

## Chapter III. Canvassing

*Revised 7/1/07*

The canvassing process includes counting ballots, tabulating votes by election district and certifying the results of all official primary and general elections and question submitted elections held pursuant to federal or state law. It is the process which produces official election results, whether it is the official number of valid votes cast for each candidate for each elected office, or the official number of valid Yes and No votes cast on an issue in a question submitted election.

For local elections, there are always two canvasses: the original canvass and the final canvass. For national and state elections, there are always three canvasses: the original, intermediate and final canvass.

Canvassing begins with the counting of ballots on election night and culminates with the county canvass or the state canvass, depending on the election.

### **a. Election Night Tabulation**

Election night tabulation (ENT) refers to the unofficial counting of ballots and reporting of election results to the media and public on election night. This is done by county election officers and the Secretary of State's office as a public service. There is no statutory requirement for election night reporting; it is customarily done in response to the intense interest by the media, candidates and public in knowing the results of the election. It is important to note that results tabulated and reported on election night are unofficial. For local offices they are official after the county canvass; for national and state offices they are official after the state canvass. For the national and state ENT, the media support the program by purchasing computer hookups in the Secretary of State's office. The Associated Press has traditionally made a separate donation to support the program. Part of the funds are used to pay for programming costs in the Secretary of State's office, and the remainder are donated to the Kansas County Clerks and Election Officials Association's scholarship fund for college students.

The law refers to the counting of ballots as the original canvass, whether it occurs in the precincts or centrally at the county election office. (See Original Canvass below.)

### **Local Elections**

Local elections include county, township, city, school board, all other jurisdictions with elected officers, and special question submitted elections. For all these elections, ENT is handled entirely by the county election officer. If the county uses hand-counted paper ballots or a precinct-count optical scan system, the ballots are counted at the precincts by election board workers, then the results are reported to the county election office where they are tabulated as needed into district and county totals. At that point they are available for dissemination to the press and public. If the county uses a central-count optical scan system, the ballots are brought from the precincts to the county election

office where a special board scans them and tabulates the results. If the county uses a direct recording electronic (DRE) voting system, the precinct results are brought to the county election office on data cartridges. A special board at the county election office then tabulates and disseminates the results.

### **National and State Elections**

National and state elections include elections of all federal officers, state officers, constitutional amendment ballot questions, and certain other special elections, such as questions about changing the method of selection of judges in judicial districts. For these national and state elections, election night tabulation involves reporting to the Secretary of State's office. Each county counts its ballots and tabulates them as usual, then reports the results to the Secretary of State where the results are tabulated further into statewide totals and multi-county district totals. Counties may choose one of three options for reporting their results: (1) telephone, which involves reading the figures to an employee or volunteer in the Secretary of State's office, who inputs the data into the computer, (2) fax, which also requires a data entry operator in the Secretary of State's office to enter the data, or (3) Internet, which means the county election officer accesses the Secretary of State's web site and enters the election results, and they are automatically loaded into the computer database.

The Secretary of State's office encourages county election officers to adopt Internet-based reporting, and plans are to develop a system where counties can upload their files directly to the Secretary of State's computer without requiring a separate data entry step in the process.

On election night, the Secretary of State's office continuously updates the tabulated results and makes them available first to the media outlets who have paid for hookups. The office also maintains public access computer terminals which members of the public may use to track the results. Also, the results are posted on the web site after a twenty-minute delay for anyone to access.

#### **b. Original Canvass**

The original canvass is conducted either at the polling place or at the county election office. It is conducted at the polling place by the precinct election board workers in counties that use hand-counted paper ballots and counties that use precinct-count optical scan systems. It is conducted at the county election office in counties that use central-count optical scan systems and direct recording electronic voting systems. [KSA 25-3001 et seq., KSA 25-4611]

At the original canvass the election board counts the votes for each candidate in each race and for each question on the ballot and produces precinct totals for inclusion in the countywide totals. The election board at the original canvass reviews all special cases such as write-in votes and voided and mismarked ballots to determine voter intent in each case. In instances where the board is able to determine voter intent, the board includes the results with the rest of the precinct election totals. The review of ballots is conducted as a group; under no circumstances should any one person, even the county election officer, be allowed to handle or count ballots alone. In instances where the board is unable to determine voter intent, they challenge the ballots and refer them to the county board of

canvassers for final determination at the county canvass. The original canvass board also refers to the county board of canvassers all provisional ballots and ballots that were challenged at the time they were cast at the poll.

### **Special write-in boards**

If the board conducting the original canvass fails to correctly tally and report write-in votes, the county election officer is authorized to appoint a special bipartisan board to open sealed containers of ballots, review the ballots and tally the write-in votes. The board reports the write-in totals to the county election officer for inclusion in the election results to be presented to the board of county canvassers. The special board is not authorized to perform functions other than counting write-in votes. [KSA 25-3008(h)]

The board conducting the original canvass does its work according to procedures established by the county election officer. Instructions should be provided in written form to promote adherence to statutory requirements. [Post Audit Report 93PA34]

### **Photography at the canvass**

Some county election officers adopt policies prohibiting cameras, videocameras and camera phones at the canvass, whether it is the original, intermediate or final canvass. Although the intent is to conduct the canvass in such a way that it is as open and transparent as possible, use of cameras by the public may be prohibited because it may be distracting or intimidating or it could lead to disclosure of the contents of a voter's ballot or a violation of the federal Voting Rights Act.

### **c. Intermediate Canvass**

The county board of canvassers, which is composed of the members of the board of county commissioners, conducts the final canvass in local elections and the intermediate canvass in national and state elections. In the case of intermediate canvasses, the county election officer sends an abstract of the county election results to the Secretary of State's office, where the figures are tabulated in preparation for the final canvass of national and state election results.

The time and place for the county canvass, whether intermediate or final, is governed by KSA 25-3104. The place is the county election office, unless the canvassers decide to hold it at another location and the county election officer publicizes the change. The canvass begins between 8:00 and 10:00 a.m. on the Friday after the election unless the county election officer moves the date of the canvass to the following Monday, in which case notice must be published in a newspaper of general circulation in the county. The election officer might move the canvass to Monday to allow more time for processing provisional ballots and making other arrangements for the canvass, or it might be because of scheduling conflicts which make it difficult to convene the canvassing board on Friday. Whichever day is chosen, the canvass is usually completed that morning or the afternoon of the same day, but on occasion the canvassers might recess and complete the canvass another day due to scheduling conflicts, the number of races to be certified, or requests for recounts.

During the days between the election and the county canvass, the county election officer prepares the tabulated results from the original canvass and groups all provisional ballots,

challenged ballots and issues referred by the original canvass boards in preparation for the county canvass.

