Approved February 18, 1986
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

10:00 a.m./~~p.m.~~ on February 5, 1986 in room 514-S of the Capitol.

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

Committee staff present:

Mary Sue Hack, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Matt Lynch, Judicial Council
Walt Scott, Topeka Attorney
Justice David Prager, Supreme Court Judge
Ron Smith, Kansas Bar Association
Professor James M. Concannon, Law Professor, Washburn University School of Law

Senate Bill 480 - Civil procedure amendments.

Matt Lynch stated the bill contains amendments relating to the rules of civil procedure and service of process recommended by the Civil Code Advisory Committee and approved by the Judicial Council. Mr. Lynch explained the amendments in the bill. A copy of his explanation is attached (See Attachment I).

Walt Scott testified the concern he has with the bill is the service of summons section. He said he personally writes the judgment letter. The only clarification is the sheriff is to mail out this notice. He is concerned about what action should be taken if the letter is returned to the sheriff's office. He needs to know the letter was sent, and if it's not returned, he assumes it will get good judgment.

The chairman recognized Justice David Prager to respond to questions by the committee. The chairman inquired if it is the sheriff's responsibility to mail out this letter. Judge Prager replied, yes. He is in favor of the form that requires the sheriffs to do it. He emphasized this is the last alternative in making service. The constitutional problem is when it is nailed on the door.

Mr. Lynch proposed removing the phrase dwelling house and reinserting residence.

Ron Smith, Kansas Bar Association, testified the bar is in support of this legislation. A copy of his testimony with proposed amendments is attached (See Attachments II). A copy of "KBA 1986 Legislative Policy" is also attached (See Attachment III).

Professor James M. ConCannon stated Ron Smith asked him to comment upon proposed amendments to the bill submitted by the Kansas Bar Association. A copy of his testimony is attached (See Attachment IV).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on February 5, 1986.

Senate Bill 480 continued

Justice Prager stated he will present the proposals to the judicial council subcommittee and he will report back consensus of the subcommittee.

Senate Bill 413 - Mechanics' liens; intent to perform.

Senator Feleciano explained a proposed amendment that appeared on page 3 of the balloon copy, that expands the definition of residential property (See Attachment V). This addresses the situation where you already own the land and have a house built on it. Senator Feleciano then moved to amend the bill by adopting the amendment. Senator Gaines seconded the motion, and the motion carried. Senator Feleciano made a motion to amend the bill by adopting the other amendments that appear in the balloon. Senator Gaines seconded the motion, and the motion carried. Senator Feleciano moved to report the bill favorably as amended. Senator Winter seconded the motion, and the motion carried.

Senate Bill 308 - Restricting limited partnerships' interests in agricultural land.

Staff explained the amendments proposed by the Kansas Farmers Union. Following the explanation, Senator Burke moved to amend the bill on page 2, line 64, after general partnerships, by adding other than corporate partnerships. Senator Langworthy seconded the motion, and the motion carried. Senator Gaines moved to report the bill favorably as amended, and the motion carried.

The chairman announced the second subcommittee meeting on Sub. for HB 2050 is at 1:30 P.M. in room 531-N tomorrow.

The meeting adjourned.

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

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-5-86

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Richard Harmon	Topeka	KS Assn. of Prop./Casualty Companies
David Prager	Topeka	Judicial Council
Matt Lynch	"	"
Jim Concannon	"	—
Sabrina Wells	Topeka	Budget Division
Jim Clark	Topeka	KBAA
Walt Hurtt	"	Self
PATRICIA HENSHALL	TOPEKA	OJA
Ron Smith	"	KS Bar Assoc
Jo Jenkins	Topeka	KS Corp. Comm.
KAREN McCLAIN	TOPEKA	KS. Assoc. REALTORS
Bob West	"	KS Lumber Dealers
Jeff Amrein	"	CNTI
Kat Mason	"	MCAK

A-VI

2-5-86

JUDICIAL COUNCIL TESTIMONY ON 1986 SENATE BILL 480

Senate Bill 480 contains amendments relating to the rules of civil procedure and service of process recommended by the Civil Code Advisory Committee and approved by the Judicial Council. The members of the Civil Code Advisory Committee are, Marvin Thompson, Chairman, Russell; Judge Terry Bullock, Topeka; Emmet Blaes, Wichita; Professor Robert Casad, Lawrence; Senator Frank Gaines, Augusta; Morris Hildreth, Coffeyville; Justice David Prager, Topeka; Leonard Thomas, Kansas City; Donald Vasos, Kansas City; Professor William Westerbeke, Lawrence; and Ronald Williams, Wichita.

Many of the amendments contained in the bill were prompted by changes in the corresponding federal rules. Those amendments are contained in sections 1, 3, 4, 5, 6 and 9 and, to an extent, sections 10 and 12. The other amendments are the result of issues raised by committee members during the Committee's review of articles 2 and 3 of chapter 60.

Section 1 amends K.S.A. 60-211 to conform it with the provisions of federal rule 11. The amendments clarify that the provisions of the section apply to motions and other papers as well as pleadings. The amendments also make it clear that the section applies to unrepresented parties. In applying the section to unrepresented parties, the comment to the federal rule states that the court has discretion to take account of the special circumstances that often arise in pro se situations. The amendments in lines 39 through 44 contain "a more focused standard of conduct" for persons signing pleadings and recognize "that the litigation process may be abused for purposes other than delay." The comment to the federal rule states that the amendments "should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."

Section 2 amends K.S.A. 60-213 by inserting a new subsection (g) at lines 104 through 109. Subsection (g) is intended to alert parties in comparative negligence actions of the need to assert cross-claims against co-parties. Under Eurich v. Alkire, 224 Kan. 236 (1978), the failure to assert such a claim results in the claim being forever barred.

