Balancing Act: Harmonizing K.S.A. § 60-2617 with the "*Fossey* rule" to Preserve the Rights of Both Litigants and the Public in Traditionally Open Court Proceedings

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I. INTRODUCTION

On October 28, 2004,[1] the Kansas Supreme Court closed the proceedings and sealed the pleadings in a mandamus case "arising out of an inquisition conducted by former Attorney General Phill Kline regarding the performance of abortions in Kansas."[2] These circumstances, the court acknowledged in 2006, were "the first in memory when this court has required public briefs and oral argument on a sealed record."[3] Even though the court termed the move "highly unusual,"[4] it went on to seal three subsequent mandamus actions also related to Kline's inquisition: a case filed later in 2006 that involved a Fox News appearance by Kline that the court dismissed shortly after it was filed,[5] as well as a pair of 2007 cases that proceeded under seal for almost a year.[6] Until the court made

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1. Order Granting Motion to Seal Proceedings, Alpha Med. Clinic v. Anderson, No. 93,383 (Kan. Oct. 28, 2004); *see also* Alpha Med. Clinic v. Anderson, 128 P.3d 364, 370 (Kan. 2006).

2. State v. Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc., 241 P.3d 45, 50 (Kan. 2010).

3. *Alpha Med.*, 128 P.3d at 382.

4. *Id.*

5. *See Clerk of the Appellate Courts - Case Search Result Appellate Case Number 97554*, KAN. APP. CTS., https://pittsreporting.kscourts.org/Appellate/CaseDetails?caseNumber=97554 [https://perma.cc/QY8R-E726] (last visited Apr. 6, 2021); *see also Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc.*, 241 P.3d at 50–51 (describing Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 97,554, as a "Petition for Writ of Mandamus filed by two abortion clinics regarding Kline's appearance before the 2006 election on 'The O'Reilly Factor'" and other alleged dissemination of information from patient records").

6. *See* Order Granting Motion to Seal, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. June 7, 2007); Order Unsealing Action, Requiring Filings of Written Record, and Setting Briefing and Argument Schedule, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. May 2, 2008); Order Granting Motion

dispositive pre-decision rulings in the 2007 cases on May 2, 2008,[7] "[a]lmost all details about the dispute remained secret for 11 months because the Supreme Court had kept separate lawsuits filed by Planned Parenthood and the attorney general's office under seal."[8]

To be sure, as the court itself put it, such circumstances were "highly unusual."[9] Ordinarily, a decision to close court proceedings or seal court records is in accordance with high standards and strict procedures prescribed by the U.S. Supreme Court. Those rules prevent judges from denying public access to presumptively open hearings and records unless they find facts to prove that a compelling interest necessitates closure or seal, consider all available alternatives, and make specific, written findings of fact to support such decisions.[10]

Long before addressing the Kline-related matters, the Kansas Supreme Court also embraced procedural limits on judicial discretion to deny public access to courts. The Kansas Supreme Court recognized "a strong presumption in favor of open judicial proceedings and free access to records in a criminal case" when it decided *Kansas City Star Co. v. Fossey* in 1981.[11] There, it adopted rules for district courts consistent with U.S. Supreme Court precedent that "will govern the closure issue in future cases."[12]

Although *Fossey* does not expressly apply to appellate or civil proceedings, the Kansas Supreme Court could have followed its spirit, if not its letter, in the mandamus cases involving Kline. The presumption of openness recognized in *Fossey* is not exclusive to criminal proceedings, as the Kansas District Court for the United States recognized in noting the

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to Seal, State *ex rel.* Att'y Gen. v. Anderson, No. 99,050 (Kan. Aug. 3, 2007); Order Amending Protective Order, Unsealing This Action, And Directing Parties To Show Cause, State *ex rel.* Att'y Gen. v. Anderson, No. 99,050 (Kan. May 2, 2008).

7. Order Unsealing Action, Requiring Filings of Written Record, and Setting Briefing and Argument Schedule, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. May 2, 2008); Order Amending Protective Order, Unsealing This Action, and Directing Parties to Show Cause, State *ex rel.* Att'y Gen. v. Anderson, No. 99,050 (Kan. May 2, 2008).

8. Associated Press, *Suits Question How Kan. Prosecutor Handled Abortion Records*, THE OKLAHOMAN (May 3, 2008), https://oklahoman.com/article/3238683/suits-question-how-kan-prosecutor-handled-abortion-records [https://perma.cc/7EWZ-RJ5G].

9. *Alpha Med.*, 128 P.3d at 382.

10. *See, e.g.*, Press-Enterprise Co. v. Superior Ct. of Cal., Riverside Cnty. (Press-Enterprise I), 464 U.S. 501, 510 (1984); KAN. STAT. ANN. § 60-2617 (2020).

11. 630 P.2d 1176, 1182 (Kan. 1981) (quoting STANDARDS FOR CRIM. JUST. § 8-3.2 cmt. (AM. BAR ASS'N 1978)).

12. *See id.* at 1184 (adopting the ABA's model standard). The standard followed the United States Supreme Court's model of sanctioning "a closure decision . . . when closure is necessary to insure a fair trial for the defendant." *Id.* at 1181 (citing Gannett Co. v. DePasquale, 443 U.S. 368, 378–79 (1979)).

"common law and First Amendment right of access to civil trials."[13] Moreover, like district courts in criminal and civil cases, the Kansas Supreme Court has "original jurisdiction in proceedings in mandamus" such as the Kline matters.[14] A presumption that applies to district courts in cases where those courts have original jurisdiction reasonably could be expected to apply equally to appellate courts in the same posture.

Despite these signposts, the highest court in the state sealed the mandamus cases involving Kline, failing even to mention *Fossey* in the process. In response, the Legislature introduced a bill in January of 2008 to protect the public's right of access under the First Amendment to presumptively open civil and criminal proceedings and records.[15] The bill faced little opposition and became effective in July of that year as Kansas Statutes Annotated (K.S.A.) section 60-2617.[16] However, because of ambiguities in the statute, its effect has tended to be the opposite of the Legislature's intent. Since its enactment, judges and litigants have used K.S.A. section 60-2617 as a mechanism to diminish, rather than advance, openness and to deny public access to the courts.

This Article reviews the series of mandamus cases involving Kline and analyzes the statute, K.S.A. section 60-2617, that the Legislature enacted in response to the court's orders to seal in those cases. Further, the Article explains how, in practice, the statute has jeopardized the presumption of openness in Kansas. In addition, the Article aims to illuminate how to interpret and apply the statute in accordance with the constitutional requirements, particularly First Amendment law, and consistently with the Legislature's original intent. Finally, the Article details how the statute could be revised to resolve its ambiguities.

II. THE PRESUMPTION OF OPENNESS AND THE "*FOSSEY* RULE"

Unquestionably, courts in the United States have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity"

13. Mike v. Dymon, Inc., No. 95-2405-EEO, 1997 WL 38111, at *1 (D. Kan. Jan. 23, 1997) (citing Publicker Indus., v. Cohen, 733 F.2d 1059, 1066–71 (3d Cir. 1984)).

14. Mobil Oil Corp. v. McHenry, 436 P.2d 982, 1006 (Kan. 1968) (citing KAN. CONST. art. 3, § 3).

15. *Minutes of the House Judiciary Committee*, KAN. H.R. (Feb. 18, 2008) (testimony of Rep. Lance Kinzer regarding HB 2825).

16. 2008 HB 2825 passed 122-1 in the House on February 29, 2008, passed 40-0 in the Senate on March 28, 2008, and was approved by the governor on April 14, 2008. *See* KS H.R. Jour., 2008 Reg. Sess. No. 34; KS S. Jour., 2008 Reg. Sess. No. 52; KS H.R. Jour., 2008 Reg. Sess. No. 59, at 2376.

in order "[t]o safeguard the due process rights of the accused."[17] However, judicial discretion in this regard is not absolute. Courts do not have the authority to close proceedings or seal records in matters that are traditionally open without balancing litigants' rights, such as a criminal defendant's Sixth Amendment rights, against the public's presumptive right of access to court proceedings and records under the First Amendment.[18]

The public's presumptive, albeit qualified, First Amendment right to access court records and proceeding, so crucial to our democracy "because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power,'" has evolved over the years.[19] During the 1970s, "the courts of this country recognize[d] a general [common law] right to inspect and copy public records and documents, including judicial records and documents."[20] As the Tenth Circuit has held, "[i]t is clearly established that court documents are covered by a common law right of access."[21] And in *Stephens v. Van Arsdale*,[22] the Kansas Supreme Court acknowledged a qualified common law right of access to records, noting that "[t]he right of the public to access to public records for public inspection is based in our common law."[23]

By the 1980s, the legal basis for the public's right of access to court proceedings and records expanded to constitutional grounds. Beginning with *Richmond Newspapers, Inc. v. Virginia*, the United States Supreme Court developed the "experience and logic" test to determine whether a court hearing was presumptively open.[24] In 1984, the Court established

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17. *Fossey*, 630 P.2d at 1181 (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979)); *see also generally* Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin v. Dowd, 366 U.S. 717 (1961); Estes v. Texas, 381 U.S. 532 (1965).

