An Evaluation of A Kansas Attorney's Rights Appointed in a Mandatory Appointments Practice District

*By: Sam Crawford**

I. Introduction

"You have the right to have an attorney. If you cannot afford an attorney, one will be provided for you."[1] Many recognize these words as part of the Miranda Warning law enforcement must give when taking an individual into custody, as mandated by the Supreme Court of the United States.[2] The right to an attorney in criminal proceedings is fundamental under the United States Constitution,[3] and is well-studied and litigated across the country as a result.[4] Kansas is no exception.[5] The Kansas Supreme Court recently established a committee to study access to attorneys across the state, and its most recent report was in December 2024.[6] This report reveals that Kansas is currently "on the verge of a constitutional crisis" regarding an individual's access to an attorney due to an attorney shortage in rural counties.[7]

This constitutional crisis, however, concerns not only the individuals who need legal representation, but also the attorneys themselves. Many rural counties in Kansas must rely on members of the private defense bar to voluntarily take appointed work, especially in counties without a public defender's office.[8] At least one county resorted to mandatory appointments practices for a time and required all members of the county defense bar to take appointments whether they wanted to or not.[9] These mandatory appointments practices could become more prevalent in counties with a shortage of competent defense attorneys willing to take appointed work voluntarily. While this result may be necessary to afford an individual's right to an attorney, it also impacts the lesser-studied rights of the appointed attorneys themselves.[10]

Requiring an attorney to accept appointed work, particularly at rates that do not compensate for an attorney's overhead costs, raises several legal issues. These

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[1] *What Are Your Miranda Rights?*, MIRANDAWARNING.ORG, http://www.mirandawarning.org/whatareyourmirandarights.html [https://perma.cc/U385-TK83].

[2] *See id.*; Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

[3] U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

[4] *See*, *e.g.*, THOMSON REUTERS, RIGHT TO APPOINTED COUNSEL (2024), Westlaw 0030 SURVEYS 22 (surveying state law on the right to an attorney); *Cases – Right to Counsel*, OYEZ, https://www.oyez.org/issues/226 [https://perma.cc/BF62-K72A] (collecting cases).

[5] *See*, *e.g.*, THOMSON REUTERS, *supra* note 4; State v. Kerrigan, 538 P.3d 852, 855–56 (Kan. 2023) (evaluating a defendant's right to an attorney under the Kansas evidentiary breath test law).

[6] *See* KAN. RURAL JUST. INITIATIVE COMM., KANSAS RURAL JUSTICE INITIATIVE: COMMITTEE FINAL REPORT TO THE KANSAS SUPREME COURT 4 (2024) [hereinafter "KAN. RURAL JUST. COMM."].

[7] *Id.* at 17, 19.

[8] *See* KAN. ADMIN. REGS. § 105-3-1(a) (requiring administrative judges in each county to compile a list of volunteer defense attorneys to take appointed work).

[9] *See* Administrative Order 2023-1 (2023) (on file with author).

[10] *See infra* Section III.

issues necessarily include a defendant's right to an attorney and the ethical obligations on both attorneys and courts to provide representation, as well as the appointed attorneys' own constitutional rights to equal protection and just compensation.[11] Accordingly, this Article evaluates an appointed attorney's rights in a mandatory appointments district against the backdrop of other interests involved. Section II describes factual background on the right to an attorney generally and Kansas's methods of affording this right. Section III chronicles the evolution of Kansas case law that addresses the rights and the ethical obligations of the appointed attorneys themselves. With this background in mind, Section IV evaluates whether a mandatory appointments practice violates an appointed attorney's constitutional rights and, if so, proposes three possible vehicles an attorney-challenger could use to enforce their constitutional rights.

II. Factual Background

A general discussion on the mechanics of appointed work is required before discussing its legal intricacies. This Section describes the right of the indigent to an attorney and how Kansas fulfills that right within its various district courts. This Section also specifically describes the previous mechanics of the Twenty-First Judicial District's mandatory appointments practice in Riley County, Kansas, for misdemeanor and traffic offense appointments.

A. The Right to an Attorney Generally

The Supreme Court significantly changed the world of criminal defense when it decided *Gideon v. Wainwright* in 1963.[12] In *Gideon*, the Court established the right to an attorney for indigent criminal defendants facing felony charges through the Sixth Amendment of the United States Constitution[13] and incorporated this right to the states through the Fourteenth Amendment.[14] The Court recognized the important role criminal defense attorneys serve when it highlighted that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[15]

In *Argersinger v. Hamlin*, the Court also used this language when it later recognized the right to an attorney for those charged with misdemeanors who face jail time.[16] While "*Gideon* involved felonies," the Court explained, "[its] rationale has relevance to any criminal trial, where an accused is deprived of his liberty."[17] The Court also noted that misdemeanor cases present unique challenges warranting the right to an attorney, including that the high volume of misdemeanor cases may lead to hasty decisions at the expense of fairness to the defendant.[18] The right to

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[11] *See infra* Sections II–III.
[12] *See* Gideon v. Wainwright, 372 U.S. 335, 339, 344–45 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942)).
[13] *Id.* at 339, 343, 344–45. The Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.
[14] *Gideon*, 372 U.S. at 343–45.
[15] *Id.* at 344–45 (quotation marks omitted) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).
[16] Argersinger v. Hamlin, 407 U.S. 25, 32–34 (1972) (quoting *Powell*, 287 U.S. at 68–69).
[17] *Id.* at 32.
[18] *See id.* at 34–36.

appointed counsel, therefore, is just as fundamental in misdemeanor cases involving potential jail time as in felony cases.[19]

Not only do indigent defendants have the right to an attorney, they also have the right to the effective assistance of counsel.[20] An appointed attorney must act to ensure the "proper functioning of the adversarial process" to ensure that any given trial "produced a just result."[21] Whether an appointed attorney is effective or ineffective is determined by judging "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[22] The failure to afford the effective assistance of counsel such that the defendant is prejudiced is the failure to afford the fundamental right to an attorney.[23]

B. Kansas Methods of Affording the Right to an Attorney

Kansas has long recognized that the right to an attorney is fundamental in criminal proceedings.[24] After *Gideon*, the Kansas Legislature enacted K.S.A. 22-4514[25] to statutorily fulfill this right.[26] The statute initially created the Board of Supervisors of Panels to Aid Indigent Defendants to coordinate public defense services across the state.[27] Under the Board of Supervisors, the first public defender offices in Kansas opened in 1972, located in Topeka and Junction City.[28] In 1982, the legislature dissolved the Board of Supervisors due to cost concerns and reformed it into the current primary version of public defense in Kansas: the Kansas State Board of Indigents' Defense Services (BIDS).[29]

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[19] *See id.* at 32, 40.
[20] Strickland v. Washington, 466 U.S. 668, 686 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).
[21] *Id.*
[22] *Id.* at 689–90 (articulating the standards for Sixth Amendment ineffective assistance of counsel claims).
[23] *See id.* at 687.
[24] *See* 1868 Kan. Gen. Stat. ch. 81, § 160 (current version at KAN. STAT. ANN. § 22-4503).
[25] Bluebook Rule requires citing to Kansas statutes using "KAN. STAT. ANN." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 264 tbl.T1.3 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). Kansas practice, however, refers to Kansas statutes using "K.S.A." *See*, *e.g.*, State v. Ernesti, 239 P.3d 40, 45 (Kan. 2010). To conform to both conventions, this Article refers to Kansas statute by "K.S.A." in above-line text and uses "KAN. STAT. ANN." in footnotes.
[26] Act of Apr. 18, 1969, ch. 291, § 3, 1969 Kan. Sess. Laws 786, 787 (codified as amended at KAN. STAT. ANN. § 22-4514 (repealed 1982)).
[27] *Id.* § 14.
[28] *The History of Public Defense in Kansas*, KAN. STATE BD. OF INDIGENTS' DEF. SERVS., https://www.ksbids.gov/the-history-of-public-defense-in-kansas [https://perma.cc/TRK4-DELX].
[29] *See* Clark v. Ivy, 727 P.2d 493, 494–95 (Kan. 1986); Indigents' Defense Services Act, ch. 142, § 9, 1982 Kan. Sess. Laws 599, 602–03.

BIDS and public defense in Kansas are primarily governed by K.S.A. 22-4501 *et seq*.[30] and K.A.R. 105-1-1[31] *et seq.*[32] K.S.A. 22-4503 requires Kansas courts to appoint counsel to indigent defendants:

> If it is determined that the defendant is not able to employ counsel, as provided in K.S.A. 22-4504, and amendments thereto, the court shall appoint an attorney from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services for indigent persons prescribed by the state board of indigents' defense services for the county or judicial district.[33]

The applicable system for each county varies across Kansas. BIDS currently has fourteen offices with trial defense attorneys, and those offices take felony case appointments in their respective counties.[34] In counties where there is not a BIDS office, or for misdemeanor, traffic, and felony appointments where BIDS is conflicted-out, district courts employ appointments panels consisting of a list local attorneys on a rotation schedule.[35] Some district courts work with the county board of commissioners to establish contract panels where a select number of attorneys are on the panel and are paid a yearly salary.[36] Others, such as Riley County, may rotate certain appointed cases to all competent criminal defense attorneys barred in the county.[37]

C. Riley County's Prior Method of Providing Indigent Defense

The history of Riley County's appointments practice for its misdemeanor and traffic cases presents a legal dilemma. Prior to 2022, the Riley County court appointed attorneys on a panel contract to misdemeanor and traffic cases; the contract attorneys were paid a yearly salary funded by the Riley County Board of Commissioners.[38] One of the six contracted attorneys left the panel in 2022.[39] The

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[30] *See* KAN. STAT. ANN. § 22-4501–4529.