Section 3 amends K.S.A. 60-216 by adding a new subsection (b) beginning at line 170. Subsection (b) corresponds to a 1983 amendment to Federal Rule 16 and provides sanctions for the failure to obey a pretrial order or to meaningfully participate in a pretrial conference. The orders referred to in K.S.A. 60-237 are (1) orders refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting the party from introducing designated matters in evidence; (2) orders striking pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Atch. I
S. Judiciary 2/5/86

and (3) orders treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

Section 4 amends K.S.A. 60-217 in lines 195 through 201 by adding the corresponding language contained in Federal Rule 17(a). The language was added to the federal rule in 1966 to keep pace with modern decisions which are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed. The amendment is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.

Section 5 amends K.S.A. 60-233 in lines 270 through 273 by adding the last sentence of Federal Rule 33(c). This sentence was added to the federal rule in 1980 due to the fact that parties upon whom interrogatories were served would occasionally respond by directing the interrogating party to a mass of business records or by offering to make all of their records available. The proposed amendment was added to make it clear that a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived.

Section 6 amends K.S.A. 60-234 in lines 314 through 317 by adding the language of the 1980 amendment to Federal Rule 34(b). The federal amendment was intended to deter parties from the practice of deliberately mixing critical documents with others in the hope of obscuring significance.

Section 7 amends K.S.A. 60-250 by inserting a new subsection (b) in lines 332 through 336. In comparative negligence actions it may well be a defendant, rather than the plaintiff, who alleges fault by an additional defendant and who intends to present evidence of such fault. In such cases a decision on a motion for directed verdict by the additional defendant should be reserved until evidence of the additional defendant's fault has been received.

Section 8 amends K.S.A. 60-254 in lines 376 through 384 by incorporating the provisions of Supreme Court Rule 118.

Section 9 amends K.S.A. 60-256 in lines 434 through 441 by adding the language of the 1963 amendment to Federal Rule 56(e). The federal amendment was adopted to contribute to the more effective utilization of summary judgment. The basic purpose of summary judgment procedure is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Allowing the pleadings to stand in the way of granting an otherwise justified summary judgment is incompatible with the basic purpose of the rule. The amendment is consistent with the present practice under Kansas Supreme Court Rule 141.

Sections 10 & 12 amend K.S.A. 60-301 and 60-303 respectively. The amendments would allow service of the summons and petition and other process by Kansas attorneys and appointed process servers in

addition to service by the sheriff. The amendments were prompted in part by the federal practice of making service of the summons and complaint the responsibility of the plaintiff rather than the U.S. Marshal. Under the federal rule, any person who is at least 18 years of age and is not a party may serve the summons and complaint.

Section 11 amends K.S.A. 60-302 by making reference to the forms for summons contained in the appendix of forms. The Committee concluded that the forms were more extensive than the statute (primarily in that the forms alert the defendant of the need to assert compulsory counterclaims) and that it would be simpler to make reference to the forms rather than inserting additional requirements in the statute.

Sections 13 & 16 amend K.S.A. 60-304 and 61-1805 respectively, to require that residence service by posting be accompanied by mailing a copy of the summons and petition to the individual by first-class mail. Sections 17, 18 and 19 make the corresponding amendments to the relevant forms. These amendments were prompted by a letter from Judge G. Joseph Pierron of Johnson County, in which Judge Pierron noted the decision in Greene v. Lindsey, 456 U.S. 444 (1982).

Greene involved a Kentucky statute which permitted service of process in forcible entry or detainer actions to be made by posting a summons "in a conspicuous place on the premises" if a suitable person could not be found on the premises to receive service of process. Service of process was made on tenants in a public housing project by posting a summons on the door of each of their apartments. There was evidence in the case that such notices were not infrequently removed before they could be seen by the tenants. The tenants claimed that they never saw the summons and did not know of the eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them and their opportunity for appeal had lapsed. The majority opinion stated that, "notice by mail in circumstances of this case would go a long way toward providing the constitutionally required assurance that the state had not allowed its power to be invoked against a person who has had no opportunity to present a defense."

The amendments in sections 14 and 15 to K.S.A. 60-308 and 60-312 would allow service by restricted mail under the long-arm statute, a procedure which is followed by over half the states in their long-arm statutes. "Restricted mail" is defined in K.S.A. 60-103 to mean mail which carries the endorsements "Return Receipt Requested Showing Address Where Delivered" and "Deliver to Addressee Only". Service by restricted mail would provide a much less costly procedure for obtaining service upon parties outside the state.

2-5-86

KANSAS BAR ASSOCIATION

1200 Harrison
P.O. Box 1037
Topeka, Kansas 66601
(913) 234-5696

SB 480

Senate Judiciary Committee

February 5, 1986

Mr. Chairman. Members of the Senate Judiciary Committee. I am Ron Smith, Legislative Counsel for the Kansas Bar Association.

KBA supports this legislation. We have especially supported changes in KSA 60-216 to conform to the current Federal Rule 16. These changes are made in Section 3.

We offer a further amendment, which is attached. What it does is conform KSA 60-226 dealing with discovery to Federal Rule 26. The balloon shows the applicable changes and as you can see, they are similar in scope to changes being made elsewhere in the bill.

KBA has supported these two provisions for some time now.

Further, I notice Sections 13 and 14 deal with service of process by mail, one using first class mail, and the other "restricted" mail. I've not checked, but you might also need to change Chapter 198 of the 1985 Session laws for conformity.

Thank you.

