1)(C).

21 K.S.A. 60-245(d).

22 K.S.A. 60-245(d)(1)(A).

23 K.S.A. 60-245(d)(1)(B).

24 K.S.A. 60-245(d)(1)(D).

25 *See* K.S.A. 60-245(c)(2)(A); However, K.S.A. 60-245(e) addresses the place of production in terms of the same limits of subsection (c)(3)(A)(ii) regarding a 100-mile in-state travel limit for nonparty subpoena recipients. How, if at all, this mileage limitation might operate in the case of a production-only subpoena is unclear. However, it should not be a concern to the criminal defense attorney; for, this civil case mileage limit is removed by the Kansas Criminal Procedure in K.S.A. 22-3214(2) (permitting compelling witnesses "from any county in the state" to attend). Therefore, it appears a requesting party could demand production of records without the presence of a custodian anywhere in the State of Kansas.

26 K.S.A. 60-245(b).

27 K.S.A. 60-245(a)(1)(A)(iv).

28 K.S.A. 60-245(c)(2)(A).

29 K.S.A. 60-245(c)(2)(B).

30 K.S.A. 60-245(c)(3)(A)(i).

31 K.S.A. 60-245(c)(3)(A)(ii).

32 K.S.A. 60-245(c)(3)(A)(iii).

33 K.S.A. 60-245(c)(1), 60-245(c)(3)(A)(iv), 60-245(d)(1)(D).

34 K.S.A. 60-245(b).

35 K.S.A. 60-245a(b)(2).

36 *See* K.S.A. 60-460(m).

37 James Concannon, *Civil Code and Time Computation Changes Effective July 1*, J. KAN. BAR ASS'N., June 2010, at 20, 28 ("Amendments to K.S.A. 60-245a(c) and 60-245(a)(1)(C) resolve an inconsistency in former law, making it clear that use of a nonparty business records subpoena is optional . . . ."). *See also* 4 Hon. Spencer A. Gard, Robert C. Casad & Lumen N. Mulligan, *Kansas Law and Practice: Kansas Code of Civil Procedure Annotated,* 264, cmt. Judicial Council's Civil Code Advisory Committee, 272 cmt. Analysis (Thompson Reuters 5th Ed. 2012).

38 K.S.A. 60-245(a)(1)(C).

39 K.S.A. 60-245a(c). The somewhat non-essential nature of K.S.A. 60-245a is illustrated by the fact that the Federal Rules of Civil Procedure get along perfectly well with just one civil "Subpoena" rule, Rule 45. The Federal Rules of Civil Procedure leave entirely to the Federal Rules of Evidence certain "Records of Regularly Conducted Activity" that may sometimes be admissible without the testimony of a "custodian" if "shown…by a certification" to comply with one of its sections regulating "Evidence That is Self-Authenticating." *See* FED. R. EVID. 803(6)(D), 902. *See also* 4 Gard et al*., supra* note 37, at 272. Of course, although slightly off topic here, the criminal defense attorney handling federal matters will wish to keep in mind that, unlike Kansas, the Federal Rules of Criminal Procedure do not incorporate wholesale the subpoena rules of federal civil procedure; FED. R. CRIM. P. 17.

40 K.S.A. 60-245a(b)(2).

41 K.S.A. 60-245a(a)(1)-(2).

42 K.S.A. 60-460(m). *Cf.* 4 Gard et al., *supra* note 37, at 58 cmt. Notes of Kansas Decisions (Supp. 2018).

43 K.S.A. 60-245a(c).

44 *In re Quary*, 50 Kan.App.2d 296, 307 (2014) ("Here, the subpoenas were issued to agencies of the State, and the State is a party to this [involuntary commitment as a sexually violent predator] action. The procedures of K.S.A. 2013 Supp. 60-245a, therefore, are inapplicable.")

45 K.S.A. 60-245a(b)(2).

46 K.S.A. 60-245(a)(1)(D).

47 The *"Business Entries and the like"* exception to the hearsay rule contained in K.S.A. 60-460(m) assures us only that compliance with the declaration or affidavit procedure of K.S.A. 60-245a(b) may result in "prima facie evidence that the records satisfy the requirements of this subsection."

48 K.S.A. 60-245(b), K.S.A. 60-245a(b)(1).

49 K.S.A. 60-245a(b)(1).

50 K.S.A. 60-245a(b)(5).

51 K.S.A. 60-245a(b)(3)(B).

52 K.S.A. 60-245(b), 60-245(c)(3)(A)(ii), 60-245(c)(3)(B)(iii). Note, however, that for the criminal defense attorney any objection based only on "travel [of] more than 100 miles" is eliminated by K.S.A. 22-3214 as to "all proceedings conducted by the court . . . ." K.S.A. 22-3214(2). However, given the last sentence of K.S.A. 60-245(e), this interpretation may prove problematic where a production-only subpoena requires production more than 100 miles away and the court seeks to hold a non-producing person in contempt.

53 K.S.A. 60-245(c)(1).

54 K.S.A. 60-245(c)(3)(C)(ii), 60-245(d)(1)(D).

55 K.S.A. 60-245a(b)(4)-(5).

56 "It shall not be necessary to tender any fee or mileage allowance to any witness when he is served with a subpoena to attend any criminal case and give testimony either on behalf of the prosecution or the defendant."

57 K.S.A. 60-245(a)(1)(A)(iv).

58 K.S.A. 60-245(a)(2)(B)-(C), 60-245(b). *See also* Daniel E. Monnat & Paige A. Nichols, *Can I Get a Witness?* J. KAN. ASS'N. JUST., July 2014, at 13.

59 K.S.A. 60-245(c)(2)(A).

60 *Cf.* FED. R. CRIM. P. 17, which provides that a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstance, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

61 *E.g.,* Health Information Portability and Accountability Act of 1996 (HIPAA). 45 C.F.R. 160.512(e)(1)(ii)(A), 160.512(e)(1)(ii)(B)-(C), 164.512(e)(1)(iv)–(v), 160.512(e)(1)(iii)(A). *See, e.g., In re Estate of Broderick,* 34 Kan.App.2d 695 (2005).