[31] Bluebook Rule requires citing to Kansas regulations using "KAN. ADMIN. REGS." THE BLUEBOOK, *supra* note 25. Kansas practice, however, refers to Kansas regulations using "K.A.R." *See*, *e.g.*, State v. Ernesti, 239 P.3d 40, 45 (Kan. 2010). To conform to both conventions, this Article refers to Kansas regulations by "K.A.R." in above-line text and uses "KAN. ADMIN. REGS." in footnotes.

[32] *See* KAN. ADMIN. REGS. § 105-1-1 to § 105-31-6.

[33] KAN. STAT. ANN. § 22-4503(c).

[34] *Contact Information*, KAN. STATE BD. OF INDIGENTS' DEF. SERVS., https://www.ksbids.gov/contact-info [https://perma.cc/X56Z-78CU].

[35] KAN. ADMIN. REGS. § 105-3-1(a); *e.g.*, Administrative Order No. 25-03, https://www.dgcoks.gov/sites/default/files/2025-02/2025%20Administrative%20Orders.pdf [https://perma.cc/5FCX-H2RN] (describing Douglas County's current private defense attorney appointments panel).

[36] *See*, *e.g.*, Letter from Riley County Defense Bar to Grant Bannister, C.J., Kansas 21st Jud. Dist. (Jan. 5, 2023) (on file with author).

[37] Administrative Order 2023-1 (2023) (on file with author).

[38] Letter from Riley County Defense Bar to Grant Bannister, *supra* note 36.

[39] *Id.*

remaining five attorneys sought higher compensation to better match the rates in surrounding counties and to compensate for the extra cases they would be appointed in the sixth's absence.[40] The Board of Commissioners and Riley County District Court failed to agree on an updated contract price, causing the panel to disband entirely.[41]

Caught between an unmoving Board of Commissioners and an increasing number of indigent defendants without appointed counsel, the Riley County District Court was forced to abandon panel negotiations and issue Administrative Order 2023-1.[42] The Order states:

> As a last resort, it is the ORDER of the Judges of the Riley County District Court that actively licensed attorneys admitted to practice law in this state, who maintain a law office in Riley County, Kansas, and who hold themselves out as being competent in the area of criminal defense will be placed on the appointment list to represent indigent Defendants accused of misdemeanor and traffic offenses.[43]

The Order provides exceptions for attorneys with conflicts of interest, with health issues, and who lack competency in criminal law.[44] It also allows an attorney to delegate their responsibility to a different attorney upon written request and consent.[45] Attorneys appointed on these cases were compensated at a rate of $120 an hour, as opposed to a yearly salary.[46]

The mandatory nature of this Order was certainly consequential to criminal defense attorneys in private practice. At the time of the Order, criminal defense attorneys in Riley County charged anywhere from $250 to $325 an hour for their services.[47] That number, alongside overhead costs of maintaining an office, has undoubtedly risen in the years since.[48] Arguably, the attorneys appointed in Riley County under this system lost money for every hour spent on appointed work. While Riley County has since reinstated its contract panel practice for appointed work, at least one attorney office that billed at a compensatory rate above $120 remains unpaid.[49] This prompts a question: does the private defense bar bear the burden to provide indigent defense to those charged with misdemeanors and traffic offenses in

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[40] *Id.*
[41] *Id.*
[42] *See* Administrative Order 2023-1 (2023) (on file with author).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Telephone Interview with Thomas Addair, CEO of Addair Law, Chtd., (Dec. 3, 2025).
[47] Letter from Riley County Defense Bar to Grant Bannister, *supra* note 36.
[48] *See id.*
[49] Telephone Interview with Thomas Addair, *supra* note 46.

Kansas? As the next Section addresses, the Kansas Supreme Court has already answered this question.[50]

III. Legal Background on Appointments in Kansas:

This Section addresses Kansas law on appointments to attorneys first by chronicling the evolution of Kansas case law on the matter from 1868 to the present day. It then addresses the ethical obligations placed on Kansas attorneys related to accepting appointments.

A. The Evolution of Kansas Case Law on Appointments Practices

Relevant case law on compensation for appointments in Kansas dates back to 1868, primarily because of its recognition of the right to an attorney since the era of its statehood.[51] Kansas case law on the matter remained unchanged until two significant events occurred: the Supreme Court decided *Gideon* in 1963[52] and the Kansas Legislature enacted BIDS in 1982.[53] These events triggered several lawsuits that changed the legal landscape surrounding appointments in Kansas.[54] This Section chronicles the evolution of these cases, beginning with the legal landscape as it stood in 1868.

1. *1868: The Burden of Appointments on Kansas Attorneys in a Pre-*Gideon *Landscape*

Pre-*Gideon*, Kansas statutorily recognized the right of the indigent defendant to an attorney.[55] As early as 1868, Kansas law required courts to appoint counsel to "any person, about to be arraigned upon an indictment or information for a felony, be without counsel to conduct his defense, and be unable to employ any . . . ."[56] Accordingly, district courts had "full power . . . to assign . . . attorneys to prisoners who may be unable to employ counsel."[57] But the attorneys appointed to represent the indigent in this era were not entitled to compensation for services rendered under the 1868 legislation.[58]

In *Case v. Board of County Commissioners of Shawnee County*, an attorney sought $15 payment[59] for his work on an appointed case.[60] The District Court, which appointed the attorney, approved the request; however, the Shawnee County Board

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[50] *See infra* Section III.A.3.
[51] Kansas was granted statehood in 1861. NAT'L ARCHIVES, *Kansas Statehood, January 29, 1861* (Aug. 15, 2016), https://www.archives.gov/legislative/features/kansas [https://perma.cc/GV4J-G8X7].
[52] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
[53] Indigents' Defense Services Act, ch. 142, 1982 Kan. Sess. Laws 599 (codified as amended at KAN. STAT. ANN. § 22-4501.
[54] *See infra* Section III.
[55] 1868 Kan. Gen. Stat. ch. 81, § 160 (current version at KAN. STAT. ANN. § 22-4503).
[56] *Id.*
[57] *See* Case v. Bd. of Cnty. Comm'rs, 4 Kan. 511, 512 (1868) (quoting "Sec. 2 of an act relating to the organization of courts").
[58] *Id.* at 513–14 (1868), *overruled by* State *ex rel.* Stephan v. Smith, 747 P.2d 816 (Kan. 1987).
[59] $15 in 1868, adjusted for inflation, is approximately equal to $342 today. CPI INFLATION CALCULATOR, https://www.officialdata.org/us/inflation/1868?amount=15 [https://perma.cc/9Y2F-X3N2].
[60] *Case*, 4 Kan. at 512–13.

of Commissioners refused to pay.[61] A unanimous, although torn,[62] Kansas Supreme Court bench reluctantly agreed with the County, holding that "[t]he law makes provisions for such appointments, but not for any compensation . . . the fact is fatal to the [attorney's] claim."[63] Consequently, the court concluded that the burden of providing indigent defense "must rest in the tender conscience and manly honor of the members of the bar."[64] This burden would not be squarely revisited by the Kansas Supreme Court for over a century.[65]

2. *1982–1986: BIDS and the Beginning of Compensation Disputes in Appointed Cases*

The legal landscape surrounding compensating attorneys for appointed work remained largely unchanged until the Supreme Court issued its landmark ruling in *Gideon v. Wainwright* in 1963.[66] Shortly after *Gideon* and its progeny recognized a Sixth Amendment right to counsel, the Kansas legislature enacted state-sponsored indigent defense, which resulted in compensation efforts for appointed work.[67] While private defense attorneys were still not entitled to compensation for appointed work under *Case*, a Kansas statute provided payment beginning in 1941 at a rate of $10 per day, not to exceed $300 total.[68] Accordingly, Kansas counties began to set aside funds to pay appointed counsel—particularly those with a high volume of criminal cases, such as Sedgwick County.[69] When forming the current version of state-sponsored indigent defense, BIDS, in 1982, the legislature was concerned with the costs of appointed work in criminal felony cases in areas where there was not a public defender office.[70] At the time, the Eighteenth Judicial District, consisting of Sedgwick County, did not have a public defender

