Approved April 30, 1988
Date

MINUTES OF THE HOUSE COMMITTEE ON INSURANCE.

The meeting was called to order by REPRESENTATIVE DALE SPRAGUE at
Chairperson

3:30 XX a.m./p.m. on APRIL 6, 1988 in room 531-N of the Capitol.

All members were present except:
Representative Wells - excused

Committee staff present:
Chris Courtwright, Research Department
Bill Edds, Revisor of Statutes Office
Nancy Wolff, Secretary

Conferees appearing before the committee:

Senator Dave Kerr
Senator Frank Gaines
Gerhard Metz, Kansas Coalition for Tort Reform
Jerry Slaughter, Kansas Medical Society
Bud Cornish, Domestic Property and Casualty
Tom Bell, Kansas Hospital Association
Gary McAllister, Kansas Trial Lawyers Association
Ron Smith, Kansas Bar Association

The meeting was called to order by the Chairman.

Hearings were scheduled on Senate Bill 631 which would limit attorneys fees paid to plaintiffs'attorneys from the Health Care Stabilization Fund.

Senator Dave Kerr co-sponsor of the bill testified as a proponent of the bill. He stated that there is quite a desparity between the amount paid to defense attorneys and claims attorneys and SB 631 would very simply try to make a difference. In his opinion, the legislation would place more money in the victims' pocket and could possibly prevent the Health Care Stabilization Fund from going broke. He presented the committee with a comparison (Exhibit I) which illustrates the total payment from the fund with and without Senate Bill 631. He further stated the bill makes no attempt to limit fees that are not paid from the fund.

Senator Gaines, the other sponsor of SB 631, also testified in support of the bill. He stated that the legislation is not a new idea and that the concept was originally presented to an interim committee a few years ago. The bill, as presented at that time would have established a percentage schedule that could be utilized for all types of contingency fee litigation. As SB 631 was originally drafted, there was a limitation of 15% that could be paid from the fund. It was later amended on the floor of the Senate to allow a 25% payment on the first $1/2 million.

The next proponent, Gerhard Metz, of the Kansas Coalition for Tort Refort and stated that SB 631 would fit into an overall package on tort reform.

Jerry Slaughter, representing the Kansas Medical Society testified in support of the bill. He stated that it is unconscionable that a plaintiff's attorney could receive 40% of a recovery. It was the opinion of the Medical Society that an injured party has not been made whole when the attorney receives a fee of that magnitude.

Representative Schauf asked Mr. Slaughter if he would support legislation that would make doctors' fees uniform across the state and he replied that for all intents and purposes it has been that way since 1975 as doctors are limited under Medicaid. Further discussion pointed out that doctors are not compelled to charge non-medicaid patients the same rates as medicaid patients and could frequently not have the same fee schedule. Also, he did not have the figures available that would reflect what percentage of all patients are Medicaid patients.

MINUTES OF THE HOUSE COMMITTEE ON INSURANCE,

room 531-N, Statehouse, at 3:30 XXX a.m./p.m. on APRIL 6, 1988.

Bud Cornish, representing Domestic Property and Casualty, testified in support of SB 631. He stated that SB 631 simply limits the medical malpractice awards that come from the Health Care Stabilization Fund. He also stated that the bill would help to stabilize surcharges that are levied by the fund and would be a good addition to the other tort reform measures.

Representative Gross made a motion to table SB 631. There being no second, the motion died.

Representative Beauchamp asked the proponents of the bill if the $.35 that is paid on the dollar on physician charges is a stable rate or has it been squeezed over the years. The gallery responded that the rate has bounced up and down.

Representative Gross then renewed his motion to table SB 631 and Representative Sawyer seconded the motion.

Representative Brown stated that she felt the motion was somewhat premature and not very courteous as the committee had not yet heard the other side of the issue.

Representative Littlejohn called for the question and the motion failed 6-8.

There being no further proponents of the bill, the Chairman called for the opponents to SB 631.

