Approved February 27, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey
Chairperson at

10:00 a.m./~~p.m.~~ on February 19, 1985 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, Winter and Yost.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Mike Boyer, Kansas Bureau of Investigation
Ron Smith, Kansas Bar Association
Darrell Kellogg, President, Kansas Bar Association
Kathleen Sebelius, Kansas Trial Lawyers
Lynn Johnson, Kansas City Attorney
Jerry Palmer, Topeka Attorney
Betty Schountz, Registered Nurse
Liz Dudley, Registered Nurse

Mike Boyer, Kansas Bureau of Investigation, presented a request for a committee bill that would broaden the reporting requirements of the law enforcement agencies of the state. Following the explanation, Senator Burke moved to introduce the bill. Senator Langworthy seconded the motion. The motion carried.

Senate Bill 110 - Medical Malpractice procedures.

Ron Smith, Kansas Bar Association, appeared in opposition to the bill. He stated the system in Indiana has a five million dollar fund set up generally like the fund in this state. In 1984 they paid out seventeen million dollars in sixty claims. There are two bills on their legislative agenda dealing strictly with that problem. A copy of his handout is attached (See Attachment I).

Darrell Kellogg, President of the Kansas Bar Association, who specializes in defense of medical malpractice cases, states the lawyers have been movers and shakers in change. If you look back, it has something to do with the public benefit and public need. He stated the Kansas Bar Association opposes such a change that is now in the bill unless there is clear and convincing evidence that there is a need in behalf of the public. In the bill there is a request for arbitrary cap for 15% of attorneys fees; there is request for an arbitrary cap for amount of awards; there is a blanket prohibition against punitive damages; and they have a locality of expert witness rule. The bar opposes the bill unless there is a demonstration of a public need. They support an interim study on this subject and hope this is the direction the bill will take. Mr. Kellogg stated he hoped the committee could come up with why the premium dollars for insurance are high. Is the cause of the problem the tort system?

Kathleen Sebelius, Kansas Trial Lawyers, testified in opposition to the bill. She stated this bill represents a dramatic departure from the current system of tort litigation. The Kansas Legislature is being asked to intervene in the legal system, to change the rules which have governed the trial of law suits and to impose arbitrary limits and restrictions on the rights of the victims of malpractice. A copy of her testimony is attached (See Attachment II).

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./p.m. on February 19, 1985.

Senate Bill 110 continued

Lynn Johnson, Kansas City practicing Attorney, specializing in medical negligence work, testified in opposition to the bill. He stated his comments will be the role of the trial lawyer. What would this bill do to the rights of the people who have come to his office in the past? Everybody was treated equally, that is called the common law. Ninety percent of the people who come to him say, I want to do something so this won't happen to somebody else. Doctors, health care providers and insurance companies have all been treated the same. The collateral source rule has been upheld throughout all of the challenges. They believe there are rules of law that are viable. He stated eighty percent of attorneys do not want to take medical malpractice cases. He turns down over ten cases for everyone he takes. If they decide to take the case, they have to prove the doctor has deviated from appropriate standards of medical care and caused the injury. As trial attorneys they must work even harder because their burden of proof is the same skepticism is higher. Mr. Johnson urged the committee to look at why premiums are high.

Jerry Palmer, Topeka Attorney, representing the citizens committee formed by Commissioner Bell, presented testimony in opposition to the bill. He explained the committee was represented by the insurance industry, medical society, chiropractors, educators and the general public. He noted the insurance companies have not been heard from yet. Mr. Palmer stated the product from the committee will be of use to the Judiciary Committee. He recommended reading the booklet from the insurance commissioner's office. Mr. Palmer stated ten percent of the health care dollar goes to malpractice premiums, and this is an important consideration. We are here dealing with how do we fund the funds for the compensation of victims. Can you consider trip insurance; a ten dollar fee for each patient admitted? This is used as an illustration.

Betty Schountz, Registered Nurse from Wichita, testified in opposition to the bill. She stated any reduction in the rights of the injured victims to bring a law suit, would likewise impair the quality of medicine. A copy of her testimony is attached (See Attachment III).

Liz Dudley, Registered Nurse, testified in opposition to the bill. She stated the real issue is the incidence of malpractice and being held responsible for one's actions. The cause of medical malpractice litigation is medical malpractice. A copy of her testimony is attached (See Attachment IV).

The meeting adjourned.

Copy of the guest list is attached (See Attachment V).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-19-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Mike Slotsky	Lawrence	Intern Sen Parrish
Mary Ann Bumgarner	Lawrence	Gen Burke - intern
Gerald A. [illegible]	Topeka	Ks. Hosp. Assoc.
Wayne [illegible]	Topeka	KHA / KMS
Don Stroce	Topeka	Ks St Bd of Healing Arts
HAROLD RIEHM	TOPEKA	Ks Assn Osteopathic Med
Elizabeth W. Carlson	topeka	Bd of Healing arts
R. C. Tozer MD	Topeka	
Belva Ott	Wichita	Dun & Bradstreet Inc
Jim Murphy	Topeka	Governor's Office
Kathy Wade Apps	Topeka	Ks. Chiropractic Assn.
Imogene Hughes	Topeka	interested
Judy Anderson	Wichita	City of Wichita
BETTY SCHOUNTZ	"	CITIZEN
LIZ Dudley	Augusta	CITIZEN
D. KELLOGG	WICHITA	KBA
CAROL LOEFFLER	WICHITA	KS Med. Soc. Aux.
Paul W. [illegible]	Topeka	Assoc of CMHC of Ks.
Marcia Poell	Topeka	Ks. Bar Assn.
Kevin Willams	Overland Park	Physicians associated
Jim Ballenger	Shawnee Mission	Kansas for Reform
Keith Ballenger M.D.	Shawnee Mission	Kansans for Reform
James Elgavia, MD	Overland Park, KS	Physicians Associated
Wayne Probasco	Topeka	KS Podiatry Assn
Mark V Bennett	Topeka	am Jur Editor

2/19/85 attch. V

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: _____

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
LYNN R JOHNSON	SHAWNEE MISSION, KAN	ATTY / KTLA
BILL SNEED	TOPEKA	K.A.D.C.
LARRY MAGILL	TOPEKA	IIAK
Lee WRIGHT	MISSION	FIG
[illegible]	TOPEKA	ICMS
F. Calvin Bigler, MD	Garden City	K.M.S.
Ron Smith	Topeka	Ks Med Society
Sherman A. Parks, Jr.	Topeka	Ks Chiropractic Assn.
Paul E. Fleener	Manhattan	Kansas Farm Bureau
Ben Bauman	TOPEKA	KTWU
[illegible]	La Cygne Ks	BN
[illegible]	Topeka	[illegible]
Alice Loedtke	Marysville	S & L
Merlin Loedtke		

Attach V

KBA 1985 LEGISLATIVE POLICY

KANSAS BAR ASSOCIATION

FOREWORD

The Kansas Bar Association's Legislative Program is a full-time commitment with staff and facilities at the KBA office in Topeka. Never before has a need been as great for attorneys and their professional associations to maintain a strong presence in the Kansas Legislature. The ranks of lawyer-legislators has declined to 10% of the legislature. Proponents of non-adversarial systems will make strong efforts to adopt their proposals in years to come. Membership has requested that the KBA exert a stronger presence in the Legislature. But members also have a central role to play in this process.

The KBA Policy Positions in this brochure represent a more structured system of disseminating KBA Executive Council policy positions. Some issues require only generalized statements of concern; others a more specific analysis. This brochure contains the product of nearly a year-long process to identify and formulate Kansas Bar Association Legislative Policies.

KBA members may disagree with specific positions taken by your Association. If so, you are encouraged to work with the KBA's internal legislative process and help effect future Association policy on such issues. Of course, KBA legislative positions do not affect your actions nor should they inhibit your personal legislative contacts.

We hope each KBA member will subscribe to the KBA **Legislative Bulletin** for a weekly update on news concerning the practice of law. And look for topical summaries of legislative matters in the monthly KBA **Barletter.** Finally, we ask that you become involved in the legislative process. Failure to become **involved** means the system may **evolve** without input from Kansas lawyers.

Darrell Kellogg, KBA President
Richard C. Hite, Legislative Chairman
Marcia Poell, Executive Director
Ronald D. Smith, Legislative Counsel

FEDERAL ISSUES

ADMINISTRATION OF JUSTICE

Attch. I

Issue

Whether to support increases in the fees to assigned counsel in federal indigent defense cases.

KBA Position

The Kansas Bar Association SUPPORTS increasing the hourly fee for assigned counsel in federal criminal matters to $50 per hour and other provisions that reflect a more realistic approach to compensating counsel for work performed for indigent defendants. To the extent that fiscal factors warrant, the KBA SUPPORTS increasing the hourly fee for assigned counsel beyond $50 per hour.

Rationale

The constitution, through judicial interpretation, is the foundation for the Sixth Amendment Right to Counsel. Yet the Congress has been reluctant to adequately compensate court-appointed counsel aiding indigent defendants charged with federal crimes. The federal government does not pay government contractors at less than standard rates, nor federal consultants, nor federal employees of every type working for the government. The federal government adequately pays the attorneys hired by the United States to represent the interest of the United States in criminal courtrooms, and should therefore provide equity in what it pays private counsel for providing competent legal services to indigent defendants.

2/19/95

CONSTITUTIONAL AMENDMENT

Issue

Whether to submit an Equal Rights Amendment for ratification.

KBA Position

The Kansas Bar Association SUPPORTS the submission of an Equal Rights Amendment to the several states for ratification.

Rationale

While it is true that federal legislation now exists which partially guarantees equality of the sexes, we believe statutory changes might be enacted which can dilute the rights of women in our society.

When the U.S. Constitution was written, our forefathers thought of almost everything in that well reasoned document. It is historically clear, however, that women were not considered equal with men, nor has the constitution always been interpreted to grant equal status to women. The concept of equality of women is so important that the Kansas Bar Association believes it should be included in the United States Constitution.

CRIMINAL PROCEDURE

Issue

Whether to modify current federal insanity defenses.

KBA Position

The Kansas Bar Association SUPPORTS a modern McNaughton Rule of "non responsibility for crime because of mental defect," but OPPOSES the shifting of the burden of persuasion from the prosecutor to the defendant. If such burden shifting is done, the KBA SUPPORTS a "preponderance of the evidence" standard, not "clear and convincing" standards.

Rationale

Kansans can be justly proud that the Commission on Uniform State Laws adopted the basics of Kansas' insanity defense code as its model act. Each state should be left to determine its own insanity defense code and under no circumstance should the Congress consider enacting an insanity code with national application.

Current federal law, enacted in October, 1984, requires that the defendant show by "clear and convincing evidence" that as a result of mental disease or defect, the defendant was unable to appreciate the wrongfulness of the defendant's conduct at the time the offense was committed. This places the burden of proof on the defendant. And, we believe, places it erroneously. A defendant should have to meet only a "preponderance" standard.

JUDICIARY

Issue

Whether in light of *Pulliam v Allen* (U.S. Supreme Court Docket # 82-1432), the statutory grant of judicial immunity should include a prohibition against the award of attorneys fees against judges.

KBA Position

To the extent the absolute grant of immunity contained in the common law has been eroded by the case of *Pulliam v Allen,* the Kansas Bar Association SUPPORTS enactment of legislation by the United States Congress to prohibit awarding of attorneys fees against defendant judges in all civil matters, and SUPPORTS a broad grant of judicial immunity at all levels of the administration of justice.

Rationale

The common law doctrine of judicial immunity has a strong and well-defined history. It grants an absolute privilege and protection to judical officers against civil liability arising out of the discharge of their judicial functions. The threat that damages create to judicial independence and impartiality is contrary to the desired atmosphere needed for the administration of justice. Attorneys fees, if awarded, have the same impact as if damages had been awarded. To have meaning the immunity must be absolute.

Issue

Whether Congress should, by law, abolish federal diversity jurisdiction.

KBA Position

The Kansas Bar Association OPPOSES modification or abolition of diversity jurisdiction in the federal courts of the United States.

Rationale

Federal diversity jurisdiction (27 USCA 1332) is granted pursuant to Article III of the U.S. Constitution. The sole reason for introduction of legislation to modify or abolish federal diversity jurisdiction is to reduce the case load of federal courts. The purpose of the constitutional clause, however, and the federal statute growing therefrom, is to promote justice, regardless of how hard the courts must work or how many new judges must be added. Uniformity of the enforcement of law is the polestar of a democratic system of justice. To expect state courts to uniformly interpret hundreds of laws from other jurisdictions is unreasonable. Proponents of abolishing diversity jurisdiction contend it will save the government $8.8 million, by sending 45,000 cases into state court systems. However, overloading the state court systems will cause an increase of expenses to state taxpayers and require more judges and more local court expenses. Federal judges in Kansas are often better staffed than state judges. To offload some of the federal case load on to state judges will work an inequity on the state court system.