18. *See* Press-Enterprise I, 464 U.S. 501, 510 (1984) (stating that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered"); United States v. Gonzales, 150 F.3d 1246, 1256 (10th Cir. 1998) (quoting *Press-Enterprise II*, 478 U.S. at 8); United States v. McVeigh, 106 F.3d 325, 336 (10th Cir. 1997).

19. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (Brennan, J., concurring) (quoting *In re* Oliver, 333 U.S. 257, 270 (1948)); *see also Sheppard*, 384 U.S. at 350.

20. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (footnote omitted); *see also* United States v. Hickey, 767 F.2d 705, 708 (10th Cir. 1985) (acknowledging "the axiom that a common law right exists to inspect and copy judicial records").

21. United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (citing *Nixon*, 435 U.S. at 597, 599).

22. 608 P.2d 972 (Kan. 1980).

23. *Id.* at 981 (citing *Nixon*, 435 U.S. at 597, 599).

24. 448 U.S. 555, 597–98 (1980) (Brennan, J., concurring) ("[R]esolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances.").

that the presumption of openness "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[25]

Further, the presumption of openness "extends to at least some categories of court documents and records, such that the First Amendment balancing test there articulated should be applied before such qualifying documents and records can be sealed."[26] As a result, courts face a very high bar before they may close any proceeding or record that has "historically been open to the press and general public" and to which "public access plays a significant positive role in the functioning of the particular process in question."[27]

Some court proceedings and records, such those involving child welfare cases and care and treatment proceedings, are not traditionally open, and thus not subject to the presumption. But proceedings before the Kansas Supreme Court, such as mandamus actions, are traditionally open, as the court poignantly confirmed when it noted that the Kline rulings were the "first in memory" where the court had kept its records from public view.[28] Moreover, access to civil actions, such as the Kline matters, is crucial "for the public to know what is going on"[29] and to "assure[] the public perception of fairness."[30] Thus, there can be little doubt that mandamus proceedings are presumptively open, subject to closure only if that presumption is overcome.

The court's decision to seal the Kline cases without balancing the First Amendment issues at stake was puzzling, especially considering it had previously recognized high standards for overcoming the presumption when it set forth the *Fossey* rule:

> [A trial court] may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a motion to suppress, and may seal the

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25. Press-Enterprise I, 464 U.S. 501, 510 (1984); *see also*, Press-Enterprise II, 478 U.S. 1, 8 (1986) (describing the high bar courts face before they may permissibly close court proceedings when such proceedings "have historically been open to the press and general public" or if "public access [to the proceeding] plays a significant positive role in the functioning of the particular process in question"); *see also generally* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993).

26. United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997).

27. *Press-Enterprise II*, 478 U.S. at 8.

28. Alpha Med. Clinic v. Anderson, 128 P.3d 364, 382 (Kan. 2006).

29. *See, e.g.*, Kansas *ex rel.* Tomasic v. Cahill, 567 P.2d 1329, 1336 (Kan. 1977) ("The need for the public to know what is going on in an ouster proceeding is substantial, and certainly outweighs the remote possibility of prejudice to parties in this civil proceeding.").

30. United States v. Gonzales, 150 F.3d 1246, 1271 n.18 (10th Cir. 1998) (quoting United States v. McVeigh, 106 F.3d 325, 336 (10th Cir. 1997)).

> record only if: (i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and (ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.
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> [T]he effectiveness of the following should receive serious consideration: (1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration of the jury, and (8) admonitory instructions to the jury.[31]

The *Fossey* court also made clear that "[t]he burden of proof is on the party making the motion."[32] The court also mandated that in order "to insure compliance with this standard," a written record must be made to reflect the evidence upon which the court relied and the factors which the court considered in arriving at its decision."[33]

A. Context of Fossey

The Kansas Supreme Court did not espouse the *Fossey* rule in a vacuum. Rather, the court emphasized the importance of open judicial proceedings even during "one of the most high-profile criminal cases in the history of [the] Johnson County"[34] area, one that spawned a true-crime novel[35] and has attracted media attention in the decades since the jury rendered its verdict in 1981.[36]

Fossey was a mandamus action brought by the *Kansas City Star*'s parent company to challenge a Miami County judge's decision to close to the public a suppression hearing that was to take place after the jury was impaneled in a murder case.[37] In that case, which the Kansas Supreme

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31. Kansas City Star Co. v. Fossey, 630 P.2d 1176, 1176, 1177, 1183 (Kan. 1981) (quoting STANDARDS FOR CRIM. JUST. § 8-3.2 cmt. (AM. BAR ASS'N 1978)).

32. *Id.* at 1183 (quoting STANDARDS FOR CRIM. JUST. § 8-3.2 cmt. (AM. BAR ASS'N 1978)).

33. *Id.* at 1184.

34. Andy Hoffman, *Update on My Book, Family Affairs, 20 Years Later*, ANDYHOFFMANBOOKS (May 16, 2012, 11:51 AM), http://andyhoffmanbooks.blogspot.com/2012/05/update-on-my-book-family-affairs-twenty.html [https://perma.cc/T693-A4VG].

35. *See id.*; ANDY HOFFMAN, FAMILY AFFAIRS (Pocket Book, Simon & Schuster) (1992).

36. *See, e.g.*, Ben Paynter, *Love Never Dies*, THE PITCH (Nov. 20, 2003), https://www.thepitchkc.com/love-never-dies/ [https://perma.cc/T7PA-LSW5]; Naimah Jabali-Nash, *Sueanne Hobson Up for Parole (9th Time) in Kansas Killing; Would-Be Neighbor Issues Warning*, CBS NEWS (Oct. 27, 2010), https://www.cbsnews.com/news/sueanne-hobson-up-for-parole-9th-time-in-kansas-killing-would-be-neighbor-issues-warning/ [https://perma.cc/5AP3-BL7F].

37. *Fossey*, 630 P.2d at 1177.

Court would later hear as *State v. Crumm*,[38]

> [A] Johnson County housewife contracted a hit on her stepson. Offering a new car and free motorcycle repair, Sueanne Hobson persuaded her seventeen-year-old son, James Crumm, and Crumm's sixteen-year-old buddy Paul Sorrentino to pick up thirteen-year-old Christen Hobson from the family's Overland Park condo on April 17. Smoking dope and drinking, Crumm and Sorrentino drove the kid to a creek bank in rural Miami County. They forced him to dig a shallow grave and told him to sit in it. He was shot once in the arm, once in the face and once through the back of the head.[39]

Crumm was the first of the co-defendants to go to trial.[40] It "was the best soap opera ever to hit Johnson County. Every day at 7 a.m., crowds lined up to get front-row seats at the courthouse."[41] As the *Fossey* court noted, "[a] great amount of news media publicity developed as a result of the case. . . . The trial caused a great deal of interest in Miami County, since it was the first murder trial in at least eight years for this rural county."[42]

On April 27, 1981, voir dire concluded and the jury was impaneled.[43] Then, the trial judge, Leighton A. Fossey, "stated that he desired to conduct a *Jackson v. Denno* suppression hearing" related to the voluntariness of statements Crumm had made to police.[44] At that point, "a discussion in open court was held between the judge and counsel concerning the closing of the suppression hearing."[45] Defense counsel concurred with the closure.[46]

But as the *Fossey* court recounted:

> An objection to the closing was raised by Liz Reardon, a reporter for the *Kansas City Times*. She read a statement[47] previously prepared by her

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38. 654 P.2d 417 (Kan. 1982).

39. Paynter, *supra* note 36.

40. *Sorrentino Murder Trial Moved to Fort Scott*, FORT SCOTT TRIB., May 27, 1981, at A1, https://news.google.com/newspapers?id=vM8fAAAAIBAJ&sjid=BdkEAAAAIBAJ&pg=4791%21603167 [https://perma.cc/2RFZ-H797]; Toni Cardarella, *Sueanne Hobson wanted her 13-year-old stepson killed by Christmas*, UPI ARCHIVES (May 1, 1982), https://www.upi.com/Archives/1982/05/01/Sueanne-Hobson-wanted-her-13-year-old-stepson-killed-by-Christmas/7705389073600/ [https://perma.cc/87M2-ZEWH].

41. Paynter, *supra* note 36.

42. *Fossey*, 630 P.2d at 1178.

43. *Id.* at 1178.

44. *Id.*

45. *Id.*

46. *Id.*

47. Sample statement:

> employer for just such a purpose. The statement contained the newspaper's request for a hearing on the closure issue and then summarized legal arguments outlining the legal standards for closing a criminal proceeding as viewed by the newspaper.[48]

The prosecution did not oppose closure,[49] and defense counsel argued that due to the impaneling of the jury and the presence of the media, "there was a substantial danger of publicity prejudicial to the defendant until such time as the validity and admissibility" of Crumm's statements "could be determined."[50] Defense counsel also cautioned against a continuance, "suggest[ing] that it would be highly prejudicial to the defendant to continue the trial and to spend further time on a hearing to determine the issue of closure."[51]

Judge Fossey found that "[t]his is a special hearing, which does not entail anything concerning the evidence in the case. It is to determine simply whether or not any confession made by the defendant is to be admissible in evidence."[52] He further found that

> [w]e do have a jury impaneled. We have had considerable publicity concerning the case already, and rather than subject the jury, in spite of by admonition, to possible influence by a report of this hearing, I will overrule the motion of *The Kansas City Star* and order that the hearing be closed.[53]

> [Your honor,] I am (name), a reporter for (newspaper or broadcaster.) On behalf of both myself and my (paper or station), I would like to note an objection to the closure of (or motion to close) this proceeding to the public and press, and I request an opportunity to be heard through counsel prior to any closure of the proceedings.
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> . . . .
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> I understand that under the First Amendment to the United States Constitution (and, if in state court, the Constitution of [Kansas]) the press and public are afforded the right to attend court proceedings. At the very least, the law requires that a hearing be held, with the press given an opportunity to participate, prior to closure. These arguments can best be made by counsel, and I request that our counsel be afforded an opportunity to be heard.