Gary McAllister, an attorney in Topeka and current president of the Kansas Trial Lawyers Association appeared on their behalf. He stated that the Health Care Stabilization Fund is not a tax and contrary to what has been said so far in the hearings, an attorney's responsibility is to maximize the client's recovery and when settled out of court, discount fees with regard to what the percentage would be. He stated that it might cost an attorney $100,000 in out-of-pocket expenses to prosecute these cases and he felt the committee was attempting to regulate and set arbitrary limits. He questioned if this practice is constitutional. He distributed a letter from Richard Mason, Executive Director of KTLA. (Exhibit II)

Ron Smith, Kansas Bar Assocition, also testified in opposition to SB 631. (Exhibit III). He also distributed a trnscript of the floor debates in the Senate from April 1, 1988 on tort reform. (Exhibit IV)

There being no other opponents or proponents, the hearings on SB 631 were closed.

Representative Neufeld made a motion that SB 631 be reported favorable for passage and Representative Beauchamp seconded the motion.

Representative Brown made a substitute motion that SB 631 be tabled until 9:00 a.m. on April 7, 1988 and Representative Turnquist seconded the motion.

Representative Sprague then adjourned the meeting until 9:00 a.m. on April 7, 1988.

Senator Dave Kerr

4/6/88

SB 631

WILL IT REDUCE PAYMENT FROM THE FUND?

91 percent of the cases which gain access to the fund are the result of settlements rather than trials.

1. Assume the victim believes he must have $1,000,000 to be made whole
2. Assume a contingent fee of 40% before SB 631
3. Assume a contingent fee of 40% on the non-fund portion of the settlement after SB 631

Without SB 631

Total Settlement: $1,750,000
Costs: ($80,000)

Balance to which contingency applies: $1,670,000

		Victim	Attorney
•Primary Insurance	$200,000	$120,000	$ 80,000
•Fund	$1,470,000	$882,000	$588,000
		$1,002,000	$668,000

Total Payment from the fund: $1,550,000

With SB 631

Total Settlement: $1,405,000

Costs: (80,000)

Balance to which contingency applies: $1,325,000

		Victim	Attorney
•Primary Insurance	$200,000	$120,000	$ 80,000
•1st ½ million	500,000	375,000	125,000
•Next ½ million	500,000	400,000	100,000
•Balance	$125,000	$106,250	$ 18,750
		$1,001,250	$323,750

Total Payment from the fund: $1,205,000

Savings to the fund with SB 631: $345,000 = 23.3%

EXHIBIT I

KANSAS TRIAL LAWYERS ASSOCIATION

112 West Sixth, Suite 311, Topeka, Kansas 66603, (913) 232-7756

April 6, 1988

TO: House Insurance Committee

FROM: Richard H. Mason

SUBJECT: SB 631 - Attorney's Fees

As you know, SB 631 was withdrawn from the House Judiciary Committee and reasigned to your Insurance Committee. This bill is another "tort reform" attempting to lower insurance rates for Kansas doctors. It clearly won't accomplish that goal and should be defeated.

WHAT'S IT CHANGE? It imposes arbitrary restrictions on the ability of a victim of medical malpractice to contract with their attorney for payment of his or her legal services.

WILL IT SAVE THE HEALTH CARE STABILIZATION FUND MONEY? There is a mistaken belief that by limiting attorney fees, there is a corresponding reduction in the amount of money the FUND will pay out. The fact is the FUND doesn't pay any plaintiff attorney fees...the plaintiff does.

WILL SB 631 LOWER INSURANCE COSTS FOR DOCTORS? No. Since it will not reduce jury awards, and thus not reduce claims paid by the FUND, it simply cannot affect malpractice insurance premiums.

SO WHAT IS THE REAL AFFECT OF THIS BILL? Proponents must hope that restricting attorney fees will make it less likely that some plaintiffs' attorneys will risk their time and personal money to handle some medical malpractice cases.

WHO SUFFERS? Limiting unrestricted use of a contingent fee contract would preclude the ability of some victims of medical malpractice to have their case decided by a jury.

Neither victims of medical malpractice, nor other victims of negligence, are complaining about attorney fees. SB 631 is not designed to help compensate them for the damages they've suffered. It is designed to keep some of them from having their day in court.

