

# KANSAS TRIAL LAWYERS ASSOCIATION



To: Representative Susan Concannon, Chair  
Members of the House Committee on Children and Seniors

From: Margaret Farley, Margaret A. Farley, Attorney at Law, P.A., Lawrence, KS  
On behalf of the Kansas Trial Lawyers Association

Date: January 22, 2020

Re: HB 2229 And act concerning adult care homes; relating to electronic monitoring; amending K.S.A. 2018 Supp. 39-981 and repealing the existing section – SUPPORT

The Kansas Trial Lawyers Association is a non-profit, professional organization of trial lawyers with members across the state. I am here to testify on behalf of KTLA in support of HB 2229.

On July 1, 2018, K.S.A. 39-931 came into being and codified nursing home and assisted living residents' pre-existing rights to use video- and audio-devices to record what happens in their own rooms. Many families and advocates wanted the law passed to make clear the right existed. Nursing home staff, owners and operators had too often blocked families' and residents' use of video monitoring equipment on facility property.

The problem was that for the industry to support the bill (which seemed to be the only way it would pass), the industry insisted the new law prohibit the use of these video-tapes in any and all civil and criminal actions and administrative hearings unless two criteria are met: 1) The evidence in the video shows the time and date of when the events on the tape occurred and 2) the recordings or tapes have not been edited or artificially enhanced. No reason for this carve out was given in the statute.

Obviously the nursing home and assisted living industry wanted to protect themselves and their members and employees from liability based upon evidence found on the tape. The fact of the industry's fight for this provision and the reason for it is not reasonably in dispute.

The Kansas Rules of Civil Procedure contain the Rules of Evidence at K.S.A. 60-401 through K.S.A. 60-485. Case law sorts out the meaning and application of these rules, where needed. The Rules broadly apply to test the admissibility of all kinds of evidence in all kinds of factual scenarios. If the evidence is admitted, then it is considered by the fact-finder to help determine the truth of the matter in dispute, generally. It becomes an item of evidence, then, that the jury or the presiding judge or the hearing officer can hear or view and lawfully consider in the case. All admitted evidence has already been tested under the rules for relevance, authenticity and in the case of hearsay exception

witness testimony or video-tapes, for example, trustworthiness. If admitted, the fact-finder determines weight and credibility of the evidence and its tendency to prove a material fact in dispute.

Despite this existing framework, K.S.A. 39-931(m) leapfrogs over the well-tested Rules of Evidence and pre-determines that a resident's video-tape which meets the threshold of admissibility and which shows for example, theft or physical abuse or sexual abuse or negligent treatment or unanswered cries for help or the cause of an unexplained fracture WILL NEVER be admitted as evidence if it has been edited or artificially enhanced or because it does not bear a date and time stamp showing when the events occurred. So now we have to ask: What does "edited" or "enhanced" or "artificially" even mean in this context? Until it is tested many times over in the courts, we will not know. And, what is meant by the phrase "the tape or recording shows the time and date the events shown on the recording occurred"? Which events? How is the time and date to be documented? Frame by frame?

There can be no argument that these are special rules for special evidence for special actors. And that is not a good or efficient way to administer justice. Which doesn't mean they aren't good questions to test evidence at a hearing or trial. It just means pre-determined blanket exclusions aren't helpful, and more often than not, one risks blocking evidence that would be helpful to the jury in sorting the truth.

Quite simply, if there is evidence which is otherwise admissible, why would Kansans want it to be kept from the jury? How is that fair or reasonable or just? How does that protect the right of trial by jury?

Do we want every industry to seek a special rule to exclude relevant evidence of wrong-doing? It will be inefficient at best, especially problematic if there is no good reason for doing so. The law as it stands serves to protect bad actors and not frail older adults dependent upon their care-givers in a nursing home. It is a windfall for the industry to which the State pays millions of tax dollars annually.

Furthermore, courts are recognizing that the admissibility of relevant electronic evidence should not suffer unreasonable barriers. The courts have evolved in their consideration of electronic evidence which was a brand new animal only a few decades ago. On December 13, 2019, the Report of the (its) Advisory Committee on Evidence Regarding Amendments to the Kansas Rules of Evidence was approved by the Kansas Judicial Council.

The Committee took up several questions, including modifying state rules of evidence to "deal expressly with modern methods of document reproduction and electronic storage of information." The report proposes amendments to the Kansas Rules of Evidence to be introduced during the 2020 legislative session. One proposed amendment reads: "To satisfy the requirement of authentication or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

The Committee also recommends amendments to K.S.A. 60-464 (b) which provides examples of ways to authenticate evidentiary items. And the Committee recommends a provision for self-

authentication of records generated by an electronic process or system. The amendments recognize the need to modify the Rules when the item of evidence is not a writing, but rather something else, such as a video-tape or a computer file.

Simplifying the rules of authentication create efficiencies in the judicial system. Subsection (m) of K.S.A. 39-931 is unnecessary and will just gum up the works.

On behalf of the members of the Kansas Trial Lawyers Association, I respectfully request that this committee support the passage of HB 2229.