M.A. Kautsch, *Press Freedom and Fair Trials in Kansas: How Media and the Courts Have Struggled to Resolve Competing Claims of Constitutional Rights*, 57 U. KAN. L. REV. 1075, 1130–31 (2009) (adapting language from SAM KLEIN & ROBERT C. CLOTHIER, PA. PRESS ASS'N, MEDIA SURIVAL KIT 11–14 (6th ed. 2001)) (footnotes omitted); *see also generally* Karen Williams Kammer, *The Reporter's Right of Access To Courtrooms and Court Records*, THE FLA. BAR, https://www.floridabar.org/news/resources/rpt-hbk/rpt-hbk-07/ [https://perma.cc/L62B-D4B8] (last visited Apr. 8, 2021).

48. *Fossey*, 630 P.2d at 1178.
49. *Id*. at 1184.
50. *Id*. at 1178.
51. *Id*.
52. *Id*.
53. *Id*.

Then, Judge Fossey ordered that "[a]ll persons, except court personnel, were required to leave the courtroom at that time."[54] The *Jackson v. Denno* suppression hearing proceeded out of view of the public.

The next day, April 28, 1981, the *Star* was "permitted to intervene in the action, and to argue the motion to vacate the closure order."[55] Although Judge Fossey declined to vacate the order, he ordered a copy of the transcript to be filed with the clerk of the district court, and he provided the *Star* with a "copy of the transcript of that suppression hearing."[56]

Crumm was convicted of first-degree murder on May 1, 1981, and that same day, the *Star* filed its mandamus action.[57] After being ordered to respond by the Kansas Supreme Court, Judge Fossey filed a motion to dismiss, arguing in part that the issue was moot as a result of the dissemination of the transcript.[58] But the *Fossey* court chose to hear the case, finding that it involved issues of "significant statewide concern of a recurring and ongoing nature."[59] It held:

> It is true that, technically, the case is moot. We hold, however, that the case is not so moot as to preclude review by this court since it can reasonably be expected that the petitioner in this case would be objecting to similar closure orders entered by other district courts in other cases. In view of petitioner's newspaper coverage in the state, the underlying dispute between the parties is one capable of repetition, yet evading review.[60]

The *Fossey* court went on to find that Judge Fossey "did not abuse his discretion" when he "order[ed] closure of the suppression hearing."[61] In so ruling, the court noted that the transcript had been disseminated; the prosecution did not oppose closure; and Judge Fossey had found that the hearing was limited to evidentiary issues related to the confession, voir dire had been completed, there was publicity surrounding the case, and "the possibility existed the jury might be influenced by a report on this special hearing despite the judge's admonition to the jurors concerning news media accounts."[62]

But the *Fossey* court did not stop there. Even though it effectively ratified the district judge's conduct, it still went out of its way to set forth

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54. *Id.*
55. *Id.* at 1184.
56. *Id.* at 1179.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1184.
62. *Id.*

the *Fossey* rule, which it held "will govern the closure issue in future cases"[63] and carries with it "a strong presumption in favor of open judicial proceedings and free access to records in a criminal case."[64] As a result, since the *Fossey* court entered its ruling on July 17, 1981, closure or seal of presumptively open hearings or records is not lawful in Kansas "unless the court affirmatively concludes that the requirements of the clear and present danger and least restrictive alternative tests have been met."[65] Moreover, the Kansas Supreme Court reaffirmed the *Fossey* rule in 2001, when it required a Sedgwick County District Court judge to hold a hearing before proceedings could be closed or records sealed, coining the phrase "the *Fossey* rule" in the process.[66]

III. SECRET SUPREME COURT PROCEEDINGS AND THE ENACTMENT OF K.S.A. § 60-2617

The *Fossey* rule recognizes, in essence, that "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view."[67] But years later, *Fossey* and its underpinnings went unreferenced and unheeded as the Kansas Supreme Court conducted four inquisition-related mandamus cases under seal stemming from certain actions of then-Attorney General Phill Kline, who was elected in November of 2002 and served one four-year term.

A. Kline's Inquisition Leads to the Court's Decision in Alpha

In his zeal to combat what he perceived to be illegal abortions in the state, Kline's office applied to open an inquisition on October 29, 2003.[68] Even though the statute governing inquisitions does not mandate such proceedings sealed, an inquisition is akin to "a one-person grand jury which provides the attorney general . . . with authority to inquire into

63. *Id.*

64. *Id.* at 1182.

65. *Id.* at 1183.

66. *See* Wichita Eagle Beacon Co. v. Owens, 27 P.3d 881, 883 (Kan. 2001) ("The result here effectuates the *Fossey* rule.").

67. United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir. 1978).

68. Application to Open Inquisition, *In re* Inquisition into the Failure to Report Abuse, Shawnee Cnty. Dist. Court Case No. 04-IQ-03 (Oct. 29, 2003). Under KAN. STAT. ANN. § 22-3101 (2020), the attorney general's office and county and district attorneys may conduct inquisitions to investigate "any alleged violation of the laws." § 22-3101(a).

alleged violations of law."[69]

Kline's inquisition was held in secret[70] "under the judicial supervision of Judge [Richard] Anderson in Shawnee County."[71] It involved issuing subpoenas for medical records of patients who had received treatment at a pair of medical clinics that provided abortion services, Alpha and Beta Medical Centers.[72] Subpoenas were issued at Kline's request that "would require petitioners to produce approximately 90 medical records, in their entirety, and without any redaction to protect the identities and other confidential information that is irrelevant to the inquisition."[73] In an attempt to maintain the closed nature of the inquisition, "[t]he subpoenas also order[ed] that the [clinics] not disclose any information about the subpoenas' existence to any individual or entity . . . ."[74]

Despite this odd posture, Judge Anderson declined to rule[75] on whether "to allow redaction of patient-identifying information from the files" subject to the subpoenas.[76] "Those subpoenas, and Judge Anderson's refusal to quash or modify them, led the clinics to file the petition for writ of mandamus . . . ."[77] The clinics moved to seal the entire mandamus action "[i]n light of the 'do not disclose' order . . . ."[78]

The secret nature of Kline's inquisition was preserved when the clinics filed their mandamus petition in October of 2004 "'under seal' because it arose from the afore-mentioned inquisition."[79] To be sure, there is a good argument to be made that applying the "experience and logic" test to records related to inquisition proceeding leads to the conclusion that such actions are not presumptively open. For one thing, inquisition

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69. State v. Cathey, 741 P.2d 738, 744 (Kan. 1987).

70. Motion for an Order to Determine Whether the Petition for Writ of Mandamus and Motion for an Order to Show Cause Should Proceed Under Seal, at *1, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. June 7, 2007).

71. State v. Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc., 241 P.3d 45, 51 (Kan. 2010). As of the date of publication, Judge Anderson is the Chief Judge of the Shawnee County District Court.

72. Order and Subpoena Duces Tecum, *In re* Inquisition into the Failure to Report Abuse, Shawnee Cnty. Dist. Court Case No. 04-IQ-03 (May 26, 2004).

73. Application to Proceed Under Seal, at *1, Alpha Med. Clinic v. Anderson, No. 93,383 (Kan. Oct. 26, 2004).

74. *Id.* at 1–2.

75. *See* Alpha Med. Clinic v. Anderson, 128 P.3d 364, 371 (Kan. 2006).

76. *Id.* at 379.

77. State v. Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc., 241 P.3d 45, 51 (Kan. 2010).

78. Application to Proceed Under Seal, at *2, Alpha Med. Clinic v. Anderson, No. 93,383 (Kan. Oct. 26, 2004).

79. Motion for an Order to Determine Whether the Petition for Writ of Mandamus and Motion for an Order to Show Cause Should Proceed Under Seal, at *1, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. June 6, 2007).

proceedings, like grand juries, are not traditionally open. For another, inquisitions are designed to give prosecutors another way to accomplish their objectives,[80] so as long as an inquisition remains ongoing, public dissemination of records related to the corresponding investigation is not likely to be in the public interest.

However, as discussed above, mandamus actions are presumptively open. But in granting the motion to seal the mandamus case in its entirety from its inception, the court did not reference *Fossey*, acknowledge the public's First Amendment rights to access the records or proceeding in any way, or consider whether alternatives to a blanket seal, such as redacting pleadings or exhibits containing information related to the inquisition that constituted an unwarranted invasion of personal privacy, were available.[81] Instead, the court entered an order just over two pages long providing in pertinent part that "[a]ll filings by parties in this mandamus action shall be under seal" because "inappropriate disclosure of [the medical] records [at issue in the case] could cause irreparable harm and it appears no such harm would result from maintaining the status quo until all relevant facts and adequate legal authorities have been presented to this court for full determination on the merits."[82] Patient privacy, and preserving the secrecy of the underlying inquisition, far outweighed any other interests the court may have considered.