The tabulated results are presented to the county canvassers along with issues that need to be resolved. [KSA 25-3107(a)] The county board of canvassers has the statutory duty to make the final decisions as to which ballots are valid and which are invalid. This includes making all final decisions about voter intent on mismarked ballots, write-in votes, and provisional and challenged ballots. Neither the canvassing board nor the county election officer is authorized to open sealed ballot containers or envelopes except challenged/provisional ballots referred to them by the counting boards. [KSA 25-3107(a)] The canvassers sign and certify an official abstract detailing the exact number of valid votes received by each candidate in each race and the number of valid votes cast for or against any questions on the ballot. [KSA 25-3109]

After the canvass, the county election officer transfers vote totals for national and state elections into the official state abstract provided by the Secretary of State and transmits the state abstract to the Secretary of State for preparation for the state canvass. [KSA 25-3202, 25-3203] The county abstract is stored as a permanent historical record in the county election office or the county historical archives. [KSA 25-3109(a)] The county election officer mails certificates of nomination (after the primary election canvass) or certificates of election (after the general election canvass) to the candidates who have been certified to have received the greatest number of valid votes. [KSA 25-3110]

If a recount has been requested in one or more races, the county canvass is not completed until the recount is completed. The other election results may be certified, but the canvassers must meet again after the recounts to certify the results of the recounted races.

#### **d. Final Canvass**

In local elections for which the county board of canvassers conducts the final canvass, the certified results are official and final. They may not be changed except: (1) by court order as the result of an election contest in a general election, or (2) as the result of an objection to a primary nomination.

In national and state elections, the county abstracts are sent to the Secretary of State within two weeks after election day. [KSA 25-3202, 25-3203] The Secretary of State tabulates the county results into statewide and district results and prepares for the meeting of the state board of canvassers. [KSA 25-3204] The state board of canvassers conducts the final canvass for all national and state primary and general elections, including constitutional amendment questions and other state question submitted elections such as proposals to change the method of selection of judges in judicial districts.

The state board of canvassers is composed of the Governor, Attorney General and Secretary of State. [KSA 25-3201] When the tabulated results are complete, the Secretary of State schedules the meeting of the state canvassers, which by law must take place by the first day of the next month following an election. [KSA 25-3205]

The state board of canvassers reviews the official county abstracts and the state abstracts prepared by the Secretary of State and certifies the results. The results are published in the *Kansas Register* by the Secretary of State and disseminated to the media and other interested parties. The Secretary of State issues certificates of nomination after the primary and certificates of election after the general election to all successful candidates. [KSA 25-3211(c)]

The abstracts are stored in the Secretary of State's office for a period of four years, then transferred to the Kansas State Historical Society Archives as permanent historical records. [KSA 25-3211]

### **Photography**

As mentioned above under Original Canvass, some counties have policies prohibiting the use of any type of photographic devices at the canvass.

### **Preparing for the County Canvass**

Whether the county board of canvassers is conducting the intermediate or the final canvass, the CEO is responsible for most of the preparation. Recommendations for the CEO to consider include:

- Have the county attorney or counselor available if possible.
- Develop written canvass procedures and have them approved by the board of canvassers beforehand.
- Review statutes regarding canvass procedures, advance voting, provisional ballots and other topics that may arise.
- Consider having someone take minutes at the canvassing meeting.
- Review recount procedures and anticipate potential costs.
- Make the process as open and transparent as possible without violating the secrecy of any voter's ballot.

### **Unauthorized Vote Disclosure**

It can be difficult at times for canvassers to fully consider the circumstances surrounding a ballot without disclosing the voter's identity. For instance, the CEO researches the facts regarding a voter's qualifications to make a recommendation to the canvassers regarding the validity of a provisional ballot, but in consideration of those facts the canvassers and CEO must be careful not to disclose how the voter voted. KSA 25-2422 makes it a felony to disclose or expose the contents of any ballot or the manner in which the ballot has been voted "while being charged with any election duty." Only a court may order the contents of a ballot to be disclosed.

### **e. Provisional Ballots**

#### **1. Processing by the county election officer (CEO)**

- a.** First, the CEO should verify the number of challenged/provisional ballots by precinct to see if the number received agrees with each precinct election board's record of the number of challenged and provisional ballots distributed. [KSA 25-3007, 25-3008]

Next, the CEO groups the challenged/provisional ballots according to the reasons for the challenges or provisional ballots.

Common groups of provisional and challenged ballots are:  
Challenged ballots based on

- (1) citizenship
- (2) age
- (3) felony conviction
- (4) mental incapacity
- (5) residence
- (6) registration
- (7) multiple votes at the same election (having already voted an advance ballot, or voted at another precinct)
- (8) failure of first-time voter to provide valid identification [KSA 25-414]

Provisional ballots based on

- (1) name change
  - (2) residence change within county
- [KSA 25-2316c(a), (b)]

**Note:**

If a residence change occurs outside the county to another location within the state within the 30-day period before an election and the voter has not re-registered, the voter may qualify to vote a former precinct ballot (See Section II d). If not, the voter is ineligible to vote in that election. [KSA 25-3701, 25-3702] However, in such cases the voter should be issued a provisional ballot in case it is discovered that an error was made in the election office.

**b.** The CEO researches voter registration records and other sources in order to provide the necessary information to the county board of canvassers for them to determine whether each ballot should count.

## **2. Canvassing**

**a.** The CEO presents the groups of challenged/provisional ballots to the county board of canvassers at the regular canvass meeting after the election. [KSA 25-3107(a)]

**b.** The canvassers review the reasons why the ballots are challenged/provisional and decide whether to count them. Care should be taken that voters' names and the manner in which they voted are not disclosed to the public or the canvassers. The CEO might want to separate the voter registration forms from the ballot envelopes before the canvass to ensure voters' privacy, but some canvassers might want to review the registration forms in determining the validity of the ballots.

**c.** The canvassers make the final decision as to whether each challenged/provisional ballot is valid. If the law addresses the issue, the ballot is valid and is counted. Other situations are decided on a case-by-case basis. Provisional ballots that are deemed valid by the canvassers are opened, counted and added to the official election results. Usually the canvassers instruct the CEO to open and count the ballots. [KSA 25-409(b)]

### **Partial Provisional Ballots**

**d.** Canvassers are required to count partial provisional ballots. If a voter cast a provisional ballot in a precinct other than the precinct in which the voter is registered but still within the same county, the canvassers should deem valid any votes for races or questions that are identical in both precincts. By the same token, any races or questions that do not appear on both precincts' ballots should not be counted. For instance, votes for the offices of president, governor, other statewide races, constitutional amendment questions, countywide races and questions, and some state or county district offices will be valid because the races or questions were common to both ballots—the ballot the voter cast for the wrong precinct and the ballot intended for the precinct in which the voter was registered. [KSA 25-3002(b)(3)] This situation arises due to poll book error, election board worker error, voter error, or instances where the voter attempts to vote at a polling place closer to the voter's home than the polling place in the precinct where the voter is registered.

