Approved March 16, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

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

3:30 ~~xxxx~~/p.m. on March 2, 1987 in room 313-S of the Capitol.

All members were present except: Representative Peterson, who was execused.

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

Conferees appearing before the committee:
Gene Olander, Shawnee County District Attorney
Representative Dale Sprague
Commissioner Robert Barnum, Youth Services, Social and Rehabilitation Services
David D. Plinsky, Assistant Attorney General
Bruce Linhos, Kansas Association of Licensed Private Child Agencies
Elizabeth Taylor, Kansas Association for the Education of Young Children
Representative Vern Williams
David Moses, Director, Consumer Fraud and Economic Crime Division of the Sedgwick County District Attorney's office.
Art Weiss, Deputy Attorney General
Marvin Pendergraft, Affiliated Fitness Centers of Kansas, Inc.
Jim Lawing, Wichita Bar Association
Lee Woodard, President, Wichita Bar Association
Susie Barnes, Executive Director, Wichita Bar Association
Marjorie Van Buren, Office of Judicial Administration
John Kuether, Kansas Bar Association
Bill Ryan, Mental Health and Retardation Services, Social and Rehabilitation Services
Jim Clark, Kansas County and District Attorneys Association
Steve Tatum, Assistant Johnson County District Attorney, Olathe
Georgia Nesselrode, Crime Victims Reparations Board, Olathe
Don Matlock, Wichita Bar Association
William J. Brink, Farmer and Real Estate Broker, Lawrence
William H. Haley, Real Estate Broker, Lawrence
Warren W. Lilly, Melvern

Hearing on H.B. 2428-Person incompetent to stand trial, notice of release from commitment

Gene Olander testified this bill provides that the county or district attorney shall be notified of involuntary commitment proceedings and notified if the defendant is to be discharged from a treatment facility. The bill also allows 10 days for the prosecuting attorney to request a determination of the defendant's competency to stand trial.

Hearing on H.B. 2011 and H.B. 2488-Personnel of homes for children, S.R.S. validation of abuse

Representative Sprague testified H.B. 2011 came from the interim Special Committee on Judiciary, however, H.B. 2488 is a more thorough bill and better addresses the problem of due process for a social worker in the S.R.S. validation procedure. He stated H.B. 2392, which has been passed out of Public Health and Welfare committee, sets standards for the removal of a name from the S.R.S. central registry. He requested the Committee give H.B. 2488 favorable consideration.

Robert Barnum supported H.B. 2488 as having more definitive language. He also stated S.R.S. is a proponent of H.B. 2392, and said H.B. 2488 and H.B. 2392 would fit together. S.R.S. does not have rules and regulations covering expunging, however they are discussing implementing this procedure with the Attorney General's office.

David Plinsky testified the Attorney General is satisfied that due process

steps in H.B. 2488 provide procedural protections necessary to arrive at a legally sound, defensible validation of abuse, (see Attachment I).

Bruce Linhos testified in support of H.B. 2488. He submitted an amendment that S.R.S. have the right and the responsibility to enact corrective action plans in validated cases where mitigating circumstances dictate that type of action. He explained the addition of a corrective action amendment would insure better protection for both children and the people who care for them. The proposed amendment is language from H.B. 2392. (see Attachment II).

Elizabeth Taylor testified in support of the concept of these two bills, however, she requested the Committee use caution when considering protecting the potential abuser versus protecting children who are in a child care facility.

The hearing on H.B. 2011 and H.B. 2488 was closed.

Hearing on H.B. 2228-Regulation of health spas and H.B. 2536-Cancellation of contracts with health spas and buying clubs

Representative Williams testified H.B. 2228 was introduced by the Sedgwick County delegation at the request of the Consumer Fraud Division of the Sedgwick County District Attorney's office, for the regulation of health spas. He stated safeguards are provided through registration and regulation and prohibition of certain unfair practices and the provision of remedial procedures, (see Attachment III).

David Moses testified in support of H.B. 2228 and H.B. 2536. He explained the necessity of regulating health spas and buying clubs, (see Attachment IV). He also submitted a report on health spa laws of other states which are a part of the attachment. He suggested if H.B. 2228 is recommended for an interim study that the provisions for a "cooling off period" in H.B. 2228 be incorporated in H.B. 2536 and that the Committee vote favorably for H.B. 2536.

Art Weiss testified in support of H.B. 2228 and H.B. 2536. He said the Attorney General's office sponsored H.B. 2536. He supported the "cooling off period". The surety bond requirement of H.B. 2228 would assure that a member could recover a portion of their membership money should the spa go out of business or move. If H.B. 2228 is going to be studied by an interim committee, he requested that the Committee report H.B. 2536 favorably.

Marvin Pendergraft testified he opposes the three day "cooling off period".

The hearing was closed on H.B. 2228 and H.B. 2536.

Hearing on H.B. 2535-Fees for county law librarys

Jim Lawing testified in support of H.B. 2535. He explained that this bill allows the Board of Trustees of the law library to increase the fees. He stated this bill addresses only the Sedgwick County Law Library, (see Attachment V).

Lee Woodard testified the Wichita Law Library serves a large amount of people and usage is expected to increase dramatically in the next few years.

Susie Barnes testified she is the head librarian of the Sedgwick County Law Library, and she supports the passage of H.B. 2535.

Hearing on H.B. 2474-Removal of guardian or conservator

Marjorie VanBuren testified this bill would help streamline the process of requiring accountability in conservatorship cases. She presented a letter from Judge Robert L. Gernon supporting this bill, (see Attachment VI).

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on March 2, 1987

The hearing on H.B. 2474 was closed.

Hearing on H.B. 2469-Probate procedure relating to termination of certain trusts, concerning notice of hearings.

John Kuether presented testimony from the Kansas Bar Association, (see Attachment VII). The amendments in the bill are designed to save money for the persons and beneficiaries involved.

Hearing on H.B. 2487-Concerning Uniform Trade Secrets Act, amendments

Ron Smith did not appear. He submitted prepared testimony in which he stated the Kansas Bar Association supports the cleanup amendments to the Uniform Trade Secrets Act, (see Attachment VIII).

Continuation of Hearing on H.B. 2428-Person incompetent to stand trial, notice of release of commitment

Bill Ryan testified he had no problem with requiring notification to the county or district attorney or changing the prior notification period from 5 days to 10 days. He stated he was concerned that the new language would allow the trial competency process to be repeated indefinitely. He proposed an amendment which would require the hospital to certify to the court whether or not the person is competent to stand trial, (see Attachment IX).

The hearing was closed on H.B. 2428.

Hearing on H.B. 2476-Preliminary hearings, appearance of witnesses

Jim Clark testified in support of this bill because the allowance of hearsay evidence removes the requirement that witnesses appear in person, thereby reducing the hearing from a "mini-trial" of 2 or 3 days, to a summary one to two hour proceeding, (see Attachment X).

Steve Tatum explained this bill is very cost effective. He stated by allowing the use of hearsay evidence, the courts could speed up the process thereby reducing costs.

Georgia Nesselrode stated she works with crime victims. She distributed a letter from a rape victim in which the victim related her experience with a preliminary hearing and requested that preliminary hearings be eliminated, (see Attachment XI).

Jim Lawing distributed the prepared testimony of the Kansas Bar Association, which opposes hearsay evidence in preliminary hearings in felonies. Court ordered and supervised criminal discovery depositions is a better alternative, (see Attachment XII).

Don Matlock testified in opposition to H.B. 2476. He stated the majority of the criminal cases he has been involved in have been settled either by plead, dismissal or plea bargining after the preliminary hearing thereby saving the cost of a trial.

Hearing on H.B. 2489-Requiring filing in eminent domain proceedings of statement of compensation with court in cases of negotiated settlement

William J. Brink testified he supports H.B. 2489. He recommended the statement of compensation should be a part of the record of the case and be open to public inspection.

Eugene W. Haley stated the compensation paid in condemnation proceedings is vital information.

Warren W. Lilly testified in support of H.B. 2489.

The meeting was adjourned at 5:25 p.m.

GUEST REGISTER

DATE March 2, 1987

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Gene Olander	Distrct atty - Topeka	200 E 7th
Jim Clark	KCDAA	Topeka
Georgia Neese Gladden	JoCo district attorneys off	Olathe
Steve Tatum	Jo. Co. Dist. Atty's Office	
Jim Burgess	AFF. Fitness Centers of KS Inc.	Topeka
Marvin Pendergraft	" " " " " "	Wichita
David M. Pilnisky	A G	Topeka
Bob Lamm	YOUTH SERVICES, SRS	"
Edwin - Dixon Hudson	observers	
Laurie Hartman	Ks. Bar Association	"
Warren W. Lilly		Melvern, KS
W J Brink		Lawrence Ks
Eugene N. Haley		Lawrence, Kansas
David Hillman	District Attys Office - Sedgwick Cty	Wichita, KS
Karen McClain	KS. Assoc. of REALTORS	Topeka
Ed DeSoignie	Kansas Dept. of Transportation	Topeka
Bruce Linhos	Villages Inc	Topeka
John F. Stumm	KALPCCA	
Jim Concannon	Washburn Law School	Topeka
JOHN F. KUETHER	KANSAS BAR ASSOCIATION	TOPEKA
THERESA SHIVELY	KANSAS NARAL	TOPEKA

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

Testimony of Assistant Attorney General
David D. Plinsky
to House Judiciary Committee
March 2, 1987

Mr. Chairman and Members of the Committee:

Both House Bill No. 2011 and House Bill No. 2488 seek to remedy widely-shared concerns about the lack of explicit due process for persons subject to validation as an abuser under the current K.S.A. 65-516.

I am appearing on behalf of Attorney General Robert Stephan, specifically in full support of House Bill No. 2488, and, in principal, House Bill No. 2011. The Attorney General has been very vocal in calling for this due process protection. He recognizes the necessity of seeing to it that persons who abuse children are kept away from child care facilities. But, he is also firmly of the belief that the drastic step of branding a person a "validated child abuser" is only taken after very specific due process protection is spelled out legislatively.

The Attorney General is satisfied that the due process steps spelled out in House Bill No. 2488 provide the procedural protections necessary to arrive at a legally sound, defensible validation of abuse.

Attachment I
House Judiciary 3/2/87

After the final decision is rendered in (f)(3), there is already in place an independent appeals procedure in K.S.A. 75-3306 and K.A.R. 30-7-26, et seq. SRS is also subject to the Act for Judicial Review and Civil Enforcement of Agency Actions, of which K.S.A. 77-607 is a part. For that reason, it appears that House Bill No. 2011 is superfluous if House Bill No. 2488 becomes law. House Bill No. 2488 makes it clear that a validated abuser does not get his/her name entered into the abuse registry until all three steps are completed, including any appeal through the court system.

We would request that specific language be appended to bill section (f)(3) to authorize the Secretary of Social and Rehabilitation Services to enact regulations effectuating the due process steps.

Attached are the regulations which have been drafted to carry out the expected mandate of House Bill No. 2488. These proposed regulations are the joint effort of the Attorney General's office and the SRS field and legal staffs. They take into consideration pragmatic personnel concerns, as well as the necessity of constitutional demands for due process.

Your careful consideration of the need for such a system is earnestly appreciated.

30-46-1. Definitions. (a) "Alleged perpetrator" means the person identified in the initial report or during the investigation as the person suspected of perpetrating a reported act of abuse, neglect or sexual abuse.

(b) "Confirmed abuse, neglect or sexual abuse" means that the report has been validated by a preponderance of the evidence.

(c) "Confirmed perpetrator" means the person who has been identified by a preponderance of the evidence to have committed a confirmed act of abuse, neglect or sexual abuse.

(d) "Investigation" means the gathering and assessing of information sufficient to determine if a child has been abused, neglected or sexually abused.