There is no question that patient privacy is an important concern. Truly, as the court found in *Alpha*, the "type of information" subject to Kline's subpoenas "could hardly be more sensitive, or the potential harm to patient privacy posed by disclosure more substantial."[83] But the court treated patient privacy as it were the only relevant issue of significance. The court sealed the action despite no evidence that it considered any other alternatives to seal, as required by the *Fossey* rule.

It should be noted that in their motion to seal, the clinics also indicated their intent to challenge the "do not disclose" order governing the underlying inquisition on the basis that it "is without legal authority under Kansas law, and [in] violation of the First Amendment to the United States Constitution."[84] But the court's order to seal made no reference to those constitutional issues, and there is no evidence the "do not disclose" order in the underlying inquisition was ever lifted.

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80. *See* Southwestern Bell Telephone Co. v. Miller, 583 P.2d 1042, 1045 (Kan Ct. App. 1978).

81. *Id.*

82. Order Granting Motion to Seal Proceedings, at *1–2, Alpha Med. Clinic v. Anderson, No. 93,383 (Kan. Oct. 28, 2004).

83. Alpha Med. Clinic v. Anderson, 128 P.3d 364, 378 (Kan. 2006).

84. Application to Proceed Under Seal, at *2, Alpha Med. Clinic v. Anderson, No. 93,383 (Kan. Oct. 26, 2004).

On February 3, 2006, well over a year after the clinics filed their mandamus action, the Court issued its opinion in *Alpha*.[85] There, the court "balanced the patients' individual privacy interests against the societal necessity and compelling State interest in pursuing criminal investigations."[86] It remanded the case, writing that "Judge Anderson's order does not do all it can to narrow the information gathered or to safeguard that information from unauthorized disclosure once it is in the district court's hands"[87] and described "procedures to be followed for redaction of the records before the district court allowed them to be turned over to the Attorney General."[88] It further wrote that such "information must be redacted by petitioners before the files are turned over to the court."[89]

Even as the *Alpha* opinion shed some light on what the court termed an "unusually high-profile case attracting keen public interest throughout the state,"[90] there is no evidence the inquisition did not proceed in secret upon remand. In fact, the court implicitly endorsed Judge Anderson's decision to seal the inquisition, writing in the opinion's only footnote: "Certain matters that have been contained only in pleadings filed under seal require discussion in order to decide the merits of this mandamus action. This court lifts the seal only to the extent such matters are mentioned of necessity in this opinion."[91]

It is hard to imagine that the inquisition needed to continue entirely in secret after *Alpha*, given that its existence had been so excruciatingly detailed in that opinion. The court or Judge Anderson could have applied the *Fossey* rule or U.S. Supreme Court precedent to establish a framework for the inquisition to go forward in a manner that would have more fairly balanced the privacy issues against the public's right of access. Doing so could have helped alleviate the growing controversy surrounding public officials conducting a high-profile legal action behind closed doors, which ultimately led to the enactment of K.S.A. section 60-2617. Instead, the court assigned the nigh impossible task of keeping the inquisition under wraps, "caution[ing] all parties to resist any impulse to further publicize their respective legal positions, which may imperil the privacy of the patients and the law enforcement objectives at the heart of this

85. *See generally Alpha Med. Clinic*, 128 P.3d at 364.

86. Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, 197 P.3d 370, 375 (Kan. 2008) (citing *Alpha Med. Clinic*, 128 P.3d at 379).

87. *Alpha Med. Clinic*, 128 P.3d at 378.

88. *Comprehensive Health v. Kline*, 197 P.3d at 375 (citing *Alpha Med. Clinic*, 128 P.3d at 379).

89. *Alpha Med. Clinic*, 128 P.3d at 379.

90. *Id.* at 382.

91. *Id.* at 372 n.1.

proceeding."[92]

B. Mandamus Action Involving Kline's 2006 Appearance on The O'Reilly Factor Proceeds in Secret, but Is Denied

The ongoing secrecy surrounding the inquisition, which remained sealed other than to the extent it was discussed in *Alpha*, spawned more litigation behind closed doors. On November 3, 2006, the Friday before Kline would stand for re-election, he appeared on *The O'Reilly Factor* on Fox News, despite the court's cautionary language in *Alpha*, and despite "Judge Anderson's insistence that Kline and his subordinates were bound by the subpoenas' nondisclosure provision."[93] Making matters worse, "[d]uring the broadcast, host Bill O'Reilly suggested that [he] had been made privy to the contents of the redacted records."[94]

In response, multiple clinics, including Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc., a corporate successor to Alpha and Beta[95] (hereinafter "Planned Parenthood"), filed a "[. . . mandamus action under seal] with [the Kansas Supreme Court] on the day before election day, November 6, 2006," in order "to press Judge Anderson to hold Kline in contempt before election day." [96] The next day, Kline lost the election to Paul Morrison, who at that time was the Johnson County District Attorney.[97] Within weeks, Judge Anderson "concluded after questioning Kline . . . under oath that Kline had not given the records to O'Reilly, if, in fact, O'Reilly had seen them at all," and the mandamus action was denied on November 30, 2006.[98]

C. Sealed Mandamus Actions Filed in 2007

Then, in a rather extraordinary turn of political events, Kline and Morrison effectively swapped public offices. After losing the 2006 election for attorney general to Morrison, "Republican precinct committee members" in Johnson County selected Kline to finish Morrison's term as

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92. *Id.* at 382.

93. State v. Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc., 241 P.3d 45, 52 (Kan. 2010).

94. *Id.*

95. *Id.* at 51 ("At the time, the clinics were referred to as Alpha and Beta; they are now known to include defendant CHPP.").

96. *Id.* at 52 (alterations in original); *see, e.g.*, Motion for an Emergency Order Staying Inquisition Sealing Records and Appointing a Special Prosecutor, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 97,554 (Kan. Nov. 6, 2006).

97. *State v. Comprehensive Health*, 241 P.3d at 52.

98. *Id.*

Johnson County District Attorney.[99] In connection with taking that position, Kline "transfer[ed] . . . clinic patient records and other Inquisition files from himself as Attorney General to himself as Johnson County District Attorney."[100]

Afraid of what Kline would do with the records, Planned Parenthood brought another mandamus action against him in June of 2007, alleging that his "unauthorized possession threatens the privacy rights of Petitioner's patients. . . ."[101] Planned Parenthood argued that its mandamus action should be conducted under seal because it "also involve[d] the secret inquisition and the sensitive medical records" at issue in the inquisition, noting "the importance of its patients' privacy rights, and this Court's admonition [in *Alpha*] not to compromise such with undue publicity."[102] Despite being represented by the same attorneys who raised First Amendment issues in the 2004 mandamus petition, the petition in the 2007 mandamus action made no such reference.[103]

The court acted quickly in response to what it deemed a "Motion for an Order to Determine Whether the Petition for Writ of Mandamus and Motion for an Order to Show Cause Should Proceed Under Seal by Petitioner."[104] It issued a one-page order the next day, bereft of analysis, that stated in pertinent part: "Granted. Action to proceed under seal."[105]

As when the court sealed the proceedings in *Alpha*, there is no evidence it assigned much, if any, weight to considerations other than patient privacy in reaching its decision. It goes without saying that a two-sentence order is incapable of the discussion required to create a record for appeal or address alternatives to blanket seal. Remarkably, the court was satisfied with those two sentences even though it had chastised Judge Anderson in *Alpha* for failing to consider alternatives, such as redaction, to the "do not disclose" order he entered in the underlying inquisition.[106] But instead of considering any such alternatives in Planned Parenthood's

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99. John Hanna, *Kline Chosen as Johnson County District Attorney*, LAWRENCE J. WORLD (Dec. 12, 2006, 12:00 AM), https://www2.ljworld.com/news/2006/dec/12/kline_chosen_johnson_county_district_attorney/ [https://perma.cc/3Q4W-CCWB].

100. *State v. Comprehensive Health*, 241 P.3d at 56.

101. Petition for Writ of Mandamus and Motion for an Order to Show Cause, at *5, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. June 6, 2007).

102. Motion for an Order to Determine Whether the Petition for Writ of Mandamus and Motion for an Order to Show Cause Should Proceed Under Seal, at *1–2, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. June 6, 2007).

103. *Id.*

104. *Id.*

105. Order Granting Motion to Proceed Under Seal, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. June 7, 2007).

106. *See* Alpha Med. Clinic v. Anderson, 128 P.3d 364, 379 (Kan. 2006).

mandamus case, the court again sealed the proceedings in their entirety, and made no findings of fact or conclusions of law to justify doing so.[107]

The court's impulse to seal inquisition-related matters in their entirety continued into the summer of 2007, as Attorney General Morrison "filed his own sealed mandamus action against Judge Anderson" in August of that year.[108] "Morrison argued that, given the Inquisition's closed status, Judge Anderson no longer had jurisdiction nor a reason to maintain court custody of documents the Inquisition had generated."[109] Although Morrison's office wrote that it "does not believe that this case . . . should proceed away from the public eye,"[110] cited the Kansas Open Records Act,[111] and correctly pointed out that "[t]he public has a right to know the actions taken by their elected officials,"[112] it also sought leave to file the petition in that case under seal "solely out of an abundance of caution and in deference to the Court's Order" sealing the proceedings in Planned Parenthood's mandamus case.[113]

The court granted the motion the next day, and that case proceeded under seal as well.[114]

Then, "[o]n September 25, 2007, after Morrison had been permitted to intervene in" Planned Parenthood's mandamus case,[115] the litigation surrounding Kline's inquisition proceeded primarily in the Planned Parenthood matter.[116] Although Morrison had brought the issue of public interest in open proceedings to the court's attention, both cases remained sealed until the court issued orders unsealing each of them on May 2, 2008,[117] preceding its ultimate opinion in *Comprehensive Health* by 7

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107. Order Granting Motion to Proceed Under Seal, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. June 7, 2007).