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[61] *Id.*
[62] *See id.* at 514 ("It is true that it would be a disgrace to the jurisprudence of the age if a man should be tried without counsel, merely because he is poor. It would be a worse disgrace if a man were allowed to starve, in a country like this. Yet if the legislature makes no provision for the poor, those who give in private charity would look in vain to the county for reimbursement. The considerations urged in this case are strong, the reasoning satisfactory, but the court is powerless.").
[63] *Id.* at 513.
[64] *See id.* at 514.
[65] *See* State *ex rel.* Stephan v. Smith, 747 P.2d 816, 836–37 (Kan. 1987) (revisiting *Case* and its burden on defense attorneys, which "was decided almost 120 years ago"). The Kansas Supreme Court relied on *Case* twice to determine if a county board must compensate individuals but did so in separate contexts. *See* Linton v. Comm'rs of Linn Cnty., 7 Kan. 79, 81–82 (1871) (probate judge compensation); Comm'rs of Neosho Cnty. v. Stoddart, 13 Kan. 207, 207, 210–11 (1874) (courtroom furnishing compensation).
[66] Gideon v. Wainwright, 372 U.S. 335 (1963).
[67] *See supra* Section II.B.
[68] *See* Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338, 1341 (Kan. 1988) (collecting Kansas statutes).
[69] *See*, *e.g.*, Clark v. Ivy, 727 P.2d 493, 495 (Kan. 1986); *see also Smith*, 747 P.2d at 822 (explaining Anderson County's appointment compensation process before overruling *Case*.)
[70] *Clark*, 727 P.2d at 495.

office.[71] Instead, it relied solely on appointing cases to local defense attorneys, resulting in a "substantial portion" of state funds expended in the county.[72]

This issue culminated a few years later into the dispute underlying *Clark v. Ivy*.[73] A newly created public defender's office opened in Sedgwick County, Kansas, on June 18, 1984, with the aim of containing state costs expended on appointed cases.[74] Shortly afterwards, the Board adopted the following policy:

> that in public defender districts the administrative judges appoint the public defender offices to A, B and C felonies (most serious offenses) in lieu of assigned counsel unless a conflict of interest arises and that the Board will review such claims from assigned counsel to decide whether or not such claims will be paid.[75]

Despite the availability of the new office and notice of this policy, Honorable Paul W. Clark, presiding judge of the Eighteenth District's criminal division, continued appointing private defense counsel in criminal felony cases even though no BIDS conflicts were present.[76] Seven of these private defense attorneys submitted claims to BIDS for compensation.[77] BIDS denied these claims "due to the board's policy not to pay assigned counsel in cases where the public defender office could have been appointed."[78] In return, Judge Clark initiated contempt proceedings against BIDS and pursued a mandamus action against BIDS to compel payment.[79]

At the Kansas Supreme Court, the parties primarily disputed whether BIDS's review and rejection of claims violated the separation of powers doctrine between the judicial and executive branches.[80] The court held the practice did not violate the separation of powers because BIDS does not infringe on the judiciary's right to appoint attorneys.[81] Rather, BIDS only steps in after the appointment is made in the compensation phase "of such appointed attorney."[82] In reaching this conclusion, the court reaffirmed that the burden to provide indigent representation relies primarily on the attorney, noting that "mere appointment . . . does not create an absolute duty on the part of the State to compensate that attorney."[83]

But the court did not leave it there; it continued by taking a moment to express its disappointment in the parties.[84] It reminded the parties that they "are

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 501.
[77] *Id.* at 495–96.
[78] *Id.* at 497.
[79] *Id.* at 497–98.
[80] *Id.* at 498 (citing State *ex rel.* Stephan v. Kan. House of Representatives, 687 P.2d 622, 634–35 (1984)).
[81] *Id.* at 501.
[82] *Id.*
[83] *Id.* at 499.
[84] *See id.* at 503.

bound together in the common goal of providing adequate legal services to indigent defendants on a cost-effective basis and should work together to accomplish that goal."[85] It also noted that the seven private defense attorneys "through no apparent fault of their own, become casualties in a territorial dispute between two members of the judiciary and a state agency."[86] Perhaps this sympathy for the private defense attorneys influenced the court's subsequent decision to revisit the burden it originally placed on them.[87]

3. *1987–1988: The Burden Shifts to the State in* Smith

Just as it closed the door on one appointment compensation dispute in *Clark*, the Kansas Supreme Court opened another door to a more complicated appointment compensation dispute in *State ex rel. Stephan v. Smith*.[88] Because *Smith* is a significant case for the issue this Article seeks to address, this section divides *Smith* into its factual background, legal analysis, and conclusion.

a. Factual Background

The facts underlying *Smith* involve two private defense attorneys practicing in the Fourth Judicial District of Kansas in 1987.[89] One attorney in Osage County was actively appealing a contempt citation for refusing to accept an appointment in a felony case.[90] Another attorney in Anderson County filed motions in his three appointed felony cases to be discharged because the amount of compensation allowed by BIDS was "inadequate to pay even his office overhead costs . . . ."[91] These two disputes were consolidated into one hearing before the Honorable James J. Smith in Anderson County.[92]

Judge Smith first set aside the contempt citation, finding that the Osage County defense attorney was "incompetent in criminal law matters."[93] Then Judge Smith ordered two of the three cases involving the Anderson County attorney be "dismissed without prejudice, and the defendants discharged from custody within 30 days, unless during that time effective . . . the State provided 'reasonable compensation.'"[94] Judge Smith denied the attorney's motion in the third case but determined that the amount to be reasonably compensated should be $68 an hour—over double the $30 an hour provided by Kansas Administrative Regulations at the time.[95] Judge Smith's order also set the "reasonable compensation rate" for all panel attorneys in Anderson County at $68 an hour and ordered that charges be dismissed without prejudice against defendants with appointed counsel that the State would

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[85] *Id.*
[86] *Id.*
[87] State *ex rel.* Stephan v. Smith, 747 P.2d 816, 836–37 (Kan. 1987) (revisiting *Case* and explicitly overruling it).
[88] *See generally id.* at 821–50.
[89] *See id.* at 821–22.
[90] *Id.*
[91] *Id.* at 821.
[92] *Id.* at 822.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 822, 826 (quoting KAN. ADMIN. REGS. § 105-5-2 (1984)).

not pay at this rate.[96] The Honorable Phillip M. Fromme subsequently entered a similar order for appointments in Coffey County.[97]

Both orders from the Fourth Judicial District prompted the then-Kansas Attorney General Robert Stephan to file a petition for writ of mandamus on the State's behalf in the Kansas Supreme Court.[98] The State's petition asked the court to compel the judges to "rescind their respective general orders . . . insofar as they apply to conditions of appointment based on compensation and the rates of compensation which exceed those established by the State Board of Indigents' Defense Services."[99] After reviewing the judges' responses and various amicus briefs, including ones from the defense attorneys, the court analyzed several legal issues the case posed.[100]

b. Legal Analysis

The district court judges countered the mandamus action under several legal theories, including that "appointed attorneys are entitled to reasonable compensation"[101] and that the duty to provide indigent defendants with the effective assistance of counsel under *Gideon* is imposed on the State, not "on the private bar."[102] Relying on *Clark*, the judges also argued that they had the right to appoint "any attorney he or she pleases who is capable of adequately representing a defendant providing, of course, the attorney accepts the appointment."[103] But the court determined *Clark* was inapplicable because, unlike the order in *Clark*,[104] the judges' orders contravened the statutes and regulations on appointing counsel.[105] The court put it simply: "[t]he indigent defendant, however, has no right to adequately paid counsel; the defendant has no right to demand that the State provide 'reasonable compensation' for his or her attorney; the level of compensation is to be determined by the judge."[106]

Clark did not provide for reasonable compensation, but the United States and Kansas constitutions would.[107] For the first time since 1868, the court looked at the constitutional rights of the defense attorneys themselves regarding compensation for appointed work.[108] The court first squarely addressed *Case* and the burden it placed on defense attorneys to provide indigent defense.[109] The court noted that the burden placed on defense attorneys "may well have been reasonable under the existing circumstances" in *Case*.[110] But it recognized that the circumstances in *Case* had since drastically changed: *Gideon* imposed a duty on the State to provide counsel under the Constitution, K.S.A. 22-4501 *et seq.* authorized attorney compensation,

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[96] *Id.* at 822.
[97] *Id.*
[98] *Id.*
[99] *Id.* at 822–23.
[100] *Id.* at 823, 828.
[101] *See id.* at 823 (noting that Judge Smith wrote a response that Judge Fromme adopted).
[102] *Id.* at 830 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).
[103] *Id.* at 832–33 (quoting Clark v. Ivy, 727 P.2d 493, 501 (Kan. 1986)).
[104] *See Clark*, 727 P.2d at 500–01.
[105] *Smith*, 747 P.2d at 833.
[106] *Id.*
[107] *Id.* at 833, 850.
[108] *Id.* at 850.
[109] *Id.* at 836.
[110] *Id.*

and the costs of maintaining office overhead had drastically increased.[111] Accordingly, the court stated: "[w]e do not find *Case* persuasive today, and we specifically overrule it. We hold that *the State has an obligation to compensate attorneys appointed* to represent indigent defendants accused of crime."[112]

Now that the burden of providing indigent representation was squarely shifted to the State, the Court next turned to whether the then-present system of appointing and compensating attorneys violated the defense attorneys' constitutional rights.[113] It addressed individual rights under the following provisions: (1) Fifth Amendment Takings Clause;[114] (2) Fifth Amendment Equal Protection;[115] (3) Thirteenth Amendment Involuntary Servitude;[116] and (4) Article 2, Section 17 of the Kansas Constitution.[117] The court quickly disposed of the Thirteenth Amendment concern,[118] but spent a significant amount of time discussing the others.