**e.** Provisional ballots that are deemed invalid are not opened. They remain sealed and are stored with the other ballots after the canvass. They may be opened under court order in an election contest, or, in some cases, the county canvassers may open ballot envelopes to retrieve forms necessary for determining the qualifications of the voters. [KSA 25-3107(a)]

See the following chart for guidance on whether to count various types of challenged and provisional ballots.

### **Legal References**

K.S.A. 25-3002, 25-3008  
Post Audit Report 93PA34

## COUNTING PROVISIONAL BALLOTS

#	SITUATION	SHOULD BALLOT COUNT?	LEGAL AUTHORITY	COMMENTS
<b>A</b>	<b>VOTER REGISTRATION</b>			
1	Voter registered in office before books closed and advance voted at the same time.	YES	25-1122 25-2311	If voter's notice of disposition was not returned by mail before canvass day.
2	Voter registered in office before books closed and advance voted at the same time. The voter's notice of disposition was returned as undeliverable.	Laws are unclear. Consult county attorney or counselor.	25-1122 25-2302 25-2311	KSA 25-2302 indicates that the ballot <i>should not</i> count because a person must be registered before voting. KSA 25-2316c(e) indicates that the ballot <i>should</i> count because the person to whom a confirmation notice is sent (after the notice of disposition is returned undeliverable) is a registered voter when the election officer adds his/her name to the registration list.
3	Voter registered at CEO office after books closed or at the polling place on election day and voted at the same time.	NO	25-2311(a)(6) 25-2311(e)	Law requires that a voter must register by the 15th day before election.
4	Registered voter had different name than on poll book due to marriage, divorce or legal proceeding and completed a new voter registration application.	YES	25-2316c(a)	
5	Registered voter had different name than on poll book and did not complete a new voter registration application.	NO	25-2316c(a)	
6	Voter was registered but voted in wrong precinct, but within the county, due to CEO error, board worker error, voter error, or insistence by voter.	YES (partial ballot)	25-3002(b)(3)	Law requires counting of partial provisional ballots—count races and questions that are identical when comparing provisional ballot to correct ballot for voter's precinct.
7	Voter was not registered.	NO	25-215 25-2302	Kansas laws require registration before voting.
8	Voter claimed to have registered at DMV, post office, state fair or NVRA registration outpost and CEO had no registration.	NO	25-215 25-2302 25-2421a	Unless CEO verifies DMV or CEO error.

#	SITUATION	SHOULD BALLOT COUNT?	LEGAL AUTHORITY	COMMENTS
<b>B</b>	<b>VOTER MOVES</b>			
	<b>MOVES WITHIN COUNTY</b>			
1	Registered voter moved within county within 30 days of election. Voted at former precinct.	YES	KS Const. Art. 5 Sec. 1; 25-3702	KS Constitution allows this so ballot not required to be provisional. Voter must complete Form FP1 before voting.
2	Registered voter moved within county within 30 days of election. Voted at either new precinct or central location.	YES	25-2353, 25-409	Must complete new registration card before voting provisional ballot.
3	Registered voter moved anywhere in county and voted at new precinct.	YES	25-2316c(b)	Voter must complete a new voter registration application.
4	Registered voter moved within county at any time before election. Voted at either new precinct or central location.	YES	25-2353, 25-409	Must complete new registration card before voting provisional ballot. No time limit on date of move.
5	Registered voter moved within the county at any time and completed a new voter registration card.	YES	25-2353	If voted at new precinct or central location.
6	Registered voter moved within county within 30 days before election. Voted ballot at wrong precinct.	YES (partial ballot)	25-3702, 25-3002(b)(3)	Entire ballot valid if voted at former precinct. Partial ballot valid if voted ballot at precinct where not registered.
7	Registered voter moved within county more than 30 days before election. Voted at former precinct.	YES (partial ballot)	25-3702 25-3002(b)(3)	Partial ballot valid if voted ballot at precinct where not currently registered.
8	Registered voter moved within the county but refused to fill out a new voter registration card before voting.	YES (partial ballot)	25-409(a) 25-3002(b)(3)	Law requires counting of partial provisional ballots—count races and questions that are identical when comparing provisional ballot to correct ballot for voter's precinct.
	<b>MOVES OUT OF COUNTY, WITHIN STATE</b>			
9	Registered voter moved anywhere in state within 30 days of election. Voted at former precinct.	YES	Kan. Const. Art. 5 Sec. 1, 25-3702	KS Constitution allows this, so ballot not required to be provisional. Voter must complete Form FP1 before voting.
10	Registered voter moved out of county but within state within 30 days before election. Voted in new precinct without re-registering.	NO	Kansas Constitution Article 5, 25-3702; 25-2316c(b)	Fail safe (provisional) voting only covers in-county moves. Former precinct voting only allows voting in precinct of former residence.
11	Registered voter moved out of county but within state more than 30 days before election.	NO	25-3702	Not protected by law. Needed to re-register at new address.

Kansas Election Standards

#	SITUATION	SHOULD BALLOT COUNT?	LEGAL AUTHORITY	COMMENTS
<b>C</b>	<b>ADVANCE VOTING</b>			
1	Registered voter requested advance ballot, did not receive ballot and voted at polls.	YES	25-2908c	If CEO verifies that voter did not cast multiple ballots.
2	Registered voter voted in advance, then voted at the polling place.	NO	25-2416(b)	Election crime.
3	Registered voter returned advance ballot in unsigned envelope.	NO	25-1124(a) 25-1136(b) 25-3002(f)	
4	Voter signed another voter's envelope.	NO	25-1120, 25-1124	Law requires voter to sign statement on voter's own envelope unless another person signs for voter at voter's direction due to disability.
5	Two voters voted in advance. Ballot envelopes switched, signed by the wrong voter in same household. Both are eligible voters and signatures match.	NO	25-1120	
6	Voter submitted an advance voting ballot with ballot envelope not sealed.	YES		Technical irregularity unless CEO finds evidence of tampering.
7	Voter applied for an advance voting ballot after deadline for application.	NO	25-1119, 25-2302 25-2311(a)	Kansas laws set application deadlines to allow time for transmission of ballots and conclusion of advance voting before election.
8	Voter used power of attorney to obtain advance voting ballot and used attorney to vote.	NO	AG letter to SOS, Sept. 16, 1997	Power of attorney has no effect in voting. Laws provide for assisted voting if affidavit of assistance is filed.
9	Voter casts advance ballot, then dies. Election board makes ballot provisional pursuant to KSA 25-1136(c).	NO	25-1136(c) AG Opinion 2002-15	If ballot should count, then the directive to make it provisional is "vain, idle, or futile." There is a presumption that the legislature does not "enact useless or meaningless legislation."
<b>D</b>	<b>OTHER</b>			
1	Registered voter's name was found by CEO elsewhere in poll book.	YES	25-2908(b)	NVRA fail safe voting
2	Voter needed assistance – should not have been challenged.	YES	25-2909	No voter error
3	Voter voted provisional ballot, only one board worker signed envelope.	YES	25-702 25-716 25-3002(b)	Technical irregularity. No voter error.
4	In primary election, registered voter requested and received a different party's ballot than the one registered for.	NO	25-3301(d) 25-3304(b)	If voter received ballot of party other than party of affiliation, ballot does not count. Unaffiliated voter may affiliate with a party and vote, or, depending on rules