LITIGATION

Issue

Whether federal Products Liability Legislation should be enacted to supercede all state common and statutory products liability laws.

KBA Position

The Kansas Bar Association OPPOSES enactment of federal products liability legislation and specifically OPPOSES legislation such as S. 44 reported May 23, 1984 by the Senate Commerce, Science and Transportation Committee, and the House version, H.R. 2729.

Rationale

We have both state and federal court systems in this country. State legislatures and state court systems are able to represent the needs of their citizens. Tort law development in each state reflects a balance of the conflicting needs of the times with local procedural preferences. Imposing a federal law concerning Products Liability would constitute a unilateral rejection of the legal systems developed in each state. No clear demonstration has been made that the problems in product liability systems of justice in the various states justify federal intervention. Nor has there been a showing that when each state has separate ways and separate case law to handle product liability legislation that such unique systems infringe upon interstate commerce sufficient to justify federal intervention. The needs of Kansas citizens are different than other states, and the state legislature is the appropriate forum if such change is needed.

Issue

Whether to support a federal No-Fault Medical Malpractice litigation system.

KBA Position

The Kansas Bar Association is OPPOSED to legislation similar to H.R. 5400, which purports to create a system of compensation for medical malpractice compensation patterned on the "no-Procedure.

Rationale

While the proposed bill is limited to setting up a no-fault system of compensating individuals injured by medical care providers rendering services under certain federal health care programs (i.e., CHAMPUS, VA Hospital Care, Medicare and Medicaid), implementing such a law would cause a clear and fundamental departure from the common law of tort compensation. One of the main purposes of our system of tort compensation is to deter the activities of a negligent defendant. The concept of indicating to health care providers that there is no such legal concept as "negligence" is to inject into our legal system an unwanted and unwarranted theory. The citizens of this nation are the beneficiaries of the current system of tort compensation for negligence in the medical malpractice arena, and there is no broad move on their part to request this system of compensation, nor are they assured that their compensation will be any fairer or more thorough than the present system.

State legislatures are the appropriate place for determining how best to regulate the tort law systems within their borders, and are better suited to balance conflicting needs and desires than is a unilaterally applied federal law which would have unknown consequences—fiscal and otherwise—on the tort compensation system in Kansas, and medical services.

REGULATION OF LAWYERS

Issue

Whether the Federal Trade Commission should be given authority to regulate lawyers and the practice of law.

KBA Position

Kansas Bar Association OPPOSES the preemption of state regulation of the legal profession by the FTC.

Rationale

Regulation of the professions has traditionally been a function of state government. Absent a showing

of a lack of effectiveness by state governments to prevent unfair or deceptive practices by members of a given profession, and lawyers in particular, state governments should continue to be the forum where such regulation takes place.

Issue

Whether to continue current favorable tax treatment for Prepaid Legal Services.

KBA Position

The Kansas Bar Association SUPPORTS extending provisions of the Internal Revenue Code's (Sect. 120) favorable tax treatment of employer-paid group legal service plans.

Rationale

The growing cost of legal services is an important consumer issue. To the extent that pre-paid legal service plans constitute an optional employee benefit, such plans should be encourated. Tax treatment of pre-paid legal services is the most logical method of encouraging the concept and allowing the average person access to a lawyer at reasonable costs. Current federal tax law has a "sunset" provision on this section. There is no logical reason not to extend such favorable tax treatment of pre-paid legal plans, or make them permanent, especially since Congress makes pre-paid insurance plans readily available for other professions (e.g., group medical health insurance plans).

Issue

Whether to continue federal funding for a Legal Services Corporation, and if so, at what level.

KBA Position

The Kansas Bar Association SUPPORTS the Legal Services Corporation, and funding of this nonprofit corporation at a level which will provide minimum access to the legal system: two attorneys for each 10,000 poor or disadvantaged people.

Rationale

Equal justice under law first requires equal access to the machinery of justice. Poor and disadvantaged people often are denied access to justice solely because of economic circumstances. A person's rights should not depend on whether he or she has

the funds to pay an attorney. Recognizing that this situation exists, and to help remedy this situation, Congress created a nonprofit Legal Services Corporation to provide legal services to the poor. Recent administrative cutbacks in the funding of LSC, we believe, are inconsistent with the demonstrated need.

Congressional dismay with LSC operations apparently stems from instances of the government being the object of LSC lawsuits. This, too, is inconsistent policy. If LSC has found it necessary to sue government agencies on behalf of its clients, such suits may recognize that government agencies have not always acted in accordance with current law.

Funding of a Legal Services Corporation should be equivalent to the minimum need for LSC services.

TAXATION

Issue

Whether to repeal the Generation Skipping Tax.

KBA Position

The Kansas Bar Association SUPPORTS repeal of the generation skipping tax.

Rationale

This form of taxation of estates and income derived from inherited wealth has existed for many years, but is not totally understood by tax practitioners, let alone the general public. The law is replete with unclear terms and, from a tax planning aspect, has become unworkable. The Reagan Administration and Senate-supported Deficit Reduction Act included a provision repealing this generation skipping tax. We support that provision.

STATE ISSUES ADMINISTRATIVE LAW

Issue

Whether to support the concept of judicial review of administrative decisions?

KBA Position

The Kansas Bar Association SUPPORTS the traditional concept of judicial review of administrative decisions.

Rationale

Our system of government requires checks and balances. The Administrative Procedures Act, which is to become effective July 1, 1985, is desirable and received unqualified support from the KBA in 1984. It is also necessary to maintain appropriate checks and balances on the executive by keeping in our law the concept of judicial review of all administrative decisions.

ADMINISTRATION OF JUSTICE

Issue

Whether to implement a statewide district attorneys system.

KBA Position

The Kansas Bar Association SUPPORTS all legislation designed to give local prosecutors the best possible administrative system to protect citizens from criminal action.

Rationale

Strong, consistent prosecution is the centerpiece in a criminal justice system. Kansans have been well served by the county attorney system. However, we believe in this day and age that a statewide district attorney system gives more uniformity to the prosecutorial function and promotes a more proficient and professional approach to the administration of the criminal justice system.

The Bar Association believes that a statewide district

attorney system or alternative legislation designed to make a county prosecutor's office as efficient as possible, is desirable.

Issue

Whether to add judges to the Kansas Court of Appeals.

KBA Position

The Kansas Bar Association SUPPORTS the addition of new judges to the Kansas Court of Appeals.

Rationale

When the court system was unified in 1976 the case load of the Court of Appeals increased dramatically. Currently only 7 judges sit on the Court of Appeals. A recent judical council study, however, establishes clear need that 2 additional judges be named to the Court of Appeals. In our system of government the judiciary has the responsibility to justify expansion of its courts to the other branches of government. But it is in the public interest for the judiciary to be able to work its case load as quickly as possible. This requires more than just adequate salaries, personnel and equipment for existing judges; it may require—and in this instance does require—more positions be named to the Court of Appeals. A larger Court of Appeals should function better than the current system of calling former or retired district judges into the appellate system in order to alleviate backlogs in the docket of the Court of Appeals.

Issue

Whether to support increases in salaries for Kansas district judges.

KBA Position

The Kansas Bar Association SUPPORTS efforts by the Kansas District Judges Association (KDJA) to increase the salaries of district judges to a level equal to nationwide median salary for such judges.

Rationale

An independent and impartial judiciary requires one that is compensated for the sacrifices, fiscal and otherwise, required of a judge. Kansas district judges currently are paid well below the median amounts for judges in similar positions of responsibility in other states. The goal of the

legislature should be to bring Kansas judicial salaries up to the nationwide median as rapidly as possible.

Issue

Whether to maintain a differential between the salaries of district judges and the appellate judiciary.

KBA Position

The Kansas Bar Association SUPPORTS maintaining appropriate salary differentials between district judges and appellate justices.

Rationale

Salaries of Kansas district judges are well below the median amount paid for judges in similar positions of responsibility in other states. In the process of bringing such salaries to the national median, appro-priate salary differentials between district judges and the appellate judiciary should be maintained.

The differentials should be commensurate with differentials in other states. In the past raising the district court salaries has acted to lower the differential between district court salaries and appellate justices. This reduced differential does not take into account the financial sacrifice necessary for newly appointed appellate justices to give up their practice and move to Topeka in order to perform their duties.

Issue

Whether to support increases in the state general fund AID to attorneys who defend indigent defendants.

KBA Position

The Kansas Bar Association SUPPORTS funding legal services aid to indigent defendants commensurate with the level of funding approved by the Congress for attorneys defending federal indigent defendants.

Rationale

The U.S. Constitution provides the foundation for the Sixth Amendment Right to Counsel for those charged with a crime. State governments have been reluctant to adequately compensate attorneys performing their court-imposed duty of

representing the indigent defendant. State government asks no other profession to provide services to indigents charged with crime at a less than cost basis. State government adequately compensates the attorneys it hires to represent the interest of the state in criminal and civil courtrooms. The state has a moral obligation not to shift the duty to pay for representing indigent defendants onto a single profession—lawyers.

CIVIL PROCEDURE

Issue

Whether to change evidentiary rules to allow routine business records to be received into evidence without need of a records custodian called as a witness.

KBA Position

The Kansas Bar Association SUPPORTS changes in the rules of evidence which promote a speedy civil trial without thwarting the fundamental fairness of those proceedings. District Courts should be encouraged to have the parties stipulate at pretrial hearings which records can be admitted into evidence without the need of calling a records custodian.

Rationale

Unless the existence of business records are a point of dispute between the parties at trial, the modern theory of evidence should be to allow counsel for the parties to introduce such records without the necessity of calling the records custodian as a witness. Motions concerning the admissibility of such records should be handled as a pretrial matter and appropriate changes to the rules of evidence should be adopted which promote such fundamental fairness.

Issue

Whether to conform Kansas statutes 60-216 and 60-226 to recent changes in the federal Rules of Civil Procedure.

KBA Position

The Kansas Bar Association SUPPORTS implementing changes in current Kansas civil

procedures statutes relating to pretrial procedure and discovery practices embodied in federal rules 16 and 26.

Rationale

The Kansas code of civil procedure was taken from the federal code of civil procedure. While it is not mandatory that state codes mirror federal procedures, we believe desirable changes in the federal code should be incorporated into the Kansas code of civil procedure.

KBA believes recent amendments to federal rule 16 and 26 do incorporate desirable changes in pretrial procedures and impose reasonable and desirable procedures on discovery techniques where in the past there has been abuse.

Issue

Whether to allow service of process by mail.

KBA Position

The Kansas Bar Association SUPPORTS service of process by mail, similar to the federal rules.

Rationale

Allowing potential defendants in civil litigation to accept and acknowledge service of legal process by mail is a desirable change in state service of process laws.

Acknowledging such service by returning a signature sheet saves the sheriff's office time and costs in making service of process. If the defendant does not acknowledge the service of process, and it becomes necessary for the sheriff to serve in person, the costs of such service should be assessed against the defendant refusing service by mail.

The system is used by federal marshals to serve federal process, and is working well.

Issue

Whether to allow unsworn declarations in lieu of notary signatures in certain public documents.

KBA Position

The Kansas Bar Association SUPPORTS legislation designed to allow unsworn declarations instead of notary signatures on certain documents, and to change the state's perjury statutes to reflect the change.

Rationale

The notary public system grew from a previous time in our history when many persons could not read or write the documents which later became evidence in legal matters. Notary signatures helped formalize the process by which the documents were created.

The more modern method of acknowledgement is the unsworn declaration, where a person swears under penalty of perjury that his signature is genuine on the document. This concept is now recognized in the Federal Rules, and a desirable change in Kansas law is recommended.

There are exceptions to the KBA's support, however. The KBA's support extends to those declarations which are **not** (1) oaths of office, (2) oaths required to be taken before a specified official other than a notary, and (3) oaths of testators or witnesses as required for wills, codicils, revocations of wills and codicils, and republication of wills and codicils.

CRIMINAL LAW

Issue

Whether to modify current Kansas laws on insanity defenses.

KBA Position

The Kansas Bar Association SUPPORTS current Kansas law with regard to methods to determine whether a criminal defendant was insane at the time of the commission of the act, and OPPOSES any attempt to amend our law to a "guilty but mentally ill" statute, or shift the burden of proof of insanity from the prosecution to the defendant.

Rationale

Kansas lawmakers should be proud that the Commission on Uniform Laws, when looking at the insanity defense code, choose to recommend a model law similar to the law already adopted by Kansas courts and the Kansas legislature. The KBA recognizes that in the criminal law, a person is either "guilty" or "not guilty," and that to have an in-between finding of "guilty but mentally ill" is a concept at odds with the moral fabric of the law.

With the test of insanity based upon a modern McNaughton Rule or cognizance rule, and not the ALI or volitional rule, the KBA believes the burden of proof of sanity at the time of the commission of the crime, when the issue is raised as a defense, is clearly on, and should remain upon, the prosecution.