108. State v. Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc., 241 P.3d 45, 57 (Kan. 2010).

109. *Id.*

110. Motion for Leave to File Petition and Appendix Under Seal, at *2, State *ex rel.* Attorney General v. Anderson, No. 99,050 (Kan. August 2, 2007).

111. *Id*.

112. *Id*.

113. *Id*. at *3.

114. Order Granting Motion for Leave to File Petition and Appendix Under Seal, State *ex rel*. Attorney General v. Anderson, No. 99,050 (Kan. Aug. 3, 2007).

115. State v. Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc., 241 P.3d 45, 57 (Kan. 2010).

116. *See id.* ("Morrison filed a sealed Memorandum in Support of CHPP's petition accusing Kline of engaging in improprieties in the transfer of patient records from the Attorney General's office to the Johnson County District Attorney's office.").

117. Order Unsealing Action, Requiring Filings of Written Record, and Setting Briefing and Argument Schedule, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. May 2, 2008); Order Amending Protective Order, Unsealing This Action, and

months.[118]

The May 2 ruling entered in Planned Parenthood's mandamus action in particular sheds a bit of light on the basis for seal. There, the Court explained that "[b]ecause Petitioner stated that this action involved the same patient records and criminal inquisition at issue in *Alpha*, this Court permitted this action to proceed under seal."[119] The court also summarized each party's position regarding whether the case should have proceeded under seal from the outset: Planned Parenthood had "recommended that the action remain under seal to protect patient privacy; Kline [had] recommended that the action remain under seal because his prosecutorial effort using the records at issue in *Alpha* was ongoing; and the Attorney General voiced no opposition to lifting the seal."[120] The court also noted that both Planned Parenthood and Kline "later amended" their positions on seal.[121] As for why the Court was now unsealing the case, it wrote that the parties "now agree that this action no longer needs to proceed under seal."[122]

The order made no reference to *Fossey* or to whether any alternatives to blanket seal had been available.[123]

In each of these four cases, all of which were sealed for some or all the time they were pending in the Kansas Supreme Court, the court never required any of the movants to seal to overcome the presumption of openness. The court never considered reasonable alternatives to blanket seal, such as the redaction of personally identifiable information from the medical records, or an order sealing only those records. The court never made any contemporaneous, on-the-record findings of fact supporting its decisions to close the proceedings in these inquisition-related mandamus cases.

Certainly, there were privacy interests at stake. Certainly, Judge

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Directing Parties to Show Cause, State *ex rel.* Attorney General v. Anderson, No. 99,050 (Kan. May 2, 2008).

118. Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, 197 P.3d 370 (Kan. 2008).

119. Order Unsealing Action, Requiring Filings of Written Record, and Setting Briefing and Argument Schedule, at *1, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. May 2, 2008).

120. *Id.* at *2.

121. *See, e.g.*, Respondent's Motion to Unseal Case, at *2, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. Dec. 6, 2007) ("As a result of [proceedings that took place in October, 2007], [Kline] has re-evaluated his position with regard to the unsealing of this case. [Kline] now agrees that this case should become public and the seal lifted.").

122. Order Unsealing Action, Requiring Filings of Written Record, and Setting Briefing and Argument Schedule, at *2, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. May 2, 2008).

123. *Id.*

Anderson placed the court in a tough spot by closing the inquisition outright rather than exploring reasonable alternatives, such as redacting personally identifiable information from the medical records Kline had subpoenaed, especially once the case had been publicly discussed in *Alpha*. The court was never asked to determine the validity of any blanket order to seal the inquisition and would have had to go to great lengths to raise the issue *sua sponte*.

But just as certainly, the court failed to consider the public's First Amendment rights when it repeatedly closed presumptively open court proceedings and records, for "the first [time] in memory," particularly when the issues, namely, elected officials' performance of their duties, are so squarely in the public interest.[124]

D. K.S.A. § 60-2617 is Enacted

As the remaining two inquisition-related mandamus cases continued to proceed in secret throughout the rest of 2007 and into 2008, the Legislature took notice. "[T]roubled by the fact that the Kansas Supreme Court has been conducting at least two important judicial proceedings in complete secrecy," it introduced "a short bill about a serious topic: The right of the people to open court proceedings."[125] Citing *Richmond Newspapers*, the bill's sponsor, Rep. Lance Kinzer (R), 14th District, testified "it is more important than ever that our judicial process be open and accessible" because "the public has a fundamental interest in all cases that are submitted to a court for resolution, and that restricting media coverage and other public access to court proceedings should only be allowed under very rare circumstances."[126] Moreover, although the bill originated in the context of legal battles regarding abortion rights, the bill's sponsor wrote in an email to a blogger covering the issues at the time that the bill is "more of an open [government] issue than a pro-life issue."[127] To achieve that legislative objective, a court would not be able to "close a hearing or allow pleadings to be filed under seal unless it first made a finding on the record that an identified safety, property or privacy interest predominates the case and outweighs the strong public interest in access

124. Alpha Med. Clinic v. Anderson, 128 P.3d 364, 382 (Kan. 2006).

125. *Testimony Regarding HB 2825*, Rep. Lance Kinzer, H. Judiciary Comm., 2007-2008 Leg. Sess. (Kan. Feb. 18, 2008).

126. *Id.* (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)).

127. Denis Boyles, *The Secret Poceedings [sic] of the Kansas Supreme Court . . .*, THE PATRIOTS (Feb. 19, 2008), https://newpatriotsblog.com/the-secret-poceedings-of-the-kansas-supreme-court-dot-dot-dot [https://perma.cc/H49Y-FULG] (alteration in original).

to the court record and proceedings."[128] The bill was approved by the governor in April of 2008,[129] and became a new section in the Kansas Statutes Annotated, section 60-2617, titled "Sealing or redacting court records; closing a court proceeding; motion; notice; hearing; exceptions."[130] It has not been amended since.

IV. AMBIGUITY AND APPLICATION OF K.S.A. § 60-2617

Unfortunately, the statute's language creates ambiguity that has caused it to be interpreted in a manner inconsistent with the legislature's intent to codify the presumption of openness. "[T]he fundamental rule governing [statutory] interpretation is that 'the intent of the legislature governs if that intent can be ascertained.'"[131] Only "[w]here the face of the statute leaves its construction uncertain, [may] the court . . . look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested."[132] However, if, as here, "the statute's language or text is unclear or ambiguous," it is appropriate to "use canons of construction or legislative history or other background considerations to construe the legislature's intent."[133]

A. K.S.A. § 60-2617(a) and (b) are ambiguous because when read together, those subsections may or may not require a hearing before a court closes a proceeding or seals a record.

The statute is ambiguous in part because it is unclear whether it requires a hearing before a court is permitted to close a hearing or seal a record. The first sentence of subsection (a) provides that "[i]n a civil or criminal case, the court, upon the court's own motion, *may hold a hearing* or any party may request a hearing to seal or redact the court records or to close a court proceeding."[134] Such language suggests that the court has discretion whether to conduct a hearing before closing proceedings or sealing records. However, subsection (b) provides that "[a]fter the hearing, the court may order the court files and records in the proceeding,

128. *Testimony Regarding HB 2825*, *supra* note 125.

129. KS H.R. Jour., 2008 Reg. Sess. No. 59, at 2376.

130. KAN. STAT. ANN. § 60-2617 (2020).

131. State v. Arnett, 223 P.3d 780, 784 (Kan. 2010) (quoting State *ex rel.* Stovall v. Meneley, 22 P.3d 124, 143 (Kan. 2001)).

132. Robinett v. Haskell Co., 12 P.3d 411, 416 (Kan. 2000).

133. State v. Keel, 357 P.3d 251, 260 (Kan. 2015) (quoting State v. Urban, 239 P.3d 837, 839 (Kan. 2010)) (emphasis removed).

134. § 60-2617(a) (emphasis added).

or any part thereof, to be sealed or redacted or the court proceeding closed."[135] This language suggests that the only circumstances under which a court may close proceedings or seal records occur after a hearing on such issues takes place.