				adopted by party, unaffiliated voter may sometimes vote without affiliating.
#	SITUATION	SHOULD BALLOT COUNT?	LEGAL AUTHORITY	COMMENTS
5	Registered voter dies after casting ballot and ballot was not provisional.	YES	AG Opinion 2002-15	Non-provisional ballots are commingled with others are thus irretrievable and impossible to not count.
6	Registered voter returned a ballot after polls closed.	NO	25-106 25-1132 (advance)	
<b>E</b>	<b>FEDERAL SERVICES VOTING</b>			
1	Federal services voter who was absent applied for ballot by noon the day before election day by completing a standard FPCA (Form 76).	YES	25-1215, 25-1216(b)	If the application was made on FPCA, voter cannot vote on local questions or precinct committee positions. May vote by fax. Not required to be registered.
2	Registered voter (non military) moved out of state but in the U.S. at any time before election. (See Presidential Situations for exception.)	NO		Not protected by law. Voter should check with new state for laws.
3	U.S. citizen eligible to vote in the election district moved out of U.S. and applied by noon the day before election day by completing a standard FPCA (Form 76).	YES	25-2314, 25-1216(b)	If the application was made on FPCA, voter cannot vote on local questions or precinct committee positions. May vote by fax. Not required to be registered.
<b>F</b>	<b>PRESIDENTIAL SITUATIONS</b>			
1	New voter moved to KS within 45 days before election. Filed form PN by noon the day before election.	YES	25-1801(b)(1), 25-1802(a)	New resident may vote only on U.S. president race.
2	Registered voter moved out of KS within 45 days before election. Filed form PF in county of former residence in KS by noon the day before election.	YES	25-1801(b)(2), 25-1802(b)	Former resident may vote only on U.S. president race.
3	Registered voter moved anywhere within KS not more than 20 days before election. Filed Form PR in county of new residence by noon the day before election.	YES	25-1801(b)(3), 25-1802©	Relocated resident may vote only on U.S. president race.
<b>G</b>	<b>VOTER IDENTIFICATION</b>			
1	First-time voter in the county fails to provide valid identification, votes provisional ballot.	NO	25-2908(e) 25-3002(b)(8)	The law requires a first-time voter to provide ID in order to have ballot counted. However, if voter provides valid identification to CEO after voting provisional ballot and before county canvass, ballot should count.

## **f. Voter Intent**

The purpose of an election is to determine the will of the voters. Most voters mark their ballots clearly, according to the rules, and their ballots are easily counted and tabulated. Some, however, fail to follow the instructions, or they mismark their ballots, or fold or tear them so that it is unclear for whom or what they intended to vote. Also, errors in ballot preparation and printing can make determination of voter intent difficult. The statutory concept of voter intent is the fundamental consideration in deciding whether questionable ballots should count. Although the concept is mentioned more than once in the election statutes, it is not clearly defined.

Voter intent was raised as an issue in the presidential election of 2000. The U.S. Supreme Court ruled in *Bush v. Gore* that the constitutional guarantee of equal protection of the law means that each voter must have an equal opportunity to have his/her vote count. A related issue from the 2000 election is consistency. Standards for counting ballots and determining voter intent must be adopted and applied the same way in all voting jurisdictions in a state or election district.

Kansas law assigns the duty of counting all ballots to local election officers, first at the precinct level, then at the county level. The voters' intent on questionable (challenged) ballots is determined at the county level. Precinct and county officers are most familiar with relevant issues affecting the votes, such as qualifications and residence of individual voters, boundary lines of political jurisdictions affecting ballot styles, and the occurrence of write-in campaigns. Election boards and canvassing boards should use local knowledge when it is helpful in determining voter intent.

The persons conducting the original canvass make the first attempt to determine voter intent. If the voter intent is impossible to determine at the original canvass, the decision is referred to the county board of canvassers.

### **What Constitutes a Vote?**

The ballot is the medium provided for the voter to express his/her intent. If the voter's intent is discernible, it is an easy matter to determine that it constitutes a vote. However, there are different voting systems in use, and different ballot forms, including hand-counted paper ballots, optical scan ballots, and touch screen electronic ballots.

No punch card ballots are certified or used in Kansas, so there are no issues to deal with in determining voter intent with hanging or dimpled chads. But, many ballots in use today have their equivalent of the hanging chad. A voter might make a check mark instead of an X in the box on a paper ballot, or make a mark outside the box. A voter might not completely fill in the oval on an optical scan ballot, or circle the oval instead of darkening it. An advance voter might use a pen or pencil that is not easily read by an optical scanner. These types of instances require a special effort to determine the voter's intent, and different voting systems treat them differently.

### **Totality of Ballot**

Often the voter's intent on a specific race or question is determined by considering the voter's actions on that one portion of the ballot. For instance, if the voter made an

intentional mark in, around or near the oval on an optical scan ballot or the box on a hand-counted paper ballot, the intent is often clear. However, in some cases the totality of the ballot needs to be considered in order to determine the voter's intent. If the voter rested the pen or pencil in an oval as the voter considered his/her voting options, but then moved on to the next race or question, leaving an incomplete mark in the oval or box, it may be necessary to consider similar actions by the voter elsewhere on the ballot to determine whether an intentional vote was cast. Habitually resting the pen in or near the ovals or squares may produce stray marks that should not be interpreted as votes.

### **Voting Systems in Use in Kansas**

Some voting systems place the original canvass at the precinct level; some at the county level.

#### **1. Hand-counted paper ballots**

When using hand-counted paper ballots, the original canvass is done at the precinct polling place. The precinct election board workers, acting as the counting board, review each ballot and determine the voter's intent. If they are unsure, they may challenge the ballot and send it to the county board of canvassers for determination at the county canvass.

These ballots are visually inspected and counted by hand, so any unusual markings on the ballots are noticeable. Paper ballots are susceptible to overvotes because they are not tallied by a machine that notifies the voter of the overvote and provides an opportunity to correct the ballot.

#### **2. Optical scan systems**

Optical scan systems may be precinct count systems or central count systems.

Precinct count optical scan systems offer the advantage of notifying the voter immediately of overvotes and some other mismarkings. The voter may correct the ballot or mark a new ballot before leaving the polling place. In this sense, voter intent is determined at the precinct level. Questionable ballots may be challenged and referred to the county board of canvassers for determination.

Central count optical scan systems may detect overvotes and mismarked ballots, but there is no opportunity for the voter to make corrections. If a ballot is marked in such a way that the voter's intent is unclear, the counting board must challenge it and refer it to the county board of canvassers.

