Approved March 6, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

3:30 ~~x~~a~~x~~m~~x~~p.m. on February 24, 1987 in room 313-S of the Capitol.

All members were present except: Representatives Duncan and Peterson, who were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Jane Holt, Secretary

Conferees appearing before the committee:
Representative Mike O'Neal
Jim Clark, Kansas County and District Attorneys Association
Commissioner Robert Barnum, Youth Services, Social and Rehabilitation Services
Representative Vincent Snowbarger
Representative Marvin Smith
Ken Harrop, a citizen, Hoyt
Jerry Slaughter, Kansas Medical Society
Wayne Stratton, Attorney
Gary McCallister, Kansas Trial Lawyers Association
Ted Fay, Kansas Insurance Department

Hearing on H.B. 2260 - Mandatory sentence for crimes with firearms, exceptions

Representative O'Neal testified H.B. 2260 exempts from the mandatory sentencing law convictions for involuntary manslaughter, (see Attachment I).

Jim Clark opposed any further reduction or dilution of the statute which requires serving a mandatory minimum sentence for use of a firearm during the Commission of a violent crime against a person, (see Attachment II).

The hearing was closed on H.B. 2260.

Hearing on H.B. 2258 - Concerning civil procedure, relating to comparative negligence

Representative O'Neal testified H.B. 2258 amends the statutes to allow legal assistants to be present during the taking of depositions. The bill makes the Kansas statutes on depositions conform to the federal rules.

Ron Smith was not present. He submitted prepared testimony, (see Attachment III). In his testimony he stated the Kansas Bar Association prefers that the question of who can be present at a deposition be set forth in the statute, however they do not oppose the bill.

Continuation of Hearing on H.B. 2288 - Availability of S.R.S. file to guardian ad litem before hearing under code for care of children.

Robert Barnum submitted an amendment to H.B. 2288, (see Attachment IV). The amendment would relieve S.R.S. from the responsibility of searching out the guardian ad litem. S.R.S. would still provide access to the records and reports to the guardian ad litem.

Jim Clark did not appear, but submitted prepared testimony opposing H.B. 2288. He suggested requiring S.R.S. furnish the reports upon the request of the guardian ad litem, and making the granting of a continuance for failure to supply the records, a matter for the trial court's discretion. (Attachment V)

Hearing on H.B. 2296 - Termination of parental rights, counsel for unlocated father

Representative Snowbarger testified this bill amends K.S.A. 38-1129, to add that the court shall appoint an attorney to represent any father whose whereabouts is unknown.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on February 24, 19 87

The hearing was closed on H.B. 2296.

Hearing on H.B. 2359 - Redemption not available to purchaser of real property.

Representative Smith testified if the statutory requirement is changed as proposed in H.B. 2359, the validity of contract sales of real property would be enhanced and contracts would be used more frequently, (see Attachment VI).

Ken Harrop testified in support of H.B. 2359. He related his experiences and requested the passage of H.B. 2359, (see Attachment VII).

The hearing was closed on H.B. 2359.

Hearing on H.B. 2418 - Health care providers, insurance, coverage, regulation, peer review, risk management

Jerry Slaughter testified a portion of Section 8 was omitted when drafted. A copy of the omitted section is (Attachment VIII).

Wayne Stratton presented a summary of the provisions of H.B. 2418, (see Attachment IX).

Gary McCallister testified he was concerned with the language on page 11 in regard to the reporting mechanisms. He also took exception to the language on peer review on page 21, subsection (4).

Ted Fay presented a letter from Derenda J. Mitchell, Attorney, Health Care Stabilization Fund, recommending the repeal of the merit surcharge, (see Attachment X).

The hearing was closed on H.B. 2418.

Hearing on H.B. 2409 - Concerning civil procedure, relating to expert witness qualifications in certain actions

Gary McCallister testified technical professionals should not be restricted as provided in this bill to be able to testify as expert witnesses.

The Chairman announced the hearing on H.B. 2409 will be continued to Wednesday, February 25, 1987, at 3:30 p.m.

The meeting was adjourned at 5:00 p.m.

The next meeting will be Wednesday, February 25, 1987, at 3:30 p.m. in room 313-S.