(e) "Report of suspected abuse, neglect or sexual abuse" means information received by the agency or law enforcement that a child is suspected of being abused, neglected or sexually abused. (Authorized by and implementing

30-46-2. Right to interview. An alleged perpetrator shall have the right to be interviewed prior to a proposed finding being issued pursuant to K.A.R. 30-46-3. (Authorized by and implementing

30-46-3. Notice of proposed finding. (a) Prior to identifying a person as a confirmed perpetrator, the agency shall send such person a written notice of proposed finding specifically setting forth the reasons therefor and offering the alleged perpetrator an opportunity to reply, in writing, or appear in person, or both, before the social service chief or the designee of the social service chief of the area in which the alleged act was committed on the issue of the proposed finding prior to the finalization of such finding. The notice shall specify the date, time and place by or at which the alleged perpetrator may reply in writing or appear, or both. Such date shall be not less than five calendar days nor more than 10 calendar days following the date the notice was personally delivered or mailed to the alleged perpetrator.

(b) The social service chief or the designee of the social service chief shall not have been involved in the investigation of the alleged abuse, neglect or sexual abuse. (Authorized by and implementing

30-46-4. Notice of final decision. Following the alleged perpetrator's response to the opportunity to reply to the proposed finding or upon expiration of the time for such reply if no reply is made, the social service chief or the designee of the social service chief shall notify the alleged perpetrator, in writing, of the final decision on the proposed finding. Such notice shall set forth the reasons therefor and inform a confirmed perpetrator of the perpetrator's right to appeal the decision in accordance with K.A.R. 30-7-26, et seq. within 30 calendar days from the date the notice was personally delivered or mailed to the perpetrator. (Authorized by and implementing

30-46-5. Central registry. The name of a confirmed perpetrator may not be entered into the agency's central registry until such person has exhausted or failed to exercise the appeal process set forth in K.A.R. 30-7-26, et seq. (Authorized by and implementing

KALPCCA

KANSAS ASSOCIATION OF LICENSED PRIVATE CHILD CARE AGENCIES

Memorandum

TO: House Judiciary Committee

FROM: K.A.L.P.C.C.A.

RE: H.B. 2488

DATE: March 2, 1987

K.A.L.P.C.C.A. supports H.B. 2488. Our member agencies are strongly opposed to allowing child abusers to work with children in any setting. We are aware that this law--K.S.A. 65-516--in its attempt to prevent child abuse has created for the regulatory agencies serious difficulties over what constitutes abuse. Does a shove or word spoken in frustration constitute a level of abuse which should bar a child care worker from the profession? We think not, yet both such cases have been validated as abuse. Because of the complexity of enacting a law such as this we strongly support the importance of the due process that this amendment will lend to K.S.A. 65-516.

In addition to the safeguard of due process, however, we recommend that the Department of SRS have the right and responsibility to enact corrective action plans in those validated cases where mitigating circumstances dictate that type of action. We believe that in certain cases the best interest of the child as well as the child care worker could be served through correcting the problem instead of severing what might be a very important and therapeutic relationship. The addition of a corrective action amendment to this bill will insure better protection for both children and the people who care for them.

BL:bsm

Attachment II
House Judiciary 3/2/87

11

PROPOSED AMENDMENT TO HOUSE BILL 2488

In line 47 after the word "thereto" by adding:

and (A) the person has failed to successfully complete a corrective action plan which had been deemed appropriate and approved by SRS, or (B) the record has not been expunged pursuant to rules and regulations adopted by the secretary of Social and Rehabilitation Services

MMP02267OK13

2-2-87 - Rural Living & Village

Testimony of Rep. Vern Williams(R)-Wichita
Before House Judiciary Committee
Re HB 2228, Monday, March 2, 1987

****

In recognition of the value of your time and the number of bills being considered today, I will avoid prolixity and say only that:

This bill was introduced by the Sedgwick County Delegation at request of the Consumer Fraud Division of the Sedgwick County District Attorney's Office.

The purpose of this act is set forth in the new Section 2 beginning at Line 0083. It is "to safeguard the public against fraud, deceit, imposition and financial hardship and to foster and encourage competition, fair dealing and prosperity in the field of health spa operations and services by prohibiting or restricting practices by which the public has been injuredin connection with contracts for and the marketing of health spa services."

Safeguards are provided through registration and regulation and prohibition of certain unfair practices and the provision of remedial procedures.

I will let the representative of the D.A.'s office explain further and answer your questions. Thank you.

Vern Williams

Representative Vern Williams

Attachment III
House Judiciary 3/2/87

SEDGWICK COUNTY DISTRICT ATTORNEY

18th Judicial District

Sedgwick County Courthouse
Annex — First Floor
535 North Main
Wichita, Kansas 67203

CLARK V. OWENS
District Attorney

Henry H. Blase
Chief Deputy

Consumer Fraud and
Economic Crime Division
(316) 268-7921

TESTIMONY

TO: HOUSE JUDICIARY COMMITTEE

FROM: DAVID H. MOSES, DIRECTOR, CONSUMER FRAUD & ECONOMIC CRIME DIVISION OF THE SEDGWICK COUNTY DISTRICT ATTORNEY'S OFFICE

RE: HOUSE BILL 2228 - AN ACT AMENDING AND SUPPLEMENTING THE KANSAS CONSUMER PROTECTION ACT; PROVIDING FOR THE REGULATION OF HEALTH SPAS; and

HOUSE BILL 2536 - AN ACT CONCERNING THE KANSAS CONSUMER PROTECTION ACT DECLARING CERTAIN ACTS BY HEALTH SPAS AND BUYING CLUBS TO BE DECEPTIVE ACTS OR PRACTICES

GIVEN: MARCH 2, 1987 - STATE CAPITOL, TOPEKA, KANSAS

Thank you for the opportunity to address HB 2228 and HB 2536. As Director of the Sedgwick County District Attorney's Consumer Fraud Division, I have the opportunity to see first hand the problems both local and state consumers face in the marketplace.

A very important area of concern in consumer circles is the lack of specific legislation regulating health clubs and buying clubs. I intend to focus on health clubs today; however, a number of the same consumer risks exist with buying clubs.

Health consciousness is strong and seems likely to continue. Interest in health, however, outweighs actual knowledge. Maintaining good health is emphasized and part of the "package" is looking fit and trim. It appears the health trend will continue, and the health spa industry will take full advantage of this development.

Attachment IV
House Judiciary 3/2/87

The health spa industry, on the national level, has received much attention for the last ten years. In 1980 the Consumer-Affairs Department for the Washington, D.C. suburbs reported a one-year jump of 600% in complaints about exercise centers. In the Chicago area six spa chains, serving a quarter of a million people either closed or were sued for alleged fraud. Nationwide, complaints to the Better Business Bureau about health clubs soared 66% in 1982. By 1983 abuses and a string of bankruptcies prompted at least seventeen states to pass legislation regulating the fitness industry.

The consumer is initially subjected to what is called "hard sell" within the industry. The hard sell can take a number of forms. Consumers are often enticed into joining clubs by the offer of trial memberships. Other approaches are through advertisements that promise, but don't deliver, prices that aren't what they seem, misrepresentation of facilities and the expertise of instructors, and contracts that fail to disclose. After the hard sell, consumers change their minds, but are faced with contract terms that bind them to payments.

Assuming the consumers can avoid becoming the victims of "hard sell," they are still faced with avoiding health risks. Some exercise programs are ineffective or even hazardous. An instructor's incompetence usually shows up in unnecessary aches and pains by the consumer, possible stress fractures and other minor injuries. A good club will ask for a medical and exercise history. The club will make every effort to insure against consumer injury.

In the spring of 1986, the Consumer Fraud Division of the Sedgwick County District Attorney's Office initiated a summary report on the nation's health spa laws. Of the fifty-one responses, twenty-seven (53%) have specific health spa legislation. These states are: Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. A copy of this report is included for your review. The report was presented in the fall of 1986 to the National Association of Attorney's General Consumer Protection Seminar.

There are several key areas included within the legislation adopted by the twenty-seven states listed above. Every state requires that contracts have provisions for cancellation. The most common of these provisions is a "cooling off" period of three to ten days during which the buyer may cancel his contract without any penalties. Most refunds must be issued within a set period of time. Other common provisions are cancellation as a result of the death or disability of the buyer and cancellation if the spa or buyer moves.

Many states have found that regulation of spas that sell contracts prior to opening is necessary. Twenty-two states have included provisions that govern unopen spas in their laws.

Eighteen states require that the health spas maintain a bond to cover consumer claims against the spas. The amount of bonding ranges from a minimum of $10,000 in Virginia to $200,000 in Maryland. Some states require that the bond be kept only until opening, but most require a bond for the life of the spa.

Twenty states have required that there be a maximum duration for health spa contracts. In addition, eight states have indicated that contracts may not be measured by the life of the buyer. This may either be a specific provision or the general requirement that there be no automatic renewals of health spa contracts. Fifteen states have some kind of provisions for renewal of contracts.

Finally, eleven states require that health spas must register with a governmental agency. Registration entails many things, from filling out an application form and paying a fee to establishing a bond or letter of credit. Alabama, Maryland, and Nevada require that there be a registered agent. Connecticut has established the Health Club Guaranty Fund to cover claims that consumers have against spas that have closed.

It is evident that as more consumers are injured physically and financially, more states are adopting legislation to specifically regulate health spas. The most popluar aspects of these laws, thus far, are cooling off periods after entering into contracts, required bonding, provisions for cancellation of contracts, and protection prior to a club opening. It is hoped that the establishment of these laws has helped to curb fraudulent activities by the health spas in the states which have established these laws.

A year does not go by without a large number of inquiries and complaints to this office. From "Sophisticated Lady" to "Winns Fitness Center," from "Exertech" to "Gold's Gym" and also those which can't be named due to ongoing problems and investigations, a constant flow of problems currently unregulated by specific Kansas law have been seen. Although Kansas has a good, strong and effective Consumer Protection Act, it falls short of providing the necessary protection for consumers falling prey to the continuous problems within the health club industry.

And, as is usually the case, the honest businessman within the health club industry also is victimized by his "brethren." It is clear that Kansas should join the majority of states who have seen the need to specifically legislate the health spa industry. Regulations such as a cooling off period, bonding, and specific rules for unopened clubs, are a must to insure integrity within the marketplace. Other guidelines, as utilized by some of the twenty-seven states, will also afford an atmosphere of fairness within the health club industry.

In conclusion, I encourage you to join the majority of states nationwide in enacting Health Spa legislation by voting favorably for HB 2228 and HB 2536. If you feel HB 2228 is so extensive that it needs fine tuning, I urge you to refer HB 2228 to an interim committee and vote favorably for HB 2536.

Respectfully submitted,

David H. Moses

DAVID H. MOSES
Assistant District Attorney
Director, Consumer Fraud &
Economic Crime Division

SEDGWICK COUNTY DISTRICT ATTORNEY

18th Judicial District

Sedgwick County Courthouse
Annex — First Floor
535 North Main
Wichita, Kansas 67203

CLARK V. OWENS
District Attorney

Henry H. Blase
Chief Deputy

Consumer Fraud and
Economic Crime Division
(316) 268-7921

SUMMARY REPORT: HEALTH SPA LAWS

Submitted by

DAVID H. MOSES
Assistant District Attorney
Director, Consumer Fraud & Economic Crime Division
Sedgwick County District Attorney
Sedgwick County Courthouse Annex - First Floor
535 North Main
Wichita, Kansas 67203

September 30, 1986

Research Assistants
Jeri M. Austin
Leslie A. Coe

SEDGWICK COUNTY DISTRICT ATTORNEY

18th Judicial District

Sedgwick County Courthouse
Annex — First Floor
535 North Main
Wichita, Kansas 67203

CLARK V. OWENS
District Attorney

Henry H. Blase
Chief Deputy

Consumer Fraud and
Economic Crime Division
(316) 268-7921

SUMMARY REPORT: HEALTH SPA LAWS

I. INTRODUCTION

Fifty-three requests for health spa legislation were sent out to American Samoa, Guam, Puerto Rico, the Virgin Islands, and the various states, not including Kansas. To date, of those requested, only two have not yet replied (the Virgin Islands and West Virginia). Thus fifty-one or ninety-six percent have responded.