Thus, it is possible to interpret subsection (b) so that K.S.A. section 60-2617 requires a hearing before any orders to close or seal are entered. The impediment to such an interpretation is the presence of the words "may hold a hearing" in subsection (a), creating ambiguity.[136]

To resolve this ambiguity, the word "may" that appears directly before the words "hold a hearing" in subsection (a) should be interpreted as a mandatory command akin to "shall," "will," or "must." Although the word "may" is often associated with permissive language, rather than mandatory, its meaning depends on the context of its use. "[A]s a general rule, the word 'may' will not be treated as a word of command *unless there is something in context or subject matter of act to indicate that it was used in such sense*."[137] Although using the "word 'may' as opposed to 'shall' is indicative of discretion or choice between two or more alternatives, [the] context in which [the] word appears must be [the] controlling factor."[138]

The legislative intent, applicable precedent, and ordinary notions of procedural due process converts the word "may" to a command in this context. Legislative testimony provided that a court "could not close a hearing or allow pleadings to be filed under seal unless" the statute were invoked; in other words, the legislature contemplated that hearing would be a precondition to disclosure.[139] Further, K.S.A. section 60-2617 was enacted to combat the lack of transparency surrounding the inquisition-related mandamus cases in the Kansas Supreme Court.[140] The Legislature's intent would be entirely defeated if courts were permitted to close proceedings and records in secret, as the Supreme Court did in those cases. Moreover, the *Fossey* rule requires such a hearing.[141] That rule, as well as the notice requirements set forth in the second and third sentences of K.S.A. section 60-2617(a),[142] are consistent with "[t]he basic elements

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135. § 60-2617(b).

136. § 60-2617(a).

137. State *ex rel.* Sec'y of Soc. & Rehab. Servs. v. Jackson, 822 P.2d 1033, 1038 (Kan. 1991) (quoting BLACK'S LAW DICTIONARY 979 (Centennial ed. 1991)) (emphasis added).

138. *Id*. (quoting BLACK'S LAW DICTIONARY 979 (Centennial ed. 1991)).

139. Kinzer, H. Judiciary Comm., *supra* note 120.

140. *Id.*

141. *See supra* notes 31–33 and accompanying text.

142. KAN. STAT. ANN. § 60-2617(a) (2020) provides:

> Reasonable notice of a hearing to seal or redact court records or to close a court proceeding

of procedural due process[,] . . . notice and an opportunity to be heard at a meaningful time and in a meaningful manner."[143]

Given the well-established legislative intent to codify the presumption of openness, the words "may hold a hearing" could easily be interpreted in a manner consistent with that presumption and read to require hearings in open court before judges can close proceedings or seal records.

The words "may hold a hearing" in subsection (a) also create ambiguity for one other reason: by apparently making hearings optional, rather than mandatory, the statute conflicts with constitutional requirements and consequently has uncertain application. As discussed *supra*, the *Fossey* court adopted procedures and standards to apply to "future closure determinations."[144] Under *Fossey*, a hearing is mandatory for district courts considering closure of proceedings or seal of records.[145] But as set forth in K.S.A. section 60-2617, the words "may hold a hearing" could be interpreted as a signal that a court has discretion to choose whether a proceeding can be closed, or a record sealed, irrespective of the presumption of openness. The *Fossey* rule, however, does not allow discretion; a hearing must be held. Moreover, legislative testimony set forth *supra* indicates that the Legislature's intent originally was to mandate hearings rather than make them discretionary.

B. K.S.A. § 60-2617(a), (b), and (d) are ambiguous because they may or may not put the burden of proof on the movant to close proceedings or seal records.

Subsection (a) provides that either "the court, upon [its] own motion, may hold a hearing or any party may request a hearing to seal or redact the court records or to close a court proceeding."[146] "Good cause" is required[147] before "the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted or the court proceeding closed."[148] That language could well be interpreted

shall be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact court records or to close a court proceeding shall also be given to the victim, if ascertainable.

143. Kennedy v. Bd. of Shawnee Cnty. Comm'rs, 958 P.2d 637, 652 (Kan. 1998) (quoting *In re* Petition of City of Overland Park for Annexation of Land, 736 P.2d 923, 928 (Kan. 1987). To be truly effective, such notice should be given in open court so observers would also become aware that a hearing to address issues related to closure and seal has been scheduled.

144. *See supra* Part II; Kansas City Star Co. v. Fossey, 630 P.2d 1176, 1184 (Kan. 1981).

145. *See id.* at 1181–84 (describing the standards for closure and sealing records and requiring that "a record of the hearing where the issue of closure is determined should be prepared.").

146. § 60-2617(a).

147. § 60-2617(d).

148. § 60-2617(b).

consistently with *Fossey* to mean that at such hearing, brought at the behest of a judge or a party seeking closure or seal, the burden of proof is on such person. However, because the statute does not expressly set forth the burden of proof to be carried at such hearing, it could just as easily be interpreted to require opponents to closure or seal to present evidence in favor of disclosure, turning the presumption of openness on its head and effectively presuming closure.

As discussed above, *Fossey* found that the burden is on the movant to close or seal because such party faces the difficult task of overcoming the presumption.[149] Unlike in some other areas of law, where the burden of proof shifts to one participant or another depending on the circumstances,[150] nothing in the *Fossey* rule or the relevant precedent contemplates that this burden of proof ever shifts or is otherwise rebuttable.[151] Thus, to the extent it is ambiguous in this regard, K.S.A. section 60-2617 should be interpreted to mean that at a hearing on the issue of whether a proceeding should be closed or a record sealed, the movant to close or seal, including the judge, bears the burden of proof.

C. K.S.A. § 60-2617(c) and (d) are ambiguous because although those subsections may reference certain aspects of the presumption of openness, they do not expressly establish a framework for its application, subjecting the statute to a variety of possible interpretations.

Subsections (c) and (d) represent the Legislature's admirable, but flawed, attempt to draft operative language that effectively balances the competing rights at stake when a court contemplates closing a hearing or sealing a record. Unfortunately, not only do these subsections fail to track the *Fossey* rule, but they also fail to establish an express framework for how to overcome the presumption of openness, inescapably leading to ambiguity.

Subsection (c) attempts to encapsulate the notion that the presumption of openness must be overcome before closure or seal is permissible. It provides in its entirety that "[i]n granting the order [to close a proceeding or seal a record], the court shall recognize that the public has a paramount interest in all that occurs in a case, whether at trial or during discovery and in understanding disputes that are presented to a public forum for

149. *Fossey*, 630 P.2d at 1183.

150. *See, e.g.*, *In re* Adoption of Baby Boy Irons, 684 P.2d 332, 338–39 (Kan. 1984) (finding the presence of suspicious circumstances shifts the burden of proof to prove undue influence).

151. *Fossey*, 630 P.2d at 1183.

resolution."[152] However, that language does not provide any guidance for what recognizing that interest means, or how such recognition impacts motions for closure or seal.

Meanwhile, subsection (d) requires a showing of "[g]ood cause to close a proceeding or seal or redact records," which requires "a finding on the record that there exists an identified safety, property or privacy interest of a litigant or a public or private harm that predominates the case and such interest or harm outweighs the strong public interest in access to the court record and proceedings" before a court may enter an order to close or seal.[153] Although this language ostensibly establishes a balancing test for courts to use when considering whether to close a proceeding or seal a record, the statute again contains no guidance, such as the well-established standards referred to herein as the "clear and present danger" test, the "reasonable alternatives" test, or the "experience and logic" test, to assist the court in determining how to properly balance the competing interests.

The standards set forth in K.S.A. section 60-2617(c) and (d) leave much to be desired given the available language from the applicable precedent, but its language still could be interpreted in a manner consistent with the *Fossey* rule. Making the requisite "good cause" showing could certainly involve a court requiring the movant to close or seal to present evidence to prove that a "clear and present danger to the fairness of the trial would exist if the information were publicly disclosed" under *Fossey*.[154] Such evidence could fairly be considered "good cause" as contemplated by the statute.

Moreover, a court could meaningfully recognize the "paramount interest"[155] of the public and the "strong public interest in access to the court record and proceedings"[156] if it took steps to demonstrate, as required by the *Fossey* rule, that no "reasonable alternative means" to closure or seal are available to prevent the harm that the defendant would suffer as required before the presumption of openness may be overcome and an order to close or seal entered.[157] By considering all available alternatives, from intensive voir dire, to protective orders on trial participants, to change of venue, the court effectuates the public's "paramount interest" in "access to the court record and proceedings" before entering an order overcoming

152. § 60-2617(c).

153. § 60-2617(d).

154. *Fossey*, 630 P.2d at 1183 (quoting STANDARDS FOR CRIM. JUST. § 8-3.2 cmt. (AM. BAR ASS'N 1978)).

155. § 60-2617(c).

156. § 60-2617(d).

157. *Fossey*, 630 P.2d at 1182 (quoting STANDARDS FOR CRIM. JUST. § 8-3.2 cmt. (AM. BAR ASS'N 1978)).

the presumption of openness.[158]

The foregoing analysis is consistent with both the statutory language and the legislative intent, and nothing in K.S.A. section 60-2617 precludes either a "clear and present danger" or a "reasonable alternatives" analysis. Even so, as discussed *infra*, the statute is not always interpreted in a manner consistent with the *Fossey* rule, proving its ambiguity.

D. K.S.A. § 60-2617(b) and (d) are ambiguous because although these provisions could be interpreted to require that courts make specific on the record findings of fact to support closure or seal, courts tend not to make such findings and merely copy and paste the language of K.S.A. § 60-2617(d) instead.