Printing specifications on optical scan ballots are exacting. Scanners generally do not detect mismarkings, and they do not detect write-in votes if the ovals are not filled in. These are only detectable by visual inspection before vote tabulation or in a recount conducted by hand. It is recommended that county election officers adopt procedures that require the visual inspection of *all* optical scan ballots before the tabulation process begins in order to identify all ballots containing write-in votes. This would be done at the polling places in counties using precinct-based optical scan equipment. It would be done at the county election office in counties using central scanning equipment.

### **3. Direct recording electronic systems (DRE)**

DRE systems offer the advantage of preventing overvotes. A voter is prohibited from selecting more choices than allowed. The voter is also given an opportunity to review the entire ballot before leaving the voting booth.

Many late-model DRE systems also offer the advantage of helping to clarify voter intent on write-in votes. In many systems the voter types the write-in candidate's name using a keyboard, so sloppy handwriting cannot obscure the voter's intent. Also, the systems require the voter to "mark" the write-in box to indicate their desire to cast a write-in vote, so it is impossible to enter a write-in vote and fail to mark the box.

For more on the types of voting systems, see Chapter VI.

## STANDARDS FOR COUNTING VOTES

	<b>GENERAL STANDARDS</b>
Count the vote if:	A distinguishing mark is made in the box or oval next to a candidate's name or next to a question on the ballot. (examples: √, X, •, ←)
	A mark appears in the box or oval indicating the pen or pencil was intentionally moved across the paper from one point to another.
	A box or oval is circled but there is no mark inside. Most optical scan systems will not detect it, but if it is visually inspected, as in the case of a hand recount, it should count.
	The name of the candidate or the candidate's political party is circled but the box is not checked or the oval is not completed.
	A voter votes for a candidate and also writes the candidate's name in. Count only one.
	A voter votes for fewer choices than allowed. The voter is not required to vote in every race. No voting system should disqualify an undervote, although it is helpful if they notify the voter of undervotes to give the voter an opportunity to complete the ballot if he/she so wishes.
	The totality of the ballot clarifies the voter's intent on one portion of the ballot. Example: if it is unclear whether a dot in a box or oval on a particular race is a clear expression of voter intent, the counting board may consider marks made by the voter on the other races on the ballot. If similar marks were made throughout the ballot, the counting board should consider the mark in question to be a vote.
	The voter properly casts a ballot at the polling place on election day or casts an advance ballot, then dies before the county canvass, unless the ballot was a provisional advance ballot. [AGO 2002-15]
Do not count the vote if:	A voter votes for more choices than allowed.
	There is a dot that could be made by a pen or pencil merely resting in a box or oval on the ballot.
	A voter marks the ballot in such a way that it obscures the voter's intent or invalidates the vote. If this happens, it should invalidate only the portion of the ballot affected by the error. Other votes on the ballot should count unless invalidated for a separate reason.
	A voter casts an advance ballot, then dies, and the election board makes it a provisional ballot. [AGO 2002-15, KSA 25-1136(c)]

	<b>PAPER BALLOT STANDARDS</b>
Count the vote if:	A box is checked and scribbled out or crossed out and another box is checked. (The latter is counted.)
	An X is made near the box but not inside it, and not closer to another candidate's name.
	<b>OPTICAL SCAN BALLOT STANDARDS</b>
Count the vote if:	An oval shape is marked, near but not inside the oval, and not nearer another candidate's name.
	An oval is completed and scribbled out or crossed out and another oval filled in. (The latter is counted.)
	<b>DRE EQUIPMENT STANDARDS</b>
	DRE equipment is programmed to inform the voter of overvotes, undervotes and other errors. The equipment allows the voter to review each page of the ballot before casting it. Such systems prevent many of the voter errors that can invalidate other types of ballots.

Note: For a discussion of voter intent on write-in votes, see Section III g following.

**Legal References**

K.S.A. 25-2903, 25-3002, 25-3103  
 Attorney General Opinion 2002-15

### **g. Write-In Votes**

Voters may cast write-in votes in any official election except (1) presidential preference primaries, (2) a primary election where there is at least one candidate filed for the office, and (3) question submitted elections. [KSA 25-213, 25-2903, 25-2904, 25-4503]

Note: Write-in blanks are always provided at primary elections for precinct committeemen and committeewomen positions in the two major political parties because these positions are *elected* at the primary, whereas other candidates on the primary ballot are merely *nominated* at that election. [KSA 25-213]

Generally, the voter must make his/her intent known in order for the vote to count. The name must be written legibly enough and spelled correctly enough to make the voter's intent clear to the persons counting the ballots. [KSA 25-2903]

The persons determining the voter's intent may be the counting board in the precinct, a board convened for that purpose in the county election office, a special advance voting board, or the county board of canvassers. Ballots with unclear voter intent are challenged and referred to the county board of canvassers for determination.

The voter casting a write-in vote is instructed to write the candidate's name on the blank line and to mark the box or darken the oval next to the write-in blank on the ballot, but the law specifically states that failure to mark the box or darken the oval should not invalidate that portion of the ballot. The vote should count if the voter's intent is clear, regardless of whether the voter marked the box or darkened the oval. [KSA 25-2903]

During the ballot counting process after the polls close, persons counting ballots in counties using hand-counted paper ballots or optical scan ballots should be instructed to visually inspect each ballot, looking for write-in votes. The reason for this is that write-in votes are considered valid even if the voter fails to mark the box or fill in the oval next to the write-in blank.

Write-in votes are valid if the voters' intent is clear, and they may affect the outcome of the election, especially in local races. Thus, it is important to ensure that they are tabulated. If the original counting board fails to produce write-in totals, the county election office is authorized to convene a special write-in board to open sealed ballot containers to search for write-in votes. (See also section b.) [KSA 25-3008(h)]

Voter intent is determined at the local level, not the state level, because often local knowledge of candidates is most helpful in determining voters' intent.

### **Affidavits of Write-In Candidacy**

It is not necessary to tabulate or report write-in votes for a candidate for state office elected on a statewide basis or president/vice president of the United States unless the candidate has filed an Affidavit of Write-in Candidacy with the Secretary of State's office. If such a candidate has filed the Affidavit, all county election officers will be notified by the Secretary of State, and they must tabulate and report write-in votes for the candidate as part of the official election results. Votes for other write-in candidates who have not filed affidavits are not required to be tallied or reported for that office. [KSA 25-3002(c), (d), (e)] (See also Chapter IV.)

Write-in candidates for other offices are not required to file affidavits of write-in candidacy to have their write-in votes tallied and reported. This includes U.S.

Representative and Senator, state offices elected from districts smaller than the entire state, and all county, township and local offices. Write-in votes for these candidates should be tallied along with the other candidates' votes.

