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May 23, 2022

ATTORNEY GENERAL OPINION NO. 2022- 6

Douglas T. Shima, Secretary  
Kansas Supreme Court Nominating Commission  
Kansas Judicial Center  
301 SW 10<sup>th</sup> Avenue  
Topeka, KS 66612

Re: Constitution of the State of Kansas—Judicial—Selection of Justices of the Supreme Court; Supreme Court Nominating Commission; Congressional District; Resident Member of the Bar; Change in Congressional District Lines; Effect

Courts—Supreme Court—Supreme Court Nominating Commission; Certified Roster of Attorneys; Certificate Evidencing Qualifications and Voting; Record of Election and Appointment to Commission

Synopsis: A vacancy on the Kansas Supreme Court Nominating Commission occurs when the residence of a lawyer member is no longer located in the congressional district from which elected due to redistricting changes of the boundaries of the congressional district. The resulting vacancy shall be filled by the procedure in K.S.A. 20-128. Cited herein: K.S.A. 20-119; 20-120; 20-124; 20-125; 20-127; 20-129; 25-2022a; 77-201; Kan. Const., Art 3, § 5; Substitute for Senate Bill 355; Substitute for Senate Bill 563.

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Dear Mr. Shima:

As secretary of the Kansas Supreme Court Nominating Commission (Commission), you request our opinion regarding the impact on the membership of the Commission when the Kansas Legislature changed the congressional district lines by enacting 2022

Substitute for Senate Bill No. 355 (Sub. for S.B. 355).<sup>1</sup> Specifically, you ask whether a vacancy occurs when the residence<sup>2</sup> of a member of the bar elected to the Commission is no longer located in the congressional district from which the member was elected due to a change in congressional district lines accommodating shifts in the locations of the state's population.

Section 5 of Article 3 of the Kansas Constitution addresses the manner of selection of Supreme Court justices.<sup>3</sup> Under that procedure, a “nonpartisan nominating commission whose duty it [is] to nominate and submit to the governor the names of persons for appointment to fill vacancies in the office of any justice of the supreme court” was established.<sup>4</sup>

(e) The supreme court nominating commission shall be composed as follows: One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; *one member from each congressional district chosen from among their number by the resident members of the bar in each such district*; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.

(f) The terms of office, *the procedure for selection and certification of the members of the commission* and provision for their compensation or expenses *shall be as provided by the legislature*.<sup>5</sup>

Kansas has four congressional districts.<sup>6</sup> Thus, under Article 3, Section 5(e), the Commission is comprised of nine members.

Exercising its authority under Article 3, Section 5(f), the legislature enacted K.S.A. 20-119 through 20-138. Under those statutes, licensed lawyers elect a licensed lawyer who resides in their respective congressional district.<sup>7</sup> Similarly, resident licensed lawyers

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<sup>1</sup> Sub. for S.B. 355 became effective on February 10, 2022.

<sup>2</sup> K.S.A. 77-201, *Twenty-third* defines residence as “the place which is adopted by a person as the person’s place of habitation and to which, whenever the person is absent, the person has the intention of returning. When a person eats at one place and sleeps at another, the place where the person sleeps shall be considered the person’s residence.”

<sup>3</sup> Voters approved this procedure in 1958 following the “Kansas triple play.” The “Kansas triple play” occurred when, after the sitting governor lost the primary election, the ailing chief justice of the Kansas Supreme Court and the sitting governor resigned their offices, thereby allowing the lieutenant governor to become governor and appoint the former governor as chief justice of the Kansas Supreme Court. Kansas Historical Society, <https://www.kansasmemory.org/item/228731>, accessed March 30, 2022.

<sup>4</sup> Kan. Const., Art. 3, § 5(d).

<sup>5</sup> Kan. Const., Art. 3, § 5 (emphasis added).

<sup>6</sup> Sub. for S.B. No. 355, §§ 4 – 7.

<sup>7</sup> See K.S.A. 20-120.

select the Commission's chair in a statewide election.<sup>8</sup> The term of office for each Commission member is currently four years.<sup>9</sup>

The legislature has established a procedure for the election and appointment of Commission members if redistricting "changes the number of congressional districts in the state."<sup>10</sup> Redistricting under Sub. for S.B. No. 355, however, did not change the number of congressional districts,<sup>11</sup> which makes this procedure inapplicable.