S. Judiciary 2/5/86
Atch. II

PROPOSED AMENDMENT TO SB 480

Create a new Section 5 which amends KSA 60-226 by adding new subsections (f) and (g) below:

"(f) At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery The court shall do so upon motion by the attorney for any party if the motion includes: (1) a statement of the issues as they then appear; (2) a proposed plan and schedule of discovery; (3) any limitations proposed to be placed on discovery; (4) any other proposed orders with respect to discovery; and (5) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten day after service of the motion.

"Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

"Subject to the right of a party who property moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Section 3.

"(g) Signing of Discovery Requests, Responses and Objections. Every request for discovery or response or objection to discovery made by a party represented by an attorney shall be signed by at least one attorney of record in such attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state such party's address. The signature of the attorney or party constitutes a certification that he has read the request, response or objection and that to the best of such person's knowledge, information, and belief formed after reasonable inquiry (1) consistent with these statutes and warranted by existing law or good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper

purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party or person making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

"If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."

And by renumbering the remaining sections.

2-5-86

KBA 1986 LEGISLATIVE POLICY

A SECOND CENTURY OF SERVICE

1882

KANSAS BAR ASSOCIATION

Atch. III
S. Judiciary 2/5/86

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 lawyers-legislators has declined to 10% of the legislature. Proponents of non-adversarial compensation 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 Journal of the Kansas Bar Association. 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.

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

ISSUES
TABLE OF CONTENTS

Administrative Law **7**
Administration of Justice
Federal 1
State 7
Civil Procedure **10**
Commercial Law **25**
Constitutional Amendments **1**
Criminal Law **11**
Criminal Procedure
Federal 2
State 11
Judiciary
Federal 3
State 12
Law Related Education **13**
Litigation
Federal 3
State 14
Probate **18**
Regulation of Attorneys
Federal 5
State 19
Taxation **6**
Tort Reform **20**
Trends in Law **23**
Uniform Laws **24**

FEDERAL ISSUES

ADMINISTRATION OF JUSTICE

Issue: Fees for 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 pays the attorneys hired by the United States to represent the interest of the United States in criminal and civil cases, and should therefore provide equity in what it pays private counsel for providing competent legal services to indigent defendants.

CONSTITUTIONAL AMENDMENTS

Issue: The Equal Rights Amendment.

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

Rationale: 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. 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. 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: The Federal insanity defense.

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" standards, 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: Abolition of 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 advanced to modify or abolish federal diversity jurisdiction is to reduce the case load of federal courts and save money. 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: Federal Products Liability Legislation.

KBA Position: The Kansas Bar Association OPPOSES enactment of federal products liability legislation.

Rationale: Both state and federal court systems exist 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 and the Kansas Legislature has enacted an enlightened statute governing

products liability litigation. 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: Federal No-Fault Medical Malpractice compensation systems.

KBA Position: The Kansas Bar Association is OPPOSED to legislation which purports to create a system of compensation for medical malpractice on a "no-fault" basis.

Rationale: While such concepts are 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 common law tort compensation. One of the main purposes of our system of tort compensation is to deter the activities of a negligent defendant. The suggested concept tells health care providers there is no legal concept called "negligence" and injects into our legal system an unwanted and unwarranted theory. The citizens of this nation are the beneficiaries of the legal system, and there is no broad move on their part to request this system of compensation. They are not assured such compensation will be any fairer or more thorough than the present system.

Recent decisions by the U.S. Supreme Court indicate a preference that State legislatures are the appropriate place for determining how best to regulate the litigation systems. Legislatures 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 Kansas medical and legal services.

REGULATION OF LAWYERS

Issue: Federal Trade Commission authority to regulate lawyers and the practice of law.

KBA Position: The Kansas Bar Association OPPOSES FTC preemption of the state's regulation of the legal profession.

Rationale: Regulation of the professions has traditionally been a function of state government. Absent a showing that state governments cannot effectively regulate 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: Encouraging 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 prepaid legal service plans constitute an employee benefit, such plans should be encouraged. Tax treatment of pre-paid legal services is the most logical method of encouraging use of this benefit, 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 other plans readily available for employers.

Issue: Appropriate Federal funding for a Legal Services Corporation.

KBA Position: The Kansas Bar Association SUPPORTS the Legal Services Corporation, and funding of this nonprofit corporation at a level which will provide at least 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 there are funds available to pay an attorney. The profession's commitment to this problem through its *pro bono* programs is considerable. But this does not diminish the need for the LSC. 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. Suggested cutbacks in funding of LSC are inconsistent with the demonstrated national need.

Dismay with LSC operations apparently stems from instances of government agencies 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 may not always act in accordance with the law.

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

TAXATION

Issue: The Generation Skipping Tax.

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

Rationale: This form of taxation on 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 Administration and Senate-supported legislation included a provision repealing this generation skipping tax. We support that provision.

STATE ISSUES

ADMINISTRATIVE LAW

Issue: 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 is desirable and received unqualified support from the KBA in 1984. It is also necessary to maintain appropriate checks and balances on the executive. This is done in our law through the concept of some level of judical review of all administrative decisions.

Issue: Extension of the Kansas Administrative Procedures Act.

KBA Position: KBA SUPPORTS the extension of KAPA to all appropriate state agencies.

Rationale: The Administrative Procedures Act has been effective since July 1, 1985. A 1985 interim committee is considering extending the act to other state agencies and agencies of local government. A period of adaptation is appropriate to see if unanticipated problems arise for state agencies before extending the act to local units of government.

ADMINISTRATION OF JUSTICE

Issue: 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 of a criminal justice system. Kansans have been well served by the county attorney system.

However, we believe in this day and age a statewide district attorney system gives more uniformity to the presecutorial function and promotes a more proficient and professional approach to the administration of the criminal justice system.

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

Issue: Adding 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 judicial 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: Salary increases for Kansas district judges.