Of the fifty-one responses, twenty-seven (53%) have specific health spa legislation. These states are: Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

It should be noted that Kansas has no specific laws which regulate health spas. Kansas utilizes the Kansas Consumer Protection Act.

Following this introduction, the Summary Report discusses registration procedures, required bond amounts, provisions that govern unopen spas, contract duration, renewal provisions, financing periods, provisions for cancellation of contracts, enforcement of the various laws, and miscellaneous notes on each law.

After a summary of each section, there is a description of each state's law in regard to that section. Following the report is a table which recapitulates the study and a summary of the health spa laws of the united States.

II. REGISTRATION PROCEDURES

Eleven states require that health spas must register with a governmental agency. Registration entails many things, from filling out an application form and paying a fee to establishing a bond or letter of credit. Alabama, Maryland, and Nevada required that there be a registered agent. Connecticut has established the Health Club Guarranty Fund to cover claims that consumers have against spas that have closed.

Alabama:
- -register with the Attorney General's Consumer Protection Division and furnish name and address of each business location, as well as any other registration information the Division deems appropriate
- -registered agent required representing each seller of health spa services
- -bond or irrevocable letter of credit
- -must keep records of bond and premium payments on it

Arizona:
- -none

California:
- -none

Connecticut:
- -must be licensed by Department of Consumer Protection and provide a list of each piece of equipment and each service available and two copies of each contract the spa intends to use
- -fee of $100; renewal fee of $200
- -pay a $300 fee annually to the Connecticut Health Club Guaranty Fund
- -if refused a license, spa may request a hearing within ten days to hear grounds for refusal of license

Florida:
- -register with Department of Agriculture and Consumer Services
- -maintain a bond for three years after commencing business of a letter or credit or certificate of deposit
- -fee of $100 per location

Georgia:
- -none

Hawaii:
- -none

Illinois:
- -none

Indiana:
- -none

Kentucky:
- -register with the Attorney General's Division of Consumer Protection by providing name and address of health spa; names and addresses of the officers, directors, and stockholders; the type of available facilities; approximate size of health spa; whether or not a shower is provided; the names and addresses of employees and their respective qualifications for employment; type of membership plans to be offered and their costs; and a full and complete disclosure of any completed or pending litigation initiated against the health spa and any of its officers and directors within the last three years
- -bond or proof of financial responsibility required with annual documentation

Louisiana:
- -none

Maryland:
- -must register with the Consumer Protection Division, giving full name and address of each spa location
- -registered agent required
- -bond required
- -fee $250

Massachusetts:
- -none

Minnesota:
- -none

Mississippi:
- -file a statement with the Attorney General's Division of Consumer Protection which includes the name and address of the health spa; the names and addresses of the officers directors, and stockholders of the health spa and its parent corporation, if such an entity exists; the types of available facilities; approximate size of the spa; the type of membership plans to be offered and their costs; and a full and complete disclosure of any completed or pending litigation initiated against the spa and any of its officers and directors within the last three years
- -$25,000 bond filed with the Office of the State Treasurer or case deposit with the State Treasurer satisfied by certificate of deposit; investment certificates of share accounts; US bearer bonds; or cash deposit with the State Treasurer

Nevada:
- -must register with the Consumer Affairs Division, providing full name and address of spa
- -resident agent required

New Hampshire:
- -file a statement with the Attorney General's Consumer Protection and Anti-trust Division which includes name and address of spa; names and addresses of officers, directors, and stock holders of spa and parent corporation, if such an entity exists; type of available facilities; written list of each piece of equipment and service; size of the spa; whether or not shower facilities are provided; names and addresses of employees and their respective qualifications; type of membership plans and their costs; a full and complete disclosure of pending or completed litigation against the spa and any of its officers or directors within the last three years
- -keep registration statement on premises
- -must be updated semiannually
- -$50,000 bond or cash equivalent or marketable securities or provide financial statements

New York:
- -none

North Carolina:
- -none

Oregon:
- -none

Rhode Island:
- -none

South Carolina:
- -must obtain a certificate of authority from the Department of Consumer Affairs and submit a certified copy of its charter or articles of incorporation and bylaws; if a corporation, a certified copy of the certificate of authority or good standing from the Secretary of State; a copy of the membership agreement; a copy of any contract to be issued; and a list of outlets at which physical fitness services will be offered
- -fee of $25 per outlet; renewal fee of $50 per outlet
- -certificate of authority must be posted

Tennessee:
- -none

Texas:
- -must register with the Department of Labor Standards and include name and address of the spa; name and address of any person who directly or indirectly controls 10% or more of the stock; the type of available or proposed facilities and services; the approximate size of the health spa; and either a complete disclosure of any litigation or complaint filed with a government authority relating to failure to open

or the closing of a health spa brought against the owners, officers of directors that was completed within the past two years or is currently pending; or provide a notarized statement that shows that there has been no such litigation
-fee not to exceed $100
-registration must be available on the grounds of the spa

Virginia:
-register with the Commissioner of Agriculture and Comsumer Services and disclose the address, ownership, date of first sales, and date of first opening
-fee of $125; renewal fee of $125 annually
-each separate location is considered a separate health spa and must file a separate registration

Wisconsin:
-none

III. REQUIRED BOND AMOUNTS

Eighteen states require that the health spas maintain a bond to cover consumer claims against the spas. The amount of bonding ranges from a minimum of $10,000 in Virginia to $200,000 in Maryland. Some states only require that the bond be kept until opening, but most require a bond for the life of the spa.

Alabama:
- $50,000

Arizona:
- none

California:
- none

Colorado:
- $50,000 (unopened spa's)

Connecticut:
- none

Florida:
- $50,000

Georgia:
- none

Hawaii:
- $50,000

Illinois:
- none

Indiana:
- $25,000 (unopened spa's)

Kentucky:
- $50,000

Louisiana:
- $25,000 or C. D.

Maryland:
- $200,000

Massachussets:
- $25,000

Minnesota:
- $25,000 or prepayment of contracts + deposits held on merchandise ordered through the spa

Mississippi:
-$25,000

Nevada:
-$25,000

New Hampshire:
-$50,000

New York:
-none

North Carolina:
-pre-opening receipts until opening of spa

Oregon:
-none

Rhode Island:
-none

South Carolina:
-at the discretion of the Administrator of Consumer Affairs, not to exceed $25,000

Tennessee:
-$25,000

Texas:
-20% of pre-opening receipts, not less than $20,000 or more than $50,000

Virginia:
-depends on the number of members; ranges from $10,000 to $50,000

Wisconsin:
-none

IV. PROVISIONS THAT GOVERN UNOPEN SPAS

Many states have found that regulation of spas that sell contracts prior to opening is necessary. Twenty-one states have included provisions to govern unopen spas in their laws.

Alabama:
- -down payment must not exceed 5% of contract
- -contract may be cancelled if spa is not open by specified date

Arizona:
- -none

California:
- -services must begin within 6 months of contract

Colorado:
- -must put date of opening on contract
- -escrow all pre-opening sales or cash bond, letter of credit, certificate of deposit, or other surety in the amount of $50,000

Connecticut:
- -must prepare listing of equipment and services and give to Commissioner of Consumer Protection and put on every contract; spa is not considered to be open until substantially all of the items on the list are available
- -must provide that the spa will be fully operative on a specified date no later than one year after the contract
- -five day penalty-free cancellation after opening of spa
- -escrow pre-opening receipts or fidelity bond of $50,000

Florida:
- -maintain bond before opened
- -rules promulgated regulating contract for future sales

Georgia:
- -if unopen for more than 60 days, three day penalty-free cancellation after opening

Hawaii:
- -must be operative within one year of contract
- -five day cancellation from written notice that facility is fully operative

Illinois:
- -seven day penalty-free cancellation instead of three day if spa is unopen
- -planned centers must be open within three months of a specified date of within twelve months, whichever is earlier
- -escrow pre-opening receipts or provide information required by Attorney General

Indiana:
- -must be in operation within twelve months
- -$25,000 bond with the Secretary of State until opening

Kentucky:
- -prepayment contracts placed in escrow until spa is opened for thirty days

Louisiana:
- -none

Maryland:
- -contract may be cancelled if spa is not open by specified date
- -may cancel contract within three days of opening
- -description of specific services and facilities must be on contract
- -date of expected opening must be on contract

Massachussets:
- -cancellation if spa fails to open planned location

Minnesota:
- -none

Mississippi:
- -none

Nevada:
- -spa must open by specified date

New Hampshire:
- -none

New York:
- -escrow pre-opening receipts or furnish information required by Secretary of State

North Carolina:
- -establish a bond or trust account for pre-opening receipts which must remain in force until 60 days after all services are available
- -three day right to cancel after opening

Oregon:
- -must include date of completion on contract
- -place pre-opening receipts in trust account and notify Attorney General of the depository
- -refund monies if spa isn't open by specified date

Rhode Island:
- -none

South Carolina:
- -cannot advertise unopen spas unless clearly state that spas are not open

Tennessee:
- -none

Texas:
- -must open before the 181st day after the first membership is sold
- -escrow pre-opening receipts until 30 days after opening
- -spa is considered open when all advertised and promised services are available

Virginia:
- -deposit pre-opening receipts in bank until 30 days after opening unless already have a $50,000 bond

Wisconsin:
- -services must be available within 6 months of contract
- -three day cancellation after opening
- -no more than $25 or 10% of total contract price, whichever is less, may be required prior to the date buyer receives written notice that facilities and services are fully available

V. CONTRACT DURATION

Twenty states have required that there be a maximum duration for health spa contracts. In addition, eight states have indicated that contracts may not be measured by the life of the buyer.

Alabama:
-none

Arizona:
-3 years

California:
-3 years; may not be measured by life of buyer

Colorado:
-2 years

Connecticut:
-2 years
-must make 12 month contract available

Florida:
-3 years; may not be measured by life of buyer

Georgia:
-36 months

Hawaii:
-3 years; may not be measured by life of buyer

Illinois:
-2 years

Indiana:
-may not be measured by life of buyer

Kentucky:
-none

Louisiana:
-3 years; may not be measured by life of buyer

Maryland:
-none

Massachussets:
-2 years; may not be measured by life of buyer

Minnesota:
-18 months; may be extended after buyer has been a member for at least 6 months

Mississippi:
-24 months

Nevada:
-none

New Hampshire:
-none

New York:
-3 years; may not be measured by life of buyer

North Carolina:
-3 years

Oregon:
-3 years

Rhode Island:
-2 years

South Carolina:
-2 years

Tennessee:
-3 years

Texas:
-may not be measured by life of buyer

Virginia:
-3 years

Wisconsin:
-2 years

VI. RENEWAL PROVISIONS

Fifteen states have some kind of provisions for renewal of contracts. These may either be a specific provision or the general requirement that there be no automatic renewals of health spa contracts.

Alabama:
- -none

Arizona:
- -none

California:
- -none

Colorado:
- -none

Connecticut:
- -no automatic renewal
- -renewal must be accepted in writing and may become effective only upon payment of renewal price

Florida:
- -renewable annually
- -may not be executed and paid for until 60 days or less prior to the expiration of the previous contract

Georgia:
- -renewable at option of both parties

Hawaii:
- -must pay not less than 10% of cash price of the original contract

Illinois:
- -renewable annually
- -must not pay less than 10% of cash price of the original contract

Indiana:
- -none

Kentucky:
- -none

Louisiana:
- -none

Maryland:
- -no automatic renewal

Massachussets:
- -offerable upon expiration of previous contract
- -not to exceed 24 months

Minnesota:
- -none

Mississippi:
- -none

Nevada:
- -no automatic renewal

New Hampshire:
- -no automatic renewal
- -may provide option to be accepted in writing to go into effect upon payment of renewal price

New York:
- -at the option of the buyer up to 30 days after expiration of previous contract
- -must be for like period

North Carolina:
- -none

Oregon:
- -none

Rhode Island:
- -none

South Carolina:
- -upon expiration of previous contract upon payment by buyer
- -for twelve months

Tennessee:
- -may not exceed 36 months
- -no automatic renewal

Texas:
- -fee of not less than $50
- -not to exceed 2 years

Virginia:
- -may have a renewal option

Wisconsin:
- -original contract not to exceed 2 years

VII. FINANCING PERIOD

Nine states have decided that contracts must be financed within a specific time period. The list below indicates the maximum financing periods allowed.