CRIMINAL PROCEDURE

Issue

Whether to allow discovery depositions in criminal matters.

KBA Position

The Kansas Bar Association SUPPORTS certain limited uses of discovery depositions in criminal matters.

Rationale

Discovery depositions are used in criminal matters in other states. In Kansas, historically, they have not been used because the transcript of the pretrial hearing has been used for such purposes. If that is the purpose for the pretrial hearing, the use of regulated discovery depositions can speed up rather than hinder the administration of criminal justice.

In the legislation we support, a discovery deposition can be used only when (1) the defendant waives his right to a pretrial hearing, or (2) if the deposition is to be used solely for impeaching or contradiction of the witness at a subsequent trial.

JUDICIARY

Issue

Whether to change the form of questions on ballots pertaining to changes from the merit selection of judges.

KBA Position

The Kansas Bar Association SUPPORTS legislation designed to make the ballot question concerning merit or partisan selection of judges more understandable.

Rationale

The provisions of KSA 20-2901 relating to the language on ballots to change from merit to partisan selection of judges is hard to understand.

The language of the statute should be changed to state simply:

> "Shall judges of the District court in this district continue to be appointed by the governor upon nomination by a District Nominating Commission and subject to a retention in office by a vote of the voters? (yes) (no)."

Issue

Whether to support the merit selection of judges.

KBA Position

The Kansas Bar Association, although aware that we have a dual system of electing or appointing judges in Kansas SUPPORTS the merit selection of judges.

Rationale

An independent, impartial and qualified judiciary is more important to a democracy than one that is popularly elected.

Public officials elected by constituents are expected to be "representative" of the wishes and desires of the people who elect them. Such expectations are inconsistent with an independent and impartial judiciary. Judges owe first allegiance to the constitution, statutes enacted by the legislature, and the law. The Kansas Bar Association realizes that judges in Kansas, as in other states, are sometimes elected. Other judges in Kansas are appointed on a merit selection basis. **On balance,** we believe the merit selection of judges based on qualifications for office rather than the political or fiscal abilities to win partisan elections, is the more desirable selection system for judges.

LAW-RELATED EDUCATION

Issue

Whether to support efforts by the judiciary and the bar to educate children as to the importance of the law, the legal profession and the judicial system.

KBA Position

The Kansas Bar Association SUPPORTS law-related education efforts and funding.

Rationale

Before the Bar can expect better understanding of the legal profession and its role in society, teaching the importance of our legal system must become part of our school system. Programs to teach such information are called "Law Related Education."

The State Board of Education and the Kansas Supreme Court have embarked on a joint project to provide LRE efforts in public schools. The Kansas Bar Association supports such efforts.

LITIGATION

Issue

Whether to increase PIP benefits and tort liability thresholds under current Kansas no-fault laws.

KBA Position

The Kansas Bar Association SUPPORTS adjusting PIP benefits and medical expense thresholds to reflect the impact of inflation since enactment of the original no-fault law in 1974. KBA OPPOSES arbitrary increases in the tort threshold which change the delicate legislative compromise reached in 1974. KBA further opposes modifications to the threshold to implement "verbal thresholds."

Rationale

The original no-fault concept in 1974 was a compromise of numerous viewpoints. Experience under no-fault since that time demonstrates that no-fault has accomplished one of the principal

purposes, that of getting needed personal injury benefits to injured policy holders without the requirements of what many had thought had become nuisance lawsuits.

No one doubts that inflation has eroded the compromise, which was designed to exclude approximately 70% of small auto negligence cases from the tort liability system. To go beyond an inflationary adjustment without appropriate data and justification from insurance companies, should be insufficient to change such public policy.

To the extent justified, KBA would support increasing the tort liability threshold commensurate with need, but not to exceed $1,000, which we believe would adequately speak to inflationary concerns.

Issue

Whether to enact an Unfair Claims Settlement Practices Act.

KBA Position

The Kansas Bar Association OPPOSES legislation of the type embodied in 1983 Senate Bill 291.

Rationale

KSA 40-2404 **currently** defines what constitutes unfair methods of competition and unfair or deceptive acts and practices within the insurance industry. The Insurance Commissioner has the authority to enforce provisions of that statute.

As originally conceived, an Unfair Claims Settlement Practices Act (UCSPA) would allow **individuals** to bring private lawsuits against insurance companies if the company is engaging in one of the prohibited practices in KSA 40-2404. In the suggested legislation, individuals bringing suit would not be required to establish that the practices of the insurance company constitute a "general business practice." All that is required is an isolated unfair practice. If successful, plaintiffs would be allowed reasonable attorneys fees, settlement of the claim and other damages.

Individuals can now maintain such actions, but they must first show a "pattern of conduct," not just isolated incidences. Attorneys fees are not currently allowed.

The Kansas Bar Association believes that granting a private right of action plus attorneys fees is too harsh a remedy. The regulation of unfair claims practices by insurance companies is best left to the commissioner.

Issue

Whether to support the concept of dram shop liability of tavern owners.

KBA Position

The Kansas Bar Association SUPPORTS such liability being imposed upon tavern owners and operators for the conduct of their patrons if their liability is measured as part of the comparative negligence theory.

Rationale

The liability of tavern owners for the conduct of their patrons—and even individuals who serve guests alcoholic beverages in their home—seems to be an emerging issue in other states.

KBA believes tavern owners should be liable for the subsequent tortious conduct of their patrons, but **only** if the liability of the tavern owner or operator is measured under the rules of comparative negligence.

Issue

Whether the concept known as "prejudgement interest" is a desirable remedy in civil litigation.

KBA Position

The Kansas Bar Association OPPOSES the original draft of the concept known as prejudgement interest embodied in 1984 Senate Bill 800 and similar legislation. The KBA SUPPORTS such legislation if the effect of the bill, taken as a whole, encourages pretrial settlement by imposing penalties on any party unwilling to make progress towards a meaningful settlement.

Rationale

Settlement of legal disputes is preferred in the law and should be statutorally encouraged. However, it takes all parties with cooperative counsel to effect a meaningful settlement. The concept of prejudgement interest as currently drafted constitutes a penalty only on the defendant. The KBA does not support legislation which gives one

side an upper negotiating hand in the process of finding a satisfactory settlement. Such legislation would not be in the interest of justice.

If such incentive legislation is adopted, both parties must be given adequate time for discovery before such legislation should allow settlement offers to be effective. A balanced approach to the administration of justice is required with such legislation.

Issue

Whether to impose limits on the percentages attorneys may contract to charge from clients in civil matters based on contingent fee contracts.

KBA Position

The Kansas Bar Association OPPOSES legislative regulation of contingent fee contracts in legal matters. If such regulation is needed, the KBA SUPPORTS a Supreme Court rule which sets guidelines for trial courts to review the attorney fee contracts of all parties, and make determinations of reasonableness based on the difficulties and circumstances of each individual case.

Rationale

The attorney-client relationship is intensely personal. Contingent fee contracts are designed primarily to insure that everyone has access to our judicial system for a determination of their rights. Contractual arrangements between attorneys and clients should not be abrogated by statute without sound, fundamental reasons of major public policy significance and which has a reciprocal benefit for all persons.

Late in 1984, a special subcommittee of the Litigation Section of the Kansas Bar Association studied the contingent fee contract system of Kansas. The committee had benefit of numerous law review articles, court rules and cases, as well as a 50-state survey of how the several states regulate or abstain from regulation of such contracts. While the Kansas Disciplinary Administrator is concerned about such contracts and has received some verbal complaints, it should be noted that no one complaining of contingent fee problems has filed a formal complaint with the Disciplinary Administrator.

All members of the special study committee were of the opinion that contingent fee contracts provide a positive service to the public in that they are the only way many deserving people can afford a judicial determination of their rights. The committee does acknowledge there is a general feeling by the public that lawyers benefit too much under contingent fee contracts, or that such contracts somehow fuel our litigous nature. Although these perceptions are unfounded, the appearance of contingent fee abuse can be eliminated through continuing legal education, and, if necessary, court rules.

A sizable majority of states do not regulate contingent fee contracts. However, a dozen states, including Kansas (KSA 7-121b) require court approval of fees in medical malpractice cases. There is little question that the Kansas Supreme Court has inherent powers to regulate contingent fee contracts. The canons of ethics and corresponding Disciplinary rules make it clear that no attorney may fall below the prescribed level of conduct with regard to such fees without making himself subject to disciplinary action [KSA 7-125. See also DR 2-106(B)]. Punitive regulation of the contingent fee system may act to preclude otherwise meritorious claims from the judicial system, which would disenfranchise a large sector of our citizens from a dispute resolution system. The negative social implications from such exclusions would be great. Regulation of such contracts is therefore best left with the judicial branch of government.

PROBATE

Issue

Whether Kansas courts should admit wills of Kansas residents to probate in Kansas when those wills do not qualify for admission in Kansas but have been admitted to probate in other states.

KBA Position

The Kansas Bar Association SUPPORTS legislation prohibiting residents of Kansas and their potential devisees and legatees from "forum-shopping" in other states for laws which admit Kansas resident documents for probate when under Kansas laws such documents would not be allowed probate.

Rationale

K.S.A. 59-2229 and 59-2230 have been amended to appear to allow forum shopping by potential persons claiming to be devisees or legatees under the foreign document, in order to get the document into probate in Kansas.
This interpretation allows the heirs of residents of Kansas, or potential devisees or legatees to take documents which do not qualify as wills under Kansas law to another state with more liberal laws for the admission of documents to probate, then come back to Kansas and probate their "foreign will." The intent of the non-resident statute in our probate code is to allow documents **made outside Kansas** by non-resident decedents which purport to bequeath real or personal property in Kansas to probate in Kansas. The current interpretation is contrary to the original intent of the non-resident statute.

KBA suggests that the phrase "residents or" be deleted wherever it appears in K.S.A. 59-2229 and 59-2230. Further, KBA SUPPORTS amending K.S.A. 59-2224 to allow executors and administrators to prosecute or oppose the probate of any will. Currently, only heirs, devisees or legatees have the power to prosecute or oppose the probate of a will.

Issue

Whether to make certain changes in the Informal Administration of Estates law.

KBA Position

The Kansas Bar Association SUPPORTS reduction of non-claim periods to four months and the period an estate is open under this act to six months.

Rationale

The purpose of the Informal Administration of Estates act was to speed smaller estates through the probate process. Reducing the non-claim period to four months and reducing to six months the period a simple estate is open are amendments which further the original intent of this act.

REGULATION OF ATTORNEYS

Issue

Whether to implement a statewide sales tax on attorneys fees.

KBA Position

The Kansas Bar Association OPPOSES the concept of sales taxes on professional fees and services.

Rationale

Sales taxes historically have been imposed upon the sale of goods, not on fees for services or professional services. No reason has been advanced to single out a single service industry. If public policy deems it desirable that sales taxes be imposed upon fees for services and professional services the KBA believes it should be imposed on **all** professions allowed to be incorporated as professional associations pursuant to KSA 17-2707 (b), not just attorneys. In addition, it should be imposed upon all businesses which charge for services performed such as barbers, beauty shop operators, etc., who do not now collect a sales tax.

TORT REFORM

Issue

Whether to support various proposals which attempt to "reform" the tort compensation system in Kansas.

KBA Position

The Kansas Bar Association OPPOSES any changes in the existing adversarial tort law system, whether proposed by the Kansas Medical Society or others, including but not limited to changes in (1) rules governing residency of expert medical witnesses, (2) creation of dollar caps on nonpecuniary losses in personal injury actions, (3) changes in the collateral source rule, (4) suggestions for overall limits on awards in certain personal injury actions, (5) regulation of contingent fee contracts, and (6) changes in methods of pleading, proving and awarding punitive damages **unless** proponents of such change can demonstrate a clear and convincing public need for such change, and such change can demonstrate a clearly defined benefit to the public.

Rationale

Fault-based tort compensation systems grew from our common law experiences, with some statutory modifications. While the antiquity of a law does not guarantee its reasonableness, it does insure that reasonable minds have discussed the theories and the law.

The purpose of our tort compensation system is to create and maintain a system of "individualized justice" which accomplishes two basic goals: (1) having the wrongdoer compensate the victim of such wrongful acts so that society in general will not have to make such compensation, and (2) deter the defendant from repeating such conduct that juries have determined is intolerable.

While modifications to a pure tort compensation system have been made in the past, none have evolved without strong public involvement, and a well-studied look for alternatives. The public must derive some basic and substantial benefit from any tort law change before such change is warranted. Changes most often involve tradeoffs that the public must recognize and understand before such change will have lasting public acceptance.

While the Kansas Bar Association is not unalterably opposed to changes in the tort compensation system, we believe it should not happen without an exhaustive legislative process of review which hears all sides and gathers the evidence needed to resolve these complex issues.