KBA Position: The Kansas Bar Association SUPPORTS increases in salaries of district judges to a level of the nationwide median for 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. Such increases should be implemented immediately.

Issue: Salary differentials between 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, appropriate 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: 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 or 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: Conforming Kansas statutes 60-216 and 60-226 to recent changes in the federal rules of civil procedures.

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 procedure, we believe desirable changes in the federal code should be incorporated into the Kansas code of civil procedure. Recent amendments to federal rules 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: Use of unsworn declarations in lieu of notary signatures in certain public documents.

KBA Position: The Kansas Bar Association SUPPORTS legislation allowing unsworn declarations instead of notary signatures on certain documents, and change in the perjury statutes to reflect the change.

Rationale: The notary public grew from a 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 are required for wills, codicils, revocations of wills and codicils, and republication of wills and codicils.

CRIMINAL LAW

Issue: Current Kansas 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: Kansans should be proud that the Commission on Uniform Laws when looking at a model insanity defense code, chose to recommend a law similar to that already adopted by Kansas courts and the Kansas legislature. 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: Discovery depositions in criminal matters.

KBA Position: The Kansas Bar Association SUPPORTS 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.

We believe the use of regulated discovery depositions can speed up the administration of criminal justice. In the legislation we support a discovery deposition is appropriate when the defendant waives his right to a pretrial hearing or if the deposition is used solely for impeaching or contradiction of the witness at a subsequent trial.

JUDICIARY

Issue: 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, however, are inconsistent with an independent and impartial judiciary. Judges owe first allegiance to the constitution, statutes enacted by the legislature, and the law, not to majoritarian pressures. **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.

Issue: A Permanent Independent Citizen's Commission on Judicial Compensation.

KBA Position: The Kansas Bar Association SUPPORTS the creation of a permanent independent citizen's commission on judicial compensation. A majority of the members of the commission should be lay persons.

Rationale: Keeping judicial salaries attractive is an ongoing problem which should be addressed by a permanent citizens' commission. Historically, the legislature has been reluctant to fund judicial salaries at levels which remain competitive with other key members of the executive branch, and judicial colleagues in other states. In 1979, similar recommendations from a citizen's group were not implemented by the Legislature. The idea of a commission has merit, however, and should be renewed.

Issue: Alternative Dispute Resolution.

KBA Position: When the parties can agree, KBA SUPPORTS alternatives to the use of judiciary facilities and personnel.

Rationale: Proposed legislation would allow the parties to an action to stipulate to the appointment of a temporary judge to hear and make all necessary orders in an action. If requested the administrative judge of the district could choose a temporary judge, and the action would proceed as if the judge were from the regular bench. Such legislation would not affect the right of jury trials or the appellate process to litigants. It is a natural extension of alternative dispute resolution systems.

LAW-RELATED EDUCATION

Issue: Law-related education.

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. Teaching such information is 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: 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, and modifications of current "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 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 would be inappropriate 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: "First party pain and suffering" statutes.

KBA Position: KBA OPPOSES the concept of mandatory "first party pain and suffering" insurance coverage.

Rationale: Some proponents of a substantial increase in no fault medical expense threshold also propose mandatory insurance coverage for first party pain and suffering. Essentially, this means people injured in auto acccidents would have to buy their own pain and suffering coverage.

The proposal is unique. No state has experience to suggest the true cost of such coverage. The proposal is most objectionable, however, because it is apparently offered as the basis for further limitations on the right to bring a lawsuit.

A recent Federal Department of Transportation study indicated Kansas no fault laws are "in balance" between awards paid under no fault and the original intent of the act to weed out smaller cases. Implementing this untried first party pain and suffering concept in Kansas might jeopardize that "balance."

KBA supports modest inflationary increases in the current medical tort threshold and PIP benefits. However, the practical effect of this statutory pain and suffering award would be to increase the tort threshold to $3,000, which is higher than necessary to adjust for inflation.

Issue: Unfair Claims Settlement Practices Act.

KBA Position: The Kansas Bar Association OPPOSES such legislation.

Rationale: KSA 40-2404 **currently** defines what constitutes unfair methods of competition and unfair or deceptive arts 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 would allow **individuals** to bring private lawsuits against insurance companies if the company were engaging in one of the prohibited practices in KSA 40-2404. There would be no requirement to establish the act if the insurance company constitutes a "general business practice." All that is required is an isolated unfair practice. If successful, plaintiffs would be allowed reasonable attorney's 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: 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 — is an emerging legislative issue in other states.

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

Issue: Prejudgment interest.

KBA Position: The KBA OPPOSES the original draft of the concept known as prejudgment interest found in 1984 SB 800, or similar legislation. The KBA SUPPORTS such legislation only 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 prejudgment interest as previously drafted placed 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.

In such legislation, both parties must be given adequate time for discovery before settlement offers are made. A balanced approach to the administration of justice is required with such legislation.

Issue: Post Judgment Interest Rates.

KBA Position: Post-judgment interest rate statutes should be amended to allow the Secretary of State to publish an interest rate each month equal to the average T-bill rate for the previous twelve month period. Such rate should apply as the post-judgment interest for all civil judgments rendered during that month, and for the duration of the judgment.

Rational: Post-judgment interest rates need to be set on a more realistic basis. The current 15% statutory rate is excessive in light of current inflation and interest rates. T-bill rates more accurately reflect the cost of money, and our recommended procedure to establish a post-judgment rate is more equitable than setting rates by statute. The impact of excessive postjudgment interest rates on large awards which are on appeal is improper. For example, verdicts against the Kansas Health Care Stabilization Fund accrue post-judgement interest at 15% on cases appealed by the Fund, which adversely impacts the solvency of an already hard-pressed fund. Setting post-judgment interest using the T-Bill rate will help make the law more equitable.