Alabama:
-2 years

Arizona:
-none

California:
-2 years

Colorado:
-2 years

Connecticut:
-none

Florida:
-none

Georgia:
-36 months

Hawaii:
-none

Illinois:
-none

Indiana:
-3 years

Kentucky:
-none

Louisiana:
-none

Maryland:
-none

Massachussets:
-25 months

Minnesota:
-none

Mississippi:
-none

Nevada:
-none

New Hampshire:
-2 years

New York:
-37 months

North Carolina:
-none

Oregon:
-none

Rhode Island:
-none

South Carolina:
-none

Tennessee:
-none

Texas:
-2 years

Virginia:
-none

Wisconsin:
-none

VIII. PROVISIONS FOR CANCELLATION OF CONTRACTS

Every state with a health spa law requires that contracts have provisions for cancellation. The most common of these provisions is a "cooling off" period of three to ten days during which the buyer may cancel his contract without any penalties. Most refunds must be issued within a set period of time. Other common provisions are cancellation as a result of the death of disability of the buyer and cancellation if the spa or buyer moves.

Alabama:
- -3 day penalty-free
- -spa goes out of business or moves and does not provide facilities within 5 miles
- -buyer dies or becomes disabled
- -buyer moves out of town and there is no facility within 15 miles
- -spa does not open by date specified
- -30 days after spa fully operational, if misrepresentation concerning available facilities

Arizona:
- -3 day penalty-free
- -buyer dies or becomes disabled
- -buyer moves and there is no facility within 25 miles

California:
- -3 day penalty-free
- -buyer dies or becomes disabled
- -buyer moves and there is no facility within 25 miles
- -services must begin within 6 months of contract

Colorado:
- -3 day penalty-free
- -buyer dies or becomes disabled (cancellation or extension)
- -spa moves and there is no facility within 5 miles
- -spa opening is delayed more than 60 days

Connecticut:
- -3 day penalty-free
- -buyer dies or becomes disabled (cancellation or extension)

Florida:
- -3 day penalty-free
- -spa goes out of business or moves and there is no facility within 5 miles
- -buyer dies or becomes disabled

Georgia:
- -3 day penalty-free
- -buyer dies or becomes disabled
- -services must begin within 6 months of contract

Hawaii:
- -3 day penalty-free
- -buyer dies or becomes disabled (cancellation or extension)
- -five day penalty-free from time spa opens (if not open at signing of contract)
- -must be operative within one year of contract

Illinois:
- -3 day penalty-free
- -7 day penalty-free if spa is not open when contract is signed
- -buyer moves and there is no facility within 25 miles
- -buyer dies or becomes disabled
- -spa doesn't open 12 months from date of contract or within 3 months of date specified (whichever is earlier)

Indiana:
- -3 day penalty-free
- -spa does not open within 12 months
- -buyer dies or becomes disabled
- -spa moves more than five miles
- -spa goes out of business
- -must be operative within twelve months

Kentucky:
- -3 day penalty-free

Louisiana:
- -3 day penalty-free

Maryland:
- -3 day penalty-free
- -3 day penalty-free from opening of spa
- -buyer becomes disabled (extension only)
- -spa closes for more than one month (extension or cancellation)
- -spa does not open by date specified

Massachussets:
- -3 day penalty-free
- -buyer dies or becomes disabled
- -spa fails to open a planned location
- -spa closes
- -spa changes operation
- -spa moves
- - buyer moves and there is no facility within 25 miles

Minnesota:
- -3 day penalty-free

Mississippi:
- -5 day penalty-free
- -buyer dies or becomes disabled

Nevada:
- -3 day penalty-free
- -buyer becomes disabled (extension or cancellation)
- -spa is closed for more than one month (extension or cancellation)
- -does not open by date specified

New Hampshire:
- -3 day penalty-free
- -buyer dies or becomes disabled
- -spa services are changed drastically
- -spa moves 8 miles

New York:
- -3 day penalty-free
- -spa doesn't open within one year
- -buyer dies or becomes disabled
- -buyer moves and there is no facility within 25 miles
- -spa closes or changes operation

North Carolina:
- -3 day penalty-free
- -buyer dies or becomes disabled
- -buyer moves more than eight miles and there is no facility within 30 miles
- -spa changes operation
- -3 day penalty-free after opening

Oregon:
- -3 day penalty-free
- -buyer dies or becomes disabled
- -spa goes out of business
- -spa moves more than five miles
- -spa does not open by date specified
- -spa changes operation

Rhode Island:
- -10 day penalty-free
- -buyer moves 25 miles
- -buyer dies or becomes disabled

South Carolina:
- -3 day penalty-free
- -buyer dies or becomes disabled
- -buyer moves and there is no facility within 50 miles
- -extension for disability or pregnancy

Tennessee:
- -3 day penalty-free

Texas:
- -3 day penalty-free
- -goes out of business and there is no facility within 10 miles
- -buyer dies or becomes disabled
- -spa does not provide advertised services

Virginia:
- -3 day penalty-free
- -spa moves or goes out of business and there is no facility within five miles
- -buyer dies or becomes disabled

Wisconsin:
- -3 day penalty-free
- -spa does not open within 6 months
- -buyer dies or becomes disabled

IX. ENFORCEMENT

Laws are not successful unless there is some way to enforce them. Below is each state's method of enforcement.

Alabama:
- -supervision and enforcement by the Attorney General and district attorneys
- -violation is a Class C felony
- -noncompliance is an "unfair or deceptive trade practice"

Arizona:
- -Attorney General, county attorneys, city attorneys, or any aggrieved buyer may institute proceedings
- -buyer may bring action for damages, reasonable attorney fees, and, if the violation is willful, punitive damages in the amount of $2,ooo per violation

California:
- -buyer may bring action for 3 times the actual damages plus reasonable attorney fees
- -failure to comply may be corrected within 30 days without penalty

Colorado:
- -part of the Colorado Consumer Protection Act
- -30 day "right to cure" after new ownership

Connecticut:
- -enforcement by Attorney General and Commissioner of Consumer Protection
- -may use Chapter 54

Florida:
- -enforcement by Department of Agriculture and Consumer Services
- -part of the Florida Consumer Protection Act
- -violators are guilty of misdemeanors of the first degree

Georgia:
- -part of the Fair Business Practices Act of 1975

Hawaii:
- -noncompliance is an "unfair or deceptive act"
- -buyers may bring action

Illinois:
- -enforcement by Attorney General under the Consumer Fraud and Deceptive Practices Act; buyer may be awarded 3 times the damages
- - buyer may bring action for 3 times the costs and reasonable attorney fees

Indiana:
- -noncompliance is a "deceptive act"

-enforcement by attorney general or buyer
-secretary of state brings action on the bond

Kentucky:
-enforcement by attorney general
-buyer may bring action for relief, reasonable attorney fees, and costs
-statute of limitations is one year after action of attorney general or two years after violation is discovered (whichever is later)

Louisiana:
-must receive written warning and then be fined $500 or less

Maryland:
-noncompliance is an "unfair or deceptive trade practice"

Massachussetts:
-buyer may bring action for injunctive relief, multiple damages, and attorney fees
-civil penalty not to exceed $2,500 per violation
-attorney general may bring action to enforce bonding provisions

Minnesota:
-attorney general may sue for injunctive relief and civil penalty not to exceed $25,000
-spa must close if it does not follow bond provisions
-buyer may bring action to recover damages, costs, disbursements, including reasonable attorney fees, and equitable relief

Mississippi:
-buyer may bring action for damages, reasonable attorney fees and costs
-criminal penalties for failure to comply with registration or contract requirements or if there are misrepresentations for not more than $2,000 or imprisonment for not more than one year, or both; this is a misdemeanor

Nevada:
-misdemeanor

New Hampshire:
-failure to comply is an "unfair or deceptive trade practice"
-remedy through RSA 358-A, (Consumer Act)

New York:
-buyer may bring action for 3 times damages plus reasonable attorney fees
-civil penalty of not more than $2,500 per violation
-enforcement by attorney general
-political subdivisions may enact local laws to enable local enforcement

North Carolina:
- -buyer may bring action for damages and reasonable attorney fees
- -noncompliance is an "unfair practice"

Oregon:
- -remedies through "unlawful Trade Practices" section

Rhode Island:
- -none

South Carolina:
- -enforcement by administrator of Department of Consumer Affairs
- -violation is a misdemeanor
- -must be fined not less than $500 nor more than $5,000 or be imprisoned for not more than three years or both
- -violation is a violation of the South Carolina Trade Practices Act

Tennessee:
- -enforcement by Consumer Affairs Division

Texas:
- -buyer may bring action for damages, equitable relief, attorney fees, and costs
- -statute of limitations is one year after district attorney, county attorney, or attorney general terminates action or two years after violation is discovered, whichever is later
- -civil penalties of $25,000 or less per violation and $50,000 or less for all violations
- -enforcement by district attorney, county attorney, and attorney general
- -noncompliance is a "false, misleading, or deceptive act or practice" within the Business Commerce Code
- -registration, escrow, or security violation is a misdemeanor
- -fine for withholding or falsifying documents not to exceed $2,000

Virginia:
- -enforced through the Virginia Consumer Protection Act

Wisconsin:
- -enforcement by the Department of Agriculture, Trade and Consumer Protection
- -action for temporary or permanent injunctive relief
- -civil penalty of between $100 and $10,000
- -buyer may bring civil action to recover damages, costs, disbursements, including reasonable attorney fees, and such other equitable relief

X. MISCELLANEOUS

Below are listed additional requirements that each state may have.

California:
- -maximum payment of $1,000

Connecticut:
- -if a spa offers a contract of more than 12 months duration, it must offer a contract of 12 months duration

Florida:
- -buyer must be provided with rules and regulations prior to the signing of the contract
- -whenever ownership (or stock ownership) is changed, members must be notified
- -members must furnish identification upon entering spa

Georgia:
- -spa must state on contract that buyers with heart disease should consult physician before joining

Hawaii:
- -spa must provide buyer with list of services and equipment prior to the signing of the contract

Illinois:
- -at least one person with CPR certification must be on premises at all times
- -maximum payment of $2,500

Kentucky:
- -spa must provide buyers with list of membership plans and prices prior to the signing of the contract; spa may not sell memberships that are not on this list
- -cannot offer specials or discounts unless they are available to all prospective buyers

Louisiana:
- -none

Mississippi:
- -must present a comprehensive list of plans and prices available to buyers; spa may not sell memberships that are not on this list or for more than the prices on the list

New Hampshire:
- -list of membership plans must be provided to buyer; spa may not sell plans that are not on this list
- -cannot offer specials or discounts unless they are available to all prospective buyers

New York:
- -maximum payment of $1,200

Oregon:
- -must prepare list of plans and services; cannot sell any form or plan not included on this list

South Carolina:
- -no spa can advertise services which are not available in every branch unless specifying such

Texas:
- -spa must provide list of plans prior to the signing of the contract
- -cannot offer specials or discounts unless they are available to all prospective buyers
- -if an Act of God prevents the spa from being open for more than 30 consecutive days, contracts must be extended

Virginia:
- -any contract entered into by buyer on false or misleading information, representation, notice or advertisement is void and unenforceable

Wisconsin:
- -buyer liable for only the portion of total contract used if any of the facilities or services described become unavailable or no longer fully operational and is entitled to a refund of any other funds already paid

XI. SUMMARY CHART

HEALTH SPA LAWS

	REGISTRATION PROCEDURES	REQUIRED BOND AMOUNTS	PROVISIONS THAT GOVERN UNOPENED SPAS	CONTRACT DURATION	RENEWAL PROVISIONS	FINANCING PERIOD	PROVISIONS FOR CANCELLATION OF CONTRACT	ENFORCEMENT, ETC.	MISCELLANEOUS
ALABAMA	X	X	X			X	X	X	
ARIZONA				X			X	X	
CALIFORNIA			X	X		X	X	X	X
COLORADO		X	X	X		X	X	X	
CONNECTICUT	X		X	X	X		X	X	X
FLORIDA	X	X	X	X	X		X	X	X
GEORGIA			X	X	X	X	X	X	X
HAWAII		X	X	X	X		X	X	X
ILLINOIS			X	X	X		X	X	X
INDIANA		X	X	X		X	X	X	
KENTUCKY	X	X	X				X	X	X
LOUISIANA		X		X			X	X	
MARYLAND	X	X	X		X		X	X	
MASSACHUSSETTS		X	X	X	X	X	X	X	
MINNESOTA		X		X			X	X	
MISSISSIPPI	X	X		X			X	X	X
NEVADA	X	X	X		X		X	X	
NEW HAMPSHIRE	X	X			X	X	X	X	X
NEW YORK			X	X	X	X	X	X	X
NORTH CAROLINA		X	X	X			X	X	
OREGON			X	X			X	X	X
RHODE ISLAND				X			X		
SOUTH CAROLINA	X	X	X	X	X		X	X	X
TENNESSEE		X		X	X		X	X	
TEXAS	X	X	X	X	X	X	X	X	X
VIRGINIA	X	X	X	X	X		X	X	X
WISCONSIN			X	X			X	X	X

XII. CONCLUSION

As more consumers are injured physically and financially, more states are adopting legislation to help regulate health spas. The most popular aspects of these laws, thus far, are required bonding and provisions for cancellation of contracts. It is hoped that the establishment of these laws has helped to curb fradulent activities by the health spas in the states which have established these laws.