TRENDS IN LAW

Issue

Whether new causes of action centered around medical technological changes should be statutorally abolished.

KBA Position

The Kansas Bar Association OPPOSES legislation designed to prohibit certain causes of action, such as wrongful life, wrongful birth, etc.

Rationale

Statutory prohibitions against certain new causes of action, without a strong showing that such causes of action are detrimental to society as a whole, are inappropriate. The court system is fully capable of separating meritorious lawsuits and legal issues from those of questionable origin. Judicially prohibitive statutes, in general, are often too broadly based to be fair. The court system is designed to litigate individual issues of merit and broad-based exclusions by statute are inappropriate.

UNIFORM LAWS

Issue

Whether to adopt the Uniform Transfers to Minors Act.

KBA Position

The Kansas Bar Association SUPPORTS adoption of the UTMA.

Rationale

The Uniform Transfers to Minors Act is a more modern approach to codification of the rules and procedures encompassed in the Uniform Gifts to Minors Act, which has been adopted in Kansas and other states. The Bar Association prefers the broader version contained in the Uniform Transfers to Minors Act.

Issue

Whether to support changes in Article VIII of the Uniform Commercial code relating to investment securities.

KBA Position

The Kansas Bar Association SUPPORTS recommended 1977 amendments by the Uniform Laws Commission regulating Article VIII of the Uniform Commercial Code relating to investment securities.

Rationale

The world of investments and investment banking is rapidly changing. The original Uniform Commercial Code is nearly a quarter of a century old. Changes in the types of available investments and the expanded regulation of practices of investment companies and financial institutions establishes a need for modern changes in the uniform law.

INDEX TO ISSUES

TESTIMONY
IN OPPOSITION TO

S.B. 110

ON
MEDICAL MALPRACTICE

Kathleen Gilligan Sebelius
Executive Director
Kansas Trial Lawyers Association
February 19, 1985

2/19/85
Attch. II

S.B. 110 introduced by the Senate Judiciary Committee, at the request of the Kansas Medical Society, represents a dramatic departure from the current system of tort litigation. The Kansas Legislature is being asked to intervene in the legal system, to change the rules which have governed the trial of law suits and to impose arbitrary limits and restrictions on the rights of the victims of malpractice. Before agreeing to act on all or even parts of this radical legislation, it is crucial to examine the current situation, to determine whether or not a problem exists and then to design a solution specific to the problem. It is essential to ask at every step, who will be hurt by a change in the current status and who stands to benefit.

Is there a medical malpractice crisis in Kansas and throughout the country? For what we are doing in Kansas in examing S.B. 110 is being mirrored in at least 20 states in the nation. In the mid-70's some states even passed some of the features which are being promoted in Kansas. Many states are engaged in intensive studies of this issue.

During the mid-70's, the last wave of medical malpractice crisis, insurance companies declared that they would no longer write malpractice legislation. Doctors throughout the country were in a panic. In some states there were strikes and walkouts. Legislatures in some areas responded with massive restrictions of victims' rights, similar to provisions in S.B.

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110. Other states, like Kansas, developed legislation to sol... the "crisis of availability".

The Health Care Stabilization Fund was created as a special insurance company to write insurance for Kansas health care providers and to insulate Kansans from the national experience.

Before delving further into the insurance situation, it should be recognized that one decade later the crisis is different. No one testified yesterday that liability insurance was not available. It is available in Kansas. In fact, more companies are writing malpractice insurance than ever before.

The crisis you are being asked to address is affordability. Is the cost of liability insurance too expensive? What are those costs paying for? Are there ways of lowering those costs?

At the outset the question must be asked: "Does malpractice exist in the medical community?" And the answer is a resounding and unfortunate yes.

Every national study including the Rand Corporation Study, major closed claims studies in Florida and California, and even studies by the American Medical Association indicate that even though malpractice claims are rising, only a small fraction of the incidents result in a claim.

A joint study conducted by the California Medical Association and California Hospital Association found that approximately 1 in 20 hospital admissions result in a

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disability caused by health care management. The report concludes that "Problems of performance, rather than purely judgmental issues, were the overwhelming mechanism."

According to the Kansas Hospital Association, in 1983 there were 435,000 hospital admissions, 225,000 surgical procedures performed and 39,400 births. Using the California estimates, there were an estimated 21,750 injuries out of the 435,000 hospital admissions, yet during 1983 there was a total of 156 claims for malpractice in Kansas.

The medical malpractice system is designed to perform two functions: the deterrrence of medical negligence and the compensation of victims. The liabilty rule transfers from the patient to the physician the expected costs of injury which the patient would be willing to pay to prevent.

Patricia Danzon, an economist formerly with the Rand Corporation, now with Duke University, has done most extensive work in the country studying this issue. In recent testimony to Congress she stated:

> "The most extreme criticisms of the malpractice system are unfounded. Far from being excessive, the number of claims falls short of the number of incidents of malpractice. This disposition process is far from random. Court awards are strongly influenced by the economic loss of the plaintiff."

Then if indeed malpractice exists, and if the victims have a right to be compensated, are the costs too high?

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In Kansas and nationally, malpractice premiums comprise less than 1% of the total health care dollar. (See Insurance Data handout). According to the American Medical Association this 1% ratio has been in place since 1968. This means that even if this entire area of law was abolished and no health care provider ever had to purchase insurance, and returned every dollar to the citizens of Kansas, their health care bill would be reduced by less than 1%.

The term "defensive medicine" has now replaced the discussion about rising health care costs due to malpractice. We would heartily concur with the conclusions of the medical profession on this topic.

The American Medical Association 1984 "Study of Professional Liability Problems" said the following about defensive medicine:

> "If in fact 30% of health care costs are attributable to 'defensive medicine', the Committee on Professional Liability would point out that it would be a gross exaggeration to conclude that all of these costs are wasteful. The best defensive medicine, of course, is simply good medical practice and medical care which is defensible! If 'defensive medicine' means that good medicine is being practiced so that the physician can defend himself successfully if a bad result occurs, then the public would be in favor of 'defensive medicine'. Claims experience would show, however, that all of the diagnostic tests in the world are insufficient to provide a successful defense for an unskilled or unthinking physician. Also, the vast majority of diagnostic testing that might be classified as 'defensive medicine' by

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hindsight proves to be clinically appropriate in the patient's interests and in the defense of claims."

I would also direct the Committee's attention to Attachment D, in the Kansas Medical Society's testimony of yesterday, which is a survey comparing medical practice in 1974 and 1984. Again, this seems to substantiate the statement of the American Medical Association.

We would argue that if "defensive medicine" means that Kansas doctors are utilizing existing technology and specialty information available to them using more care in writing records, and seeking second opinions more frequently, then patients in Kansas are the ultimate beneficiaries. They are receiving better medical care. We applaud these efforts.

Are individual doctors paying too much for insurance? According to data which we have compiled, Kansas doctors will pay approximately 4% of their "after expenses, before taxes income" in malpractice insurance in 1985. In 1979, Kansas doctors paid approximately 4% of income for liability insurance. Is this a major crisis?

The aggregate figures tend to hide some of the specific dilemmas referred to in yesterday's testimony: the plight of the rural doctor in Kansas, the high premiums paid by high risk specialist, particularly those doctors who deliver babies.

What have these premium dollars been used for? Why have the costs risen so dramatically?

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In the October 1984 Report on the Health Care Stabilization Fund, prepared by Insurance Commissioner Fletcher Bell, the Legislature was given some cumulative data. (See Table 2 handout). From July 1, 1976 through December 31, 1983, the Fund collected $14.5 million from health care providers in Kansas. Of that amount $11 million or 76% was paid to claimants and $2.8 million went to defense and administration expenses.

Victims used their awards and settlements to pay bills. Some money went to the lawyers who helped to fight for the compensation dollars; other money was returned to the health community to pay medical bills. The vast majority of claims in Kansas are small; since 1976, 77% were settled for less than $10,000.

If there are relatively few claims, and according to Kansas Medical Society statistics, the vast majority of Kansas doctors have never been sued or sued only once, and most claims are relatively small, why have the insurance premiums risen so dramatically? We must look to the insurance industry and ask for some accountability.

First, we need a brief review of the Kansas medical laibility insurance situation. The Legislature created the Health Care Stabilization Fund in 1976, to provide all coverage over $100,000 to health care providers in Kansas. Doctors were

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required to purchase $100,000 in primary coverage on the open market. A "surcharge", a percentage of the primary coverage, was set each year and paid into the Fund for excess coverage.

The handout in the packets illustrates one of the serious problems. This report from the Insurance Commissioner shows that although malpractice claims were increasing during the early 80's, and major sums of money were being paid to victims, health care providers in Kansas paid no surcharge for 3 years (FY 81, FY 82, FY 83). Indeed the surcharge in 1980 was only 15%. It is not difficult to see that the Fund was in serious financial difficulty.

It is interesting that none of the proponents of S.B. 110 reminded you that last year the entire medical community and the Insurance Commissioner's Office came to the Legislature to urge the passage of S.B. 507, which was designed to make the Fund actuarially sound, to pay off past debts and to stabilize the medical liability insurance situation. The Kansas Medical Society said in testimony supporting S.B. 507 that "Kansas doctors know that the bill (S.B. 507) would raise premiums 50% to 100%" and while they were not thrilled with the situation, they wholeheartedly endorsed the bill.

S.B. 507 did the following things:

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- raised primary coverage for providers from $100,000 to $200,000;
- capped the liability of the Fund at $3,000,000.
- allowed an 80% surcharge on providers.

The actuarial studies indicated that S.B. 507 was essential for the Fund, and predicted that the rates could be lowered as soon as the past debt was paid.

You are being urged to pass major restrictions of victims' rights in S.B. 110 and in a large part the impetus comes not from the legal community, but from the legislation which was written by the insurance and medical industries last year.

While we do not have nearly enough time to explore the insurance data very thoroughly, I would urge the Legislature to be cautious of this crisis, just as you were in products liability.

Included in your packet is some insurance data. The source is Bests "Casualty Loss Reserve Development Report", 1975-1983. The front sheet summarizes data from the top 75 companies writing malpractice insurance. As you can see, investment income is $300 million more than losses paid for those years.

Before the Committee is unduly alarmed by the "Incurred Losses" column, it is important to explain insurance jargon.

"IBNR's" or "incurred but not reported losses" are accounting figures used by insurance companies. The money in this category is still in the company; in fact, it is unlikely that some of those dollars will ever be paid in claims. This is the "guesstimate" of future liability, set aside when a claim is made. Companies write these as actual losses for tax purposes, but only the claims paid are actual dollars out of the company.

Since less than half the claims are settled with indemnity, or any payment to the plaintiff, it is clear that this column, while dramatic, is not very accurate. "Losses paid" is money actually used to settle claims. So nationally, malpractice underwriters have earned $7.3 billion in premiums and $1.7 billion in investment income, and paid out only $1.5 billion in claims.

The next two sheets show the data for Medical Protective and St. Paul, the two major malpractice carriers in Kansas. Again, losses paid are a fraction of the earned premiums. Then why are doctors paying such high rates for insurance?

We would like to work with the medical community to investigate this problem. The data is sparse for Kansas, but it is incumbent on the Legislature to ask for data to substantiate the rates paid by Kansas physicians.

In reality, malpractice insurance in Kansas has a cap, a specific ceiling. It has since the creation of the Fund. Primary coverage insurers know that their company has a maximum liability of $200,000 per claim. (It was $100,000 until July 1, 1984). Why with such predictable and certain laibility limits are rates continuing to rise?

What about the rural doctors? While we have been unable to get specific data to substantiate this contention, KTLA members maintain that rural doctors are sued far less frequently, and that the awards are substantially lower in rural areas. Why don't their insurance rates reflect that experience? While we are sympathetic to the plight outlined by Dr. Linda Warren, her case is a good example of a situation gone awry. Why should Doctor Warren be paying such high rates, in a rural area, with 14 years experience and an unblemished record?

Some of these answers may be forthcoming from the Kansas Citizens' Committee, a special task froce convened by Insurance Commissioner Fletcher Bell to study the malpractice situation. The Committee consists of representatives from the medical community, legal community, teachers, labor, insurance agents, and senior citizens. They have alrady scheduled at least 17 hours of meetings and hearings over the next five months. We

would urge the Senate Judiciary Committee to take full advantage of this opportunity to gather some in-depth data before making decisions on new legislation.

While this limited time frame does not provide a real opportunity to explain the features of S.B. 110, or to allow the Committee to hear from some of the Kansas citizens who would be affected by this legislation, it is important to understand the full impact of this proposal.

While we support the evidence that there are relatively few law suits, we also argue that there are few multi-million dollar awards. These awards are not invented by lawyers, but are dollars decided upon by juries to compensate the staggering losses suffered by malpractice victims. The awards merely reflect the staggering costs of health care, of taking care of major injuries over a long period of time.