Under the *Fossey* rule, "[i]n making a decision of either closure or nonclosure, the trial judge should make findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision."[159] In multiple places, K.S.A. section 60-2617 seems in step with that aspect of the rule. Subsection (b) requires that "the court shall make and enter a *written finding of good cause*" in the event a proceeding is closed or a record sealed.[160] Subsection (d) includes a similar reference, providing that:

> Good cause . . . does not exist unless the court *makes a finding on the record* that there exists an identified safety, property or privacy interest of a litigant or a public or private harm that predominates the case and such interest or harm outweighs the strong public interest in access to the court record and proceedings."[161]

One possible interpretation of these statutory provisions would be that closure or seal is inappropriate unless a court makes specific findings of fact, based on evidence presented by the movants to seal, that "good cause" exists to justify closure or seal. However, courts throughout the state have interpreted the statute to mean that merely copying and pasting the text of subsection (d) complies with the law.

For example, the Labette County District Court granted a motion by the Attorney General's Office to seal certain pleadings under K.S.A. section 60-2617 in May of 2014.[162] There, the court entered an order,

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158. § 60-2617(c)–(d).

159. *Fossey*, 630 P.2d at 1184.

160. § 60-2617(b) (emphasis added).

161. § 60-2617(d) (emphasis added).

162. Order Sealing or Redacting Court Records Pursuant to (2013 Supp.) K.S.A. 60-2617, at *1, State v. Bennett, Labette Cnty. Dist. Court Case No. 13 CR 263 PA (May 1, 2014).

captioned *Order Sealing or Redacting Court Records Pursuant to (2013 SUPP.) K.S.A. 60-2617*, which provided in pertinent part:

> The Court, after reviewing said pleading and considering the safety, property, or privacy interests of a litigant, or a public or private harm that predominates the case, and further, after determining that such interest or harm outweighs the strong public interest in access to the Court record, finds and Orders that the above referenced pleading should be filed under confidential seal and be kept in a confidential Court file unavailable to the public. Said pleading shall not be publicly disclosed without the written permission of the Court.[163]

Despite a dearth of specific findings, as required by *Fossey*, the district court granted the order.

The Attorney General's Office also invoked the statute in 2013 when it attempted to obtain a standing order to seal pleadings in a triple homicide in Franklin County,[164] and although that motion was denied, numerous records were sealed on a case-by-case basis during that litigation, apparently irrespective of K.S.A. section 60-2617.[165]

A 2019 order in Shawnee County serves as another example of how courts tend to copy and paste K.S.A. section 60-2617(d) at the expense of the presumption of openness. Rather than make any findings of fact whatsoever, the district court entered an order sealing a brief filed by the pro se defendant that provided in pertinent part:

> [p]ursuant to K.S.A. 60-2617(d), [sic] court has made requisite findings that there exists an identified safety, property or privacy interest of a litigant or a public or private harm that predominates the case and such interest or harm outweighs the strong public interest in access to the court record and proceedings.[166]

Thus, even though the statute can certainly be read to require that courts make specific findings of fact before closing proceedings or sealing

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163. *Id.*

164. *See generally* Motion To File Pleadings Under Seal, State v. Flack, Franklin Cnty. Dist. Court Case No. 2013 CR 104 (July 1, 2013).

165. The following records were sealed by June of 2015: "State's Notices of Intent to Issue Business Records Subpoenas, Waivers, Returns;" the State's "motion to perform consumptive DNA testing;" the State's "proposed jury instructions, proposed jury questionnaire, and proposed procedures for having potential jurors complete the juror questionnaire;" "records pertaining to inquisition testimony;" and the "State's Motions to Admit the Defendant's Statements and State's Motion to Admit Redacted Statements." *See* State's Response to the Ottawa Herald's Motion to Intervene, for the Release of Sealed Documents, and to Vacate Orders to Seal, State v. Flack, Franklin Cnty. Dist. Court Case No. 2013 CR 104, at *5–6 (June 9, 2015). The motion did not disclose the legal bases for the orders to seal. *See id.*

166. Order Directing Clerk of the Shawnee County District Court to Seal Ex Parte Motion and Ex Parte Order, State v. Chandler, Shawnee Cnty. Dist. Court Case No. 11 CR 1329 (March 21, 2019).

records, courts have entered orders that simply copy and paste the statutory language instead. Such action is a far cry from the legislative intent. To the extent the multiple references within K.S.A. section 60-2617 requiring the court make findings of fact are ambiguous, the statute should be interpreted in a manner consistent with, and in the context of, applicable United States and Kansas Supreme Court precedent, particularly *Fossey*.

E. The remaining provisions of K.S.A. § 60-2617 presume openness.

When the Supreme Court issued its May 2, 2008 order unsealing the two then-active inquisition-related mandamus cases, it seemed to predicate its decisions largely on the fact that, as cited above, the parties "now agree that this action no longer needs to proceed under seal."[167] Thus, is it perhaps not a coincidence that K.S.A. section 60-2617(e) provides that "[a]greement of the parties shall be considered by the court but shall not constitute the sole basis for the sealing or redaction of court records or for closing the court proceeding."[168] As such, even if any or all of the participants, including the judge, agree to, or are not opposed to, closure of a proceeding or seal of a record, subsection (e) can reasonably be interpreted to mean that more is required to overcome the presumption of openness.

Subsection (f) also implicitly recognizes the presumption of openness. It sets forth several classes of cases, such as juvenile and adoption matters, to which the presumption of openness does not apply[169] because the proceedings listed therein are not traditionally open. For such cases, "[t]he provisions of this section shall not apply."[170]

Finally, subsection (g) recognizes the presumption of openness because it ensures that the statute "shall not preclude a court from allowing a settlement which includes a confidentiality clause to be filed under seal where the interests of justice would be served by such settlement being filed under seal."[171] The Legislature implicitly recognized the presumption that court proceedings and records are open because, by expressly permitting confidentiality clauses, it created an exception to that presumption.

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167. Order Unsealing Action, Requiring Filings of Written Record, and Setting Briefing and Argument Schedule, at *2, Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, No. 98,747 (Kan. May 2, 2008).

168. KAN. STAT. ANN. § 60-2617(e) (2020).

169. § 60-2617(f).

170. *Id.*

171. § 60-2617(g).

F. The Legislature could amend K.S.A. § 60-2617 to expressly conform to the Fossey rule.

Had the Kansas Supreme Court followed its own *Fossey* rule, the Legislature would not have been moved to introduce K.S.A. section 60-2617. The abortion clinic mandamus cases would have been presumptively open, and any closure or sealing would have been based on specific findings following a hearing. Unfortunately, since the enactment of K.S.A. section 60-2617, with its ambiguities, judges and litigants have used it to circumvent the presumption of openness and avoid following *Fossey*. The bench and bar now need to recognize that, if K.S.A. section 60-2617 is applied in a case, it must be interpreted in accordance with the *Fossey* rule, which articulates the constitutional requirements for open courts, and the Legislature's original intent, which was to codify the presumption of openness.

The *Fossey* rule is clear and constitutionally based. In contrast, K.S.A. section 60-2617 is sufficiently flawed and problematic that it warrants amending if courts continue to copy and paste the statutory language as a substitute for making findings of fact.

a. K.S.A. § 60-2617 could be amended to require consideration of reasonable alternatives, including narrowly drafted protective orders applicable to trial participants.

The fix for existing subsection (a) is simple: the first instance of the word "may" should be replaced with the word "must," "shall," or "will" to expressly convey both that a hearing is required before a proceeding is closed or a record is sealed and also that the statute sets forth the exclusive mechanism for doing so.

Following subsection (a), a new section, derived from *Fossey*, is needed in order to expressly govern how courts are to determine whether closure or seal is permissible:

> At the hearing required by subsection (a), the burden of proof is on the party making the motion. The moving party must establish that: (1) a clear and present danger to the fairness of the trial would exist if the information were publicly disclosed, and (2) the prejudicial effect of such information on the fairness of the trial cannot be avoided by reasonable alternative means. The effectiveness of the following alternatives should receive serious consideration: continuance, severance, change of venue, change of venire, intensive voir dire, additional peremptory challenges, sequestration of the jury, admonitory instructions to the jury, and protective orders prohibiting the parties, court personnel, or law enforcement involved in the case, from making

> extra-judicial statement that a reasonable person should know will have a substantial likelihood of materially prejudicing the criminal proceeding. Extra-judicial statements are those made outside the functioning of the judicial system.

The first eight of those alternatives are from *Fossey*.[172] The final alternative is a nod to a trend that was not pervasive when *Fossey* came down in 1981: judges have begun to enter protective orders aimed at trial participants. Such orders, drafted with the First Amendment in mind, can be an effective means for courts to limit pretrial publicity as a ready alternative to closing proceedings or sealing records.

The legal basis for this type of protective order is Rule 3.6(a) of the Kansas Rules of Professional Conduct. Thereunder, an attorney who will be "participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[173] As set forth in the proposed amendment *supra*, Black's Law Dictionary defines extra-judicial statements as those made "outside the functioning of the court system," and as such, the rule does not apply to court records or statements made during court proceedings.[174] But it does allow a court to limit the out-of-court statements of those who would have the most impact on the proceedings, such as the attorneys and witnesses under subpoena.