The first right the court struggled with was the proposition that a defense attorney has a Fifth Amendment right to be free from being required to provide legal services without just compensation.[119] After a lengthy review of other state courts' analyses,[120] the court concluded that Kansas attorneys have a property interest in the services they provide and that those services are property that receive Fifth Amendment Takings Clause protection.[121] Accordingly, the court concluded:

> When the attorney is required to advance expense funds out-of-pocket for an indigent, *without full reimbursement*, the system violates the Fifth Amendment. Similarly, when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is *genuine and substantial interference with his or her private practice*, the system violates the Fifth Amendment.[122]

The court next addressed Fifth Amendment Equal Protection, including whether the appointments practice discriminated against attorneys based on their

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[111] *Id.*
[112] *Id.* (emphasis added).
[113] *See id.* at 837–49.
[114] *Id.* at 837–42.
[115] *Id.* at 843–46.
[116] *Id.* at 846–47.
[117] *Id.* at 847–49.
[118] *See id.* at 847 (citing U.S. CONST. amend. XIII) ("We know of no Kansas attorney who has been imprisoned for failure to accept an appointment under the Act. Without further discussion, we hold that the system does not offend the Thirteenth Amendment.").
[119] *See id.* at 837.
[120] *See id.* at 838–41 (collecting cases from West Virginia, Illinois, Oklahoma, Kentucky, Iowa, Arkansas, Nevada, Oregon, Alaska, Nebraska, Missouri, Florida, and New Jersey).
[121] *Id.* at 842.
[122] *Id.* (emphasis added).

profession and geographic location.[123] Applying rational basis review,[124] the court determined that the State's interest in providing counsel to the indigent is a legitimate public goal.[125] But doing so at the "expense of a particular group of people," here, attorneys, is impermissible.[126] An attorney's "ethical obligation may justify paying attorneys a reduced fee for legal services to the poor . . . but not less than the lawyers' average expenses statewide."[127]

The court further noted that the State system impermissibly treated attorneys differently based on geographic location.[128] Attorneys in larger counties where public defender's offices are located employ voluntary panels for appointments, whereas attorneys in smaller counties with no public defender's office remained subject to mandatory appointment.[129] At the time, this meant that approximately 45% of attorneys in smaller counties bore a higher burden to provide indigent defense than the remaining 65% of attorneys in larger counties.[130] "It is difficult," the court concluded, "to articulate a rational basis for requiring some attorneys to donate a considerable amount of their time and money to indigent criminal defense, and other attorneys none, simply because of their geographic location."[131]

Similarly, the court concluded that the State's system violated Kansas's Equal Protection Clause, articulated in Article 2, Section 17 of the Kansas Constitution, which requires Kansas law to apply uniformly across the state.[132] The court noted that to "apply uniformly" requires a law to be "geographically uniform."[133] "The present system," the court concluded, "quite obviously does not operate uniformly across the state" and accordingly violates Kansas Equal Protection.[134]

c. Conclusion

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[123] *Id.* at 843. The Fifth Amendment states, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Fifth Amendment Equal Protection is intertwined with the Fourteenth Amendment's Equal Protection clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).

[124] *See Smith*, 747 P.2d at 844 ("The traditional yardstick for measuring equal protection arguments is the 'reasonable basis' test. Under this test, the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.").

[125] *Id.*

[126] *Id.*

[127] *Id.* at 845.

[128] *Id.*

[129] *Id.*

[130] *See id.* at 845–46 (listing Osage, Anderson, and Coffey County as examples of mandatory appointment districts). The disparity between the number of attorneys living in urban verses rural counties in Kansas continues to grow today; 79.2 percent of attorneys living in Kansas live in the five most populous counties while only 20.8 percent live in rural counties. KAN. RURAL JUST. COMM., *supra* note 6, at 9.

[131] *Smith*, 747 P.2d at 845.

[132] *Id.* at 849. Article 2, § 17 states, in pertinent part: "All laws of a general nature shall have a uniform operation throughout the state." KAN. CONST. art. 2, § 17.

[133] *Smith*, 747 P.2d at 848 (emphasis omitted) (citing Stephens v. Snyder Clinic Ass'n, 631 P.2d 222, 232 (Kan. 1981)).

[134] *Id.* at 849.

The *Smith* court concluded that BIDS' appointment system, which failed to fully compensate appointed attorneys, violated several provisions of the United States and Kansas constitutions.[135] In doing so, it made two key findings:

> (1) The State . . . has an obligation to pay appointed counsel such sums as will fairly compensate the attorney . . . at a rate that is not confiscatory, considering overhead and expenses.[136]
>
> (2) Kansas attorneys have an ethical obligation to provide pro bono services for indigents, but the legal obligation rests on the state, not upon the bar as a whole or upon a select few members of the profession.[137]

The court then made several suggestions to the State to amend its practice to bring it up to constitutional scrutiny, including a mix of legislative and administrative actions.[138]

While the court ultimately denied the State mandamus, it also set aside the judges' orders to compensate the attorneys $68 an hour to give the State time to amend its appointments practice and to ensure defendants received their constitutional right to representation.[139] "That is a burden," the court stated, "which the bar must continue to shoulder, at least temporarily, under the present system."[140]

4. *Post-1987:* Smith's *Extension and Other Legal Challenges*

Cases surrounding appointment compensation disputes did not end with *Smith*.[141] Indeed, the facts surrounding *Smith* and the decision itself prompted two cases from opposite sides of the issue that presented new legal theories.[142] First, the Osage County Board of Commissioners brought a declaratory judgment action against its misdemeanor appointments panel attorneys who demanded the $68 hourly compensation that *Smith* addressed.[143] Second, several attorneys in Liberal, Kansas, filed a class action lawsuit against the State seeking compensation for the

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[135] *Id.* at 850.
[136] *Id.* at 849.
[137] *Id.* at 850.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *See generally* Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338 (Kan. 1988); Sharp v. State, 783 P.2d 343 (Kan. 1989).
[142] *See Burns*, 747 P.2d at 1340; *Sharp*, 783 P.2d at 345.
[143] *Burns*, 747 P.2d at 1340 (citing *Smith*, 747 P.2d at 816).

appointed services rendered prior to *Smith's* ruling.[144] This Section addresses each case in turn.

a. 1988: *Smith's* Ruling is Extended to County Boards for Misdemeanor Appointments via a Declaratory Judgment Action

Board of County Commissioners of Osage County v. Burns was another Fourth Judicial District appointment compensation dispute that arose alongside *Smith*.[145] After Judge Smith and Judge Fromme entered their orders in Anderson and Coffey County, attorneys in Osage County submitted claims to its Board of Commissioners seeking the same $68 an hour for services provided in misdemeanor appointments.[146] The Osage County Board, however, only budgeted $30 an hour for such services.[147] Seeking to avoid paying the full value of the claims, the Osage County Board sought declaratory judgment to determine if it had a legal duty to pay these claims at all and, if so, whether it must do so at the $68 rate requested.[148]

One argument the Kansas Supreme Court considered on appeal was that the statute only required the State to pay for appointed work on felony cases, not misdemeanor cases.[149] Indeed, a Kansas Administrative Regulation explicitly states that "[l]egal representation at state expense shall not be provided in . . . services on behalf of a defendant charged with a misdemeanor . . . ."[150]

Confronting this regulation, the court again confirmed that "the State has the obligation to furnish counsel and to pay appointed counsel such sums as will fairly compensate the attorney . . . at a rate which is not confiscatory, considering overhead and expenses."[151] The court further noted that the Board of Commissioners for each county in Kansas is statutorily responsible for all expenses of its district courts.[152] Any judicial expenses not borne by the State, therefore, fall to the counties.[153] Accordingly, the court concluded that "the county has a legal obligation to provide counsel for indigent defendants who are charged with misdemeanor offenses when imprisonment is a real possibility and to pay fees to such appointed counsel."[154]

With the legal obligation placed on the Board of Commissioners, the court next addressed the question of compensation.[155] In doing so, the court held that "the county is not required to pay more than the hourly rate fixed for attorneys representing indigents in felony cases for attorneys representing indigents in

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[144] *Sharp*, 783 P.2d at 344–45 (citing *Smith*, 747 P.2d at 816).
[145] *See generally Burns*, 747 P.2d at 1338–43.
[146] *Id.* at 1340.
[147] *Id.*
[148] *Id.*
[149] *Id.* at 1341 (citing KAN. STAT. ANN. § 22-4519 (1986)).
[150] *Id.* (citing KAN. ADMIN. REGS. § 105-1-1(b)(3) (1986)).
[151] *Id.* at 1342 (quotations omitted) (citing State *ex rel*. Stephan v. Smith, 747 P.2d 816, 849 (Kan. 1987)).
[152] *Id.* (citing KAN. STAT. ANN. § 20-348 (1986)).
[153] *Id.*
[154] *Id.*
[155] *Id.* at 1342–43.