GUEST REGISTER

DATE Feb 24 1987

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Mr & Mrs Don Gilliat	Reno Co. Kansas Assn. of Townships	RR#2 Hutchinson, Ks 67501
Kenneth L Harvey	"	Rt 1 Box 349 Hoyt, Ks 66440
Mr & Mrs Merrill Suter	"	RT 1 Box 162 Cheney KS 67025
Dr James Bretenbach	" " Reno	Pretty Prairie, Ks
Jess Bockelman	St. Francis Medical Center Wichita	Topeka
Jim Fitzgerald	KS State Historical Society	Memorial Bldg. Topeka
Helen Stephens	Ks. Society of Land Surveyors	Topeka.
Bill Henry	KS Engineering Society	Topeka
George Barbee	Ks. Consulting Engeneers	Topeka
VANCE LISTON	KS SOCIETY OF ARCHITECTS	TOPEKA
Ann Davidson	Ks. Society of Architects	Topeka
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS	"
Kevin M Hill	STUDENT	"
Jack Fay	KID	"
Pam Eyestone	KID	"
Ted Anderson	KSCPA	Topeka
Jan Vacek	KSCPA	"

STATE OF KANSAS

MICHAEL R. (MIKE) O'NEAL
REPRESENTATIVE, 104TH DISTRICT—HUTCHINSON
RENO COUNTY
P.O. BOX 1868
HUTCHINSON, KANSAS 67504-1868

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: JUDICIARY
LABOR AND INDUSTRY
PUBLIC HEALTH AND WELFARE
WAYS AND MEANS COMMITTEE
INTERNSHIP

MEMORANDUM

TO: House Judiciary Committee

DATE: February 23, 1987

RE: HB 2260

Several years ago the Legislature took a tough stand on crimes involving firearms and passed a mandatory sentencing law aimed at (1) deferring criminals from using firearms to commit crimes and (2) reducing crimes committed by firearms and the death and injury caused thereby (State v. Pelzer, 230 Kan. 780).

The law was made applicable to convictions for rape, aggravated sodomy or any Chapter 34 crime (crimes against persons). Probation and suspension of sentence was prohibited on these convictions.

Then came the case of Sutton v. State, 6 Kan. App. 2d 831. There Sutton was convicted of attempted first degree murder. The judge's sentencing pursuant to the mandatory sentencing provisions of K.S.A. 21-4168 was reversed by the appellate court because attempted murder is a Chapter 33 crime, not a Chapter 34. (Anticipatory crimes are covered under Chapter 33.)

Thus, we have a law that sends to prison those who are convicted of such crimes as involuntary manslaughter, but which does not require that we send would-be 1st degree murderers to prison.

House Bill 2314 creates an exception to the mandatory sentencing law insofar as it applies to the crime of involuntary manslaughter (K.S.A. 21-3404). By definition it is an unintentional crime and as such is strikingly different from its counterparts in the mandatory sentencing law. Imposition of the penalty has brought about great hardship and has done little to advance the cause of just sentencing.

Consider the circumstances where involuntary manslaughter is committed. Often it is the person who in defending himself takes the life of another under circumstances where such force is later found to be unjustified. Often it is the tragic loss of life in hunting accidents or negligent discharges where the defendant and victim were close friends or relation. When negligence is excessive it becomes criminal. But in Kansas, it also is an automatic ticket to prison without regard for the tragic and unintentional circumstances.

Attachment I
House Judiciary 2/24/87

Take the recent case of Willie L. Robinson (State v. Robinson, docket #56,971). In attempting to unload his gun in his bedroom, he handed it to his common law wife. The gun discharged, killing her. The unintentional act was done in such a careless manner that it constituted involuntary manslaughter, a Class D felony. The Court of Appeals has recently held that there is nothing in the statute to suggest that involuntary manslaughter was to be excluded so Willie is off to prison to contemplate the tragic loss of his wife, while others who intentionally committed worse crimes are out on probation in many cases.

Consider also the case of Montie Brown (State v. Brown, docket #84-57182-A) convicted two years ago of involuntary manslaughter when a warning shot fired in the direction of two individuals stealing from his property, hit one and killed him. The statute gave the judge no authority to consider Montie's circumstances which were as follows:

1) criminals were stealing from his property
2) his act was found to have been unintentional
3) he had no previous criminal record
4) he hadn't fired his gun in over 10 years
5) he is a 56 year old triple-by-pass patient with severe heart problems
6) the crime demonstrated an isolated event with no evidence that he poses a threat to society
7) public-opinion was overwhelmingly in his favor
8) his pre-sentence report indicated he shouldn't be incarcerated notwithstanding the statute
9) in a negligence action filed by the family of the deceased, a settlement satisfactory to the family was quickly reached.