For example, the Barton County District Court entered this sort of protective order in a high-profile murder case, *State v. Longoria*,[175] involving the kidnap, rape, and murder of a 14-year old high school student in Great Bend to which the national media gravitated.[176] In entering the order, the court noted that "[t]he Court's inherent powers include the ability to issue orders that will safeguard the ability of all litigants to have a fair trial conducted in the presence of an objective, impartial, unbiased jury."[177] The court ordered "that counsel for the state, the defense, their respective agents and employees and law enforcement

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172. Kansas City Star Co. v. Fossey, 630 P.2d 1176, 1183 (Kan. 1981) (quoting STANDARDS FOR CRIM. JUST. § 8-3.2 cmt. (AM. BAR ASS'N 1978)).

173. KAN. R. PRO. CONDUCT 3.6(a).

174. BLACK'S LAW DICTIONARY 706 (10th ed. 2014).

175. 343 P.3d 1128 (Kan. 2015).

176. *See id.*; *see also, e.g.*, Crimesider Staff, *Alicia DeBolt Murder: Kansas Cheerleader's Killer, Adam Longoria, Faces Life at Sentencing Today*, CBS NEWS (June 26, 2012, 11:55 AM), https://www.cbsnews.com/news/alicia-debolt-murder-kansas-cheerleaders-killer-adam-longoria-faces-life-at-sentencing-today/ [https://perma.cc/VE32-HQMF].

177. Order, at *1, State v. Longoria, Barton Cnty. Dist. Court Case No. 2010 CR 231 (Kan. Sept. 10, 2010).

personnel involved in this case shall make no extra-judicial statement that a reasonable person should know will have a substantial likelihood of materially prejudicing this criminal proceeding."[178]

The *Longoria* protective order also included a laundry list of extra-judicial statements that do not violate the order. That list of permissible categories of extra-judicial speech includes, in its entirety, statements regarding:

> (1) The general nature of the claim or defense; (2) Information contained in a public record; (3) That an investigation continues in progress; (4) The identity of persons involved in the case; (5) Scheduling issues; (6) Results of hearings or trials; (7) Requests for assistance in obtaining evidence and information necessary thereto; (8) The identity, residence, occupation and family status of the accused; (9) The fact, time and place of arrest; and (10) The identity of investigating and arresting officers and agents.[179]

Longoria is not the only instance where district courts have entered such protective orders in high profile criminal cases.[180] And even though the Kansas Supreme Court has never expressly ruled on the use of such orders, such as in its opinion when the defendant in *Longoria* appealed his conviction, the defendant did not raise the order as an appealable issue.[181] Moreover, the *Longoria* court gave little credence to the defendant's argument that his right to trial fairness had been prejudiced, opining that "a defendant can obtain a change of venue only upon showing that publicity has displaced the judicial process entirely or that the courtroom proceedings more resemble a circus or a lynch mob."[182] The *Longoria* court further found that "the media covered Longoria's case factually—as opposed to inflammatorily—even if its coverage revealed some inadmissible evidence (*i.e.*, Longoria's criminal history)."[183] Thus, despite the order, the media was able to cover the case adequately, which it would have been unable to do in the face of more extreme measures such as blanket seal or closure. In other words, the protective order in that case impaired neither the defendant's rights nor those of the public. Such orders should be available to parties and judges seeking to balance the competing issues implicated by K.S.A. section 60-2617.

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178. *Id.*

179. *Id.* at *2 (numbering added).

180. *See, e.g.*, Order, State v. Craig, Reno Cnty. Dist. Court Case No. 2011 CR 654 (Kan. Nov. 4, 2011).

181. *See generally* State v. Longoria, 343 P.3d 1128 (Kan. 2015).

182. *Id.* at 1143 (citing State v. Carr, 331 P.3d 544, 598–99 (Kan. 2014)).

183. *Id*.

b. K.S.A. § 60-2617 could be amended to reflect that specific findings of fact, elicited during a public hearing, are required before an order for closure or to seal may be entered.

As for amending the remaining existing sections of K.S.A. section 60-2617, the first sentence of subsection (b), authorizing the court to close a proceeding or seal a record, should remain more or less intact, as there is no question courts may indeed close proceeding or seal records, so long as the appropriate procedural safeguards are followed. But the second sentence should be stricken and replaced with the following:

> A record of the hearing where the issue of closure is determined should be prepared. In making a decision of either closure or nonclosure, the trial judge should make specific findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision.

Unfortunately, this amendment is necessary because existing subsection (b) has been ineffective in preventing courts from simply relying on copied and pasted portions of K.S.A. section 60-2617, particularly subsection (d), to justify closure or seal rather than follow its ostensible directives to make findings of fact on the record instead.

Meanwhile, existing subsection (c) serves little purpose other than noting that the public indeed has a "paramount interest" in open court proceedings and records. The provision is no longer necessary, as the amendments replace this ambiguous standard with the *Fossey* rule. It should be stricken from the law. Existing subsection (d) should also be removed. It, too, has been superseded by the *Fossey* rule.

However, existing subsection (e), prohibiting closure or seal based solely on the agreement of the parties, does not create ambiguity, as it can be read in a manner entirely consistent with the presumption of openness and the *Fossey* rule. It should remain. Existing subsections (f) and (g) should remain for the same reason.

c. Proposed revision of K.S.A. § 60-2617

Below, for reference, is a version of the statute consistent with the foregoing:

> **60-2617. Sealing or redacting court records; closing a court proceeding; motion; notice; hearing; exceptions**. (a) In a civil or criminal case, the court, upon the court's own motion, ~~may~~ *shall* hold a hearing or any party may request a hearing to seal or redact the court records or to close a court proceeding. Reasonable notice of a hearing to

seal or redact court records or to close a court proceeding shall be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact court records or to close a court proceeding shall also be given to the victim, if ascertainable.

(b) At the hearing required by subsection (a), the burden of proof is on the party making the motion. The moving party must establish that: (1) a clear and present danger to the fairness of the trial would exist if the information were publicly disclosed, and (2) the prejudicial effect of such information on the fairness of the trial cannot be avoided by reasonable alternative means. The effectiveness of the following alternatives should receive serious consideration: continuance, severance, change of venue, change of venire, intensive voir dire, additional peremptory challenges, sequestration of the jury, admonitory instructions to the jury, and protective orders prohibiting the parties, court personnel, or law enforcement involved in the case, from making extra-judicial statement that a reasonable person should know will have a substantial likelihood of materially prejudicing this criminal proceeding. Extra-judicial statements are those made outside the functioning of the judicial system.

~~(b)~~*(c)* After the hearing *required by subsection (a)*, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted or the court proceeding closed. ~~If the court grants such an order, before closing proceedings or granting leave to file under seal, the court shall make and enter a written finding of good cause.~~ *A record of the hearing described in subsection (a) should be prepared. In making a decision of either closure or nonclosure, the trial judge should make specific findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision.*

(c) In granting the order, the court shall recognize that the public has a paramount interest in all that occurs in a case, whether at trial or during discovery and in understanding disputes that are presented to a public forum for resolution.

(d) Good cause to close a proceeding or seal or redact records, whether upon the motion of a party, or on the court's own motion, does not exist unless the court makes a finding on the record that there exists an identified safety, property or privacy interest of a litigant or a public or private harm that predominates the case and such interest or harm outweighs the strong public interest in access to the court record and proceedings.

~~(c)~~*(d)* Agreement of the parties shall be considered by the court but shall not constitute the sole basis for the sealing or redaction of court records or for closing the court proceeding.

~~(f)~~*(e)* The provisions of this section shall not apply to proceedings under the revised Kansas code for care of children, K.S.A. 2019 Supp.

> 38-2201 et seq., and amendments thereto, the revised Kansas juvenile justice code, K.S.A. 2019 Supp. 38-2301 et seq., and amendments thereto, the Kansas adoption and relinquishment act, K.S.A. 59-2111 et seq., and amendments thereto, to supreme court rules which allow motions, briefs, opinions and orders of the court to identify parties by initials or by familial relationship or to supreme court rules which require appellate court deliberations to be kept in strict confidence. Nothing in this section shall be construed to prohibit the issuance of a protective order pursuant to subsection (c) of K.S.A. 60-226, and amendments thereto.
>
> ~~(g)~~*(f)* The provisions of this section shall not preclude a court from allowing a settlement which includes a confidentiality clause to be filed under seal where the interests of justice would be served by such settlement being filed under seal.

V. CONCLUSION

Despite its ambiguity, K.S.A. section 60-2617 can be interpreted in a manner consistent with the *Fossey* rule, creating a meaningful statutory right to access court proceedings and records consistent with applicable precedent and constitutional requirements. For the Legislature's intent to be realized, however, judges cannot close court proceedings and seal court records based on orders that are copied and pasted from the statute book. Instead, K.S.A. section 60-2617 should be interpreted to require that before a judge is permitted to close a hearing or seal a record, the party seeking such closure, even the judge, must present evidence in open court that the dissemination of information in a court proceeding or record would create a "clear and present danger" the defendant's rights to a fair trial, show that no alternatives to seal are available to protect the defendant's right to a fair trial if the proceeding or record were public, and make written findings to that effect.

An alternative to interpreting K.S.A. section 60-2617 through the lens of *Fossey* would be for the Legislature to amend the statute and remove its ambiguities. Still, even if the Legislature does not see fit to amend K.S.A. section 60-2617, and its ambiguity remains, it should be interpreted and applied in a manner consistent with the *Fossey* rule.