S.B. 110 chooses as its primary target those victims who have suffered most at the hands of negligent doctors; those Kansans who have sustained the most serious injuries.

Some of the major features of the bill are: LIMITATIONS ON DAMAGES.

- elimination of punitive damages: regardless of the facts, health care providers are not liable for gross and wanton conduct.

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- $100,000 limit on pain and suffering: This arbitrary figure falls heavily on non-wage earners. It reduces the value of life to $100,000 and assumes that all cases are similar. Are the loss of legs the same for a 10 year-old boy and a 70 year-old man? Does a significant facial scar have the same effect on a 12 year-old girl and a 60 year-old woman?

- $500,000 total limit on award. This amount is grossly unfair in many cases. It is supposed to pay for medical bills, pain and suffering and loss of wages. If a 35 year-old professional making $40,000 a year was rendered an invalid, he could collect a total of $500,000. If that same person worked to age 65 and received no raise or increases, a total salary would be $1.2 million.

- $3.2 "safety value". It is ironic that only medical bills are to be paid to the full extent. Provisions in this section virtually ensure continued litigation and potential harrassment of the victim during the remainder of a lifetime.

This feature of a cap on damages has been found unconstitutional by 5 State Supreme Courts. Although glowing reports were given about the insurance climate in Nebraska and Indiana, my information is that the Indiana patients fund is

bankrupt, Nebraska has liability problems and malpractice rates and health care costs have continued to rise in both states.

- collateral source rule: this is a significant shift in the law. Currently jurors are not told how much insurance is available for the doctor or health care provider, nor how much insurance coverage the victim has. This shift tends to penalize the person who has purchased private insurance to the benefit of the wrongdoer.

- limitations on contingency fees: The contingency fee is the key to the courthouse. It allows victims with no assets to hire the best possible attorney. Clients are given the choice between an hourly rate and contingency fee. The lawyer gets paid only if additional funds are available from an award or settlement. All studies indicate that the contingency fee system is one of the most effective screening tools, because it provides an economic disincentive to take questionable cases.

- change in expert witness: Witnesses would be limited to Kansas or a contiguous state. This can only be designed to exert peer pressure and discourage medical testimony.

These are only some of the features of the bill. Again, we would urge the Judiciary Committee to analyze carefully who will be harmed by the passage of S.B. 110. Future victims of

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malpractice, especially those with major injuries, bear the brunt of these cost-saving measures.

We would urge the Committee to proceed with caution. There will be a substantial amount of information generated by the Citizens Committee and by similar studies around the country. We would urge that in your haste to solve a problem, to avoid creating an even more drastic situation for the citizens of Kansas.

Thank you for this opportunity to testify on S.B. 110. The members of the Kansas Trial Lawyers Association would like to work with the medical community and the Legislature to resolve the issues.

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Dr. H. Stephen Gallager, a professor of pathology at the M.D. Anderson Hospital and Tumor Institute in Houston, which is noted for cancer treatment. He said, however, that he doesn't believe anybody knows at what point the disease turns into cancer, so he could never recommend preventive surgery.

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For some of Dr. Sifers' patients, problems did not begin until months after they left the operating room. For others, they began before Dr. Sifers closed the incision.

The most common complaint was of a post-operative infection that would not heal. Most of the women told in their lawsuits of infections that sometimes lingered for more than a year, turned their skin black and produced open sores.

Other complaints later surfaced in lawsuits:

- Breasts that were too hard, sometimes like softballs.
- Implants that protruded through the skin and had to be surgically replaced.
- The discovery that up to half of the breast tissue was left after the mastectomy even though Dr. Sifers concedes that common medical procedure for mastectomy calls for the removal of at least 90 percent.
- Breast implants that were too large. In one case, according to attorneys, a patient's bra size increassed from a 32A to a 32D after her surgery.

Sometimes one and two subsequent surgeries plus dozens of office visits were needed to correct the problems.

"He would sew me up and it would just come apart again," recalled Aleta Witt, a Merriam woman who for nine months watched holes the size of nickles repeatedly tear through the infected skin of her right breast. "I was just about out of my mind."

Dr. Sifers' testimony shows he was having his own private doubts. In Mrs. Witt's case, he testified that he believed her condition was "horrendous."

Dr. Sifers' experience with implant protrusion—40 out of 222—far exceeds the less than 1 percent rate that usually is expected, said Dr. Carroll L. Zahorsky, a plastic surgeon who did follow-up surgery on four of the women and testified for two of them.

Dr. Sifers said the problem might be the brand of implants he used.

He also claimed the implants were not too large, but he testified that he never made a precise measurement of the excised breast tissue before selecting an implant. At any rate, he said he didn't make his patients' breasts smaller.

"Everybody wants, the patients always want to be maybe a tad larger," he testified.

Once complications appeared, Dr. Sifers testified, he sought help from other doctors. Among those was his son, Dr. Tim Sifers, who was in practice with him.

A notation made by Dr. Tim Sifers on Mrs. McGuire's medical chart read: "Draining again. Someday Daddy is going to learn how to fix this, we hope."

That notation was followed by one from his father saying, "No one else knows how to fix this either."

Dr. Sifers defended his surgery record in a deposition.

"I don't believe there is a surgeon in Kansas who has lost only one set of nipples in 200 operations," he testified. "It's the best record in Kansas City."

Dr. Zahorsky said in an interview that he found Dr. Sifers' procedures to be incomplete.

"A major problem with what Dr. Sifers did was that the surgery was not completed," Dr. Zahorsky said. "We found 30 to 50 percent of the breast tissue had not been removed when we reoperated on them."

He said general surgeons like Dr. Sifers take risks when they work in areas of medicine in which they are not specialists.

Even Dr. Sifers' friend and colleague, Dr. Young, agreed outside help should have been sought.

"We all have complications, but those should be limited to a certain percentage," Dr. Young said. "I think he didn't know how to handle complications from the implant."

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After the Carol McGuire trial surgical committees at Bethany Hospital and Shawnee Mission Medical Center began to review Dr. Sifers' cases. Bethany suspended his privilege to perform the breast procedure. He quit practicing at Shawnee Mission altogether when he and hospital officials could not agree on his standing.

Donald Strole, attorney for the Kansas Board of Healing Arts, said that after learning of the suspensions the board interviewed Dr. Sifers. A pathologist is reviewing some of the cases to see if surgery was justified.

"The big question is whether this kind of preventive surgery should be done at all," Mr. Strole said. "My personal feeling is that he probably did too many surgeries on too many women that were unjustified."

Even if the board decides some of the mastectomies were unnecessary, it probably would take no action other than to get a formal agreement with Dr. Sifers that he would not do the procedure any longer, Mr. Strole said.

Dr. Sifers has, in part, already made that vow.

He testified in one deposition that this phase of his medical career is behind him. His breast series is complete.

"I have done the work and it's finished," Dr. Sifers said.

stricted by Bethany Medical Center from performing mastectomies—the medical term for removal of breast tissue—and has stopped practicing altogether at Shawnee Mission Medical Center, the hospital where he performed most of the mastectomies.

And the Kansas Board of Healing Arts, concerned about the lawsuits, sent Dr. Sifers for neurological and emotional analysis at the Mayo Clinic in the fall of 1983. He received a clean bill of health.

Some say Dr. Sifers' problems may have been as simple as pride—an inability to ask for help from medical specialists when he needed it.

"He was zealous in his fight against breast cancer," says Dr. John Young, a friend of Dr. Sifers and a surgeon himself. "He is a man who had practiced 30 years and seen many, many women die from breast cancer . . . I think he was sincere and felt this was a way to prevent these women from going through a painful death.

"The problem was not in the way he had done the operations, only in the way he had taken care of the complications . . . it was pride I think that kept him from seeking help."

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Even early in his career, Dr. Sifers sought to realize his vision of ridding women of breast cancer.

Two women in his own family suffered from the disease, he has testified. He knew the odds: One of 11 women is stricken with the disease and about 38,000 die from it every year.

In 1947 he was graduated from the University of Kansas Medical School and did his residency at the Cleveland Clinic, a nationally known hospital in Ohio.

In 1955, Dr. Sifers returned to Kansas—his childhood home—to practice surgery and teach at KU Medical Center. He eventually would have offices both in Merriam and Kansas City, Kan.

He served in top positions of area surgical organizations and was chief of surgery and chief of staff at Bethany Medical Center in Kansas City, Kan.

He also became chairman of the Kansas City Blue Shield board of directors and a member of the national Blue Shield board, where he worked on limiting medical costs.

From his early work at the Cleveland Clinic, he knew that despite the widely different surgical methods of treating breast cancer, none was better at saving lives. At that time options were primarily limited to either modified radical mastectomies, the removal of almost all breast tissue, or to radical mastectomies, removal of all breast tissue and some chest muscle.

The survival rate is about 70 percent—a rate that has not changed in recent history, according to the American Cancer Society.

"Women were dying at the same rate in 1975 as they were 100 years ago," Dr. Sifers has testified. "We should be looking for marks to do earlier surgery . . .to save women from this since it's a primary cause of death in this nation."

From that sprang his vision—a series of mastectomies that he hoped would pioneer a prevention for breast cancer.

Dr. Sifers believed there had to be cell changes in breast tissue that could be identified before a tumor formed. He thought that some forms of breast disease were "premalignant," and that removing the breast early was a woman's best chance of avoiding cancer.

To ease women's fear of being disfigured by the procedure, he believed that artificial implants should replace the breasts.

Dr. Sifers was a general surgeon, not a cosmetic, or plastic, surgeon. He has testified that most of his training for doing implants came from reading.

He undertook his study in earnest.

"I thought I had an original contribution to make," he testified.

"I will present a paper ultimately to the College of Surgeons confirming earlier work indicating that this type of surgery will reduce breast cancer by 95 percent."

In order to prove his theory to the College of Surgeons, he testified, he believed he had to present evidence of at least 50 successful surgeries. He called his plan his "breast series."

By the 1980s, says Dr. Young, Dr. Sifers was probably doing more mastectomies than anyone else in Johnson and Wyandotte counties.

☆ ☆ ☆

For a dozen years he had been performing mastectomies followed by implants without challenge.

Then came a 45-year-old Shawnee housewife named Carol McGuire.

At the 1982 trial of her malpractice suit against Dr. Sifers, gruesome details about post-operative complications came to public attention for the first time.

She testified she had gone to Dr. Sifers with fibrocystic disease, or hardened tissue or lumps in the breasts. Dr. Sifers diagnosed her as "premalignant" and operated.

She said the surgery was followed by a 16-month infection that would not heal. Her silicone implants repeatedly broke through the skin. Eventually her nipples sloughed off.

The question was raised whether Mrs. McGuire even needed surgery. Doctors testified on her behalf that she had no signs of cancer and was never a candidate for surgery.

Dr. Young, the only doctor to testify in Dr. Sifers' behalf, said the operation was valid, however, because of recurring lumps in Mrs. McGuire's breasts.

Dr. Earl Sifers . . . sought to pioneer a prevention for breast cancer

The jury found that Mrs. McGui 35 percent negligent in the case b she didn't take as much bed rest Sifers had directed.

But the jury still awarded her $ for actual damages—lost wages, cal expenses, pain and sufferin permanent disfigurement.

Other women contacted attorn say that they, too, had been Dr. patients and also had suffered.

Jay Thomas, an attorney whos is handling 13 of the cases, says t tern has been fairly consistent: W with fibrocystic disease went to D ers; he told them they had a one-in chance of developing cancer; he them to undergo a mastectomy; tion set in afterward, forcing add surgery.

Only after their lawyers gather dence about post-operative pro did many of the women learn ther alternatives that might have save breasts, he said.

"This is the single hardest m because we have to be the ones to the news to them," he said.

Dr. Sifers has testified, howeve he believed the women were "pre nant"—that their fibrocystic c might someday turn into cancer.

He also testified that he looke family history of breast cancer a as considering patients' reques surgery because of an overriding cancer. But he testified that som he operated when the only criteri met was having fibrocystic diseas

Other medical experts say that cystic disease might be an indicat surgery only when the disease vanced and the patient also has a history of breast cancer. And the say, surgery would not always be sary.

A study published in *The New land Journal of Medicine* in Ja showed that 70 percent of the w who have fibrocystic disease a more likely to get breast cance women without it.

Fibrocystic disease has no cu cording to the National Cancer Ins but it is usually treated with di medication for pain. Sometimes can be removed surgically with moving the breast.

The same factors that cause fib tic disease probably cause cance

payrolls of up to $600 million, and a chance to tie into the future of the auto industry.

"This is the cutting edge," says Joser[illegible]rran, official with the Texas Econ[illegible] Development Commission. "We want to be in on it."