The bill would not prevent a judge from sending one convicted of involuntary manslaughter to prison under proper circumstances. It would, however, grant the judge discretion to take factors such as those set forth above into consideration in determining a just sentence.

With the prison population at its current numbers, would we rather see those like Montie go to prison - or the would-be 1st degree murderer, instead?

Kansas County & District Attorneys Association

827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351

EXECUTIVE DIRECTOR • JAMES W. CLARK

Testimony in Opposition to

HB 2260

The Kansas County and District Attorneys Association opposes any further reduction or dilution of the application of the statute which requires serving a mandatory minimum sentence for use of a firearm during the commission of violent crimes against persons. "Each year, some 30,000 Americans die through the suicidal, homicidal or accidental abuse of guns, and several hundred thousand are injured. Many more are victimized by crimes committed with guns, and the contribution of armed crime to the public's fear of crime is incalculable." The Armed Criminal in America, a National Institute of Justice study. The Kansas Legislature, in considering the alarming number of crimes against persons in which a firearm was used, opted for increasing the penalties for criminals, rather than imposing restrictions on gun use and ownership that generally affect only the innocent. This position has been supported by President Reagan and the Congress, and the passage of the Comprehensive Crime Control Act of 1984 insures an additional 5-year minimum mandatory sentence for use of a firearm in a federal crime of violence.

While our position may appear harsh in some fact situations, the Committee should know that in most cases where the more serious homicide charges are involved, and a claim of self-defense is made, the Kansas Supreme Court requires the giving of instructions on the lesser, included offense of both voluntary and involuntary manslaughter. In fact, most convictions of involuntary manslaughter occur when a greater crime was charged.

In those few, and highly unusual situations, such as self-defense, property defense, or crimes of passion are involved, where imposition of a mandatory term of incarceration seems harsh, this committee should consider that a jury of peers has considered the same situation, in light of all the facts, and determined the defendant guilty. In addition, there remains the remedy of executive clemency or pardon for these kinds of cases.

In the above mentioned Department of Justice study, a survey of 1800 convicted felons was made. The study shows that restriction on retail sales is not effective, but that a sizeable majority of the felons who did not use a firearm cited enhanced penalties as an important reason for their decision. To depart from this policy, even for the so-called "lesser" crime of involuntary manslaughter, would reduce this deterrent effect.

Attachment II
House Judiciary 2/24/87

KANSAS BAR ASSOCIATION

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

February 23, 1987
HB 2258

Mr. Chairman. Members of the House Judiciary Committee. I am Ron Smith, KBA Legislative Counsel

This bill is intended to let the parties decide who can be present at a deposition under KSA 60-230(h), and as such is similar to the federal rule.

KBA prefers that the question of who can be present at a deposition be set forth in the statute. Our preference is because the presence of the statute acts as an automatic discovery order limiting who can or cannot be included at a deposition.

Discovery is becoming one of the more expensive areas of litigation. Scheduling depositions is sometimes difficult, and once set, if you postpone for any reason, the cost and delay increases. If one party comes to the deposition and finds the other party has asked a psychiatrist to sit in on the deposition and "take notes," if the deponent's attorney refuses to let the deposition take place under those circumstances, they'll have to find a judge to settle their dispute. Again this means more time and money.

If the parties can refer to the statute and say, "It doesn't allow psychiatrists" to attend the deposition, they settle the dispute right there.

Attachment III
House Judiciary 2/24/87

Obviously, we can live with this version of the bill where subsection (h) is stricken. We prefer the alternative, however.

Session of 1987

HOUSE BILL No. 2288

By Representative Graeber

2-11

AN ACT concerning proceedings pursuant to the Kansas code for care of children; relating to certain records and reports.

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

Section 1. (a) Not less than 48 hours, excluding Saturdays, Sundays and legal holidays, before a hearing pursuant to this code, ~~the department of social and rehabilitation services~~ shall ~~provide to the child's guardian *ad litem*~~ any records or reports in the custody of the department which are necessary to the conduct of such hearing.