HOUSE BILL NO. _____

SEDGWICK COUNTY LAW LIBRARY

PRESENTATION BY JIM LAWING:

The State of Kansas has six major law libraries. Two are located in Topeka, one in Lawrence, one in Olathe and one in Kansas City. The Sedgwick County Law Library is the only major law library located west or south of Topeka.

In Sedgwick County alone, the law library provides an essential resource to approximately 68 attorneys and judges employed by the county, as well as 16 city attorneys and judges, legal aid attorneys, other government attorneys, nearly 1,000 attorneys in private practice, university and high school students and the general public. The Sedgwick County law library is also used regularly by lawyers from other counties in southern and western Kansas and by lawyers from all parts of the state when they have cases in Sedgwick County. Public use, particularly by Wichita State University students and high school classes, has increased in recent years.

The library is presently housed in approximately 7,000 square feet of rented space at 225 North Market in downtown Wichita, approximately two blocks from the county courthouse. The library is open from 8:00 a.m. to 9:00 p.m. Monday through Thursday, from 8:00 a.m. to 5:00 p.m. on Friday, and from 9:00 a.m. to 3:00 p.m. on Saturday.

The major expenses of the library are for books, rent and salaries. A law library must be constantly updated by subscriptions to case reporters, statute books, loose-leaf services, law journals and magazines. Current expenses for books and other publications are approximately $130,000 per year. Rent expense, which includes utilities other than telephone service, was approximately $106,000 in 1986. The exact amount of rent depends upon utilities, insurance and maintenance expense incurred by the landlord, which are passed through to

Attachment V
House Judiciary 3/2/87

the tenants of the building. These expenses have increased nearly $10,000 per year in the last eighteen months primarily as a result of electric rate increases (over $6,000 per year) and higher insurance rates. Salary expense is approximately $75,000 per year. Other expenses, such as telephone service, health insurance for employees, office equipment and supplies, shelving, furniture and furnishings may vary from year to year, depending on whether any significant new purchases are required.

The major sources of funding for the library are fees included in docket fees or court costs and attorney registration fees. The statutes presently authorize fees of $8 in Chapter 60 Civil cases and felony criminal cases and of $5 in all other cases filed in Sedgwick County. In 1986, these fees totalled approximately $245,000. The annual registration fee for attorneys residing in the county was $40 per attorney in 1986 and was increased to $50 in 1987. Based on approximately 1,050 registered attorneys, these fees totalled approximately $42,000 in 1986. Other sources of funds include a $1,350 semi-annual payment the county commission is required to make by statute in lieu of providing space for the library in the county courthouse, and approximately $6,000 for subleasing a small office to a person who operates a legal secretary placement service.

In summary, the operating expenses for 1986 show expenses of approximately $336,000 and revenues of approximately $295,000. The 1986 deficit of nearly $40,000, is temporarily covered by 1987 attorney registration fees, but will recur in an equal or greater amount during 1987 paid in January. The expenses for rent are fixed by contract, and with cost increase pass-throughs and a contractual rent escalation effective in 1989, are certain to increase. If salaries could be reduced, the reduction could not be in a material amount. A major portion of expenses for books and publications is fixed by the necessity of purchasing current volumes and supplements publications previously acquired, without adding new publications or services. On the revenue side of the ledger, no significant increase in the number of case filings or the number of registered attorneys is projected.

The statutory fees for maintaining the Sedgwick County law library were last amended in 1984. A comparison of the budget for 1984 with the 1986 expenditures discussed above, is as follows:

	1984	1986
Books	$63,200	$130,000
Salaries	72,300	75,000
Rent	90,900	106,000
Miscellaneous	24,500	25,000
TOTAL	$250,900	$336,000

The budget increases between 1984 and 1986 have occurred almost entirely as a result of cost increases for rent and books over which the library has little control.

The Proposed Amendments. The proposed amendments are as follows:

(1) K.S.A. 19-1319 would be amended to allow the board of trustees of a county law library to increase annual registration fees for attorneys to $75. The existing statute requires a vote of a majority of the attorneys in the county to increase fees above $10 per year. The amount is archaic and the procedure for changing the fee by vote of the entire membership is cumbersome and unnecessary within reasonable limits.

(2) K.S.A. 19-1322 (Supp. 1986). would be amended to change the fees for case filings from $8 to $10 in Chapter 60 civil cases and felony criminal cases and from $5 to $7 in all other cases. The actual amount would be fixed by the board of trustees, as provided by the existing statute, and it is not anticipated that the full amount of the authorized increase would be implemented immediately.

A minor change in subsection (d) of K.S.A. 19-1332, is also suggested as a clarification of the existing statute. Subsection (b) authorizes higher fees in Sedgwick and Wyandotte counties than are authorized for other counties under subsection (a). Subsection (d) provides that fees up to the amount

provided in subsection (a) (e.g., $5 in chapter 60 and felony cases) are to be deducted from the docket fee otherwise required for the case. The higher fees authorized in subsection (b) for Sedgwick and Wyandotte Counties are in addition to the docket fees otherwise charged. As an illustration, the docket fee in chapter 60 civil cases generally is $55. In Sedgwick county, $5 of $8 library fee is deducted from the $55 amount and $3 added to it for a total docket fee of $58. The proposed amendment to K.S.A. 19-1322(d) would clarify how the additional $3 in the example is collected and would conform to the practice presently followed by the Clerk of the District Court.

(3) K.S.A. 19-1315 would be amended to clarify the certain provisions relating to the Board of Trustees of the Sedgwick and Johnson County law libraries. This does not represent a change in existing law. K.S.A. 19-1309(b) (1986 Supp.) contains the same provisions the amendment would add to 19-1315. The predecessor of Section 19-1309 was originally enacted in 1927. Section 19-1315 was enacted in 1957. The two sections were originally intended to provide county law libraries the alternative of being organized under either statute and both pertain to the same subject matter--election of board of trustees, which is required to consist of five persons only in Sedgwick and Johnson counties. Ideally, the two provisions might be merged into a single statute, but the same clarification can be accomplished simply by incorporating a couple of sentences from Section 1309 into Section 1315. The result is to make it clear that either statute can be relied upon to the same effect, without requiring a determination of whether law libraries in counties other than Sedgwick and Johnson counties would be affected by merging the two statutes.

Conclusion. Sedgwick County has maintained a quality law library without direct state or significant county support primarily through "user fees" collected from litigants and attorneys. As the only major law library in a large geographic area, the demands placed on the Sedgwick County law library are

unique and cannot be met with the existing level of funding. The proposed increase in docket fees is relatively small (e.g., in Chapter 60 cases the increase from $58 to $60 at the maximum represents only a 3% increase) and places no demands on general funds of the state or county. The proposed increase in attorney registration fees, from a present $50 to a maximum of $75 without a majority vote is a more substantial percentage increase. In each case, the Board of Trustees would retain discretion to set fees in lesser amounts and should not need to immediately implement the maximum permitted increases.

STATE OF KANSAS
22ND. JUDICIAL DISTRICT
BROWN, DONIPHAN, MARSHALL, NEMAHA COUNTIES

ROBERT L. GERNON
DISTRICT JUDGE
P.O. BOX 417
HIAWATHA, KS 66434
913-742-7481

February 26, 1987

VERDELL HAWS, C.S.R.
OFFICIAL COURT REPORTER

JULIE MEYER
ADMINISTRATIVE ASSISTANT

Ms. Marjorie Van Buren
Office of Judicial Administration
Kansas Judicial Center
301 West 10th
Topeka, KS. 66612

RE: House Bill 2474

Dear Marjorie:

I would hope that the committee studying the above numbered bill, and the entire legislature, will give favorable consideration of this bill.

In my view, this bill would help streamline the process of requiring accountability in conservatorhsip cases.

Under the present system, if an individual or an entity in a fiduciary relation is the conservator for an individual and does not follow statutory accounting requirements, it is cumbersome and time consuming to replace that conservator.

In our own experience in this district, at one time we attempted to track down each conservator and require updated accountings. To our surprise we found that some conservators had left the state, and some themselves were in an incapacitated condition and incapable of following up on their duties to the conservatee. Others simply refused to respond to any court request.

In appropriate cases, the change effected by this bill, would allow the court on its own motion, in the shortest possible length of time, to replace a conservator so that the assets of the conservatee might be better accounted for and protected.

As you recall, over the past year at meetings of the District Judges' Legislative Coordinating Committee, when this issue was discussed, it has received a favorable comment from the judges who work with this type of case.

I urge the committee and the legislature to look favorable upon this change. Those the law seeks to protect will be better protected by this change.

Sincerely,

Bob Gernon

Robert L. Gernon
District Judge
22nd Judicial District

RLG:jm

Attachment VI
House Judiciary 3/2/87

KANSAS BAR ASSOCIATION

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

March 2, 1987
HB 2469

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

KBA Supports this legislation. It was recommended by our Probate and Trust Law section.

The provisions are noncontroversial in nature, and speak to specific problems in the costs of handling small probate cases and trust matters. The sections are designed to save money for the persons and beneficiaries involved in these matters.

Attachment VII
House Judiciary 3/2/87

KANSAS BAR ASSOCIATION

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

March 2, 1987
HB 2487

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

KBA supports these cleanup amendments to the Uniform Trade Secrets Act.

The changes recommended in this bill were recommended by the American Bar Association's Patent Law Section, and the Uniform Laws Commission. They concern the rights, duties and liabilities concerning "intellectual property."

The Kansas Trade Secrets Act is found at KSA 60-3320 et seq. These amendments do the following:

1. Subsection (b) amendments allow the court, when considering appropriate instances where an injunction is in order under the Act, allows injunctive relief to include the alternative of paying a "reasonable royalty" is paid for the misappropriation of the intellectual property. It defines the "exceptional circumstances" when this reasonable royalty alternative may be imposed.

2. Subsection 2(a) changes just allows the aggrieved party in a trade secrets dispute to seek actual damages or liability for a "reasonable royalty" as well as current law, which allows a suit for "unjust enrichment."

Attachment VIII
House Judiciary 3/2/87

3. Sections 3(a) and 3(b) simply clarify that the Trade Secrets act allows both contractual and tort-based remedies for those who have suffered damages by the actions of another that misappropriate and use a trade secret.

4. Section 4 is clarification. Current law does not apply the act to misappropriation of a trade secret that occurred before July 1, 1981, the effective date of the act. The new language simply means that if the "misappropriation" of the trade secret occurred before that time, that "continuing misappropriation" of the same trade secret cannot now be enforced under the act. The continuing misappropriation must be tied into an original pre-existing act.