EXHIBIT II

A SECOND CENTURY OF SERVICE
1882
KANSAS BAR ASSOCIATION

April 6, 1988
HB 631

Mr. Chairman. Members of the House Insurance Committee.

Limiting contingent fees of lawyers is not tort reform. All this type of tort reform does is make astrology look respectable. KBA opposes SB 631. Further, you cannot offer an amendment cleaning up the percentages that would make us accept the bill. In our opinion is a vain attempt to exercise power the legislature does not possess because it violates the Separation of Powers doctrine and has at least four other possible constitutional deformities. KBA opposes statutory regulation of professional contracts if the effect is to impose artificial percentage limits or unreasonable and constrictive restraints on attorneys, clients, and the legal system's ability to resolve disputes.

Points to Consider

1. On few issues is the Bar more united than against unnecessary government regulation of the profession. This is not a medical malpractice plaintiff attorney issue. This is a regulation issue for all attorneys. With this kind of a limit in place, what keeps the rest of the industry and insurance industry from wanting similar restrictions on the ability to sue for damages?

2. Many states have regulated medical malpractice reforms. Only six have adopted limits on contracts between private parties as a method of controlling medical malpractice premiums. Only five put percentage limits into the fees.

3. The Bar does not need to be regulated by the Legislature. Attorneys are regulated by a separate branch of government. Not only is there regulation, but the grant of regulatory power to the Judiciary is constitutional in nature (Art. III, Sec. 1, State constitution).

4. Such limits don't work. "A spot check of medical societies and insurers in states restricting attorneys' fees shows all have seen upsurges in numbers of suits and size of awards." 62 Medical Economics 52, at 56 (Oct. 21, 1985)

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EXHIBIT III

5. Mr. Chairman, this bill regulates the private fee contract between the client and his attorney. What business is it of the state to tell me which professional I can and cannot hire?

6. No state interest, rational or otherwise, was presented to the Senate for regulating the Bar. The only Senate arguments advanced were: (a) Contingent Fee Contracts constitute gambling contracts and must be regulated, and (b) The limits will make more of the recovery available to the claimant and at the same time reduce payouts from the Health Care Stabilization Fund (HCSF), and (c) there is no difference between workers compensation type cases and medical malpractice cases. All such arguments are without merit:

> (a) Medical malpractice fee contracts are no different than common law negligence actions, where American courts consistently allow contingent fee contracts if reasonable. (Actually, the legislature is without power to regulate lotteries and gaming contracts.]
>
> (b) You cannot make more money available to plaintiffs and at the same time reduce payouts from the HCSF unless fewer meritorious claims are not filed. Senator Kerr's remarks that this will not keep people from suing for malpractice does not comport with facts: Commentators indicate fee limit restrictions in California were specifically intended to restrict plaintiff's access to courts. Jenkins & Schweinfurth, California's Medical Injury Compensation Reform Act, An Equal Protection Challenge (1979), 52 So. Cal. L.Rev. 829, 944, fn 696.
>
> (c) Even California's principle legislative sponsor has acknowledged that a malpractice case is "extremely difficult to prove, demands a great deal of research into causal factors and exhausts a tremendous amount f time on the part of the attorney." Keene, California Medical Malpractice Crisis, in "A Legislator's Guide to the Medical Malpractice Issue (Warren & Merrit Edits., 1977 (pp. 29-30).
>
> (d) Further, "Modern medicine is highly complex and technical and there is often a significant lag time between the date of the wrongful act and the date an injury is perceived. These factors present special difficulties in gathering evidence and proving negligence in medical malpractice cases." Green, Medical Malpractice and the Propensity to Litigate, in The Economics of Medical Malpractice, pp. 196-197.

7. Further, this bill with the Senate amendments appears to keep persons from hiring an attorney even on a win or lose, straight hourly fee arrangement if the total exceeds the percentages ascribed.