State officials like Mr. Ferran are ripping over each other to sell GM on their states. On state and city economic development boards, where a new factory offering only a few score jobs can

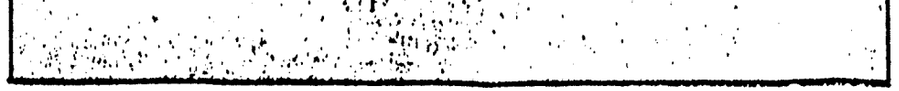
plant is being called the prize of the century.

In Michigan, they're talking about their commitment to the "automobile culture" and vow to beat any offer.

There's tough talk in Missouri, too.

"Missouri is the No. 2 automaker, and we plan to be No. 1," said Randy Sissel, press secretary to Gov. John Ashcroft. "So we have to be very aggressive in our

See Saturn, pg. 10A, col. 1



No. 1

Tiffany Chin, of the San Diego Figure Skating Club, skates to victory in the Seniors Ladies U.S. Figure Skating Championships competition at Kemper Arena Saturday. See story on Page 1 Sports. (staff photo by Jim McTaggart)

But government officials and contractors say most of the companies in the program are not cheating, though they do admit that Jenkins and Stapleton's is among perhaps dozens of firms in Missouri and Kansas with dubious claims to minority and female ownership.

The problem is by no means limited to Kansas and Missouri.

See Firms, pg. 14A, col. 1

Breast removal and implant: Did the doctor know best?

By Eric Palmer
and Jenny Deam
staff writers

Dr. Earl Churchill Sifers had a vision. With the zeal of a medical pioneer, he wanted to rid women of the horror of breast cancer.

His theory was unconventional and unproven—remove a woman's breast at the first suspicion of cancer, even without solid proof of the disease. Then, to keep her self-esteem intact, implant an artificial breast.

But the vision would bring its own horror to some.

Of the 222 women on whom he has operated since 1969, 16 have sued the Mission Hills general surgeon in the last four years, claiming malpractice and negligence.

They claimed in their lawsuits to suffer for months—sometimes years—from serious infection that kept wounds from healing and fears from subsiding. Some claimed that second and third surgeries were necessary to repair the damage when silicone implants broke through the skin.

All who filed suit claimed to be permanently scarred, both physically and emotionally.

Of the women who claimed Dr. Sifers failed to heal them, 13 say they are victims of a double tragedy. They have said in their lawsuits, and experts have testifed in some cases, that the surgeries were unnecessary because cancer was not detected.

(A Merriam woman describes complications she suffered after having a mastectomy and getting artificial breast implants. Page 12A.)

Dr. Sifers has conceded in testimony that two-thirds of all the women he operated on did not have cancer. He also testified that in 40 of the women he treated, breast implants broke through the skin—a rate considered exceedingly high by other medical experts.

But he has denied in sworn testimony any negligence and stated that his surgery record is one of the best in Kansas City.

Dr. Sifers, 60, would not agree to an interview for this story on the recommendation of his attorneys. His attorneys also declined comment because cases are pending.

His comments in this story were drawn from his court testimony in one lawsuit and his sworn deposition in another.

Six of the 16 lawsuits have been settled for more than $1.5 million before they reached trial. The rest are expected to be resolved this year, lawyers say.

In the one lawsuit that went to trial, a Johnson County jury found Dr. Sifers partly negligent and awarded $443,000 to his patient. That 1982 case, with its explicit and gruesome testimony, is believed by lawyers to have prompted the other women to come forward with similar stories.

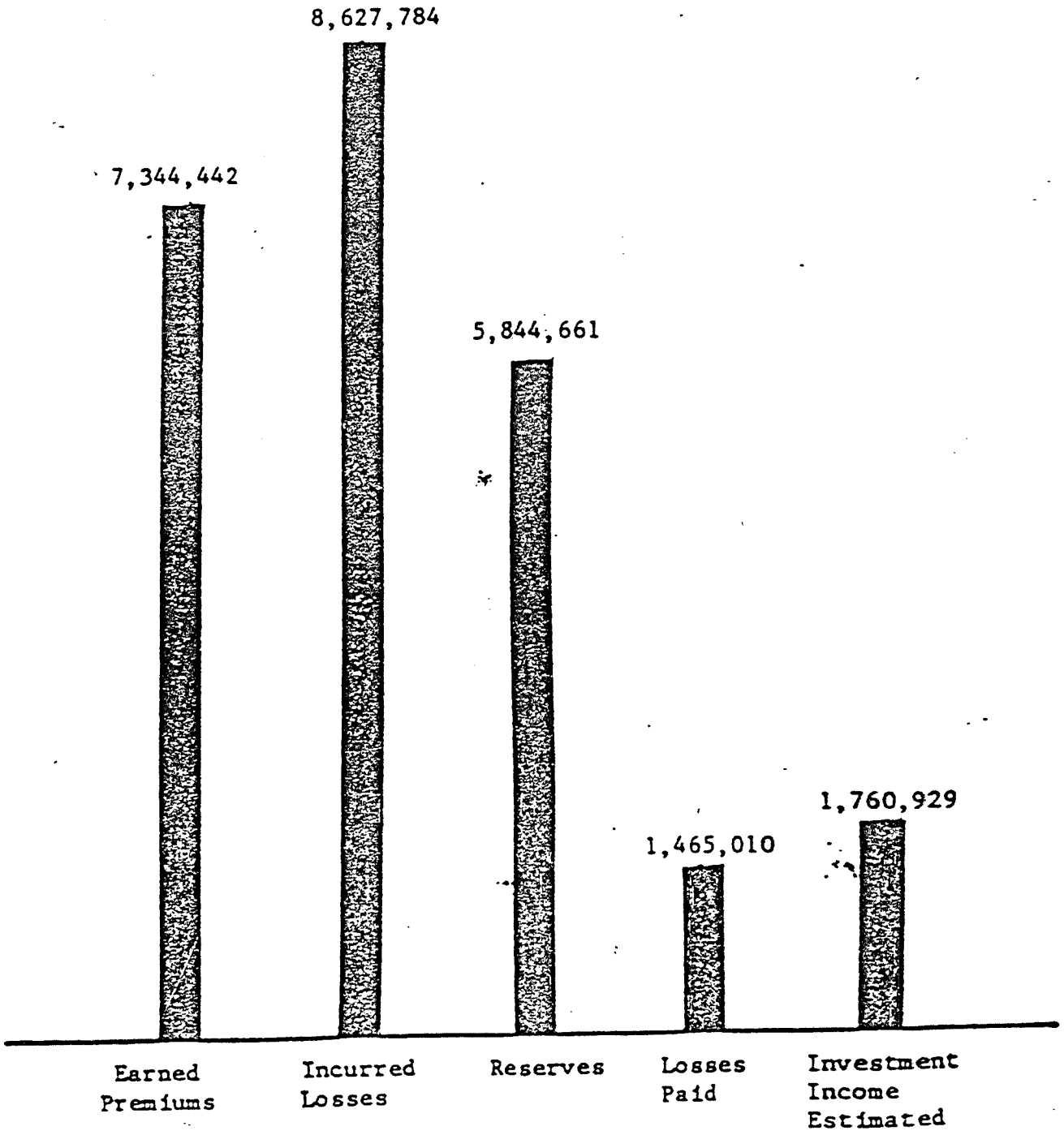
With the wave of litigation facing him, Dr. Sifers now has more malpractice suits filed against him than any other physician in Kansas by a margin of more than two to one, according to a comprehensive study by the Kansas Trial Lawyers Association. General surgeons average nationally one claim every four years, according to St. Paul Fire and Marine Insurance, the largest medical malpractice insurer in the country.

On four occasions pathologists—doctors who analyze tissue samples—filed complaints against Dr. Sifers alleging to an overview committee that he had done "inappropriate surgery," according to court testimony.

Meanwhile, Dr. Sifers has been re-

See Doctor, pg. 13A, col. 1

MEDICAL MALPRACTICE
SELECTED 75 COMPANIES
1978-1983



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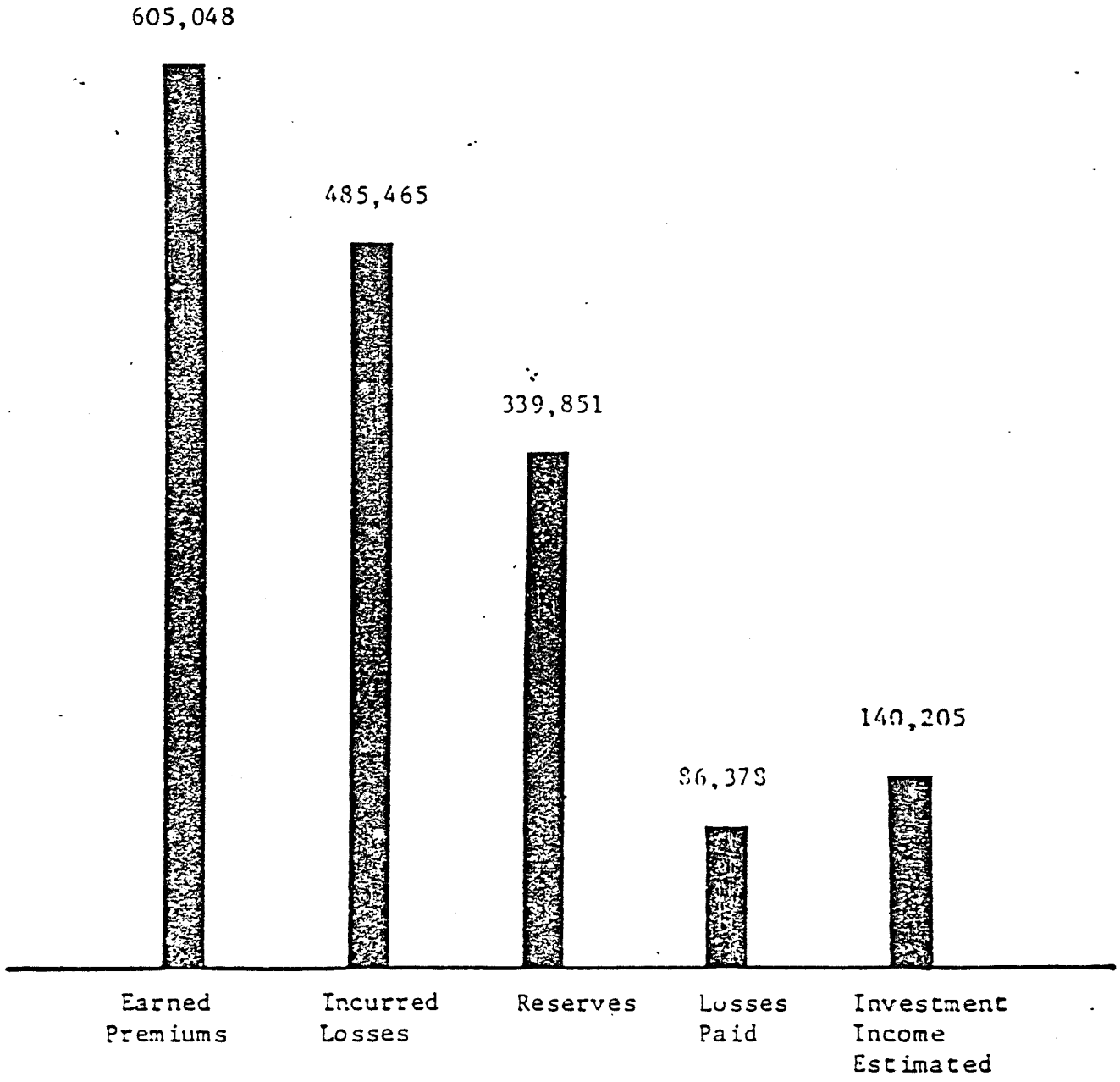
MEDICAL MALPRATICE
THE MEDICAL PROTECTIVE COMPANY
1976-1983