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Statement Regarding House Bill No. 2428

1) Title - This is a Bill concerning criminal defendants who have been found not competent to stand to trial; amending K.S.A. 22-3305.

2) Background - In 1972, the U.S. Supreme Court decided the case of Jackson v Indiana, 406 U.S. 715. In effect, that case held that a criminal defendant may not be detained "for an indefinite period simply on account of his incompetency to stand trial." More specifically, Jackson held that "a person charged with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." If the defendant cannot be restored to competency within a reasonable period of time, the defendant must be either civilly committed or released. K.S.A. 22-3305 implements the Jackson requirements.

3) Effect of Passage - This Bill requires notification to the court and the county or district attorney when an incompetent defendant is no longer in need of further treatment following civil commitment. It also changes the prior notification period from five to ten days. SRS has absolutely no objections to either of these requirements. However, new language also authorizes the prosecuting attorney to request a new determination of competency pursuant to K.S.A. 22-3302. Unless this language is amended, a criminal defendant, having never received trial due to lack of competency, could be recycled through the evaluation process indefinitely. If this occurred, the intent of Jackson v Indiana would be defeated. SRS opposes starting over with a new trial competency evaluation whenever a criminal defendant is no longer in need of further hospitalization. Defendants should not be subjected to multiple commitments under K.S.A. 22-3302.

4) SRS Recommendation - The Department of Social and Rehabilitation Services only objects to that portion of the Bill which would allow the trial competency process to be repeated indefinitely. To prevent that from happening, and still provide the court and county or district attorney with an opinion on trial competency whenever a defendant is no longer in need of further hospitalization, the following language is proposed:

> On page two beginning at line 0047, the following language would appear: At the time of giving notification to the court and the county or district attorney of the county in

Attachment IX
House Judiciary 3/2/87

which criminal proceedings are pending pursuant to subjection (1) or (2), the treatment facility from which the defendant is to be discharged shall include an opinion from the head of the treatment facility thereof as to whether or not the defendant is now competent to stand trial. Upon request of the prosecuting attorney, the court may set a hearing on the issue of whether or not the defendant has been restored to competency. If no such request is made within ten days after receipt of notice pursuant to subsection (1) or (2), the court shall order the defendant to be discharged from commitment and shall dismiss without prejudice the charges against the defendant, and the period of limitation for the prosecution for the crime charged shall not continue to run until the defendant has been determined to have attained competency in accordance with K.S.A. 22-3302 and amendments thereto.

Robert C. Harder, Secretary
Social and Rehabilitation Services
296-3271

March 2, 1987

Kansas County & District Attorneys Association
827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351
EXECUTIVE DIRECTOR • JAMES W. CLARK

Testimony in Support of HB 2476

The Kansas County and District Attorneys Association is once again requesting legislation that permits the admission of hearsay evidence at the preliminary examination. We have presented testimony in the past regarding the merits of this proposal, and material in support is attached. We are in support of this legislation because the allowance of such evidence removes the requirement that witnesses appear in person, thereby reducing the hearing from a "mini-trial" of two to three days (one preliminary hearing in California took 42 days), to a summary one to two hour proceeding. There are two primary benefits:

1. **Savings to the Judicial System.** Not only does a summary proceeding reduce the time a judge must spend on the case, but reduces the cost of witness fees and mileage. The cost of both prosecution and defense attorneys is a strong possibility in most cases, but many good attorneys spend considerable time on a case, regardless of whether or not it is spent in court.

2. **Savings to the victim.** The victim will not have to take off work, arrange a babysitter, find transportation and parking, and undergo the anguish of re-living the incident one more time, simply for the purpose of finding probable cause to hold the defendant for trial.

Attachment X
House Judiciary 3/2/87

HEARSAY IN PRELIMINARY HEARINGS

President's Task Force Recommendation

Legislation should be proposed and enacted to ensure that hearsay is admissible and sufficient in preliminary hearings, so that victims need not testify in person.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and the people of this State find and declare that:

1. Requiring the victim to appear and testify at a preliminary hearing is an imposition that should be eliminated to the extent the ends of justice allow; and

2. For a judicial determination at a preliminary hearing of whether probable cause exists to believe a defendant committed a crime, it should be sufficient that a law enforcement officer or other appropriate party testify concerning the facts as provided by the victim.

B. Therefore, the legislature and the people of this State declare that the purpose of this Act is to ensure the admissibility and sufficiency of hearsay evidence of victims in preliminary proceedings to determine probable cause in criminal prosecutions.

SECTION 102. ADMISSIBILITY OF HEARSAY IN PRELIMINARY PROCEEDINGS

In any pretrial or preliminary proceeding, hearing, or examination in connection with a criminal case, where the issue to be determined is whether probable cause exists to believe a defendant has committed the crime with which the defendant is accused, hearsay evidence shall be admissible, and the finding of probable cause may be based upon hearsay evidence in whole or in part. No victim or witness shall be required to appear unless the court, in light of the evidence and arguments submitted by the parties, determines that the appearance of the victim or witness likely would lead to a finding that there is no probable cause, or unless other compelling circumstances exist.

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*Drafted with the assistance of the Crime Victims Project of the National Association of Attorneys General.

Commentary

This Act permits the use of hearsay in any pretrial or preliminary hearing or proceeding where the issue to be determined is whether probable cause exists to believe a crime has been committed by a defendant. No witness can be subpoenaed to appear at the hearing unless the court believes that the witness' testimony likely would lead to a finding that no probable cause exists.

The Act is intended primarily to spare victims of crime from having to testify repeatedly in connection with criminal prosecutions. In many instances, victims and witnesses are required to come to court not only at trial, but also at numerous preliminary proceedings and hearings. The preliminary proceedings may be continued without notice to the victim, or if held, may last for days. Even if the hearing itself is brief, a victim or witness may be required to wait long periods in court, due to crowded case dockets. The victim suffers needless inconvenience and expense if forced to relive again and again his or her victimization. Moreover, since preliminary hearings are often held within a few days of the crime, some victims are still hospitalized or may be too traumatized to speak about their experience. Their inability to testify should not prevent a prosecution from going forward.

The Act envisions that testimony from a police officer or detective assigned to the case, who has spoken with the victim and can present the victim's account of the offense, should be admissible in preliminary hearings and sufficient for a finding of probable cause to be made. At trial, of course, most victims and witnesses still would be required to speak for themselves, and be subject to cross-examination. This is because to determine guilt the standard of proof is greater, and more reliability is required than might be achieved through less formal methods of evidence presentation. As the United States Supreme Court said:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.
>
> * * *
>
> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved. [1/]

The Supreme Court has ruled that though the Fourth Amendment requires a "fair and reliable" judicial determination of probable cause as a condition for any significant pretrial detention, the finding need not be made at an adversary hearing. [2] The determination that there are facts and circumstances sufficient to warrant a prudent person in believing that a suspect has committed an offense can be made using written testimony and hearsay, without recourse to formal rules of evidence, since the preliminary hearing is not a minitrial on the issue of guilt, but is rather an investigation into the reasonableness of the basis for the charge. [3] The Court has emphasized another reason why full-scale preliminary hearings should not be required:

> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay. [4]

The Federal Rules of Criminal Procedure explicitly authorize the use of hearsay at preliminary probable-cause examinations, and the practice is well-established in the Federal system. [5] Present practice in the states varies, but more than half permit hearsay of victims in preliminary hearings; approximately one-fourth require an adversarial preliminary examination in which hearsay is not generally admissible to support a probable cause finding. (Some states permit preliminary hearing hearsay only from children, certain experts, or to prove ownership of property.) [6]

It should be noted that grand juries, in returning indictments charging individuals with crimes, traditionally have not been bound by technical rules of evidence. Normally, an individual indicted by a grand jury is denied a preliminary examination, since the function of both proceedings is the same: to determine whether there is probable cause to believe the individual has committed a crime. There is, therefore, no practical reason to require more stringent evidence standards in a preliminary hearing than in a grand jury proceeding, and to do so may encourage prosecutors to make use of grand juries rather than preliminary examinations. [7]

FOOTNOTES

1. Brinegar v. United States, 338 U.S. at 174-175. Cf. McCray v. Illinois, 386 U.S. 300 (1967).

2. Gerstein v. Pugh, 420 U.S. 103, 122-125 (1975). The case involved a challenge to a Florida procedure by which an accused person could be jailed prior to trial solely on the basis of the prosecutor's decision to charge the person with a crime, without any judicial determination of probable cause. The U.S. District Court and the Court of Appeals both held that detention required a judicial determination of probable cause accompanied by the full panoply of adversary safeguards: counsel, confrontation, cross-examination, and compulsory process for witnesses. The Supreme Court declined to go that far, saying that adversary safeguards are not essential, and that the use of more informal procedures is justified because the sole issue, whether there is probable cause to believe the suspect has committed a crime, "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof." Id., at 120. The standard is the same as that for arrest: probable cause defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed an offense. Emphasizing that this is not a determination of guilt or innocence, the Court went on to say:

> The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime (64-109). This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause (footnotes omitted). (Id., at 12-122.)

The Court also ruled that because of the limited function and nonadversary character of the probable cause hearing, it is not a critical stage in the prosecution that would trigger the right to counsel.

3. Id. See also Coleman v. Burnett, 155 U.S. App. D.C. 302, 477 F.2d 1187, (1973).

4. Gerstein, supra note 2, at 121-122.

5. Federal Rules of Criminal Procedure, Rule 5.1: Preliminary Examination:

> (a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

6. States allowing victims' hearsay at probable cause hearings include: Arizona (Rule of Cr.P. 5.4(c)); Colorado (People v. Williams, 628 P.2d 1011 (Colo. 1981) and People v. Quinn, 516 P.2d. 420 (Colo. 1973)); Delaware (Super. Ct. Cr. Rule 5.1); Florida (Rule of Cr.P. 3.133(b)); Georgia (Super. Ct. Rule 26.2(B)(1)); Hawaii (Rule of Cr.P. 5); Illinois (People v. Jones, 221 N.E.2d 29 (Ill.App. 1966) and People v. Blackman, 414 N.E.2d 246 (Ill.App. 1980)); Indiana (no authority specifically on point but source contacted stated victim hearsay at preliminary hearings is permitted); Iowa (Rules of Cr.P. section 813.2 rule 2(4)(b)); Kentucky (Ky. Rev. Stat.Rule of Cr.P. 3.14(2)); Louisiana (La. Code of Cr. P. art.294, see also, State v. Sterling, 376 So.2d 103 (La. 1979) and State v. Antoine, 344 So.2d 666 (La. 1977)); Maryland (59 Op. Att'y. Gen. 182 (1974)); Minnesota (State v. Rud, 359 N.W.2d 573 (Minn. 1984), Minn.Rule of Cr.P. 11.03, 18.06 subd. 1); Mississippi (Beard v. State, 369 So.2d 769 (Miss. 1979), quoting Gerstein v. Pugh language concerning hearsay at preliminary hearings, 420 U.S. 103 (1975)); Montana (Rules of Evidence section 101); Nebraska (Delay v. Brainard, 156 N.W.2d 14 (Neb. 1968), Neb. Rev. Stat. 27 section 1101(4)(b)); New Hampshire (State v. Arnault, 317 A.2d 789 (N.H. 1974)); New Jersey (State v. Engle, 493 A.2d 1217 (N.J. 1985)); New Mexico (Rule 16(c) Magis. Ct., Rule 18 Munic. Ct., Rule 53(c) Metro. Ct.); North Dakota (Rule of Cr.P. 5.1(a), State v. Morrissey, 295 N.W.2d 307 (N.D. 1980)); Oregon (Or. Rev. Stat. section 135.173); Pennsylvania (Commonwealth v. Branch, 437 A.2d.748 (Pa.Super. 1981); Rhode Island (State v. Brown, 488 A.2d 1217 (R.I. 1985)); South Carolina (State v. Jones, 259 S.E.2d 120 (S.C. 1979)); Utah (Utah Code Ann. section 77-35-7(d)(1); Vermont (Rule of Cr.P. 5(c)) (preliminary hearings in Vermont are nonadversarial and affidavits showing probable cause are read to determine if state has made out its prima facie case); Washington (court rules substantially follow Federal Rules of Evidence; see also, Wash. Rev. Code Ann. section 9A.44.120 which says a statement made by a child under the age of 10 describing any act of sexual contact is admissible as evidence in criminal proceedings when certain conditions are met); West Virginia (Rule of Cr.P. 5.1(a)(1) to (3)); Wyoming (Rule of Cr.P. 7(b) and Rule of Evidence 1101(3)); District of Columbia (Rule of D.C. Super. Ct. 5(d)(1)).