~~(b) Failure to comply with the provisions of subsection (a) shall be grounds for a continuance of the hearing until such records or reports have been provided to the guardian ad litem for the period required by subsection (a).~~

(c) This section shall be part of and supplemental to the Kansas code for care of children.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

the guardian ad litem

review

of social and rehabilitation services

The department of social and rehabilitation services shall provide access to said guardian ad litem.

Attachment IV
House Judiciary 2/24/87

Kansas County & District Attorneys Association

827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351

EXECUTIVE DIRECTOR • JAMES W. CLARK

Testimony in Opposition to

HB 2288

The Kansas County and District Attorneys Association opposes HB 2288 in its present form. Much criticism is made by children's advocacy groups, and others, concerning the delay in judicial procedures designed to protect children. The blanket requirement in HB 2288 for furnishing any and all SRS records, before any and all hearings, will only increase delays, as well as burden the agency with an added, and often unnecessary, function. There is no requirement that the guardian ad litem request the records, and there is an absolute requirement for a continuance of the hearing if the records are not furnished.

While we do not quarrel with the intent behind this bill, we find it unworkable in its present form.

SUGGESTED AMENDMENTS

The better practice would be to amend the bill to require furnishing records **upon the request of the guardian ad litem,** and making the granting of a continuance for failure to supply the records **a matter for the trial court's discretion.**

Attachment V
House Judiciary 2/24/87

STATE OF KANSAS

MARVIN E. SMITH
REPRESENTATIVE, FIFTIETH DISTRICT
SHAWNEE AND JACKSON COUNTIES
123 N.E. 82ND STREET
TOPEKA, KANSAS 66617-2209

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER EDUCATION
TAXATION
TRANSPORTATION

FEBRUARY 24, 1987

HB 2359
HOUSE JUDICIARY COMMITTEE

MR. CHAIRMAN AND MEMBERS OF COMMITTEE:

APPROXIMATELY A YEAR AGO A CONSTITUENT FROM THE 50th DISTRICT CONTACTED ME CONCERNING A PROBLEM THAT HAD DEVELOPED ON A CONTRACT SALE OF PROPERTY THAT HAD BEEN NEGOTIATED EIGHTEEN (18) MONTHS PREVIOUSLY.

THE PURCHASER HAD BEEN DELINQUENT IN MAKING PAYMENTS ON A TIMELY BASIS. THE PURCHASER HAD BROKEN THE CONTRACT REQUIREMENT OF FAILURE TO PERFORM. IF TWO (2) OR MORE MONTHLY PAYMENTS ARE DUE AND NOT PAYED, THEN THIS AGREEMENT AT THE OPTION OF SELLER "SHALL BECOME NULL AND VOID, AND ALL RIGHTS AND INTERESTS HEREBY CREATED OR EXISTING IN FAVOR OF OR DERIVED FROM PURCHASER SHALL ABSOLUTELY CEASE AND TERMINATE, AND THE RIGHT OF POSSESSION AND ALL LEGAL AND EQUITABLE INTEREST IN THE PROPERTY HEREBY CONTRACTED OR CREATED HEREUNDER SHALL REVERT TO AND REVEST IN SELLER WITHOUT ANY DECLARATION OF FORFEITURES OR ACT OF RE-ENTRY AND WITHOUT ANY OTHER ACT TO BE PERFORMED BY SELLER, AS ABSOLUTELY AND FULLY AS IF THIS AGREEMENT HAD NEVER BEEN MADE, AND ALL AMOUNTS PAID BY PURCHASER HEREUNDER SHALL BE FORFEITED TO SELLER AS LIQUIDATED DAMAGES AND AS RENT FOR SAID PROPERTY."

KANSAS SECURED TITLE AND ABSTRACT COMPANY, TOPEKA, WAS THE ESCROW AGENT.

Attachment VI
House Judiciary 2/24/87

BEFORE THIS CONTRACT AND PROPERTY WAS RELINQUISHED BY THE PURCHASER TO THE SELLER A LONG CONSIDERABLE AMOUNT OF TIME WAS INVOLVED.