Issue: Limitations on who can be present during depositions.

KBA Position: KBA SUPPORTS amendments to KSA 60-230(h) which, in addition to persons currently authorized by statute to attend depositions, would allow "bonafide employees of counsel, or those necessary to record a deposition" to attend such depositions.

Rationale: Current statutes need to be amended to allow legal assistants and those necessary to operate videotape equipment to attend depositions. 1985 HB 2216 would strike subsection (h) from the statute, thus allowing anyone to attend depositions, subject to court restrictions. This would be similar to the Federal Rules approach. KBA, however, believes the Kansas rule with the proposed modification is preferable.

Issue: Extension of the Nonconfrontational Privilege for certain child witnesses.

KBA Position: KBA OPPOSES further extension of laws which limit the Right to Confrontation.

Rationale: Chapter 112 of the 1985 session laws allows use of prerecorded videotapes of children to be introduced into evidence at trial if the child is less than 13 years of age, and the defendant is alleged to have physically, mentally or emotionally abused or neglected, or sexually abused, the child. Oral tape recordings of statements, under certain conditions, are also allowed.

The ability to abuse the nonconfrontational privilege exists, and should be of concern to all citizens. The nonconfrontational privilege adopted in 1985 should not be further extended at this time.

Issue: A "shield law" for reporters and media employees.

KBA Position: KBA OPPOSES "shield laws."

Rationale: Proponents of shield laws argue that when the judicial system's interest in obtaining evidence collides with a reporter's interest in protecting his news sources, the reporter's interests should be paramount. KBA believes that there should be no further extension of the First Amendment to suppress evidence needed for the orderly administration of justice.

PROBATE

Issue: Non-resident wills submitted to probate.

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

Rationale: KSA 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.

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.

KBA suggests that the phrase "residents or" be deleted wherever it appears in KSA 59-2229 and 59-2230. Further, KBA SUPPORTS amending KSA 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.

REGULATION OF ATTORNEYS

Issue: Sales tax on attorneys' fees.

KBA Position: The Kansas Bar Association OPPOSES sales tax on professional fees and services.

Rationale: A sales tax historically has 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 a sales tax 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.

Issue: Mandatory Legal Malpractice Insurance.

KBA Position: KBA OPPOSES mandatory insurance for professionals, especially in light of the current liability crisis.

Rationale: While Kansas health care providers are required to carry malpractice insurance in order to practice medicine, current problems with medical malpractice insurance availability should give legislators reason to consider the problems that arise from

mandatory professional liability insurance. Most Kansas lawyers carry malpractice insurance. Oregon, the only state which currently mandates lawyer malpractice insurance, has a unified bar (as opposed to a voluntary bar association) and a lawyer-owned insurance company. Kansas is currently a two-company state for legal malpractice insurance. Without other options available for malpractice coverage, a mandated program may leave Kansas lawyers without any commercial insurance coverage.

TORT REFORM

Issue: Changing the adversarial practice of law.

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 non-pecuniary losses in personal injury actions, (3) changes in the collateral source rule, (4) suggestions for overall limits on awards in certain personal injury actions, and (5) 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, 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 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 trade offs 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.

Issue: Contingent fee regulation.

KBA Position: The Kansas Bar Association OPPOSES legislative regulation of contingent fee contracts in legal matters. If such regulation is needed, it should come in 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. Contractural arrangements between attorneys and clients should not be abrogated by statute without sound, fundamental reasons of major public policy significance and which have 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.

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 judi-

cial determination of their rights. While there is a general feeling by the public that lawyers benefit too much under contingent fee contracts, or that such contracts somehow cause lawsuits, these perceptions are unfounded. The Rand Corporation's study of contingent fees indicates use of the contingent fee screens some cases out of the system, and, on average, the lawyer using contingent fee contracts will earn about the same as his defense counterpart. 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 being subject to disciplinary action [KSA 7-125. See also DR. 2-106(B)].

Punitive regulation of the contingent fee system may keep otherwise meritorious claims from the judicial system, which would disenfranchise a large sector of our citizens from dispute resolution systems. The negative social implications from such exclusion would be great. Regulation of such contracts is therefore best left with the judicial branch of government.

Issue: Medical Malpractice Issues.

KBA Positions: KBA SUPPORTS legislation which:

1. Implements certain recommendations by the Board of Healing Arts to create a stronger peer review system;
2. Reduces the amount of required insurance that a health care provider must purchase from the Health Care Stabilization Fund from $3 million to $1 million;
3. Provides for experience rating of Kansas physicians;
4. Requires the plaintiff to offer proof of the present value of future damages;

5. Requires itemized jury verdicts;
6. Strengthens screening panel statutes.

KBA opposes limitations on awards.

Rationale: Premiums for medical malpractice insurance are very high and create a problem for Kansas health care providers. However, there are many reasons why premiums have increased. Drastic changes in the tort system such as limiting the amount of damages which can be recovered, cannot be justified. Priority should be given to reducing the incidence of medical malpractice, improving the actuarial aspects of the Health Care Stabilization Fund and modifying the tort system to prevent the filing of groundless suits, and controlling verdicts which are truly excessive. KBA positions on these issues would accomplish those objectives without changing the basic nature of the tort system.

TRENDS IN LAW

Issue: Prohibition of medical technological causes of action.

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 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: Changes in Article VIII of the Uniform Commerical Code relating to investment securities.

KBA Position: The Kansas Bar Association SUPPORTS recommended 1977 amendments by the Uniform Law 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 Commerical 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.

Issue: Uniform Limited Partnership Act amendments.