States not permitting victims' hearsay at probable cause hearings include: Alabama (Ala.Code section 15-11-6); Alaska (Rules of Evidence apply to trials and preliminary hearings, but preliminary hearings are very rarely held due to the

Alaska constitutional provision granting a right to a grand jury. See Alaska Stat. section 12.40.110 permitting hearsay of children under 10 before grand juries, enacted in 1985); Arkansas (Rule of Evidence 1101(b)(3)); California (Cal. Penal Code section 872(b) permits hearsay of a witness unless the witness is the victim of a crime against his/her person or the testimony of the witness includes eyewitness identification of a defendant); Connecticut (Conn. Gen. Stat. Ann. section 54-46(a) permits only written reports of experts and chain of custody matters); Idaho (Rule of Cr.P. 5.1(b) permits hearsay under limited circumstances involving property ownership and other related matters as well as expert testimony); Kansas (rules of evidence governing trials generally are followed; but see, Kan. Stat. Ann. section 60-460(dd) which permits hearsay of child victims in any criminal proceeding); Maine (Rule of Evidence 1101); Massachusetts (Myers v. Commonwealth, 298 N.E.2d 819 (Mass. 1973)); Michigan (People v. Kubasiak, 296 N.W.2d 298 (Mich. App.1980), Rules of Evidence 801, 1101(b)(3)); Missouri (rules of evidence governing trials generally are followed, but see Mo. Rev. Stat. section 491.075, permitting statements of children under 12 who are victims of sexual abuse and/or various other serious crimes into evidence at any criminal proceeding); Nevada (rules of evidence governing trials generally are followed, but see, Nev. Rev. Stat. section 51.385, permitting statements made by children under 10 describing any acts of sexual conduct performed with or on the child into evidence at any criminal proceeding if certain conditions are met); New York (Rule of Cr.P. section 180.60(8) and section 190.30(3) permit hearsay evidence in the form of written statements of certain witnesses and victims, but only in property crimes); North Carolina (N.C. Gen. Stat. section 15A-611(b) which permits hearsay to show ownership, value, and possession of property, experts' reports and other matters); Ohio (Rule of Cr.P. 5(B)(2)); Oklahoma (Okla. Stat. Ann. tit.12 section 2103; but see, Okla. Stat. tit. 12, section 2803.1, permitting hearsay testimony of child sexual abuse victims under 10 if the child is unavailable or unable to testify); South Dakota (S.D. Codified Laws Ann. section 23A-4-6; but see, S.D. Codified Laws Ann. section 19-16-38, permitting statements of some children into evidence at any criminal proceeding concerning sexual abuse); Tennessee (Rule of Cr.P. 5.1(a) permits hearsay in the form of documentary proof of ownership and written reports of experts); Texas (Tex. Stat. Ann. section 16.07); Virginia (Va. Code Ann. section 19.2-183(B)); Wisconsin (Wis. Stat. Ann. section 970.03(11) permits hearsay statements about property ownership and other related issues, but otherwise, section 911.01(2) and 4(c), Wis. Rules of Evidence, states that the rules of evidence apply to preliminary examinations except for proceedings with respect to pretrial release).

7. In its Note to Federal Rule of Criminal Procedure 5.1, the Advisory Committee on Rules commented that a grand jury indictment may properly be based upon hearsay evidence, and an indictment cannot be challenged on the ground that there was inadequate or incompetent evidence before the grand jury. Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). "This being so, there is a practical advantage in making the evidentiary requirements for the preliminary examination as flexible as they are for the grand jury," the committee wrote. "Otherwise there will be increased pressure upon United States Attorneys to abandon the preliminary examination in favor of the grand jury indictment." The committee acknowledged that some have urged that the rules of evidence at the preliminary examination should be those applicable at trial, because the

purpose of the preliminary examination should be to determine whether there is sufficient evidence to justify subjecting the defendant to the expense and inconvenience of trial. (Weinberg and Weinberg, the Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich. L. Rev. 1361, 1369-1399 (1969).) But Rule 5.1 "rejects this view for reasons largely of administrative necessity and the efficient administration of justice," according to the committee. Further, the committee pointed out, the preliminary examination is not the proper place to raise the issue of the admissibility of evidence, since that is for the trial court to decide. Giordenello v. United States, 357 U.S. 480, 484 (1958). (Federal magistrates are not required to be lawyers, and may not be able to deal with the technical rules of hearsay.)

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A Proposal for the Use of Otherwise Inadmissible Hearsay in Kansas Preliminary Examinations

Emil A. Tonkovich

A PROPOSAL FOR THE USE OF OTHERWISE INADMISSIBLE HEARSAY IN KANSAS PRELIMINARY EXAMINATIONS

Emil A. Tonkovich *

In Kansas, persons arrested on a felony warrant are entitled to a preliminary examination before a magistrate, unless the warrant was issued pursuant to a grand jury indictment.[1] Preliminary examinations are formal, adversarial proceedings in which the defendant may cross-examine state witnesses and introduce evidence in his own behalf.[2] Hearsay evidence, however, is not admissible in Kansas preliminary examinations[3] unless it fits a recognized exception to the hearsay rule[4] or a limited statutory exception.[5]

The primary purpose of a preliminary examination is to judicially determine whether there is probable cause to believe that a felony has been committed, and whether there is probable cause to believe that the defendant committed it.[6] The preliminary examination is essentially a judicial inquiry into whether the defendant should be held for trial.[7]

Preliminary examinations in Kansas go beyond that which is constitutionally required of a judicial probable cause determination.[8] Kansans pay a high price for these unnecessary procedures.[9] Consequently, the Kansas preliminary examination has been the target of substantial criticism.[10]

Although more drastic remedies are arguably feasible, permitting the use of otherwise inadmissible hearsay in Kansas preliminary examinations would represent a conservative, yet significant, procedural improvement. This article will review the constitutional and legislative foundations for preliminary examinations and examine the status of hearsay in these proceedings. It will also suggest a proposal that hearsay be admissible in Kansas preliminary examinations.[11]

I. CONSTITUTIONAL AND LEGISLATIVE FOUNDATIONS FOR PRELIMINARY EXAMINATIONS

The fourth amendment defines both the standards and procedures for arrest

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* Associate Professor of Law, University of Kansas, J.D. 1977, *summa cum laude*, Notre Dame. The author acknowledges the assistance of James P. Gerstenlaur, third year law student at the University of Kansas, in this article's preparation.

[1] KAN. STAT. ANN. § 22-2902(1) (1981).

[2] *Id.* § 22-2902(3).

[3] State v. Cremer, 234 Kan. 594, 599-600, 676 P.2d 59, 63-64 (1984).

[4] KAN. STAT. ANN. § 60-460 (1983).

[5] *See id.* § 22-2902a (Supp. 1983) (regarding forensic examinations).

[6] State v. Jones, 233 Kan. 170, 172, 660 P.2d 965, 968-69 (1983).

[7] *Id.*

[8] Adversarial preliminary examinations are not constitutionally mandated. Gerstein v. Pugh, 420 U.S. 103, 119-25 (1975).

[9] The unnecessary costs to society are apparent and do not need elaboration. However, beyond the obvious waste of judicial, prosecution, and police resources, it is worth noting that victims and witnesses are often subjected to unnecessary harassment, embarrassment, and inconvenience.

[10] *Criminal Procedure Relating to Preliminary Examinations; Amending K.S.A. 22-2902 and Repealing the Existing Section, 1984: Hearings on House Bill No. 2522 Before the Kansas House Committee on Judiciary (1984)* (unpublished minutes of testimony on February 7-8, 1984) [hereinafter cited as *Hearing*].

[11] *Id.* (testimony by Professor Emil A. Tonkovich on February 7, 1984).

and post-arrest detention.[12] The standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a reasonable person to believe that the defendant had committed or was committing a crime.[13] This standard represents a necessary balance between the individual's right to liberty and the state's duty to protect society against crime.[14] To implement the fourth amendment's safeguards, it is generally required that the probable cause determination be made by a neutral and detached magistrate.[15]

In the leading case of *Gerstein v. Pugh*,[16] the United States Supreme Court addressed the issue of whether an arrestee who is subjected to extended post-arrest detention is constitutionally entitled to a judicial determination of probable cause.[17] The Court recognized that, because of practical considerations, a police officer's probable cause determination may be legally sufficient to justify the arrest of a criminal suspect and the brief detention of the suspect to take administrative steps incident to arrest.[18] However, once the suspect is in custody, there is no longer any reason to dispense with the magistrate's probable cause determination.[19] Therefore, the Court held that the fourth amendment requires a timely judicial determination of probable cause as a prerequisite to extended post-arrest detention.[20]

The Court in *Gerstein*, however, also found that the fourth amendment does not require adversarial probable cause hearings.[21] The only issue in these post-arrest situations is whether there is probable cause for detaining the arrestee pending further proceedings.[22] This issue, the Court reasoned, can be determined without an adversarial hearing.[23]

While its holding was limited to the precise requirement of the fourth amendment, the Court in *Gerstein* recognized that state procedures may vary widely in satisfying this requirement.[24] An adversarial determination of probable cause, such as the Kansas preliminary examination, is not constitutionally required.[25] For example, the Court found that a probable cause determination at the arrestee's first appearance before a judicial officer will satisfy the fourth amendment.[26]

Although adversarial preliminary examinations are not constitutionally mandated, many jurisdictions provide for them in various forms and utilize them to different degrees.[27] A few states do not have any form of preliminary examination, but instead satisfy the *Gerstein* requirement through an *ex parte* probable

[12] Cupp v. Murphy, 412 U.S. 291, 294-95 (1973).
[13] Beck v. Ohio, 379 U.S. 89, 91 (1964).
[14] Brinegar v. United States, 338 U.S. 160, 176 (1949).
[15] Johnson v. United States, 333 U.S. 10, 13-14 (1948).
[16] 420 U.S. 103 (1975).
[17] *Id.* at 105.
[18] *Id.* at 113-14. *But see* Payton v. New York, 445 U.S. 573, 576 (1980).
[19] 420 U.S. at 114.
[20] *Id.*
[21] *Id.* at 120, 123.
[22] *Id.* at 120.
[23] *Id.*
[24] *Id.* at 123.
[25] *Id.*
[26] *Id.* at 123.
[27] *See, e.g.*, FED. R. CRIM. P. 5.1(a) (adversarial preliminary examination permitting hearsay); KAN. STAT. ANN. § 22-2902(3) (1981); *Cremer*, 234 Kan. at 599-600, 676 P.2d at 63-64 (adversarial preliminary examination not generally permitting hearsay).

cause affidavit at the initial appearance.[28] Only Kansas and ten other states provide for a full adversarial preliminary examination in which hearsay is not generally admissible to support the probable cause finding.[29] The source of this right to a full adversarial preliminary examination in Kansas is statutory.[30]

II. HEARSAY IN PRELIMINARY EXAMINATIONS

In *Gerstein*, the Court stated that the Constitution does not prohibit states from authorizing the use of otherwise inadmissible hearsay evidence to determine probable cause at the preliminary examination.[31] Furthermore, the Court found that the accused has no constitutional right to confront State witnesses at the preliminary examination.[32] Noting the distinctions between trial findings of guilt and probable cause determinations, the Court reasoned that the accused's confrontation and cross-examination of State witnesses at preliminary examinations might only slightly enhance the reliability of probable cause determinations.[33] This speculative benefit, the Court concluded, was outweighed by the burden these procedures place on the already overburdened criminal justice system.[34]

In two recent cases, *State v. Sherry*[35] and *State v. Cremer*,[36] the Kansas Supreme Court addressed the issue of the admissibility of hearsay evidence in preliminary examinations. *Sherry* involved a limited statutory exception to the hearsay prohibition, while *Cremer* concerned the general admissibility of hearsay.