8. The whole premise of SB 631 is the fiscal stability of the Health Care Stabilization Fund. KBA has not supported mandatory insurance for professionals, either now or in the past. In retrospect the arguments of the past four years over medical malpractice stem from problems with the Fund. Premiums are too high in many instances because doctors are financing a level of insurance they don't want or need to protect assets. The traditional insurance view -- protecting your assets -- is not accomplished by the Fund. The argument that the fund provides a guarantee the claimant will get something is wrong; the claimant gets nothing unless they prove negligence, causation and damages in the most difficult type of personal injury case. The Fund is not a guarantor of recoveries because few malpractice victims collect from the fund. KBA doesn't blame anyone. However, the time has come perhaps for the 1988 legislature to recognize the Fund has outlived its usefulness. The physicians are creating their own special insurance company in SB 677. Let them run it like an insurance company and be done with it.

Constitutional Considerations

SEPARATION OF POWERS

1. As early as 1793, American courts regulated reasonableness of attorney fees. Breckenridge v. McFarland, Addison Reporter, 49 (Pa.).

2. Kansas Supreme Court, Article III, Sec. 1, gives Supreme Court the "inherent power to regulate admissions to the bar, and the practice of law." Martin v. Davis, 187 Kan. 473. See also Syl. #12, State ex rel Stephan v. Smith, 242 Kan. 336, (Dec. 1987), where the court states: "The power to regulate the bar, including the power to discipline its members, rests inherently and exclusively with this court."

> (a) "While the Supreme Court has constitutional power to determine court procedure, it may acquiesce in legislative action in this area. The constitutional power over court administration and procedure remains vested in the Judicial branch, even though legislation is used to help perform its function. Problems arise only when court rules and statutes conflict. Under such circumstances the court's constitutional mandate must prevail." State v. Mitchell, 234 Kan. 185 (1983). Simply put, SB 631 conflicts with Rule 1.5 because the court determines the reasonableness of contingent fees.

3. Contingent fee regulation is an inherent judicial function. Schlesinger v. Teitelbaum, 475 F.2d 137 (3rd Cir., 1973), where a federal appeals court noted "in its supervisory power over the members of its bar, a court has jurisdiction of certain activities of such members, including the charges of contingent fees." Regulating the Bar and disciplining lawyers are judicial functions "protected against

legislative incursion, as are, for instance, adjudications issues in traditional adversary litigation." Garrett v. Bamford, 582 F.2d 810 (3rdCir., 1978).

4. Adoption of rules of court regulating the practice is certainly as much a judicial function with which the legislature may not interfere as is the admission of attorneys. Hoopes v. Bradshaw, 231 Pa. 485, 487, 80 A. 1098 (1911). See also Beckert v. American Federation of State, County and Municipal Employees, 425 A.2d. 859 (1981) and Ballou v. State Ethics Commission, 424 A.2d 983 (1981) where the legislature's "ethics act" was unconstitutional encroachment by the legislature on the Pennsylvania Supreme Court's inherent and exclusive power to regulate attorney conduct.

5. That other legislatures have regulated contingent fees is not persuasive. Judicial Power is specific to each state, based on its constitution and common law decisions.

DUE PROCESS

6. "To arbitrarily deny a claimant the right to competent legal representation by fixing unreasonably low renumeration for services rendered by attorneys is a serious matter and may amount to a denial of due process." Cline v. Warrenberg, 109 Colo. 497, 126 P.2d. 1030 (1942).

7. Representation by counsel is essential to the effective exercise of an individual's First Amendment rights to petition for grievances and access the courts. Therefore, the right to obtain counsel of one's own choosing can be restricted only where necessary to achieve a compelling state interest. Access to the courts for resolution of civil disputes between private parties is protected by First and 14th amendments. City of Long Beach v. Bozek, 645 P.2D 137 (1982). See also United Transportation Union v. Michigan Bar Assoc., 401 U.S. 576 (1971).

EQUAL PROTECTION

8. Attorney fee limits should have the "heightened scrutiny" equal protection test, because such limits constitute content discrimination under the First Amendment. That is saying that one form of the fundamental right to petition government for redress of grievances is appropriate, but not others. In regulating the exercise of the First Amendment, the Government may not "pick and choose which views may be heard." Police Department of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). This precludes government from picking and choosing which types of common law lawsuits can be heard.