FOR YEARS CONTRACT SALES OF PROPERTY HAVE BEEN VERY POPULAR AND SUCCESSFULLY USED BY BOTH SELLERS AND PURCHASERS, BECAUSE OF EASY ABILITY TO FINANCE PURCHASE OF REAL PROPERTY AND ALSO USUALLY AN INTEREST RATE ADVANTAGE TO THE SELLER. BUT, IF WE HAVE INCREASED DEFAULT AND ADDED EXPENSE FOR REPOSSESSION, THEN CONTRACT SALES WILL BE IN JEOPARDY AS POPULAR MEANS OF TRANSFERRING PROPERTY FROM A SELLER TO A PURCHASER.

I BELIEVE THAT IF THE STATUTORY REQUIREMENT WAS CHANGED AS PROPOSED IN HB 2359, THEN THE VALIDITY OF CONTRACT SALES OF REAL PROPERTY WOULD BE ENHANCED AND CONTRACTS WOULD BE USED MORE FREQUENTLY.

February 24, 1987 HB 2359

Mr. Chairman and Members of the Committee:

I am Ken Harrop from Hoyt, Kansas.

In July of 1984 we entered into a contract with David and Nora Schaal. They were to pay off our mortgage under the terms of the original contract plus a note for $3,774.71 for 5 years at 10%. The couple was separated shortly thereafter and Nora missed her first payment in November of 1984. She never entirely caught up and defaulted in November of 1985.

After repeated attempts to explain to her the consequences of defaulting before she actually did, and offering to release her from the note if she would find new financing, my wife and I decided we should foreclose. We tried ending the matter by having her sign the property back in exchange for two months free to leave the premises. She initially agreed and then decided to fight.

Through the ensuing "negotiations" I learned that the contract all of us had agreed to and signed didn't really mean what it said. As my lawyer has said, it gave us the right to litigate the matter. This was little consolation in light of the fact that she had no legal fees. Her counsel was through the Washburn Legal Clinic and she did not have to leave the premises and was making no payments all during this process. In view of her financial condition, I would most likely never collect anything even if I won the case.

Attachment VII
House Judiciary 2/24/87

Meanwhile, my legal fees were mounting, the prospects for a court date soon were dim, and I had to make the mortgage payments to keep from defaulting myself.

With nothing to gain and the financial burden increasing, I was forced to dismiss my claim on condition that she leave. Now that it's over, I do not intend to enter such a contract again under the present law. The seller has no chance.

I hope the committee will favorably consider HB 2359.

bylaws of the facility. The committee shall investigate all such reports and take appropriate action, including recommendation of a restriction of privileges at the appropriate medical care facility. In making its investigation, the committee may also consider treatment rendered by the health care provider outside the facility. The committee shall have the duty to include with its quarterly report to the appropriate state licensing agency any finding by the committee that a health care provider acted below the applicable standards of care or in a manner that may be grounds for disciplinary action pursuant to K.S.A. 65-2836 and amendments thereto, and which has a reasonable probability of causing injury to a patient, so that the agency may take appropriate disciplinary measures.

(3) If the health care provider involved in the reportable incidents is a medical care facility, the report shall be made to the chief of the medical staff, chief administrative officer or risk manager of the facility. The chief of the medical staff, chief administrative officer or risk manager shall refer the report to the appropriate executive committee which is duly constituted pursuant to the bylaws of the facility. The executive committee shall investigate all such reports and take appropriate action The committee shall have the duty to include with its quarterly report to the department of health and environment any finding that the facility acted below the applicable standard of care or in a manner that may be grounds for disciplinary action pursuant to K.S.A. 65-2836 and amendments thereto, and which has a reasonable probability of causing injury to a patient, so that appropriate disciplinary measures may be taken.

(4) As used in this section, "knowledge" means familiarity because of direct involvement or observation of the incident.

(5) This section shall not be construed to modify or negate the physician-patient privilege, the psychologist-client privilege, or the social worker-client privilege as codified by Kansas statutes.

(b) If a reportable incident is reported to a state agency which licenses health care providers, the agency may investigate the report or may refer the report to a review or executive committee to which the report could have been made under subsection (a) for investigation by such committee.