Sub. for S.B. No. 355 included a section that states:

The provisions of this act shall not affect the term of any representative to congress elected to represent a district at the general election of 2020 or the term of any successor to such representative serving for an unexpired term. All such representatives shall continue to serve the districts from which elected until the representatives elected from the congressional districts established by this act commence their terms of office in January 2023.<sup>12</sup>

The Legislature also enacted 2022 Substitute for Senate Bill 563 (Sub. for S.B. 563) that changed the boundaries for state senatorial, representative, and state board of education districts.<sup>13</sup> It included the same language above allowing state senators to "continue to serve the districts from which elected until the senators elected from the districts established by this act commence their terms of office in January 2025."<sup>14</sup> This language was also included in provisions for state representatives and state board of education members allowing them to continue to serve until the representatives and state board of education members elected from the districts established under Sub. for S.B. 563 commenced their terms of office in January 2025.<sup>15</sup> This language in Sub. for S.B. No. 355 and Sub for S.B. 563 is clear and expressly applies only to congressional representatives, state senators, state representatives, and state board of education members. Thus, we cannot interpret any of these provisions to apply to the Commission.<sup>16</sup>

Additionally, the Legislature has used language that governs a change in boundaries for school boards. "Changes of member district territory and boundaries such that a member of a board of education no longer resides in the member district from which elected or

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<sup>8</sup> See K.S.A. 20-119.

<sup>9</sup> K.S.A. 20-125.

<sup>10</sup> K.S.A. 20-129.

<sup>11</sup> See K.S.A. 2021 Supp. 4-143 (establishing four congressional districts).

<sup>12</sup> Sub. for S.B. 355, Section 3.

<sup>13</sup> Sub. for S.B. 563 became effective on April 21, 2022.

<sup>14</sup> *Id.* at Section 4.

<sup>15</sup> *Id.* at Section 48 (representatives) and Section 176 (state board of education members).

<sup>16</sup> *In the Interest of T.S.*, 308 Kan. 306, 309-10 (2018) (courts read statutory language as it appears, without adding or deleting words, and statutory construction is used only if the language is less than clear or is ambiguous).

appointed shall not shorten the term of such member.”<sup>17</sup> Its failure to do so in Sub. for S.B. No. 355 strongly suggests it did not so intend for Commission members.<sup>18</sup>

Because the Legislature has not addressed redistricting boundary changes for the Commission, we must determine whether the current lawyer member continues to serve or a vacancy occurs.

K.S.A. 20-127 describes when vacancies occur in the Commission. It states:

If the chairman or any other members of the commission elected by the members of the bar shall cease to be a member of the bar entitled to engage in the general practice of law in Kansas, or if the chairman shall change his place of residence from the state or if any other *member of the commission, whether elected or appointed, shall change his place of residence to a congressional district other than that from which he was elected or appointed*, the chairman or such other member as to whom such change of condition exists, shall no longer be a member of the commission and a vacancy shall exist as to his membership.<sup>19</sup>

The statute requires an action by the lawyer member that results in the member either ceasing to be a member of the bar or changing the physical location of the member’s residence. Here, neither has occurred. Specifically, the lawyer member on the Commission did not “change his place of residence to a congressional district other than that from which he was elected.” Rather, the change occurred by the congressional district lines being redrawn which resulted in the residence of the lawyer member being outside of the congressional district from which he was elected. The Kansas Legislature did not include redistricting as a cause that creates a vacancy. Thus, a vacancy prescribed by K.S.A. 20-127 has not occurred.

In short, the legislature has not addressed whether a vacancy occurs due to a change in the boundaries of the congressional districts. Nevertheless, we believe a vacancy occurs when after the congressional district lines were changed, a lawyer member of the Commission no longer resides in the congressional district from which elected.

In Attorney General Opinion No. 89-51, this office addressed whether a person who was appointed to the Washburn University Board of Regents as a resident of a senatorial district under K.S.A. 1988 Supp. 13-1a04 became disqualified if the person no longer resided in the senatorial district from which he was appointed. We concluded that the requirement of residence in that senatorial district for that person continues throughout the term of office and voluntary failure of a person to maintain such residence results in

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<sup>17</sup> K.S.A. 25-2022a.