KBA Position: KBA SUPPORTS the amendments to the 1976 Uniform Limited Partnership act.

Rationale: The original ULPA was enacted in 1916, with major amendments in 1976. In 1984, the Internal Revenue Service issued two rulings that makes possible beneficial changes in the 1976 Uniform Limited Partnership Act. The new amendments limit what the certificate of limited partnership must contain concerning the limited partners, expand the list of specific actions a limited partner may take without becoming liable, allow the partnership agreement to specify how and when additional partners can be brought into a partnership, and provide for other minor changes which make the act more useful.

Issue: The Rights of the Terminally Ill Act.

KBA Position: KBA SUPPORTS adoption of amendments of the Rights of the Terminally Ill Act recently completed and recommended for state adoption by the Uniform Laws Commission embodied in the Kansas Natural Death Act, KSA 65-28,101 *et seq.*

Rationale: Since 1976, when California adopted the first "living-will" law, thirty-five states, including Kansas, have adopted similar legislation. Under this act, a competent adult can execute a declaration

specifying the life-sustaining medical treatment may be withheld under certain circumstances.

Recent amendments to these laws were recommended by the Uniform Laws Commission, which KBA believes should replace our existing law. Although Kansas has a Natural Death Act, uniformity in this area of law is desirable.

Issue: The Uniform Trade Secrets Act

KBA Position: KBA SUPPORTS recent suggested amendments to the Uniform Trade Secrets Act.

Rationale: In 1981, the Patent, Trademark and Copyright Law Section of the American Bar Association and the American Patent Law Association adopted resolutions suggesting changes in the Uniform Trade Secrets Act. The 1981 resolutions include relatively minor changes in this Act to clarify specific issues.

COMMERCIAL LAW

Issue: Inclusion of attorneys under the Fair Debt Collection Practices Act.

KBA Position: KBA OPPOSES federal legislation including attorneys within definitions of "debt collectors" under the Fair Debt Collection Practices Act.

Rationale: Businesses engaged in collecting debts for clients must comply with the Fair Debt Collection Practices Act, which imposes civil penalties, attorneys fees and other sanctions against "debt collectors" violating the provisions of the act. HR 237 and S 951 would delete the exemption now present for attorneys.

KBA believes individual state regulation of professionals is the appropriate method of speaking to a problem of abusive debt collection practices *by attorneys*. Our legal system allows lawsuits for abuse of process if attorney conduct is improper. State legislatures and the disciplinary administrators can regulate such activity through consumer legislation or attorney discipline. Broadening the FDCPA to include attorneys is an unjustifiable intrusion into the operation of the legal profession.

Issue: Aids in Execution.

KBA Position: KBA OPPOSES proposed changes in current law regarding methods for obtaining aid in execution in the collection of judgments which would limit judicial participation in such proceedings.

Rationale: The proposal to permit lawyers to conduct debtors exams in locations other than a courthouse without judicial control of the proceedings has more potential for creating problems than eliminating them. Direct court involvement in such proceedings is desirable.

Issue: Mandating plain language contracts.

KBA Position: KBA OPPOSES legislation requiring "plain language" contracts.

Rationale: Such legislation would practically prohibit the use of well defined words and phrases of art. In addition, such legislation would result in litigation to determine whether language used in contracts is "plain" enough to meet statutory guidelines.

2-5-86

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TESTIMONY ON SENATE BILL 480

SENATE JUDICIARY COMMITTEE

Professor James M. Concannon

February 5, 1986

Mr. Chairman. Members of the Committee. Ron Smith asked that I comment upon proposed amendments to S.B. 480 submitted by the Kansas Bar Association.

I endorse the addition of subsection (g) to K.S.A. 60-226. Sections 1 and 3 of S.B. 480 adopt amendments to K.S.A. 60-211 and 60-216 to require reasonable investigation by attorneys in filing pleadings and motions and to require good faith participation in pretrial conferences. These sections conform Kansas law with 1983 amendments to Federal Rules of Civil Procedure 11 and 16, which were part of a package of amendments seeking to curb abuses in the entire pretrial process. An integral part of that 1983 package was Rule 26(g) which the Bar Association's proposed section 60-226(g) tracks verbatim. Its purpose is to extend the attorney's duties of good faith and reasonable investigation to the discovery process.

It might be thought that section 60-211 alone is sufficient to extend these duties to discovery since it applies to "every pleading, motion and other paper." However, the 60-211 standard is a general one. Its specific application to discovery issues might be subject to varying judicial interpretations. The Federal Rules Advisory Committee explained in part:

> Rule 26(g) . . . parallels the amendment to Rule 11 . . . Motions relating to discovery are governed by Rule 11. However, since discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

In short, if the changes in S.B. 480 to sections 60-211 and 60-216 are wise, the addition of 60-226(g) is necessary to complete the reform.

I feel less strongly about the Bar Association's proposed new section 60-226(f) which tracks Federal Rule 26(f). Kansas

Atch. IV
S. Judiciary 2/5/86

Supreme Court Rule 136 already prescribes a procedure for conducting discovery conferences. I am attaching a copy of that Rule as an appendix. If the Court is satisfied with the operation of Rule 136, perhaps there is no great need to change it. However, the first paragraph of the Bar Association's proposed subsection (f) is a significant improvement over the first paragraph of the Court's Rule 136. Under the Court's Rule parties have the absolute right to a discovery conference even if they have not sought to resolve discovery issues privately. The Bar Association's proposal permits parties to request a discovery conference only after they have sought unsuccessfully to formulate a discovery plan privately with the opposing attorney.