(c) When a report is made under this section, the person making the report shall not be required to report the reportable incident pursuant to K.S.A. 65-28,122 and amendments thereto. When a report made under this section is investigated pursuant to the procedure set forth under this section, the person or entity to which the report is made shall not be required to report the reportable incident pursuant to K.S.A. 65-28,121 or 65-28,122, and amendments thereto.

(d) Each review and executive committee referred to in subsection (a) shall submit to the appropriate state licensing agency on a form promulgated by said agency, at least once every three months, a report summarizing the reports received by the

H.B. 2418 SUMMARY OF PROVISIONS

Section 1.

Section 1 amends K.S.A. 40-3403. It eliminates the requirement that resident or nonresident inactive health care providers must have paid into the fund for at least three years the applicable surcharge or an equivalent amount to be covered by the fund for incidents arising after July 1, 1986.

Section 2.

Section 2 amends the public records act to exclude risk management records when those records are in the hands of a licensing agency, and also excludes experience rating information compiled by the Department of Insurance from disclosure under the act.

Section 3.

Section 3 clarifies when a license may be revoked, suspended, or limited by the Board of Healing Arts for the improper prescribing, selling, administering or giving of a controlled substance.

Section 4.

Section 4 clarifies unprofessional conduct related to the maintenance of medical records.

Section 5.

Section 5 modifies the peer review statute. It eliminates the requirement that peer review committees must act pursuant to written bylaws approved by the governing board of a hospital. This section also defines "peer review officer or committee." For consistency, discovery of the information contained in peer review records is no longer discoverable through the testimony of a participant in the process under this section. Section 5 also allows for information sharing among peer review committees without waiving the privileges of the statute.

Section 6.

Section 6 amends K.S.A. 1985 Supp. 65-4921 to define "appropriate licensing agency" and to further clarify what constitutes a "reportable incident."

Section 7.

Section 7 allows a hospital to rely upon its adopted policies and procedures in formulating a risk management plan.

Section 8.

Section 8 further clarifies reportable incidents and allows the health care provider to include reports of positive findings with its quarterly report.

Section 9.

Section 9 enhances the confidentiality of risk management reports. This section also defines persons and committees involved in the risk management process as "peer review committees" under K.S.A. 65-4915.

Attachment IX
House Judiciary 2/24/87

KANSAS
INSURANCE DEPARTMENT

420 S.W. 9th
Topeka 66612-1678 913-296-3071

1-800-432-2484
Consumer Assistance
Division calls only

STATE OF KANSAS

FLETCHER BELL
Commissioner

February 24, 1987

The Honorable Robert Wunsch
State of Kansas
Room 175-W, State Capitol
Topeka, Kansas 66612

RE: Recommended Repeal of Merit Surcharge

Dear Representative Wunsch:

This letter is written in response to your request to delineate the Insurance Department's concerns about the surcharge rating system and to outline our suggestions as to why the merit surcharge system should be repealed.

First, the Department has never favored a merit surcharge system for the Health Care Stabilization Fund (Fund). The purpose of insurance, in general, is to spread the risk over a number of individuals and entities (the pool) so that it can be more affordable for the group as a whole. The need for this function of insurance is accentuated in the health care community because fewer health care providers exist across whom to spread the risk. A merit surcharge system imposed upon an already restricted pool of health care providers may cause an unbearable burden for those health care providers having to pay the increased surcharge. Thus, health care providers already burdened with high premiums and surcharges are doubly burdened, perhaps to the point of breaking, when a merit surcharge is piled on top of the payments they already have to make.

Second, not only is a merit surcharge system detrimental to an already shrinking pool of health care providers, it is also detrimental because of where the increased responsibility to pay the merit surcharge falls. The merit surcharge requires that those health care providers who have had more claims must pay the merit surcharge. It is interesting, therefore, to examine where the claims fall that are being paid by the Fund. The following statistical analysis presents the amounts of money being paid in general categories of health care in Kansas.

TYPE OF CASE	AWARDS	PERCENT OF TOTAL AWARDS
Anesthesiology	$ 2,852,023.65	5%
Birth Related	$18,571,511.03	36%
Incorrect Diagnosis	$ 5,241,469.20	10%
Surgery Related	$12,876,394.53	25%
Improper Care	$ 9,296,819.75	18%
Others	$ 3,364,492.00	6%

Attachment X
House Judiciary 2/24/87

As has been the case since the inception of the Fund, the greatest amount of claims for which the Fund has become responsible lies in the indemnities paid for birth-related injuries. Consequently, a commensurate share of the merit surcharge would fall on the obstetrician or the family practice physicians who are involved in delivering babies in Kansas.