misdemeanor cases."[156] It also suggested that the administrative judge in each county work with the Board of Commissioners during the budget process to establish a reasonable compensation rate.[157] Even so, the court again emphasized that "[t]he rate should fairly compensate the attorney . . . at a rate which is not confiscatory, considering the attorney's overhead and expenses."[158]

b. 1989: Class Action Raising New Legal Claims is Denied

Seeking compensation under the *Smith* standard, several attorneys practicing in Liberal, Kansas, commenced a class action lawsuit against the State for work performed *before* the court ruled in *Smith*.[159] This suit posed several new claims that the Kansas Supreme Court did not consider in *Smith*, including claims under 42 U.S.C. §§ 1983, 1985, and 1994, and *Bivens v. Six Unknown Federal Narcotics Agents*.[160] None of these claims withstood scrutiny.[161] Although the section 1994 claim appeared to be new, the provision is simply the vehicle to enforce the Thirteenth Amendment's prohibition against involuntary servitude.[162] The court rejected this claim just as it did previously in *Smith*.[163]

The remaining claims required the court to review as a matter of first impression in the context of appointment compensation disputes. Section 1983 provides a civil action against a "*person* who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ."[164] The section 1983 claim was brought against the State itself for monetary damages, implicating Eleventh Amendment immunity.[165] Kansas has not waived its immunity in this area, so it is immune from suit under section 1983.[166] The section 1983 claim also failed because Kansas, as a state, is not a "person" that can be sued within the statute's meaning.[167] This fact was also fatal to the attorneys' section 1985 claim, which provides a civil action "[i]f two or more *persons* . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal

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[156] *Id.* at 1342.
[157] *Id.*
[158] *Id.* at 1342–43.
[159] Sharp v. State, 783 P.2d 343, 344–45 (Kan. 1989).
[160] *Id.* at 345 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)). The class action also pursued inverse condemnation and unjust enrichment claims that this Article does not address. *See id.*
[161] *See id.* at 346–48.
[162] *Id.* 783 P.2d at 346 (first quoting 42 U.S.C. § 1994; and then quoting U.S. CONST. amend. XIII).
[163] *Id.* at 346–47 (citing State *ex rel.* Stephan v. Smith, 747 P.2d 816, 846–47 (Kan. 1987)).
[164] 42 U.S.C. § 1983 (emphasis added).
[165] *Sharp*, 783 P.2d at 346. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
[166] *Sharp*, 783 P.2d at 346 (citing Beck v. Adult Auth., 735 P.2d 222 (1987)).
[167] *Id.* (citing Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989)).

protection of the laws."[168] Finally, the *Bivens* claim, a claim similar to section 1983 against federal officers,[169] failed because those claims are reserved solely against the federal government and do not provide for monetary damages.[170]

Sharp revealed several flaws in the claims brought against the State when disputing compensation for appointed work.[171] Adjustments, however, may allow for viable claims in the future.[172] Potential attorney-challengers, however, must also consider a Kansas attorney's ethical obligation to accept appointments.[173]

B. Ethical Obligations on Kansas Attorneys to Accept Appointments

Kansas case law generally has not further addressed the constitutionality of appointments practices in Kansas.[174] But the Kansas Rules of Professional Conduct (KRPC) continue to impose ever-present ethical obligations on Kansas attorneys to accept appointments.[175] KRPC 6.1, titled "Pro Bono Public Service," states that "[a] lawyer should render public interest legal service."[176] Interestingly, comment 3 to KRPC 6.1 continues to uphold the principle that the "responsibility for providing legal services for those unable to pay ultimately rests upon the *individual lawyer*."[177] This is contrary to the clear decree that *Smith* and its progeny emphasized: the State ultimately bears the burden of providing legal services for indigent defendants.[178]

Regardless, KRPC 6.2, titled "Accepting Appointments," states that Kansas attorneys "shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . . ."[179] One good cause exception to this general rule is if "representing the client is likely to result in an unreasonable financial burden on the lawyer."[180] Comment 2 to KRPC 6.2 elaborates on what an unreasonable financial burden may be by describing it as "a financial sacrifice so great as to be unjust."[181] Whether being required to accept an appointment that does not adequately compensate overhead expenses qualifies as an unreasonable financial burden remains an open question.

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[168] *Id.* (citing *Will*, 491 U.S. 58); 42 U.S.C. § 1985(3) (emphasis added).
[169] *See* Ziglar v. Abbasi, 582 U.S. 120, 130–31 (2017).
[170] *Sharp*, 783 P.2d at 347–48.
[171] Indeed, the attorney-challengers in this case tried three times without success. *See* Sharp v. State, 827 P.2d 12, 14, 17–18 (Kan. 1992) ("This is the third action filed by these plaintiffs against the State of Kansas since our decision in *Smith*.") (concluding that *Smith*'s holding that the appointments practice was unconstitutional did not retroactively apply to the class action's claims).
[172] *See infra* Section IV.B.3.
[173] *Infra* Section III.B.
[174] One exception this Article does not address is compensation for appointed work on municipal cases. *See* Ricke v. City of El Dorado, 939 P.2d 916, 917–18 (Kan. 1997). In *Ricke v. City of El Dorado*, the Kansas Supreme Court held "that a municipal court may contract for legal services for indigent defendants in a criminal case, and if it chooses that method, the market will set the price." *Id.* at 918. The court noted, however, that "[i]f the market system does not produce effective counsel, then the municipality must adopt a mandatory appointment system and compensate the attorney so appointed as set forth in State ex rel. Stephan v. Smith." *Id.*
[175] *See* KANSAS RULES OF PRO. CONDUCT r. 6.1–6.2 (KAN. SUP. CT. 2025).
[176] *Id.* r. 6.1.
[177] *Id.* r. 6.1 cmt. 3 (emphasis added).
[178] *Compare id.*, *with* State *ex rel.* Stephan v. Smith, 747 P.2d 816, 849 (Kan. 1987), *and* Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338, 1342 (Kan. 1988).
[179] KANSAS RULES OF PRO. CONDUCT r. 6.2.
[180] *Id.* r. 6.2(b).
[181] *Id.* r. 6.2 cmt. 2.

An exhaustive review of legal research databases does not reveal any disciplinary actions against a Kansas attorney for refusing to accept an appointment, but that does not mean a disciplinary action for such conduct is unavailable. The use of the word "shall" in KRPC 6.2 as opposed to the word "should" in KRPC 6.1 suggests that KRPC 6.2 is mandatory and not merely aspirational.[182] If an attorney rejects a judge's appointment, the judge may be obligated to report the attorney for misconduct.[183] The attorney's colleague witnessing the refusal would need to do the same.[184] Once in disciplinary proceedings, the attorney faces several ramifications ranging anywhere from informal admonition to permanent disbarment.[185] These are serious consequences that attorneys who may seek to avoid an appointment or challenge an appointments practice should consider.

IV. Legal Analysis: Does a Mandatory Appointments Practice Withstand Legal Scrutiny?

Ethical obligations aside, a private defense attorney may seek to challenge a mandatory appointments practice. The Kansas Supreme Court clearly placed the burden of providing indigent defense on the State for felony appointments[186] and on the County Board of Commissioners for misdemeanor and traffic appointments.[187] This Section contemplates whether a mandatory appointments practice, such as the one previously present in Riley County for misdemeanor and traffic cases, would withstand legal scrutiny if challenged. It also explores the mechanisms available to a private defense attorney seeking to challenge such a practice.

A. Possible Legal Violations

Previous cases challenging appointments disposed of several claims brought by private defense attorneys.[188] Accordingly, this Section does not address rejected claims under the Thirteenth Amendment, related federal claims, or separation of powers doctrine.[189] Reviewing Kansas case law does reveal two

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[182] *Cf.* David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 737, 739 (1980) (explaining how the American Bar Association replaced the word "shall" with "should" in its version of the pro bono obligation to ensure pro bono service remained an aspirational goal as opposed to mandatory rule subject to discipline).

[183] KANSAS CODE OF JUD. CONDUCT Canon 2 r. 2.15(B) (KAN. SUP. CT. 2025).

[184] KANSAS RULES OF PRO. CONDUCT r. 8.3(a).

[185] *See* KAN. SUP. CT., *Rule 225: Types of Discipline, in* REPORTS OF RULES ADOPTED BY THE SUPREME COURT OF THE STATE OF KANSAS, 274, 274 (2025), https://kscourts.gov/KSCourts/media/KsCourts/Rules/2025-RuleBook.pdf [https://perma.cc/UJD2-PWH2].

[186] State *ex rel.* Stephan v. Smith, 747 P.2d 816, 850 (Kan. 1987).

[187] Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338, 1342 (Kan. 1988).

[188] *See Smith*, 747 P.2d at 842–43, 846–47 (disposing separation of powers and thirteenth amendment claims); Sharp v. State, 783 P.2d 343, 346–48 (Kan. 1989) (definitively disposing 42 U.S.C. § 1994, Thirteenth Amendment, inverse condemnation, unjust enrichment, and *Bivens* claims).