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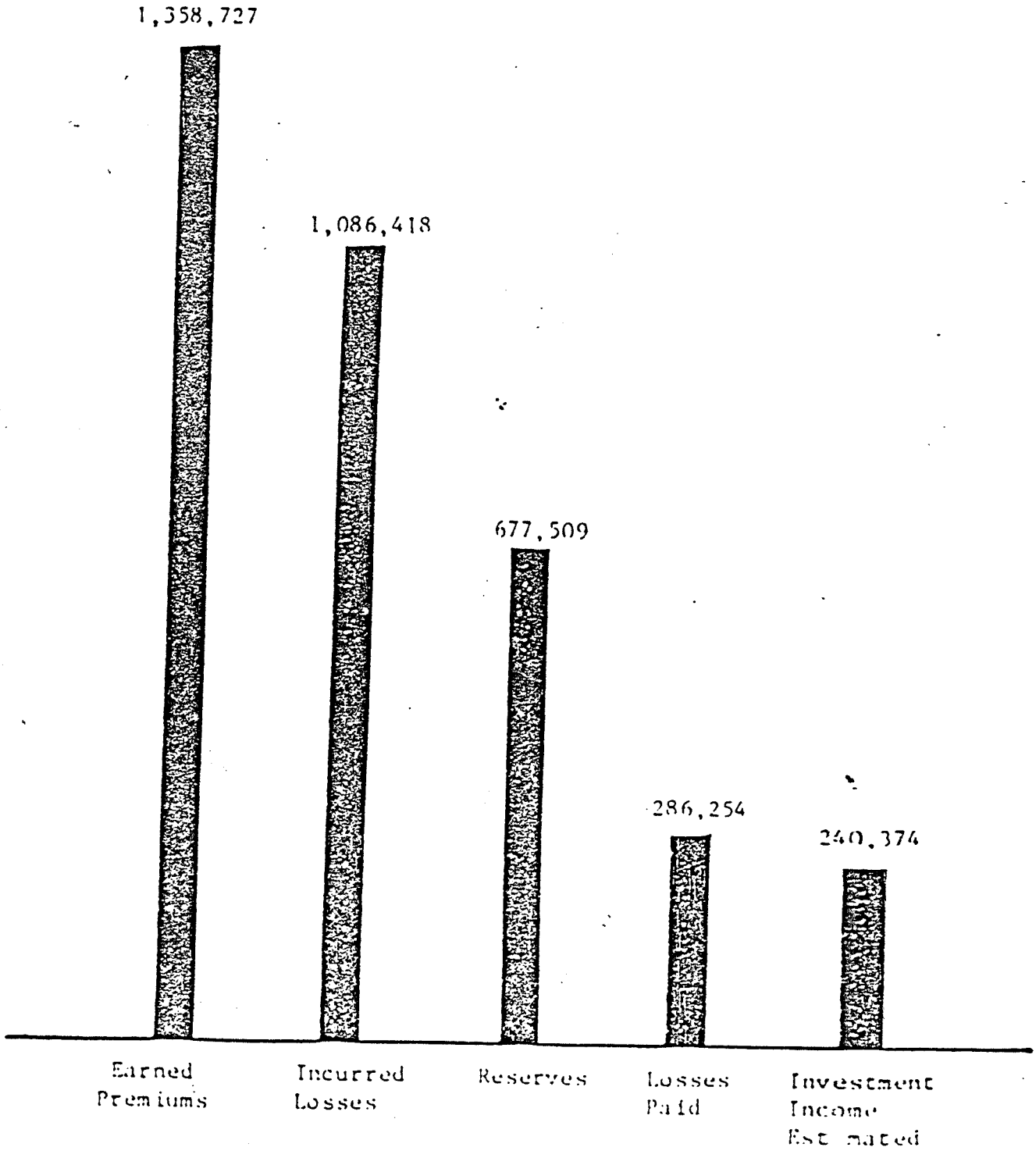
II

MEDICAL MALPRACTICE
ST. PAUL GROUP
1975-1983



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II

2-19-85

February 19, 1985

Honorable Mr. Fry and members of the Senate Judiciary Committee:

Thank you for allowing me the opportunity to speak to you today in opposition of the infamous "Doctor's Bill".

First, some background information so you will know where I am coming from. I attended nurses training from 1949-51. I was employed in this area for approximately 25+ years. This experience and the knowledge I acquired from it is the basis for my opinions expressed today.

Medical malpractice has been around for a long time. I can remember back in the 50's while working in a small hospital, a mother having her labor induced so the physician could go on his two week vacation. The only problem is that the mother delivered a dead premature fetus; quote, " must have miscalculated the date", unquote. The doctor went on his vacation, the parents, heartbroken, buried their first child. Nothing legally was done. In another instance, a patient had a nephrectomy. During the operative procedure, the renal artery was lacerated, unknowingly, and a few hours later, the patient began to hemorrhage, and did expire. There was no blood available for this victim. Oh, the Highway Patrol rushed some to the hospital, however she expired before the arrival. This lady, young mother of four children, should have had surgery elsewhere, not to mention being typed and crossmatched for blood to be on hold for this major surgery. Again - nothing happened. I remember commenting to a relative of the victim, who incidentally was a nurse who worked at the hospital, that I hoped they had a good attorney. Don't believe my remarks were appreciated - after all, keep those doctors on pedestals!

In the late 50's we moved to Wichita, at which time I was employed in larger hospitals. Things didn't change much - same negligent acts taking place and not much being done about it - if anything.

2/19/85
Attch. III

The last four years of my employment in nursing was spent working in a surgical intensive care unit of a local (Wichita) hospital. We received patients from small communities - who should have been sent to us much sooner. During one surgery in the local hospital, either an intern or resident was told by the attending surgeon to release a certain clamp, which was an incorrect one. The assistant complied - the patient in his late 40s at the time is now a vegetable (if he is still living). Surgeon didn't really mean that clamp, and the relatives thought the patient unfortunately suffered a stroke during the proceure! Another victim - had the subclavian artery lacerated while an intern was attempting to put in a line. The patient was undergoing emergency abdominal surgery due to an assault. This victim ended up with chest being opened, chest tubes inserted, in addition to the original problem. As this had been an assault case to begin with, I imagine the individual being responsible for the first assault got the blame for the entire condition.

What was done about the above incidents? Absolutely nothing! From the late 40's to the present time, physicians have committed malpractice, and their peers have failed to properly police them. In fact, they will cover up for them in most instances. I do not wish to infer that all physicians are BAD physicians, because that is not true. There are some capable, compassionate physicians, however, these same physicians should be responsible enough to weed out the ones who need it.

Finally in the latter part of December, 1976, I could no longer accept all that had and continued to happen in the areas of patients becoming victims. I frankly felt like an accomplice to the crimes. Nursing is no longer a profession for me.

77

In Jan, 19~~76~~, I contacted attorneys that I knew and for the next 6 years I was self employed, organizing and flow charting, summarizing and doing some research for plaintiff attorneys for medical negligent cases. My number of attorneys grew to 17, and consisted of attorneys not only in Kansas, but also in Florida, Colorado, Oklahoma, California and Minnesota. Of all the cases I worked up, there was definite negligence there, or in a few where there was not, the cases were not taken by the attorneys.

III

Two years ago, I went from being self employed to being employed for a very reputable medical malpractice firm. There is a need for medical malpractice litigation. This is the only recourse these victims have. Malpractice litigation is also beneficial as it keeps the doctors on their toes. This improves health care. ANY REDUCTION IN THE RIGHTS OF THE INJURED VICTIMS TO BRING A LAWSUIT, WOULD LIKEWISE IMPAIR THE QUALITY OF MEDICINE.

At this time, I would like to share with you some of the cases I have reviewed. All these have either been to trial and a verdict received, or have been settled without going to trial.

Six cases of misdiagnosed Hirschsprungs Disease. All six children had unnecessary surgeries, i.e., rectal biopsies, colostomys, Swenson Pull Throughs, and then to add insult to injury- multiple complications. One little girl has had a total of 23 surgeries to attempt to correct something she didn't have to begin with, and also to attempt to correct all the complications. One other little girl had a total of 14 surgeries All had complications. Because of all the xray these children were subjected to, how do we know they will not develop leukemia and/or some type of cancer at a later age? They do have permanent damages, both physical, and some mental. In fact, there were actually 11 cases misdiagnosed. Oh yes, there was a hearing for this by the State Board of Healing Arts - and--- doctor exonerated! I am not allowed to know the settlement amounts in these cases, but if it was even to begin to compensate these children for what they went through unnecessarily, it would have to be very substantial. Some of these children had to go to UCLA and Chicago to get the adequate care they needed.

Same surgeon - 2 more deaths! Settled out of court. One was a negligently cut bronchus; other a mid gut volvulous inadequately repaire

There is the case of the young man - 24 at the time- in a car accident. A cardiovascular surgeon, attempting to repair his aorta, clamped it, rather than doing a bypass. This resulted in paralysis, impotency and committed this young man to a wheel chair the remainder of his life. Everyone is a potential victim as I see it. Would you like something like this to happen to you or your family - an no recourse Certainly not, but it does happen.

III

A 39 yr. old man who went in for a laminectomy and fusion, had the 5th lumbar nerve damaged during the procedure. As a result the plaintiff was rendered totally and permanently impotent. He has no control over his bowels and bladder either.

A young lady - 31 yrs.- went into a hospital in southwestern Kansas for pilonidial cyst surgery. Anesthesia was administered, placing her in an unconscious state, after which an endotracheal tube was placed in her throat, rather than the trachea. By the time this was discovered, and cardiopulmonary resuscitation begun, it was too late. The surgery was on 6/29/81, she was air ambulanced to Wesley and remained on a respirat and being diagnosed as brain dead, was allowed to die on 7/15/81

A 38 yr. old lady, mother of 2 children, entered the hospital in Pratt, Kansas for a hysterectomy. During the procedure, the bowel was nicked with resulting peritonitis and necessitating a second procedure. She survived this procedure, however, another physician was called in for consult, and ordered a hyperalimentation IV nourishment which was the first for this hospital. Nurses were not familiar with this and apparently the physician wasn't either. All in all, the patient was given this at a large rate of infusion, became overloaded with fluid and developed pulmonary edema, going into a respiratory arrest. For some reason they were not able to intubate her and apparently did not even try to do a tracheostomy. She expired. Daily weights had been ordered for this lady, however the nurses did not do them as they felt she was too weak to stand up - and the hospital did not have a bed scale. Understand they acquired one shortly after. Daily weights is important to keep an accurate knowledge of fluid overloading.

A middle aged man went into the hospital for removal of an intramedullary tumor. The defendant doctor opened up the dura, however, did not remove the tumor. Testimony at trial revealed the surgeon surgically severed, or caused to be severed, the plaintiff's spinal cord by traumatizing the spinal cord with a surgical instrument of by failing to do an adequate decompressive laminectomy. Patient is rendered a paraplegic, committed to wheelchair for life. Since trial patient has been hospitalized numerous times due to infections which

III

are common with paraplegics, and in fact has since had to have one of his legs amputated. This surgeon, doing neurosurgery, has had no formal training in neurosurgery.

A 61 yr. old lady was admitted to a Hoisington Hospital for a myocardial infarction. She complained of a charlie horse in her leg, however, was ignored. Finally several days later, she was diagnosed as having arterial thrombophlebitis. She was transferred to Wesley Medical Center, however, due to the lengthy period of time of symptoms until surgery, it was too late to save the leg. In this case the patient's symptomotology was developing and deteriorating which should have alerted the attending physician for the need for prompt evaluation, diagnosing and the undertaking of preventative or prophylactic therapy, in this case, heparin. The patient's morbidity would have been prevented had proper prophylactic therapy been administered.

Brain damaged baby cases are too numerous to go into at this time. There have been several. Their outcome is usually always very poor, necessitating medical treatment the remainder of their lives; their life expectancies are lowered of course. Another thing I find very often with children being involved by some injury, is that the stress on the family - parents, siblings, etc., is very great and very often the parents do divorce.

I urge you to throw this bill out! The physicians have them selves in this predictament. This " crisis" they refer to in the field of medical malpractice is not a crisis, but rather a chronic reaction to the symptoms they have been ignoring - since at least the late 40's that I know of. Had they taken proper steps to "heal" themselves all these years, we wouldn't be having these problems, and these victims. I understand why they do not want punitive damages- after all, that would have to come out of their own finances - not insurance. Punitive damages should be awarded more than they are.

Thank you again for your time.

Betty J. Schountz
2427 W. Grant Street
Wichita, Kansas 67213

III

LIZ DUDLEY

TO THE HONORABLE MR. FRY AND MEMBERS OF THE SENATE JUDICIAL COMMITTEE:

OPPOSITION TO THE PROPOSED KANSAS MALPRACTICE REFORM BILL

I come to you today as a concerned citizen and as a Registered Nurse opposing this special interest legislation concerning malpractice reform.

I hear physicians stating that malpractice litigation is increasing their professional liability insurance. Has the Kansas Medical Association proved to you that their insurance premiums are a direct result of the judicial system? How can there be a crisis in obtaining professional liability insurance when there are 2 new liability insurance companies entering the Kansas Market place at a lower cost than Medical Protective - which equals a total of 4 professional liability insurance carriers. Tort reform bills do not impact the insurance rates.

But I don't feel that is the real issue here. The real issue is the incidence of malpractice and being held responsible for ones actions. The cause of medical malpractice litigation is medical malpractice.