I would like to comment briefly on two other sections of S.B. 480. The first is section 14 which appears on pages 17 and 18 of the Bill. The purpose of the amendment is to permit mail service of process to obtain personal jurisdiction under the long arm statute. Just last year the Legislature adopted a new procedure for service by mail, patterned after Federal Rule 4(c), to obtain personal jurisdiction. K.S.A. 1985 Supp. 60-314. It would be possible to argue that the 1985 statute applies of its own force in long arm statute cases. However, that interpretation is disputable and it is wise to expressly authorize mail service in the long arm statute itself. It would seem more consistent and less confusing to use the same new mail procedure in long arm cases that was adopted for other personal actions. Lines 122 and 123 on page 18 could be changed to read, "served or (B) by sending a copy of the summons and of the petition to the person to be served in the manner set forth in K.S.A. 1985 Supp. 60-314. No order of." The proposed changes at lines 125-6 and 128-130 then could be deleted since these matters are covered by section 60-314.

I recommend this change because section 14 as proposed could cause confusion by specifying restricted mail service. Kansas law currently contains a provision for restricted mail service in K.S.A. 60-307(c). It may be used only in actions which do not seek a personal judgment. Section 14 proposes to authorize restricted mail service in actions seeking personal judgments.

No change is needed in proposed section 13 which insulates the Kansas procedure for tacking notice on defendant's door from challenge under Greene v. Lindsey, 456 U.S. 444, 102 S. Ct. 1874, 72 L.Ed.2d 249 (1982).

My final observation merely involves proofreading. The proposed amendment to K.S.A. 60-217(c) in section 4 does not say what you wanted to say. Lines 218-220 on page 6 purport to permit (and perhaps require) an incapacitated person to sue by an incapacitated next friend. It should read that "the minor or incapacitated person may sue by the minor or incapacitated person's next friend or by a guardian ad litem."

APPENDIX

Rule No. 136

DISCOVERY CONFERENCE. To expedite processing and disposition of litigation, minimize expense and conserve time, the court in any action shall conduct a discovery conference with counsel, upon request of a party, or on the court's own motion. The request must be called to the attention of the judge but may be endorsed on any pleading or made by motion. The discovery conference shall be scheduled by the court as soon as possible.

The court may, at a discovery conference or other appropriate time, designate the time and place of discovery, restrict discovery to certain designated witnesses, or require statements to be taken in writing or by the use of electronic recording rather than by stenographic transcription.

If a discovery conference is requested in a damage action, no depositions, other than of the parties, shall be taken until after the discovery conference is held, except by agreement of the parties or order of the court.

At the discovery conference, the issues shall be identified and the possibilities of stipulations and settlement explored. There shall be an exchange of information on the issues of the case and appropriate discovery procedures determined and ordered. The judge shall require completion of discovery within a definite number of days after the discovery conference has been conducted. If discovery cannot be completed within the period of time originally prescribed by the judge, the party not able to complete discovery shall file a motion prior to the expiration of the original period for additional time to complete discovery. Such motion shall contain a discovery plan and shall set forth the reasons why discovery cannot be completed within the original period. If additional time is allowed, the judge shall grant only that amount of time reasonably necessary to complete discovery.

[**History:** Am. effective December 11, 1980.]

2-5-86

H

Session of 1986

SENATE BILL No. 413

By Special Committee on Judiciary

Re Proposal No. 34

12-19

AN ACT concerning subcontractors' liens; amending K.S.A. 60-1103 and K.S.A. 1985 Supp. 28-170 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-1103 is hereby amended to read as follows: 60-1103. (a) *Procedure.* Any supplier, subcontractor or other person furnishing labor, equipment, material or supplies, used or consumed ~~at the site of the property subject to the lien~~ for the improvement of real property under an agreement with the contractor, ~~or~~ (1) a subcontractor of the contractor, (2) or (3) an owner contractor may obtain a lien for the amount due in the same manner and to the same extent as the original contractor except that:

(1) The lien statement must state the name of the contractor and be filed within three months after the date supplies, material or equipment was last furnished or labor performed by the claimant; ~~and~~

(2) if a warning statement is required to be given pursuant to ~~subsection (c)~~ *section* 2, there shall be attached to the lien statement the affidavit of the supplier or subcontractor that such warning statement was properly given; *and*

(3) a notice of intent to perform, if required pursuant to section 3, must have been filed as provided by that section.

~~(b)~~ *Recording and notice.* When a lien is filed pursuant to this section, the clerk of the district court shall enter the filing in the mechanic's lien docket. The claimant shall (1) cause a copy of the lien statement to be served personally upon any one owner and any party obligated to pay the lien in the manner provided by K.S.A. 60-304 *and amendments thereto*, for the service of

(b) Owner contractor is defined as any person, firm or corporation who:
(1) Is the fee title owner of the real estate subject to the lien; and
(2) enters into contracts with more than one person, firm or corporation for labor, equipment, material or supplies used or consumed for the improvement of such real property.

(c)

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summons within the state, or by K.S.A. 60-308 *and amendments thereto*, for service outside of the state, (2) mail a copy of the lien statement to any one owner of the property and to any party obligated to pay the same by restricted mail or (3) if the address of any one owner or such party is unknown and cannot be ascertained with reasonable diligence, post a copy of the lien statement in a conspicuous place on the premises. The provisions of this subsection requiring that the claimant serve a copy of the lien statement shall be deemed to have been complied with, if it is proven that the person to be served actually received a copy of the lien statement.