[189] *See Smith*, 747 P.2d at 842–43, 846–47; *Sharp*, 783 P.2d at 346–48. Even if an attorney faced disciplinary sanctions for refusing to accept an appointment, a Thirteenth Amendment claim is unlikely viable unless the attorney is imprisoned. *See* Shapiro, *supra* note 182, at 770 ("In the case

general umbrellas of potentially viable claims an attorney-challenger could be successful under: (1) federal and state equal protection clauses; and (2) the Fifth Amendment takings clause.[190]

1. *Equal Protection Clauses*

A mandatory appointments practice arguably violates the equal protection clause of the United States Constitution. Whether it violates equal protection under the Kansas Constitution, however, is a more nuanced answer.

a. Equal Protection Under the United States Constitution

The Fifth Amendment states, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[191] This protection is incorporated to the states through the Fourteenth Amendment.[192] Courts analyze equal protection claims using a three-step analysis:

> The first step of an equal protection analysis is to determine the nature of the . . . classifications and whether the classifications result in arguable indistinguishable classes of individuals being treated differently.
>
> . . . .
>
> After determining the nature of the . . . classifications, a court examines the rights which are affected by the classifications. The nature of the rights dictates the level of scrutiny to be applied.
>
> . . . .
>
> The final step of the analysis requires determining whether the relationship between the classifications and the object desired to be obtained withstands the applicable level of scrutiny.[193]

Courts also presume that the challenged practice is constitutionally valid.[194]

Under the first step, there are two potentially viable classifications that an attorney-challenger may argue that are being treated differently.[195] First, a mandatory appointments practice treats attorneys differently compared to other

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of the lawyer, then, the imposition of professional discipline, even to the point of disbarment, for refusal to accept an assignment appears to pass muster under the thirteenth amendment [sic]. But those who have reached this point with me may share my doubts about imprisonment for contempt for such a refusal.").

[190] *See Smith*, 747 P.2d at 837–43, 843–50.

[191] U.S. CONST. amend. V.

[192] Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).

[193] Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc., 255 P.3d 1186, 1207–08 (Kan. 2011).

[194] *Id.* at 1207.

[195] *Smith*, 747 P.2d at 843.

professionals by only requiring attorneys to provide indigent defense services.[196] Second, within attorneys, a mandatory appointments practice in one county, but not all others, treats attorneys differently based on geographic location.[197]

Applying the second step, the *Smith* court held that an appointments practice affects the fundamental right of those attorneys, particularly if it violated the Fifth Amendment.[198] Attorneys, however, are not a suspect class under the second step of an equal protection analysis.[199] Accordingly, the appropriate level of scrutiny to apply under step two is rational basis.[200] Rational basis is satisfied "if the classification bears a rational relationship to a legitimate governmental purpose."[201]

There is no argument that providing indigent defense is not a legitimate governmental purpose.[202] This responsibility is both rooted in the United States Constitution, Kansas statute, and attorney ethics.[203] To say otherwise should cut against the core values of every defense attorney, private or public.

But, under each identified classification, the rational relationship between the appointments practice and the classification may be subject to further debate.[204] Comparing attorneys to other professionals, the *Smith* court concluded that assisting the indigent is a legitimate goal, "but cannot be accomplished at the expense of a particular group."[205] Other professions, such as grocers, builders, and even veterinarians, are not forced to provide their services to the indigent without adequate compensation.[206] Even payment of $120 an hour would violate equal protection when "the effect is similar if their overhead and out-of-pocket expenses are not covered by the compensation they receive."[207] Private defense attorneys who maintain offices and multiple staff likely have high overhead and out-of-pocket costs that are not covered by the compensation received when representing indigent defendants in a mandatory appointments county.[208]

Perhaps the stronger classification private defense attorneys can argue under is different treatment between attorneys based on geographic location.[209] As of 2024, 78.82 percent of Kansas attorneys live in the five most urban counties, leaving the remaining 21.18 percent thinly spread across Kansas's remaining 100

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[196] *See id.* at 843–44.
[197] *See id.* at 845.
[198] *Id.* at 844.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *See id.* at 831, 844–45.
[203] *See id.* at 832, 834, 844.
[204] *Id.* at 843–44.
[205] *Id.* at 844.
[206] *Id.* (citing Cunningham v. Superior Ct., 177 Cal. App. 3d 336, 348 (1986)). Even Kansas veterinarians are entitled to reasonable compensation under Kansas law for their expenses for services provided to the State. KAN. STAT. ANN. § 47-610.
[207] *Smith*, 747 P.2d at 844.
[208] *See* Letter from Riley County Defense Bar to Grant Bannister, *supra* note 36.
[209] *See Smith*, 747 P.2d at 845.

rural counties.[210] Sixteen counties have three or fewer attorneys; of those sixteen, two counties have none.[211] These numbers only report attorneys' location generally, they do not differentiate between those competent to practice criminal law and those not.[212] It is safe to say that the majority of Kansas criminal defense attorneys practice in urban areas.

As the *Smith* court articulated, "[i]t is difficult to articulate a rational basis for requiring some attorneys to donate a considerable amount of their time and money to indigent criminal defense, and other attorneys none, simply because of their geographic location."[213] When a rural county, like Riley County, is forced to implement a mandatory appointments practice to ensure indigent defendants are constitutionally afforded their right to an attorney, it disproportionately affects the attorneys living in Riley County.[214] Such a practice would disproportionately affect attorneys living in other rural districts, too.[215] With an ever-increasing shortage of attorneys practicing in rural counties, mandatory appointments practices already are or may become necessary, and the geographic disparity between urban and rural defense attorneys heightens.[216] Attorneys challenging a mandatory appointments practice today based on geographic location differential treatment have strong equal protection claims under the United States Constitution.

b. Equal Protection Under the Kansas Constitution

Equal protection under the Kansas Constitution largely works like equal protection under the United States Constitution.[217] Under the Kansas Constitution, "[a]ll laws of a general nature shall have uniform operation throughout the state."[218] As the *Smith* court noted, Kansas courts interpret this provision to require that laws "apply uniformly throughout the state and thus be *geographically* uniform."[219]

Mandatory appointments practices do not operate uniformly across the state since they are products of a few rural counties compared to the entirety of Kansas's 105 counties.[220] But does a mandatory appointments practice issued by a single

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[210] KAN. RURAL JUST. COMM., *supra* note 6, at 8–9. The five urban counties in Kansas include Douglas, Johnson, Sedgwick, Shawnee, and Wyandotte. *Id.* at 8.
[211] *Id.* at 11.
[212] *See id.* at 9–12 (reporting attorney numbers generally, instead of by practice area).
[213] *Smith*, 747 P.2d at 845.
[214] *See id.* ("The net effect is that an attorney in private practice in a small district without a public defender bears a much greater proportion of the burden than do his or her peers in voluntary or public defender districts.").
[215] *Id.*
[216] *See id.* at 846. ("Those in mandatory districts . . . are required to shoulder the burden of indigent criminal defense, paying part of the expense out of their own pockets, while being paid fees that average less than their fixed office overhead. Meanwhile, most Kansas attorneys are not required to participate or contribute.").
[217] Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc., 255 P.3d 1186, 1207–08 (Kan. 2011) (considering federal and Kansas equal protection together under the same standard of review).
[218] KAN. CONST. art. 2, § 17. The section further allows special laws to be enacted in areas designated as "urban areas." *Id.* Currently, these areas only include Johnson and Sedgwick counties. KAN. STAT. ANN. § 19-2654.
[219] *Smith*, 747 P.2d at 848 (emphasis in original) (quoting Stephens v. Snyder Clinic Ass'n, 631 P.2d 222, 232 (Kan. 1981)).
[220] *See County List*, KANSAS.GOV., https://portal.kansas.gov/government/county-list/ [https://perma.cc/WJC2-YRHS]; *see supra* Section IV.A.1.

district court in one county qualify as a law of general nature? For example, it is true that Riley County's mandatory appointments practice was a law of general nature towards private defense attorneys in Riley County, but the Order did not extend generally to all counties in the state.[221] Conversely, the Order derives authority from the Indigents' Defense Services Act.[222] This Act is a law of general nature across the state.[223] Whether a challenge to one county's appointments practice necessarily challenges the Indigents' Defense Services Act itself is currently an open question.

This question has not been squarely addressed by case law, but *Burns* is informative.[224] *Burns*, which extended *Smith* to county boards, did not involve a direct challenge under Kansas Equal Protection.[225] But the challenged counties' appointments practices derived their authority from several Kansas statutes authorizing payment for appointed attorneys.[226] The *Burns* court noted that "the responsibility for providing counsel for indigents charged with misdemeanors has been left by the legislature to the county."[227] The *Burns* court also noted that counties have statutory and regulatory authority to fix the amount of payment.[228] A county's appointments practice is significantly intertwined with the Indigents' Defense Services Act—a law of general nature subject to equal protection under the Kansas Constitution.[229]

2. *Fifth Amendment Takings Clause*

A mandatory appointments practice arguably violates another federal right: the Takings Clause under the Fifth Amendment of the United States Constitution. The Fifth Amendment Takings Clause states: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[230] This clause is incorporated against the states through the Fourteenth Amendment.[231] A government "taking" must satisfy due process principles to be valid:

> More specifically, reasonableness, *e.g.,* arbitrariness, is an issue under the Due Process Clause of the United

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[221] *Compare* Administrative Order 2023-1 (2023) (on file with author), *with Smith*, 747 P.2d at 848 (concluding that the Indigent Defense Services Act of 1986 was a law of general nature because it "is of consequence, in all counties of the state").