### **Write-In Stickers or Labels**

In order to minimize problems with misspellings, abbreviations and illegible handwriting that obscure the voters' intent, some write-in candidates distribute stickers or labels with their names printed on them. The candidate asks the voters to take the stickers with them to the polling place and affix them in the appropriate place on the ballot. Stickers are neither prohibited nor specifically allowed in Kansas law. However, some county election officers in counties using optical scan ballots have adopted regulations, with the advice of their respective county attorneys, to prohibit stickers in their counties because of the possibility of jamming their optical scan ballot counting equipment. These regulations are adopted pursuant to KSA 25-2706(a), which authorizes the adoption of regulations controlling the voting procedure. Once adopted, the regulations must be filed with the Secretary of State. Write-in candidates considering the use of stickers should consult the county election officer(s) regarding any requirements for stickers.

If stickers are applied to ballots by voters in a county which has adopted a regulation prohibiting stickers, it is recommended that the votes count despite the existence of the prohibitory regulation. The regulations often are successful in preventing the use of stickers, but if stickers are used notwithstanding a regulation, the voter's intent carries more weight than the county's regulation. Any ballots containing stickers should be separated from the other ballots and hand counted.

Two Attorney General opinions summarized below interpret the law to allow stickers and discuss the proper use of stickers in casting and counting ballots. Although they recognize that the law does not prohibit stickers, they do not say the county election officer may not adopt regulations prohibiting them.

### **Attorney General Opinions 84-99 and 94-110**

Anyone canvassing write-in votes who encounters stickers or labels should consult these Attorney General opinions for guidance. Here is a list of some of the principles set forth in the opinions.

- The sticker must be in or close enough to the space designated for the write-in to make the voter's intent clear.
- The sticker may be applied to the ballot upside down, extending over the edge of the ballot, out of alignment with the printing on the ballot, or in such a way that it covers words on the ballot which are not material to the vote, as long as it does not obscure the intent of the voter.
- If a sticker is affixed to the wrong office or in a place on the ballot which makes it unclear which office is intended, the vote is not counted.

- If a sticker is affixed in such a way that the voter’s intent is unclear and the vote is not counted, it should void only that portion of the ballot. The rest of the ballot should be counted unless voided for a separate reason.
- Unnecessary words on a sticker, or printing in a size or type that does not conform to the printing on the ballot, is not a ground for rejecting a vote. However, write-in candidates preparing stickers for distribution to voters should be aware of certain statutory prohibitions, such as the use of a “title, degree or other symbol of accomplishment, occupation or qualification” (such as Dr., General, PhD). Statutes prohibit such printing on ballots, but neither the statutes nor the Attorney General opinions instruct canvassers as to whether to invalidate write-in stickers that contain them. This is left to the canvassers to decide.
- Although ballots must be printed in black ink, the use of other colors in printing write-in stickers does not invalidate the votes.
- As is the case with regular write-in votes, if a voter affixes a sticker and fails to check the corresponding box or complete the oval, it does not invalidate the vote.

### **Fictitious Names and Unqualified Candidates**

A common question arising from write-in voting is how to handle write-in votes for fictitious names and unqualified candidates. Fictitious names include votes for such “persons” as Mickey Mouse, John Doe, Me, and None of the Above. Unqualified candidates include votes for persons who obviously are not candidates for the office (ex: George W. Bush for township clerk) or who do not meet the qualifications for the office (ex: a person who lives outside the city who receives votes for council member).

Write-in votes for fictitious names and unqualified candidates should be handled the same. The officials conducting the original canvass should tally all the votes and report them to the county election officer. Before the meeting of the county board of canvassers, the county election officer must determine (1) if any such “candidates” received enough votes to win the office (or nomination), and (2) if the names are truly fictitious and the “candidates” truly unqualified.

For instance, it is possible, though unlikely, for a person named John Doe or Michael “Mickey” Mouse to live in the county or for a nonresident of the city to have moved into the city without re-registering before the election.

As always, questionable write-in votes may be challenged and sent to the county canvassers for decision. The intent of the laws is to allow the county canvassers to be presented with all relevant information so they are able to certify which candidate, person or other entity received the most valid votes. [KSA 25-3107(a)]

### **Nicknames**

Nicknames that are widely recognized as representing a write-in candidate’s given name are acceptable unless the voter’s intent is unclear due to the similarity to the name of another person. Examples are Mike for Michael, Frank for Francis, Betty for Elizabeth, and Peggy for Margaret.

## Case Law

There is little case law from Kansas that offers guidance in counting write-in votes. It is instructive, however, to consider rules derived from cases in other states.

**a. *Devine v. Wonderlich* (Iowa-1978)**--The candidate's surname alone is a valid vote if the surname alone sufficiently distinguishes the candidate. If two people named Smith run for office, the surname alone is not sufficient.

For a write-in candidate named Francis P. Devine, the Iowa Supreme Court counted the following write-in votes: Devine, Mr. Devine, F. Devine, Franc Devine and Francis P. Devine. It did not count these votes: Danny Devine, Russell Devine, Louis P. Devine.

**b. *Meyer v. Lamm* (Colorado-1993)**--This case quoted another case, *Young v. Simpson* (1895) in saying that, "unless the statute declares that a strict compliance is essential, in order to have the ballot counted, the courts will not undertake to disenfranchise any voter by rejecting his ballot, where his choice can be gathered from the ballot when viewed in the light of the circumstances surrounding the election."

Applying the standard in *Meyer*, the following write-in votes were counted for a candidate named Peggy Lamm: Miss Lamm, Ms. Lamm, Mrs. Lamm, and Lamm. Peggy Lamm was the only person who had campaigned as a write-in candidate, a fact which the court noted in deciding that write-in votes containing the surname alone constituted clear voter intent.

However, write-in votes containing the correct surname but a different given name were not counted: Nancy Lamm and B. Lamm.

In determining whether to count a write-in vote containing only the surname, canvassers should consider the commonality of the surname within the election district and public knowledge as to whether the candidate is a "known" write-in candidate for that office.

**c. *Guerra v. Garza* (Texas – 1993)**--The Texas Appellate Court (Corpus Christi) held that write-in ballots which had "Gus," "Garza," or "Gus Garza" either completely written or partially written were properly counted for Gustavo Garza in the election. The ballots that had "Gues," "Gue," the initials "G.G.," or "Gus Garcia" were not counted. The Court arrived at this determination despite two other persons with the same surname "Garza" (Robert Garza and LaQuita Garza) having their name pre-printed on the ballot for different positions. However, the Court did not count votes for "Garza" which did not appear on the correct line because the voter's intent was not clearly ascertainable.

**d. *Matter of Guilianelle v. Conway* (New York – 1999)**--The Supreme Court of New York found that ballots containing only the surname "De Marco" were properly counted despite the 15 phone book listings in the city that had the same surname. The Court found decisive the unambiguous campaign materials used by De Marco, and found that voter intent could be determined given all the circumstances surrounding the election.