~~(c) (1) A lien may be claimed pursuant to this section for the furnishing of labor, equipment, materials or supplies for the improvement of residential property only if the claimant has:~~

~~(A) Mailed to any one of the owners of the property a warning statement conforming with this subsection; or~~

~~(B) in the claimant's possession a copy of a statement signed and dated by any one owner of the property stating that the general contractor or the claimant had given the warning statement conforming with this subsection to one such owner of the property.~~

~~(2) The warning statement provided for by this subsection, to be effective, shall contain substantially the following statement:~~

~~"Notice to owner: (name of supplier or subcontractor) is a supplier or subcontractor providing materials or labor on Job No. _____ at (residence address) under an agreement with (name of contractor). Kansas law will allow this supplier or subcontractor to file a lien against your property for materials or labor not paid for by your contractor unless you have a waiver of lien signed by this supplier or subcontractor. If you receive a notice of filing of a lien statement by this supplier or subcontractor, you may withhold from your contractor the amount claimed until the dispute is settled."~~

~~(3) The warning statement provided for by subsection (c)(1) shall not be required if the claimant's total claim does not exceed $250.~~

~~(d) (c)~~ *Rights and liability of owner.* The owner of the real (d)

property shall not become liable for a greater amount than the owner has contracted to pay the original contractor, except for any payments to the contractor made:

(1) Prior to the expiration of the three-month period for filing lien claims, if no warning statement is required by ~~subsection (c)~~ *section* 2; or

(2) subsequent to the date the owner received the warning statement, if a warning statement is required by ~~subsection (c)~~ *section* 2.

The owner may discharge any lien filed under this section which the contractor fails to discharge and credit such payment against the amount due the contractor.

~~(c) As used in this section, "residential property" means a preexisting structure in which the owner resides at the time the claimant first furnishes labor, equipment, material or supplies and which is not used or intended for use as a residence for more than two families or for commercial purposes.~~

New Sec. 2. (a) As used in this section, "residential property" means a preexisting structure in which the owner resides at the time the claimant first furnishes labor, equipment, material or supplies and which is not used or intended for use as a residence for more than two families or for commercial purposes;

(b) A lien for the furnishing of labor, equipment, materials or supplies for the improvement of residential property may be claimed pursuant to K.S.A. 60-1103 and amendments thereto only if the claimant has:

(1) Mailed to any one of the owners of the property a warning statement conforming with this section; or

(2) in the claimant's possession a copy of a statement signed and dated by any one owner of the property stating that the general contractor or the claimant had given the warning statement conforming with this section to one such owner of the property.

(c) The warning statement provided for by this section, to be effective, shall contain substantially the following statement:

"Notice to owner: (name of supplier or subcontractor) is a supplier or subcontractor providing materials or labor on Job No.

(1)

; or

(2) any construction upon real property which is (A) owned or acquired by an individual at the time the claimant first furnishes labor, equipment, material or supplies; (B) intended to become and does become the principal personal residence of that individual upon completion; and (C) not used or intended for use as a residence for more than two families or for commercial purposes.

_____ at (residence address) under an agreement with (name of contractor). Kansas law will allow this supplier or subcontractor to file a lien against your property for materials or labor not paid for by your contractor unless you have a waiver of lien signed by this supplier or subcontractor. If you receive a notice of filing of a lien statement by this supplier or subcontractor, you may withhold from your contractor the amount claimed until the dispute is settled."

(d) The warning statement provided for by this section shall not be required if the claimant's total claim does not exceed $250.

New Sec. 3. (a) As used in this section, "new residential property" means a new structure which is constructed for use as a residence and which is not used or intended for use as a residence for more than two families or for commercial purposes. "New residential property" does not include any improvement of a preexisting structure or construction of any addition, garage or outbuilding appurtenant to a preexisting structure.

(b) A lien for the furnishing of labor, equipment, materials or supplies for the construction of new residential property may be claimed pursuant to K.S.A. 60-1103 and amendments thereto after the passage of title to such new residential property to a good faith purchaser for value only if the claimant has filed a notice of intent to perform prior to passage of title to such new residential property. Such notice shall be filed in the office of the clerk of the district court of the county where the property is located and shall contain:

(1) The name of the owner of the property;

(2) the name and address of the claimant; and

(3) a description of the real property.

Sec. 4. K.S.A. 1985 Supp. 28-170 is hereby amended to read as follows: 28-170. (a) The docket fee prescribed by K.S.A. 60-2001 and amendments thereto shall be the only costs assessed for services of the clerk of the district court and the sheriff in any case filed under chapter 60 of the Kansas Statutes Annotated. For services in other matters in which no other fee is prescribed by statute, the following fees shall be charged and collected by the

clerk. Only one fee shall be charged for each bond, lien or judgment:

1. For filing, entering and releasing a bond, mechanic's lien, *notice of intent to perform*, personal property tax judgment or any judgment on which execution process cannot be issued . $5
2. For filing, entering and releasing a judgment of a court of this state on which execution or other process can be issued 15
3. For a certificate, or for copying or certifying any paper or writ, such fee as shall be prescribed by the district court.

(b) The fees for entries, certificates and other papers required in naturalization cases shall be those prescribed by the federal government and, when collected, shall be disbursed as prescribed by the federal government. The clerk of the court shall remit to the state treasurer at least monthly all moneys received from fees prescribed by subsection (a) or (b) or received for any services performed which may be required by law. The state treasurer shall deposit the remittance in the state treasury and credit the entire amount to the state general fund.

(c) In actions pursuant to the Kansas code for care of children, the Kansas juvenile offenders code, the act for treatment of alcoholism (article 40 of chapter 65), the act for treatment of drug abuse (K.S.A. 65-5201 *et seq., and amendments thereto*) or the act for obtaining treatment for a mentally ill person, the clerk shall charge an additional fee of $.50 which shall be deducted from the docket fee and credited to the prosecuting attorneys' training fund as provided in K.S.A. 28-170a and amendments thereto.

Sec. 5. K.S.A. 60-1103 and K.S.A. 1985 Supp. 28-170 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.