[222] KAN. STAT. ANN. § 22-4503(c) ("If it is determined that the defendant is not able to employ counsel . . . the court shall appoint an attorney from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services . . . ."); *cf.* Administrative Order 2023-1 (2023) (on file with author) (establishing a mandatory appointments practice).

[223] *Smith*, 747 P.2d at 848.

[224] *See generally* Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338, 1340–42 (Kan. 1988).

[225] *Id.*

[226] *See id.* at 1341–42.

[227] *Id.* at 1342.

[228] *Id.*

[229] State *ex rel.* Stephan v. Smith, 747 P.2d 816, 848 (Kan. 1987).

[230] U.S. CONST. amend. V.

[231] Zimmerman v. Bd. of Cnty. Comm'rs, 264 P.3d 989, 999 (Kan. 2011) (citing Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005)).

> States Constitution, while takings is a Takings Clause issue. Accordingly, if the governing body action is unreasonable, there cannot be a taking. The action is simply void. Only if the action is reasonable does a court proceed to address the takings issue.[232]

If the governmental action satisfies due process, then the challenging party must establish that the property at issue is a "constitutionally cognizable property interest."[233] Only then is a party entitled to just compensation, typically measured at a "fair market value" rate.[234]

Here, attorney-challengers will likely fail to establish that a mandatory appointments practice fails basic due process requirements, especially when the practice emerges from the necessity to afford the indigent the right to an attorney.[235] Attorney-challengers, however, can establish that attorney services are a constitutionally cognizable property interest by citing to *Smith* which explicitly held that "attorneys' services are property, and are thus subject to Fifth Amendment protection."[236] Accordingly, defense attorneys are entitled to just or reasonable compensation for appointed services.[237]

Calculating reasonable compensation, however, presents a challenge. *Smith* described reasonable compensation as "not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses."[238] The *Smith* court identified several factors to consider in calculating overhead costs, such as "the cost of the office, library, equipment, supplies, professional liability insurance, and secretarial help."[239] Overhead costs are certain to vary from attorney to attorney and firm to firm, making this determination time-consuming and tedious.[240]

A county board of commissioners possesses the tools for making these determinations since budgeting is crucial to county work.[241] Each county already budgets for its respective county attorney offices; similar procedures could be

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[232] *Id.* at 1000.
[233] *Id.* at 1001.
[234] *See* Creegan v. State, 391 P.3d 36, 48 (Kan. 2017) (evaluating a Fifth Amendment Takings Clause claim for taken land).
[235] *See* State *ex rel.* Stephan v. Smith, 747 P.2d 816, 837–38 (Kan. 1987). This is not to say that establishing that a mandatory appointments practice always satisfies due process. *See id.* at 838 ("Under such an analysis, the statute on its face does not violate due process. There are some problems with the application or administration of the present statutory system, however, which could render it unreasonable and arbitrary.").
[236] *Id.* at 842.
[237] *See id.* at 849–50 ("The State . . . has an obligation to pay appointed counsel such sums as will fairly compensate the attorney.").
[238] *Id.* at 849.
[239] *Id.* at 837.
[240] *Cf.* Moreno v. City of Sacramento, 534 F.3d 1106, 1116 (9th Cir. 2008) ("We are well aware that awarding attorneys' fees to prevailing parties . . . is a tedious business.").
[241] *See*, *e.g.*, SEDGWICK CNTY., BUDGET PROCESS 35 (2012), https://www.sedgwickcounty.org/media/27160/budget_process.pdf [https://perma.cc/7L4K-VWLZ] ("Sedgwick County recognizes the foundation for strong fiscal management rests in the adherence to sound financial policies and goals.").

applied to private defense attorney offices.[242] County boards also already work with the administrative judge in each district for budgeting purposes; this meeting can facilitate a budgeting process for local defense attorney offices.[243] County boards can also avoid this process by implementing, or returning to, contractual appointments panels that compensate at a rate attractive to volunteer private defense attorneys.[244] Accordingly, determining a reasonable compensation rate is achievable to compensate for taking attorneys' services.

B. Possible Attorney Lawsuits[245]

Case law on appointments practices was formed by various types of lawsuits brought by interested parties.[246] Multiple lawsuit vehicles may be available today for private defense attorneys subject to mandatory appointments practices to enforce their constitutional rights. This Section evaluates select advantages and disadvantages of three possible vehicles: (1) a petition for a writ of mandamus; (2) a petition for declaratory judgment; and (3) a 42 U.S.C. § 1983 claim.

1. *Petition for a Writ of Mandamus*

A petition for a writ of mandamus was the challengers' choice to enforce their rights in two of the four cases discussed in Section III, including in *Smith*.[247] In Kansas, "mandamus is a proceeding to compel some inferior court . . . [or] board . . . to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law."[248] Mandamus provides an opportunity to obtain an authoritative interpretation of regulatory and statutory rules guiding appointments practices—even if mandamus is ultimately denied.[249] Attorney-challengers can also file a petition for writ of mandamus directly to the Kansas Supreme Court under its original jurisdiction for expedited final results.[250]

There is no guarantee, however, that the Kansas Supreme Court would hear the petition without it going through the standard appeals process first. Attorney-challengers must demonstrate why they chose to bring the action to the Kansas

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[242] *See*, *e.g.*, BRITTANY PHILLIPS, RILEY CNTY., KAN., RILEY COUNTY, KANSAS 2024 BUDGET 17–18 (2024), https://www.rileycountyks.gov/ArchiveCenter/ViewFile/Item/3218/ [https://perma.cc/9WZH-BP4G] (budgeting for the Riley County Attorney Office's personnel, contractual, commodity, and capital outlay expenses).

[243] KAN. STAT. ANN. § 20-349.

[244] *See* Letter from Riley County Defense Bar to Grant Bannister, *supra* note 36.

[245] DISCLAIMER: this Section discusses possible lawsuits on a basic and general level. It should not be taken as legal advice, and possible attorney-challengers should obtain legal representation to properly evaluate their options.

[246] *See* State *ex rel*. Stephan v. Smith, 747 P.2d 816, 822 (Kan. 1987) (writ of mandamus); Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338, 1339 (Kan. 1988) (declaratory judgment action); Sharp v. State, 783 P.2d 343, 344 (Kan. 1989) (class action).

[247] *Smith*, 747 P.2d at 821; Clark v. Ivy, 727 P.2d 493, 494 (Kan. 1985); *see supra* Section III.A.2–3.

[248] KAN. STAT. ANN. § 60-801.

[249] *See Smith*, 747 P.2d at 829, 849–50 (denying mandamus but directing parties to adjust their appointments practice to comply with the United States and Kansas Constitutions).

[250] KAN. CONST. art. 3, § 3; *see also* KAN. SUP. CT., *Rule 9.01: Original Action, in* REPORTS OF RULES ADOPTED BY THE SUPREME COURT OF THE STATE OF KANSAS, *supra* note 185, at 63–64.

Supreme Court instead of the district court.[251] To do so, attorney-challengers can rely on concerns about judicial economy.[252] Challenging a county's appointments practice in district court could necessarily require all judges within that county to recuse themselves, delaying proceedings to find a replacement judge.[253] Attorney-challengers can also rely on a need for speedy adjudication of the issue because of its well-established importance to the public statewide.[254] Even in light of these needs, the Kansas Supreme Court's review under original jurisdiction remains discretionary.[255]

Mandamus is also difficult to obtain. Courts consider granting a writ of mandamus an "extraordinary remedy."[256] One court described mandamus as having a "drastic character."[257] Writs of mandamus are only issued upon a showing that the respondent's legal duty is clear, which may be difficult to establish.[258] Even if the legal duty is clear, courts ultimately retain discretion on whether to grant relief under mandamus.[259] Overall, while mandamus offers an opportunity for expedited results, challengers should carefully consider the chances of success under this extraordinary remedy.[260]

2. *Petition for Declaratory Judgment*

One of the cases discussed in Section III involved a petition for declaratory judgment.[261] While the county board in this case sought a declaratory judgment against defense attorneys, the reverse can be sought, too.[262] Under the Kansas Declaratory Judgment Act, "[c]ourts of record within their respective jurisdictions shall have power to declare the rights, status, and other legal relations whether or not further relief is, or could be sought."[263] Unlike mandamus's extraordinary nature, the Declaratory Judgment Act "should be liberally construed and administered" to settle uncertainty between disputed rights.[264] Additionally, "further relief based on a declaratory judgment may be granted whenever necessary or proper."[265] In an appointments practice challenge, a declaratory judgment order can clarify the rights