I have been in nursing for 10 years. I've been everything from a Staff RN in most specialty areas of the hospital to the Director of Nursing. I have seen and been forced to participate in the cover-ups of the hospitals and physicians. I have been told to "forget that incident", to close my eyes, don't ask questions & just do my job. I have assisted in surgery with drunk physicians on more than one occasion. I have seen surgical mistakes made resulting in severe disability & even death. When reporting my observations to the proper channels I was reprimanded & told to keep quiet. When I decided to fill out an incident report on these incidents I was told to "quit making waves". I have seen the same FEW Physicians do procedures they were not qualified to do, who continually overstepped their bounds and had to be bailed out by another available Dr. You see, every hospital has their few physicia that CONSISTENTLY make the same errors. They are laughed at their peers & are the

2/19/85 IV

object of many jokes. We all know who these few negligent physicians are & we felt sorry for their patients who put their lives in these physicians hands. We in the Nursing profession have been forced to keep silent for fear of our jobs. One resident even remarked, "the administration doesn't want to know if another Dr. is consistently making mistakes because they know the State Board of Healing Arts won't do anything about it. So why should I stick my neck out? They encourage us to put blinders on."

If the average physician sees 800 patients per year, you can see the potential for injury to patients if this physician doesn't practice according to principles of Standard Approved Medical Practice.

The Kansas Medical Society, and the State Board of Healing Arts along with the hospitals have a responsibility to the public to consistently and effectively perform peer reviews and police their profession. Its their lack of disciplining their own profession, weeding out the few bad apples who are consistently negligent that has caused the public to loose their trust in the medical profession and turn to the judicial system for justice and compensation for their injuries.

When the medical profession and the hospitals won't police themselves - and patients are being victimized - and the state board of healing arts won't take any action to discipline those physicians who have been proven to be negligent - WHAT CHOICE DOES THE PUBLIC HAVE BUT TO GO TO A LAWYER WHO SPECIALIZES IN MEDICAL MALPRACTICE LITIGATION?

ALL OF US ARE POTENTIAL PATIENTS - VICTIMS - PLAINTIFFS if we get treated by the wrong Doctor or at the wrong hospital.

For example: It took a medical malpractice lawyer to discover in deposition that the Medical Director of a Hospital in Wichita who had been practicing as an MD for years - WASN"T REALLY AN MD, HE HAD A FAKE DEGREE. Only then did the State Board take action.

IV

I can stand here and tell you stories of the victims I know about; the man who was told he had Cancer of the testicles, so his Doctor removed BOTH TESTICLES - later his Doctor told him it was a mistake - HE DIDN"T HAVE CANCER; and then there is the man who went in for a hemorrhoidectomy and ended up with a colon resection leaving him permanently IMPOTENT, AND UNABLE TO CONTROL HIS URINE AND BOWEL MOVEMENTS. The Doctor did the WRONG SURGERY ON HIM - severing all the nerves in those areas. I can tell you about the cover ups the Hospitals, their Lawyers and the Physicians participate in. Administrators telling a Physician to tear up his Operative report & dictate another one leaving out the negligent incidents. Nurses being advised by the Hospital Lawyers to PERJURE THEMSELVES during depositions in order to make the hospital not look negligent - if she didn't cooperate she was told she wouldn't have a job. I can tell you about physicians ALTERING MEDICAL RECORDS - with some being completely re-written months later. I can tell you about the young Anesthesiologist doing General Anesthesia on a 30 yr old man. This Doctor was too busy telling everyone in the surgery room about how much money he was making, his new car, new home, his new boat - when the Circulating Nurse told him his patients EKG monitor (heart monitor was flat. This Doctor stood up and thumped the monitor & said "Its the machine - not my patient." He continued to tell the nurses how fast his new car can go when the Operating Surgeon said "This patients blood is dark (meaning it wasn't getting enough Oxygen) Please check your patient Doctor". Then the patients heart stopped, they coded the patient but this patient died. The young Anesthesiologist had put the breathing tube down the stomach instead of the lungs and he was so busy talking about his new found economic status that he never checked for breath sounds to see if the breathing tube was in the proper position. Yes, this happened in Wichita.

Its these incidents plus many more that have caused me to leave the hospital system and the practice of Clinical Nursing. For I s not a PATIENT ADVOCATE - I was only a SILENT ACCOMPLICE.

IV

Why should the victim pay for the cost of the Doctors and/or Hospitals medical negligence?

This bill shows me that Organized Medicine is demanding special and Privileged legislation. They want to protect themselves from having to meet their responsibilities to the very persons they have injured thru medical mistakes or carelessness. This bill reads like they seek legal immunity from their own negligence. Isn't that what priviledged legislation is all about - to protect the few by taking away the rights of the many who can least afford it?

I feel regardless of whether you have an MD, RN, JD or any other title after your name, UNDER THE LAW YOU SHOULD STILL BE RESPONSIBLE FOR YOUR ACTIONS. Education does not change responsibility for one's actions — Or does it? You will ulitmately decide.

In Section 4-A-1 of this proposal dealing with "Standard of Care" - in assessing liability - testifying health care providers must practice according to the same general geographic location and from the same school of medicine those being the standards used for that situation.

In Section 4-A-iii: States testifying experts must be liscensed in Kansas or a contiguous state. These two proposals are a step backwards. Medicine no longer is different from county to county or state to state. Due to the massive communication networks, TV, computers, and Satellite communications , throughout the country the Hospitals, Physicians and other health care providers are educated NATIONWIDE on Standards of Approved Medical Practice.

There is another component inherent in these 2 proposals. Physicians are a very tight knit group in their respective counties and state organizations. They are reluctant to testify against eachother locally and even state wide. Part of the business of being a physician involves referrals & consults from your fellow physicians. Testifying against a local cohort could cause some bad blood with a resultant loss of referrals. It is discouraged within the Medical Profession -

IV

Section 4-A1-iii deals with health care providers not being held liable for failure to disclose or accurately describe facts. This issue is dealing with INFORMED CONSENT. Patients must be given enough information regarding the pros, cons, complications, risks and alternative forms of treatment in order to make an educated informed decision. This type of communication between physicians and patients does take time. But I ask you, how can there be informed consent without the proper facts being given? This vital communication is essential in establishing trust between the physician and the patient. The public is demanding more information on their health care, they are asking more questions & they deserve to be told ALL THE FACTS BEFOREHAND. When the patient has not been told the cold hard facts, has not been given the appropriate information to make an informed decision - they feel betrayed because they have been mis-informed or NON-INFORMED. The health care provider has access to all the facts and they SHOULD BE HELD LIABLE FOR FAILURE TO DISCLOSE. Just as you or I would be in any other business deal.

In Section 5 - Limitation of Recovery: This bill proposes "PUNITIVE DAMAGES SHALL NOT BE AWARDED IN ANY ACTION. I disagree. As you are probably aware, punitive damages are not applicable to every medical negligence case. I ask you to find out just how many punitive damage awards have been made against a Health Care Provider in the State of Kansas? I'd venture to guess not many. But there are those cases where Physicians and/or Hospitals have consistently behaved in reckless, willfu wanton, disregarding type conduct. In these FEW instances PUNITIVE DAMAGES ARE CLEARLY INDICATED. If Kansas had an effective Disiplinary Medical Board, this type of consistent, reckless behavior would have been squashed after the first occurrance. It is no punishment to have the defendants insurance company pay the awarded damages for his consistently reckless behavior. To effectively punish a Health Care Provide & to KEEP THIS TYPE OF CONDUCT FROM REOCCURRING - THE DEFEN T MUST BE HELD PERSONALLY LIABLE.

IV

The punitive damages must be assessed in a fair way by the court – not so small so as to be insignificant but not so large so as to put them out of business. NO PROFESSION SHOULD BE EXEMPT FROM PUNITIVE DAMAGES WHEN THEY ARE CLEARLY INDICATED.

How can the law limit the amount of damages awarded to all plaintiffs when every case is different? Every victim has a different work history, income level, age, medical negligence case, injuries and damages? These limits proposed do not take into consideration the rising cost of health care and inflation for their future medical expenses. If a patient has been totally debilitated thru medical negligence and requires a lifetime of medical care, the damages must be adequate to cover these. The plaintiff only gets one settlement & it should be figured with these in mind.

When a patient has been severly disabled by medical negligence, his family and loved ones suffer also. Money does not bring back health or life, but it is all that can be done and this bill would see to it that as soon as the VICTIM DIES - HIS SETTLEMENT IS DISCONTINUED? AND IF THE VICTIM SHOULD NOT NEED MORE MEDICAL CARE THEN HIS SETTLEMENT STOPS ALSO? I disagree. If damages are awarded fairly and realistically then they BELONG TO THE VICTIM AND HIS FAMILY AS COMPENSATION FOR HIS INJURY. Their purpose is not to be given back upon death or the cessation of medical care. Their purpose is to compensate the victim the only way the system can for injuries that NEVER SHOULD HAVE HAPPENED.

The final issue I'd like to address is the issue of specialization in Law and Medicine. These two professions along with many others are growing at such a rapid pace that specialization within these professions is necessary to provide the public with the most accurate & knowledgeable sources of information and treatment Within the Law profession the specialty of Malpractice Litigation has developed as a result of two main issues: The publics need & because of the consistent incidences of medical negligence nationwide. LAWYERS DO NOT [illegible] USE MALPRACTICE LITIGA

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THEY TREAT IT VIA THE JUDICIAL SYSTEM. IF THE AMA ALONG WITH THE HOSPITALS HAD EFFECTIVE PEER REVIEWS AND DISCIPLINED THEIR OWN PROFESSION THERE WOULD BE NO MALPRACTICE CRISIS. IT IS THEIR PROFESSIONAL-ETHICAL FAILURE THAT HAS PUT THEM IN THE SITUATION THEY ARE IN TODAY.

The malpractice litigation area is a very expensive, high risk area of law with cases that may go on for years before settlement or trial. These specialty lawyers take a risk of losing all expenses or recovering expenses along with their fee. If the law decides to put lids on attorneys fees so it is not ECONOMICALLY FEASIBLE FOR THEM TO PRACTICE THEIR SPECIALTY – then they won't. THEN WHERE WILL THE GENERAL PUBLIC MALPRACTICE VICTIMS GO FOR HELP? They won't get help from their physician, or the Hospital, or even from the State Board of Healing Arts. They will have to go to a lawyer inexperienced in Medical-Legal issues, who may end up filing lots of frivolous lawsuits, won't understand the medical terminology & issues involved, won't know what should be in the medical records & if he does order them properly he won't be able to read it much less understand its contents. Then there is the medical research involved with each case. AND WHO WOULD THIS BENEFIT? YES, ORGANIZED MEDICINE. AND WHO WOULD THIS HURT? The victims and the Public in general. This is a highly specialized area of law & it takes a specialized medical - legal background along with medical ancillary staff to effectively handle these cases. Because of their expertise, these lawyers are able to weed out frivolous cases, cases involving no negligence and handle only those cases of true medical negligence.

I make this analogy - It would be like making it economically unfeasable for a physician to specialize in Heart Disease. So if you had a heart attack & needed Heart Surgery - Bypass Operation, you won't be able to go to a specialist. You'll have to go to your Local General Practicioner for your surgery and hope & pray you have a favorable outcome. This makes no sense & only hurts the

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victims who have already been victimized once by medical negligence.

WHO IS REALLY COMPLAINING ABOUT ATTORNEYS FEES? Is it their clients? OR IS IT ORGANIZED MEDICINE?

In conclusion, I feel passage of such special interest legislation at the expense of the victim and general public is not justified now or ever. There is no insurance crises - only the wish by organized medicine to restrict the rights of victims to recover for their losses along with protecting the negligent health care providers. Any attempt to limit the victims liability will ultimately shift the costs of seriously injured patients to the public.

I feel the answer is not in legislation like this. The answer lies within the MEDICAL ASSOCIATION ITSELF. They must be FORCED TO POLICE THEMSELVES. The current STATE BOARD OF HEALING ARTS is an inefficiently functioning body who refuses to take actions on negligent physicians. By their refusal to deal with these issues, they appear to be whitewashing the problem. This State Board should be re-organized and an effective DISCIPLINARY MEDICAL BOARD SHOULD BE SET UP & should be responsible to the public and to the standards of care set forth in medicine Doctors entering this state should be forced to verify their medical degree - especially if they are foreign. I can tell you of a physician here in Kansas that cannot come up with his medical liscence for verification but is authorized to practic by the State Board of Healing Arts. Also, physicians can escape disciplinary action by moving out of state - there is no state to state communication concerning negligent physicians.

The Health Care System needs to be changed, so that Nurses can write down the TRUTH concerning their observations about patients and their treatment without fear of reprimands and loss of their jobs. Many times Nurses are the first to see medical negligence and the system should encourage the upgrading of the level of care for public safety in general. After incidents are reported to the supervisor, administrator & State Board of Healing Arts - investigations should be

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mandatory along with firm disciplinary action with liscence revocations when necessary.

Finally, as the Health Care System is set up now, the Judicial system via the medical-malpractice attorneys along with unbiased medical malpractice legislation are all these plaintiff/victims have.

REMEMBER, NO ONE IS EXEMPT FROM MEDICAL NEGLIGENCE -

IT COULD HAPPEN TO YOU!

Thank you for your time.

Sincerely,

Liz Dudley

Liz Dudley

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