**e. *Waters v. Skinner* (Kentucky – 2007)**--A Kentucky appellate court held that because the candidate, Gus Skinner, campaigned under his first name, "Gus," any votes written

for him should count because there is no ambiguity of voter intent. Though some votes were cast for “Gus” in other races, those votes did not affect the election for sheriff.

### STANDARDS FOR COUNTING WRITE-IN VOTES

Count the vote if:	a name is written in the blank but the box is not checked or the oval is not completed.
	a name is misspelled or abbreviated, unless the voter’s intent is unclear.
	a candidate’s name is written above, below or next to the candidate’s printed name, but not written in the write-in blank.
	a written message appears on the ballot clearly expressing the voter’s intent, such as: “I don’t have my glasses with me. Please make my vote count for Throckmorton Scribblemonger for governor.”
	the box next to a candidate’s printed name is not checked (or the oval is not darkened), and the same name is written in the write-in blank (count one vote).
	the box next to a candidate’s printed name is checked (or the oval darkened), and the same name is written in the write-in blank (count only one vote).
Do not count the vote if:	the instructions are to “Vote for One” and the voter makes an X or completes an oval next to a name that is printed on the ballot and also writes in another person’s name for the same office.
	the ballot is not covered by any of the above sections and voter intent is too ambiguous to reach a conclusion.

#### Write-in Votes on DRE Equipment

Older DRE voting equipment (pre-1995) often provided for write-in votes to be written on paper and counted separately from regular votes cast on the machines. Modern DRE equipment provides a keyboard for the voter to type the name of the write-in candidate. The same rules for misspellings and abbreviations apply to these votes, although on the newer equipment illegible handwriting and the use of stickers or labels are not issues.

#### Legal References

KSA 25-210, 25-213, 25-612, 25-1318, 25-1330, 25-2903, 25-3002

Attorney General Opinions: 84-99, 88-105, 94-110

## COUNTING WRITE-IN VOTES

#	SITUATION	SHOULD VOTE COUNT?	LEGAL AUTHORITY	COMMENTS
1	Name is written on ballot in space provided, but box/oval is not checked.	YES	25-2903	Failure to make a cross/check mark or fill in the oval shall not invalidate that portion of the ballot unless it is impossible to determine voter intent.
2	Write-in candidate's name is misspelled.	YES	25-3002, case law	If the voter's intent may be determined. See Section IV g.
3	Governor/Lt. Governor running as a team. Only one name is written in.	YES	25-2903, AGO 94-110	If it is clear which gubernatorial ticket the voter intended to vote for.
4	Name written in is a presumably fictitious character. (ex: Mickey Mouse, Superman)	YES		Qualifications are determined after the canvass. There will be a vacancy in the office if the winning candidate does not take the oath of office.
5	Name written in is for an unqualified candidate.	YES		Qualifications are determined after the canvass. There will be a vacancy in the office if the winning candidate does not take the oath of office. Or, if an unqualified winning candidate attempts to take the oath, the person must be declared ineligible and a vacancy exists.
6	Write-in candidate for city/school office has name written in multiple times for same office.	YES		Count only one vote for that office.
7	Write-in candidate receives write-in votes for multiple offices.	YES		Count them all.
8	No person files for a township office.	YES	25-213	A write-in candidate must receive three or more write-in votes in order to have his/her name printed on the general election ballot.
9	No person files for a national/state/county office.	YES	25-213	A candidate must receive 10% of the votes cast for the office of the Secretary of State in the preceding election for that district to have his/her name printed on the general election ballot. (Note: No person shall be required to obtain 5,000 or more votes.)
10	A member of one political party (not a candidate) is a write-in candidate of another political party in the primary.	YES	State v. Tipton	

11	No person files for the position of precinct committeeman or committeewoman.	YES	25-213	A write-in candidate must receive five write-in votes to be elected to this position.
12	Name is printed on the ballot as a candidate of a political party. Candidate's name is written in for precinct committeeman or committeewoman.	YES	25-213	
13	Name is printed on primary election ballot as a candidate of a political party. Candidate's name is written for other office or other party.	NO	25-213 25-2903	
14	Name is printed on general election ballot and also written in for another office on ballot.	NO	25-613 25-2903	

## **h. Recounts**

A recount is one of the two statutory methods for reviewing the results of an election. The other is the election contest, which is a district court proceeding (See next section).

A recount means simply repeating the process that produced the original election results in order to determine if the ballots were counted and the totals tabulated correctly. It does not review *whether* a ballot should have been counted; only *how* it was counted and whether the final totals were correct.

The recount procedure is contained in a single statute, KSA 25-3107.

A recount may be requested by:

- a.** the county board of canvassers if they discover “manifest errors appearing on the face of the poll books of any election board, which might make a difference in the result of any election,”
- b.** a candidate, or
- c.** a voter who voted in a question submitted election.

[KSA 25-3107(b)]

The person requesting the recount:

- a.** may specify the precincts or voting areas to be recounted,
- b.** may request a hand recount in counties where ballots are counted by optical scan systems, and
- c.** must post a bond to cover the cost of the recount.

Requests for recounts must be in writing. For local elections they are filed with the county election officer. Requests for recounts in state or national elections may be filed either with the Secretary of State or county election officers, as explained below.

If the county canvassers order a recount, they might formalize it in a written request filed with the county election officer, or they might simply vote in favor of a motion to conduct the recount. In the latter instance the official record of the recount request is the minutes of the canvassers’ (county commissioners’) meeting.

The law requires the requester to “file with the county election officer a bond, with security to be approved by the county or district attorney, conditioned to pay all costs incurred by the county in making such recount.” This often means the requester writes a check for the amount of the recount and files it with the county election officer. Some counties require a bond, cashier’s check or cash. The amount of the bond is determined by the county election officer(s).

The “costs incurred by the county” are generally interpreted to mean only those expenses directly caused by the recount, such as salaries of special board members, copying and postage costs, clerical supplies and rental of special office space. Expenses could include overtime pay for regular employees and the cost of temporary employees hired specifically for the recount. It does not include indirect costs such as standard salaries of regular employees or customary rent and office equipment. Kansas Administrative Regulations 6-1-1 and 6-1-2 define direct and indirect costs for special elections.

Although these regulations do not expressly govern recounts, they may be helpful in determining what costs are appropriate to include in the bond.

If the recount reverses the outcome of the election, the bond is not acted upon and the money is returned to the person who requested the recount. If the election is not reversed by the recount, the bond is used to reimburse the county(ies) for the costs.

The deadline for requesting a recount is noon on Monday following the election if the county canvass was on Friday. If the canvass was held on Monday pursuant to KSA 25-3104, the deadline to request a recount is 5:00 p.m. on Tuesday. The recount must be initiated the day after the request is made and completed by Friday at 5:00 p.m. for requests made on Monday, or 5:00 the following Monday for requests made on Tuesday. The word “initiate” is generally construed to mean that the county election officer begins preparation for the recount, including contacting special election board members and notifying candidates. If a county election officer is unable to reach a candidate, the county party chair must be notified instead. When possible, it is allowable to begin recounting ballots the same day, but often the actual ballot recounting begins later to allow all interested parties sufficient time to make arrangements to attend.