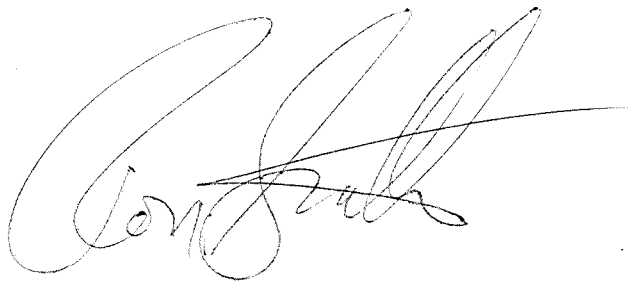
SUSPECT CLASSIFICATION

9. Fee limits constitute a classification based on wealth, which is unconstitutional. (Serrano v. Priest, 487 P.2d 1241 (1971).

The wealthy do not need contingent fees; they can pay by the hour. Only plaintiffs with modest means are adversely affected by SB 631. Because wealth classifications are a suspect classification, courts must use heightened scrutiny tests and see if there is a compelling state interest in such regulation.

10. Senator Kerr states the legislature must protect claimants from attorneys. However, the form of such protection is important. It is inappropriate for the state to "protect" an individual by suppressing his First Amendment rights.

11. Courts can impose their own contingent fee systems, and have. (New Jersey, New York). That does not mean the legislature can impose one.



THE WALL STREET JOURNAL THURSDAY, MAY 15, 1986

Don't Rush to Condemn Contingency Fees

By James L. Gattuso

Nobody likes lawyers these days. They are usually depicted, sometimes accurately, as opportunistic and overpaid. Still, it was surprising to learn of the Reagan administration's recent proposal to limit the amount of money attorneys can receive in contingency fees—and surprising, too, to hear other conservatives argue that the practice should be outlawed altogether.

Opposition to price controls has always been one of the basic tenets of free-market conservatism, and, at least since the demise of Richard Nixon, a point of agreement among Republicans generally. As evidenced by results of scrapping oil-price controls and the continuing decay of New York City's rent-controlled apartments, this opposition is well taken. Yet the principle is apparently abandoned by some conservatives when the subjects are Shakespeare's least favorite people: lawyers.

Based on Results

While the contingency-fee system is often misunderstood by the general public, it is actually very simple. Under the system, rather than receiving a set fee for each hour worked, a lawyer is paid according to the results achieved, receiving a percentage of the eventual award to his client. No money is paid before the award is made, and if the plaintiff does not win, no money is paid at all.

This system acts to provide the services of attorneys to injured people who may not be able to otherwise afford legal representation, at no cost to the taxpayer. Imagine that someone has been badly injured in an auto accident by a drunken driver. Although the accident was not his fault, and it is clear that he should be compensated by the other driver, he doesn't have the money to hire a lawyer. How can he press his claim? One solution would be to set up some mammoth government program to pay for the representation of him and others like him—an undesirable prospect. If contingency fees are available, this is unnecessary. The victim can pursue his case regardless of the amount of money he has.

There are three general criticisms usually leveled at the contingency-fee system. First, it is often said that it creates conflicts of interest between a client and his lawyer, because the lawyer is encouraged to hold out for a large award, rather than settle out of court. Second, it is said that it encourages lawyers to file meritless lawsuits. Lastly, it is argued that the fees provide a windfall to lawyers, since they may receive large fees even when they spend little time on a particular case. None of these criticisms have merit.

It is difficult to see how a contingency fee creates any sort of conflict between attorneys and their clients. Since the attorney shares proportionately in any award, and receives nothing if the case is lost, the contingent fee ensures that the attorney will have the same interest in the case as the plaintiff. Of course, there will always be times when the attorney will want to proceed to trial rather than settle out of court, or vice versa—disagreement is inevitable. Yet, on the basic object of litigation, receiving the maximum award possible, the interests of lawyer and client are identical.

Rather than encourage baseless lawsuits, the contingent fee actually helps screen them out of the system.