In *Sherry*, the issue was the constitutionality of section 22-2902a of the Kansas Statutes Annotated. This statute provides for the admission of specified forensic examiners' reports at preliminary examinations without the testimony of the forensic examiner.[37] Relying on *Gerstein*, the court upheld the validity of the statute.[38] Recognizing that while the Constitution does not prohibit the use of hearsay evidence in determining probable cause at preliminary examinations, the court acknowledged that the state statute requires the application of the rules of

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[28] The following five states use this procedure: Florida, Indiana, Iowa, Vermont, and Washington.

[29] A June 1983 survey of state attorneys general conducted by Mr. Ken Peterson, Assistant Chief Deputy District Attorney in the Sacramento, California, District Attorney's Office, indicated that as a matter of law or practice hearsay is generally not admissible in preliminary examinations in the following states: Arkansas, California, Hawaii, Idaho, Kansas, Missouri, Oklahoma, South Dakota, Tennessee, Virginia, and Wisconsin. Peterson, *The Preliminary Hearing: A Time for Modification*, PROSECUTORS BRIEF, July-Aug. 1983, at 13, 17, 20.

[30] *See* State v. Boone, 218 Kan. 482, 543 P.2d 945 (1975).

[31] *Gerstein*, 420 U.S. at 120.

[32] *Id.* at 121-22.

[33] *Id.*

[34] *Id.* at 122 n.23.

[35] 233 Kan. 920, 667 P.2d 367 (1983).

[36] 234 Kan. 594, 676 P.2d 59 (1984).

[37] KAN. STAT. ANN. § 22-2902a provides:

> At any preliminary examination in which the results of a forensic examination, analysis, comparison or identification prepared by the Kansas Bureau of Investigation, the Secretary of Health and Environment, the sheriff's department of Johnson County or the police department of the city of Wichita are to be introduced as evidence, the report, or a copy of the report, of the findings of the forensic examiner shall be admissible into evidence in the preliminary examination in the same manner and with the same force and effect as if the forensic examiner who performed such examination, analysis, comparison or identification and prepared the report thereon had testified in person.

[38] *Sherry*, 233 Kan. at 929-32, 667 P.2d at 375-78.

evidence to Kansas preliminary examinations.[39] Therefore, the court reasoned that the legislature could provide for the admission of the hearsay reports of forensic examiners.[40] In reaching its decision the court noted that in federal preliminary examinations the usual rules of evidence are not applied, and the finding of probable cause may be based on hearsay.[41]

In *Cremer*, the Kansas Supreme Court faced the issue of whether inadmissible hearsay may generally form the basis for a finding of probable cause at a preliminary examination.[42] The court of appeals had held that certain bank statements, although technically inadmissible hearsay at a trial, could be admitted and considered in determining probable cause at a preliminary examination.[43] Reasoning that the rules of evidence have traditionally been relaxed at preliminary examinations, the court of appeals held that if there is a substantial basis for crediting the hearsay it may be relied upon and form the basis of a probable cause finding in a preliminary examination.[44]

The supreme court affirmed, although not for the reasons stated by the court of appeals.[45] The court held that the bank statements were admissible hearsay under the business records exception to the hearsay rule.[46] Regarding the general hearsay issue, the court concluded that the rules of evidence contained in the Kansas Code of Civil Procedure are to be applied to preliminary examinations,[47] "except to the extent that they may be relaxed by other court rules or statutes applicable to a specific situation."[48] Noting that there are no procedural rules that make the rules of evidence inapplicable to preliminary examinations,[49] the court held that hearsay evidence is generally inadmissible in preliminary examinations.[50]

Although it rejected the use of hearsay evidence in preliminary examinations, the Kansas Supreme Court in *Cremer* based its decision on statutory, not constitutional, grounds. Furthermore, the court recognized a statutory exception to this hearsay prohibition in *Sherry*.

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[39] *Id.* at 931, 667 P.2d at 377.

[40] *Id.*

[41] *Id.*

[42] *Cremer*, 234 Kan. at 598, 676 P.2d at 62.

[43] *Id.* at 597, 676 P.2d at 62.

[44] *Id.*

[45] *Id.* at 603, 676 P.2d at 65.

[46] *Id.* at 602, 676 P.2d at 64.

[47] *Id.* at 600, 676 P.2d at 64.

[48] *Id.*

[49] *Id.*

[50] *Id.* The court added that Kansas judges, including the nonlawyer magistrate judges, "can apply the statutory rules of evidence without great difficulty." *Id.* This case, however, illustrates the difficulty that even experienced judges have in applying the rules of evidence, particularly the hearsay rule. The trial judge held the evidence admissible; the court of appeals then held it inadmissible; and finally, the supreme court held it admissible. *Id.* at 603-04, 676 P.2d at 65-66 (Miller, J. concurring).

The court also noted that "great changes in the concept of due process" support its holding. *Id.* at 600, 676 P.2d at 64. It is interesting, however, that despite this gratuitous statement, the court has fully embraced the *Gerstein* decision. *Sherry*, 233 Kan. at 931. The United States Supreme Court in *Gerstein*, a 1975 case, held that confrontation and cross-examination at preliminary examinations are not required. *See supra* notes 31-34 and accompanying text. Furthermore, thirty-nine states and the federal courts have not noticed these "great changes" in due process and do not follow the Kansas procedure. *See supra* notes 28 & 29 and accompanying text.

III. PROPOSAL

It is clear that the Constitution does not prohibit the use of hearsay in preliminary examinations.[51] It is also apparent that the hearsay prohibition in Kansas is statutory.[52] Consequently, any modifications regarding the use of hearsay in Kansas preliminary examinations must be statutory. Section 22-2902 could be effectively amended to include the following language: "The finding of probable cause may be based upon hearsay evidence in whole or in part."[53]

This amendment would be a conservative, yet significant, step toward alleviating the unnecessarily high costs Kansans pay under the present preliminary examination procedure. Rather than call several witnesses, the prosecutor could establish probable cause through the hearsay testimony of one or two witnesses. Furthermore, in many cases, this practice would avoid harassment of and inconvenience to victims and witnesses.[54] Permitting the use of hearsay in preliminary examinations will substantially benefit society with very little, if any, prejudice to criminal defendants.[55]

A more drastic modification, such as abolishing preliminary examinations, is constitutionally sound. The Kansas Legislature could abolish preliminary examinations and rely on the *ex parte* probable cause determination at the initial appearance.[56] Such a modification, however, would provide only marginally greater societal benefits with a potential cost of increased prejudice to defendants. Rather than risk these costs, the Kansas Legislature should adopt the amendment set forth above.

[51] *Gerstein*, 420 U.S. at 119-25.
[52] *See supra* notes 35-50 and accompanying text.
[53] This is the exact language used in FED. R. CRIM. P. 5.1.
[54] *See Hearings*, *supra* note 10.
[55] The Court in *Gerstein* recognized that the benefits of this practice outweigh any possible prejudice to defendants. 420 U.S. 121-25.
[56] *See supra* notes 21-26 and accompanying text.

February 24, 1985

The House Judiciary Committee
Topeka, Kansas

RE: House Bill 2454 to amend KSA 22-2902

Members of the House Judiciary Committee:

Last year at this time I came to Topeka to testify before you as a victim of crime. This year I am unable to personally testify, but again I am asking you to amend the preliminary hearing statute KSA 22-2902 by adopting House Bill 2454.

I was a victim of rape four years ago at the age of twenty. Due to very strong evidence in my favor, and my belief in our system of justice, I felt very confident and unafraid about going to trial---until the preliminary hearing. I was asked humiliating, irrelevant, detailed questions about my past that no attorney would have dared to ask before a jury. It was insinuated that because I lived alone, I was promiscuous; because I jogged in shorts, I had asked for it. I left the preliminary hearing stunned and disillusioned. I was mortified at the thought of going through this again at the trial. By the trial date I was so afraid and upset I literally almost could not walk into the courtroom. As I found out, none of what was said in the preliminary carried over to the trial, which made the preliminary hearing almost useless as a means of discovery.

The primary use of a preliminary hearing for the defense attorney seems to be to upset and intimidate the victim and to try to frighten them into not being able to testify at the trial. By intentionally putting the victim under extreme pressure, they are able to elicit answers that may not be interpreted the way the victim intended. These senseless, degrading questions leave the victim feeling used and defeated by our system.

Considering all the other detrimental aspects of the preliminary hearing, such as time and money spent, it seems senseless to put victims and witnesses through this added emotional trauma.

On behalf of victims and witnesses, I ask for your careful consideration in eliminating these traumatic, time-consuming, and costly preliminary hearings.

Sincerely,

Valerie

Valerie

Attachment XI
House Judiciary 3/2/87

KANSAS BAR ASSOCIATION

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

March 2, 1987
HB 2476

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

> KBA Opposes Section 2 of this act which allows hearsay evidence in preliminary hearings in felonies.
>
> Court ordered and supervised criminal discovery depositions is a better alternative.

Last year, upon reviewing HB 2454, which created a compromise of sorts between these conflicting concepts, KBA's legislative committee reviewed the history of the Kansas rule that requires adherence to the hearsay rule (prohibiting hearsay) at preliminary hearings. At the recommendation of the Legislative Committee, the KBA Executive Council approved official opposition to allowing hearsay evidence in preliminary hearings.

While true that the hearsay rule makes preliminary hearings longer, it allows prosecutors and defense counsel to review the credibility of key witnesses before trial. If prosecution witnesses are weak, or lack credibility, the prosecution may seek a negotiated plea. If defense witnesses are weak, or lack credibility, the defendant may seek a negotiated plea. In both instances, the allowance of full blown proof

Attachment XII
House Judiciary 3/2/87

of the prima facie case at the preliminary hearing without waiving the hearsay rule serves a useful purpose of giving counsel information which may limit future trials.

Alternative

The County Attorney association wants HB 2476 because they feel it is time that we join a majority of other states and the federal government in allowing hearsay evidence in preliminary hearings. Many of the states that use such hearsay evidence get through the preliminary hearings fast, but their trial courts are backlogged. We don't have that problem in most of Kansas, and we want to keep it that way.

As Representatives Fuller and Shriver can tell you, we are having troubles this year adequately funding the Board of Indigent Defense Services. I can offer an alternative to HB 2476 which will save money for that fund and reduce the need for any preliminary hearings.

Instead of hearsay evidence in preliminaries, how about if we eliminate the need for a lot of preliminary hearings? The judge, the witnesses, the defense counsel and the prosecutor all could be doing something else with their time.

The defendant can always waive the preliminary hearing and go to trial. However, defense lawyers force the preliminary hearing so that they can discover what the evidence is that the prosecutor has, and the

preliminary reviews the credibility and appearance of the main witnesses.

Through the use of discovery depositions, the following occurs:

1. Defendant cannot seek discovery depositions unless he waives preliminary hearing.
2. The deposition must be taken at the courthouse, and in the presence of the prosecution, who will protect the witness.

Discovery depositions are allowed in criminal matters in Florida, New Mexico, Vermont, Texas, Ohio and Indiana. Kansas prosecutors have always had the ability to take sworn testimony of witnesses by using the statutory inquisition procedure. Historically, courts have ruled that preliminary hearings are "statutory discovery proceedings" for the defendant's benefit anyway, so why not allow the defendant to take discovery depositions? Waiving the preliminary hearing in order to take one or two discovery depositions saves time, saves money to the AID fund, and speeds up the criminal justice process.

We suggest you enact in place of HB 2476 a substitute bill with the provisions of 1985 HB 2445. Prosecutors would not be disadvantaged, since they can seek protective orders just like attorneys do in the civil procedure code.

Thank you.