Recounts are considered open meetings. [KSA 75-4317] Authorized poll agents appointed for the election must be allowed to attend, although no one who is not a member of the special recount board or the county election officer or office staff may handle ballots or participate in conducting the recount.

The recount is conducted by a special election board appointed for that purpose. The county election officer supervises the process but may not be a member of the board. It is important to note that conducting a recount means simply repeating the procedure that produced the original vote totals, with the exception that optically scanned ballots might be hand counted, depending on the request made. Regular ballots and provisional ballots which were invalid or spoiled and excluded from the original results are not included in the recount. Issues involving whether ballots should have been counted are not within the purview of the recount. Such issues must be raised in an election contest in district court in the case of a general election, or an objection in the case of a primary nomination. [KSA 25-1437, 25-308]

When the recount is completed, the county board of canvassers (in each county, in the case of a multi-county district) must reconvene to certify the results.

### **Statewide or multi-county districts**

If a candidate wishes to request a recount in a statewide office or in an office comprising more than one county, the candidate may make a single request with the Secretary of State. This includes the offices of President and Vice President, U.S. Senate and House of Representatives, Governor and Lieutenant Governor, Secretary of State, Attorney General, State Treasurer, Commissioner of Insurance, multi-county Kansas Senate and House of Representatives districts, and multi-county State Board of Education districts. [KSA 25-3107(c)] It does not include judicial offices. Individual requests may be filed with the respective county election officers, but it is simpler and easier to meet statutory deadlines if a single request is filed with the Secretary of State.

In the case of such a recount the Secretary of State sets the amount of the bond and oversees the recount. The bond is set with input from the county election officers. The person requesting the recount may designate which counties to recount and the method of the recount (hand or optical scan).

### **State payment of costs**

If a recount is requested in a national or state *general election* decided by a margin of 0.5% or less, the state reimburses the counties for “the cost of any recount performed using the method by which such ballots were counted originally.” The conditions under which this rule applies are specific: the election must be a general election for a national or state office, the margin must be 0.5% or less after the county canvass, the candidate must request a recount before the deadline, and the recount as requested must be conducted using the method by which the ballots were counted originally. Also, this provision does not apply to elections for judicial offices. In cases where the automatic state payment provision applies, the Secretary of State coordinates with the state Division of Accounts and Reports, secures funding from the Legislature, and issues reimbursements to the counties. [KSA 25-3107(d)]

For more on recall elections see Chapter II, Section a 6.

### **Legal References**

KSA 25-3107

K.A.R. 6-1-1, 6-1-2

### **i. Election Contests**

An election contest is one of the two statutory remedies whereby a candidate or voter may cause the results of an election to be reviewed. [KSA 25-1435] The other remedy is the recount (See previous section.). A contest is a district court proceeding, and a much wider range of issues may be reviewed than in a recount, including spoiled and voided ballots and uncounted provisional ballots, qualifications of voters and candidates, and criminal activity. Recounts do not consider such issues; they merely repeat the counting procedure for the ballots that were deemed valid.

Contests are allowed for any official state or local question submitted election or *general* election for state, county, township, city offices, and school offices. Contests are not allowed for other local jurisdictions not listed above or for elections of federal officers: presidential/vice presidential electors, U.S. House of Representatives or U.S. Senate. [KSA 25-1435] Contests are not allowed in primary elections; the prescribed method of reviewing the outcome of a primary is an objection (See Section IV d.). [KSA 25-1434, 25-308]

#### **Who may file a contest**

Any registered voter who was eligible to vote in the election may file a contest. [KSA 25-1435] The person who files a contest is called the contestant. The candidate whose election is being contested is called the contestee. [KSA 25-1437]

#### **When to file**

The deadline to file a contest of a candidate election is five days after the certificate of election is issued. The term “issued” is construed as “mailed” because mailing is the most common method of transmitting certificates to winning candidates. [KSA 25-1439]

The deadline to file a contest in a question submitted election is five days after certification of the results, or, in the case of statewide questions, five days after the certified results are published in the *Kansas Register*. [KSA 25-1440]

#### **Where to file**

Contests of persons elected on a statewide basis and contests of statewide question submitted elections are filed with the clerk of the district court of Shawnee County.

Contests of persons elected on less than a statewide basis (district offices) are filed with the clerk of the district court in the county where the contestee resides.

Contests of question submitted elections in jurisdictions smaller than the state are filed with the clerk of the district court of the home county, or in multi-county districts, the county where most of the population is located. [KSA 25-1438]

#### **Note:**

KSA 19-3424(e), a statute which applies only to election commissioners (Johnson, Sedgwick, Shawnee and Wyandotte counties), states that the election commissioner serves as the clerk of the court for contested elections in county and local races. The statute directs contestants to file their contests with the election commissioner. It is

unclear if this statute has ever been used, and questions on its interpretation and application should be directed to the county/district attorney or counselor.

## **Grounds**

The grounds for contest are:

- (1) the contestee is ineligible to hold the office
- (2) one or more eligible voters were deprived of the right to vote, and their votes could have changed the outcome of the election
- (3) illegal votes were received or legal votes were rejected, and the votes in question could have changed the outcome of the election
- (4) error or fraud occurred in computing the results of the election which could change the outcome of the election
- (5) the contestee bribed an election officer
- (6) any other cause showing that a different candidate should have won or that the results of a question submitted election should have been different.

### **Note:**

These grounds are specified in the statutes governing contests, and they are also the grounds for filing objections to nominations. (See Section IV d.) [KSA 25-1436]

## **Procedure**

The contestant must file a written notice of contest specifying the grounds upon which the contest is based. [KSA 25-1437] Once a contest is filed, it is in the hands of the court and there is little the county election officer or anyone else can do to affect the outcome except respond promptly to court requests for information pertaining to the case.

In contests of state legislative offices and statewide question submitted elections, statutes provide specific rules regarding notice of the contest, answers to notices of contest, court proceedings, and appeals of court decisions. [KSA 25-1439, 25-1440]

Election officers should note that the law specifically allows a party to a contest to request permission to inspect all ballots and voting machines. [KSA 25-1447]

In making its final determination, the court may order a new election, affirm the election of the contestee, or revoke the election certificate of the contestee and order the election officer to issue a new certificate to another candidate. In a question submitted election, the court issues an order stating its findings.

The county board(s) of canvassers is not required to recertify election results after a contest; the court's ruling becomes the official results.

## **Costs**

The court has the authority to waive the costs, but costs also may be assessed against the contestant if the results of the election do not change as a result of the contest. The contestee may be assessed costs if found responsible for any actions specified in the grounds for contest. [KSA 25-1452]

**Legal References**

K.S.A. 25-1434 through -1452

AGO 95-66