Third, a merit surcharge system doubly penalizes the provider against whom it is imposed. Our system of professional liability insurance for health care providers in Kansas, as a practical matter, already contemplates a merit system based upon past experience and the claims paid against health care providers. The primary carriers implement a merit system through their underwriting selection process. The companies which charge a lower premium generally do not write health care providers with poor experience or in certain specialties or high risk areas. Those providers with higher numbers of claims, therefore, generally have to look to the Health Care Provider Insurance Availability Plan (the Plan) to obtain their professional liability insurance. The Plan has a merit rating system built into its assessment of rates. Since the surcharge paid to the Health Care Stabilization Fund is a percentage of the amount paid at the primary level, the merit charge or increased cost to providers who have had more claims remains intact and is also paid to the Health Care Stabilization Fund. Adding another merit surcharge on top of those increases already inherent in the system doubly penalizes the providers who have had more claims.

Fourth, implementation of a merit surcharge system requires the arguably arbitrary allocation of amounts against health care providers in lawsuits involving more than one health care provider defendant. Under our system of comparative negligence, fault may be compared with other parties or individuals in a given case. While a jury will allocate fault, settlements do not necessarily allocate the fault among multiple party defendants. Making the allocations on losses incurred before the effective date of the merit surcharge provision requires the Fund to go back and allocate the losses retrospectively in old cases. The allocation would cause the Fund to have to make assessments about cases that have been closed for quite some time when memories have faded and when the file may not contain the documentation to support the allocations being made. Ten years of files have been expedited without the merit rating surcharge requirement in place and without a mind toward a merit surcharge system. A retrospective allocation in this regard would amount to nothing more than sheer guesswork. Imposing an additional surcharge on an already burdened health care provider would not seem to be a fair way to increase the health care provider's liability to the Fund when we are making the determination in hindsight.

The prospective allocation of losses poses an administrative problem in that it is difficult for health care providers to always agree on what the fault assigned to them should be. While the Fund in recent years has tried to encourage the agreement of health care providers in the decision to settle and in the amounts being allocated against them, health care providers are often reluctant to absorb a large loss without further litigation or, at minimum, further negotiations regarding their appropriate share of a loss upon settlement. While the examples of problems in this regard are too numerous to list, some notable examples are Harrison v. Long, Kan. Supp. Ct. 86-59739-A; Risner v. Sandhu, et al., U.S. District Court 85-2182-0 (District of Kansas); and McGuire v. Sifers, 234 Kan. 368, 681 P.2d 1025 (1984). In each of these cases, one or more health

care providers did not believe themselves to be responsible for the amount the Fund claimed to be their responsibility. Further litigation was, therefore, necessary to determine the liabilities of the health care providers. Needless to say, the merit surcharge system will result, at a minimum, in increased administrative costs if not increased and expensive litigation costs.

Fifth, the collection of the merit surcharge poses administrative hurdles and dilemmas for the Fund. The surcharge, under the present system, is collected by the agents of the primary insurance carrier and is then remitted to the Health Care Stabilization Fund. This process takes several weeks, if not months, before the Fund receives the surcharge payment. Collection processes of the merit surcharge will undoubtedly further delay the Fund's receipt of the surcharge. Any increased receipts in the surcharge will be negated by the increased administrative costs and loss in interest on the use of the money during the delay.

I hope this letter portrays the problems with which we are confronted. While administration of the merit rating provision is most burdensome and expensive, perhaps of greatest significance is the detriment the system may pose to communities requiring obstetrical services. Without a doubt, Kansas health care providers involved in providing obstetrical services to Kansas citizens, will be faced with having to pay the additional surcharge on top of their already increased insurance costs. We, therefore, respectfully recommend the repeal of the merit surcharge rating system as adopted by the legislature in the 1986 legislative session.

If you or any of the other members of the committee require further information in analyzing this topic, please do not hesitate to contact the undersigned.

Very truly yours,

Fletcher Bell
Commissioner of Insurance

Derenda J. Mitchell, Attorney
Health Care Stabilization Fund

DJM:tp
LE/3852