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[251] *Id.* at 64; Ambrosier v. Brownback, 375 P.3d 1007, 1009 (Kan. 2016).
[252] *Ambrosier*, 375 P.3d at 1009.
[253] *See* State v. Sawyer, 305 P.3d 608, 613 (Kan. 2013) (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876–87 (2009)) ("[A]s an objective matter, recusal would be required in order to satisfy due process: when a judge has a direct, personal, substantial pecuniary interest in the case"). For example, all "Judges within the Riley County District Court" issued Order 2023-1. *See* Administrate Order 2023-1 (2023) (on file with author).
[254] *Smith*, 747 P.2d at 828–29.
[255] *Ambrosier*, 375 P.3d at 1009.
[256] *See Smith*, 747 P.2d at 828 (collecting cases).
[257] State *ex rel.* Stephan v. O'Keefe, 686 P.2d 171, 176 (Kan. 1984).
[258] Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline, 197 P.3d 370, 396 (Kan. 2008).
[259] *Id.*
[260] To pursue more aggressive litigation, attorney-challengers may need to first follow the procedures listed in K.S.A 12-105b. *See generally* KAN. STAT. ANN. § 12-105b.
[261] *See supra* Section III.A.4.a; Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338, 1339 (Kan. 1988).
[262] *Burns*, 747 P.2d at 1339; *see* KAN. STAT. ANN. § 60-1704 ("Any person . . . whose rights . . . are affected by a statute, municipal ordinance, contract or franchise . . . may obtain a declaration of rights, status or other legal relations thereunder.").
[263] KAN. STAT. ANN. § 60-1701.
[264] *Id.* § 60-1713.
[265] *Id.* § 60-1703.

of the attorney-challengers, the obligations of a county board, and more specifically define what reasonable compensation should be.[266]

One disadvantage of filing a petition for declaratory judgment action is that doing so in the district court of the county whose practice is being challenged will cause delay due to judges recusing themselves.[267] But filing a petition for declaratory judgment presents a less combative option for those seeking to challenge an appointments practice since favorable declaratory relief alone does not award damages or otherwise order any specific action.[268] This may prompt a county to change its mandatory appointments practice to avoid future litigation on the matter and ultimately save all parties time and resources. Inaction, however, may require further and more aggressive litigation.

3. *42 U.S.C. § 1983 Claim*

A more aggressive lawsuit may be filed under 42 U.S.C. § 1983.[269] Section 1983 provides a civil cause of action to enforce certain violations of federal rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[270]

Accordingly, section 1983 could be the vehicle used to bring Fourteenth Amendment Equal Protection and Takings Clause challenges.[271] The *Sharp* challengers unsuccessfully attempted to use section 1983 to bring their constitutional claims,[272] but a few adjustments to their strategy may prove viable today.

The primary adjustment challengers should make is to the parties named as defendants. The *Sharp* challengers erroneously named the State of Kansas in their claim for damages.[273] The *Sharp* court did not reach the merits of their claim; instead, it dismissed the case because the State of Kansas is immune from suit under

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[266] *See Burns*, 747 P.2d at 1342–43.
[267] *See supra* notes 252–53 and accompanying text.
[268] *See Relief*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining declaratory relief as merely "relief that pronounces upon the legal status or ownership of a thing").
[269] *See* 42 U.S.C. § 1983; *id.* § 1988.
[270] *See id.* § 1983.
[271] *See*, *e.g.*, Smith v. Robinson, 468 U.S. 994, 994–95, 1013, 1021 (1984) (affirming the award of attorney's fees in a section 1983 claim alleging violations of equal protection under the Fourteenth Amendment); Knick v. Twp. of Scott, 588 U.S. 180, 185 (2019) ("[T]he property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.").
[272] Sharp v. State, 783 P.2d 344, 346 (Kan. 1989).
[273] *Id.* at 346.

the Eleventh Amendment and because a state is not a "person" within the meaning of section 1983.[274] Naming a board of county commissioners, however, as defendants avoids both problems. First, a board of county commissioners is not entitled to immunity under the Eleventh Amendment.[275] Second, a board of county commissioners is considered a "person" within the meaning of section 1983.[276] The claim can also name each commissioner on the board as an individual defendant in their official and personal capacities.[277]

Overcoming Eleventh Amendment immunity and the person requirement will get challengers today further than those in *Sharp*,[278] but the work is not done there. Challengers will also need to establish that the named defendants acted "under color of" state law.[279] This can be done by arguing that the county board and its officials exercise their rights under state statutes and regulations when compensating appointed work.[280] Challengers will then need to successfully argue their claims under municipal liability principles[281] and overcome claims of qualified immunity made by defendants sued in their individual capacities.[282]

While section 1983 claims involve a significant amount of work, they possess several advantages. For example, a section 1983 claim may be filed in either state or federal court.[283] Filing in federal court can be beneficial; it allows challengers to bring their claims before a court with more experience with and solicitude towards federal claims.[284] A federal district court, however, may need to involve the Kansas Supreme Court if evaluating the federal law claims requires certification of a state law question that is determinative of the cause of action.[285]

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[274] *Id.*
[275] *See* Lincoln Cnty. v. Luning, 133 U.S. 529, 530–31 (1890).
[276] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).
[277] *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 & n.10 (1989); Hafer v. Melo, 502 U.S. 21, 27, 31 (1991).
[278] *See Sharp*, 783 P.2d at 345–46 (dismissing the section 1983 claim on Eleventh Amendment immunity and person requirement grounds).
[279] 42 U.S.C. § 1983; Monroe v. Pape, 365 U.S. 167, 184, 187 (1981).
[280] Whether a party engages in state action involves a two-prong analysis: (1) the deprivation must be caused by the exercise of some right or privilege created by the state; (2) and the party charged with the deprivation must be a person who may fairly be said to be a state actor. Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).
[281] *See Monell*, 436 U.S. at 694; Pembaur v. City of Cincinnati, 475 U.S. 469, 479–84 (1986) (articulating municipal liability standards under the official policy or custom theory of liability).
[282] An individual is immune from damages under qualified immunity when they objectively acted reasonably in light of the law that was clearly established at the time. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999).
[283] *See* Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980).
[284] Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).
[285] *See* KAN. STAT. ANN. § 60-3201. One question that could be certified stems from *Burns*, which concluded that "the county is not required to pay more than the hourly rate fixed for attorneys representing indigents in felony cases for attorneys representing indigents in misdemeanor cases." Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338, 1342 (Kan. 1988). K.S.A. 22-4507 currently fixes the minimum hourly rate for felony representation at $120. KAN. STAT. ANN. § 22-4507(c)(1). Because this is the amount that Riley County attorneys received under its mandatory appointments practice, an affirmative answer to whether K.S.A. 22-4507 controls "may be determinative of the cause." *See supra* Section II.C; KAN. STAT. ANN. § 60-3201.

Section 1983 also allows courts to award damages to successful plaintiffs.[286] Private defense attorneys who can demonstrate that they have lost money on appointed work may be interested in the possibility of compensatory damages.[287] Punitive damages, however, are not available against a board of county commissioners.[288] Regardless, perhaps the greatest advantage to a section 1983 claim is the availability of attorney's fees for successful plaintiffs.[289] Under 42 U.S.C. § 1988(b), the court must award "a reasonable attorney's fee" to parties who prevail in a section 1983 claim.[290] Overall, section 1983 provides a powerful opportunity for private defense attorneys to enforce their constitutional rights.

V. Conclusion

Requiring an attorney to accept appointed work presents a complicated legal issue with several legal rights and interests to consider. An individual's right to an attorney must be afforded, but Kansas case law clearly places the burden to do so on the State and its counties.[291] Further, while ethically obligated to accept appointments, private defense attorneys have their own constitutional rights under the United States Constitution and the Kansas Constitution. A mandatory appointments practice arguably violates these rights, particularly as it pertains to reasonably compensating these attorneys for their work. Attorneys seeking to challenge such a practice have several possible vehicles to enforce these constitutional rights.

While this Article proposes possible lawsuits attorney-challengers might bring to enforce their constitutional rights, it does not intend to place blame on courts in counties where forced to implement mandatory appointments practices. Affording the right to an attorney should be the prevailing concern of all parties involved. But, without change, the constitutional crisis that Kansas currently faces will only worsen if attorneys' rights continue to be violated and resentment grows. Boards of county commissioners must be educated on the legal importance of providing reasonable compensation to appointed attorneys, and the potential consequences of refusing to do so. Hopefully, scholarship such as this Article suffices, future mandatory appointments practices can be avoided, and no litigation will be necessary.

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[286] Carey v. Piphus, 435 U.S. 247, 253–54 (1978).
[287] *Cf.* Farrar v. Hobby, 506 U.S. 103, 112 (1992) ("[N]o compensatory damages may be awarded in a § 1983 suit absent proof of actual injury").
[288] *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).
[289] *See* 42 U.S.C. § 1988(b).
[290] *Id.* Generally, "in its discretion" is interpreted to require courts to award attorney's fees, unless the plaintiff is a pro se litigant. *See* Kay v. Ehrler, 499 U.S. 432, 437 (1991).
[291] State *ex rel.* Stephan v. Smith, 747 P.2d 816, 849 (Kan. 1987); Bd. of Cnty. Comm'rs v. Burns, 747 P.2d 1338, 1342 (Kan. 1988).