<sup>18</sup> See *State ex rel. Schmidt v. Kelly*, 309 Kan. 887, 903 (2019) (statutory language showing the legislature knows how to convey its intent suggests that it did not have such intent when that language was omitted in another statute).

<sup>19</sup> K.S.A. 20-127 (emphasis added).

such person's disqualification to hold the office and creates a vacancy therein.<sup>20</sup> In short, the official's residency in the district from which elected was a preliminary and continuing qualification to hold the office.

We have located only one case in which there was a challenge of the qualifications of a Commission member. In *State ex rel. Stephan v. Adam*,<sup>21</sup> the Kansas Supreme Court addressed the qualifications of a non-lawyer member of the Commission to continue to serve after she became the holder of a temporary permit to practice law. The Court held that a temporary permit to practice law was not within the meaning of the statutes governing lawyer members of the Commission and she remained qualified to serve as a non-lawyer member of the Commission.<sup>22</sup> However, the Court rejected her argument that she would remain qualified to serve her term after receiving her law license as long as she continued to reside in the congressional district from which she was appointed. The Court stated:

To insure that non-lawyers retained a voice in the selection of the nominees to the Supreme Court, the constitution requires that the nonpartisan nominating commission be composed of a chairman, who is a member of the bar, and an equal number of members of the bar and non-lawyers from each congressional district.

If the name of a non-lawyer member of the Commission is placed on the roll of attorneys licensed to practice law in Kansas, then, as a member of the bar, that individual will have the right to vote in the election of lawyer members to the Commission and the qualifications to stand for election to the Commission as a member of the bar. However, such a person, upon becoming a member of the bar, no longer qualifies as a non-lawyer member of the Commission. The Clerk of the Supreme Court, after placing the non-lawyer's name on the roll of attorneys licensed to practice law in Kansas, will then be required by statute to notify the governor of a vacancy on the Commission of the non-lawyer member from that congressional district.<sup>23</sup>

The rejection of the non-lawyer member's argument shows that the Kansas Supreme Court determined a member of the Commission must possess the prescribed qualifications throughout the term of office, and ceasing to possess the legal qualifications works as a forfeiture of the office.<sup>24</sup>

In the current situation, if the lawyer member of the Commission no longer resides in the congressional district from which elected due to redistricting, then that member now resides in a congressional district that already has a resident lawyer member on the

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<sup>20</sup> *Id.*

<sup>21</sup> 243 Kan. 619 (1988).

<sup>22</sup> *Id.* at 625.

<sup>23</sup> *Id.* at 626.

<sup>24</sup> See Attorney General Opinion No. 79-267; 3 McQuillin Mun. Corp., § 12:110 (3<sup>rd</sup> ed.).

Commission. The congressional district from which the lawyer member was elected is no longer represented on the Commission. In other words, one congressional district has two lawyer members and the other congressional district has none. This result is contrary to the composition of the Commission as set out in Section 5 of Article 3.

Because the composition of the Commission no longer complies with Section 5 of Article 3, a vacancy has occurred. K.S.A. 20-128 provides the procedure for filling the vacancy. It provides in pertinent part:

Any vacancy occurring from any cause . . . among the lawyer members from the congressional districts shall be filled by appointment by the chief justice of the supreme court of Kansas, such appointee to hold office until the first day of July following the expiration of four months after such appointment is made. During the four months immediately preceding the termination of such appointive term an election shall be held in the manner by this act provided for other elections of subsequent members of the commission, for the unexpired term, if any, of the member whose vacancy is being filled.

Thus, we conclude that a vacancy on the Kansas Supreme Court Nominating Commission occurs when the residence of a lawyer member is no longer located in the congressional district from which elected due to redistricting changes of the boundaries of the congressional district. The resulting vacancy shall be filled by the procedure in K.S.A. 20-128.

Sincerely,

/s/Derek Schmidt

Derek Schmidt  
Kansas Attorney General

/s/Janet L. Arndt

Janet L. Arndt  
Assistant Attorney General

DS:SS:JLA:sb