By contrast, paying lawyers by the hour creates an enormous conflict of interest between lawyers and their clients. For the hourly fee lawyer, the longer the case goes on, the more money he will get. Every pleading, motion, deposition and delay will mean more money for him, regardless of whether it leads to a better result for the client. Thus, from the standpoint of the client, as well as general court efficiency, reformers should actually be trying to encourage the contingent fee, not limit it.

Yet, there is no incentive for a lawyer to file a losing case—he gets paid only if he wins. It is consequently difficult to persuade a lawyer to risk his time and resources on what seems a losing cause. Thus, rather than encourage baseless lawsuits, the contingent fee actually helps screen them out of the system. Certainly, the screening process isn't perfect, and courts and legislatures should take steps to penalize those who bring baseless suits. The problem exists, however, despite, and not because of, contingent fees.

The most persistent criticism of the system is that it provides a windfall to lawyers who can win big fees even when they do very little work. The fees are high—usually plaintiffs' lawyers take about a third of the award. But these lawyers make no windfall profits. Just like owners of small businesses, their incomes are not tied to the amount of time they put in—they depend on the results they produce. While very often these attorneys do receive huge fees for very little work, they also at times perform substantial work on cases resulting in small fees. For cases that are lost, there is no fee at all.

On the whole, it seems contingent-fee lawyers are no better off financially than their colleagues who work on an hourly basis. According to figures recently compiled by the Rand Corporation's Institute for Civil Justice, fees and costs paid plaintiffs' attorneys nationwide total about $7 billion to $9 billion each year; defense lawyers make a total of about $6 billion to $9 billion working on hourly fees. These figures are large—lawyers certainly aren't underpaid—but show no windfall accruing to the plaintiffs' bar from contingent fees. In fact, if plaintiffs' lawyers were making significantly more than defense attorneys, one would expect to see a flood of lawyers moving from defense to the more lucrative plaintiffs' practice. There has been no evidence of such a shift.

More important, even if it seemed that contingent-fee attorneys were making too much money, placing price controls on them, as proposed by the Reagan administration, would not be in order. First, there is simply no reason to believe that consumers of legal services are inherently unable to intelligently choose how and how much to pay an attorney. While locating and hiring a lawyer can be a complex and difficult task, consumers make complex and difficult choices every day, ranging from the purchase of cars and houses to choosing, albeit with the advice of Cliff Robertson or Joan Rivers, a long-distance telephone company. In the absence of fraud or misrepresentation, there is no reason to override these decisions.

Further, as with other products, an attempt to control legal prices will not help the consumer, but simply make the product unavailable. Just as rent control makes apartments a scarce commodity, caps on contingency fees will make it harder to get a lawyer to file a case. Plaintiffs, like renters, will find themselves worse off.

That, of course, may be the reason for the recent interest in limiting fees. Clamping down on fees is a quick and easy way of quelling the current liability explosion. By cutting down on the number of cases brought by lawyers, lawmakers can avoid the burdensome and difficult chore of reexamining the ill-conceived rules of law that have brought tort law to the condition it is in today. Unfortunately, in the process, many people who really have been wronged will find themselves without access to the legal system.

Abolish Public Subsidy

This is not to say that nothing should be done to reduce fees. Lawyers, whether working on contingency or by the hour, are much too expensive. To help reduce this cost, lawmakers should eliminate the remaining barriers to advertising and competition among lawyers. Further, the real cost of litigation can be reduced by encouraging use of alternative dispute-resolution systems, such as arbitration and mediation.

In addition, legislators should reduce the incentives for excessive litigation by more fairly distributing the costs of the judicial system. The public subsidy for litigation should be abolished. Currently, most courts charge only nominal fees for their services, shielding litigants from the real costs of their actions, and leaving taxpayers with the bill. The losing party should also be forced to pay the other party's attorneys fees in certain cases, especially where a litigant has a meritless claim or defense. Only by reforms such as these can the problem of excessive litigation be resolved. Imposing price controls is not the answer.

Mr. Gattuso, an attorney, is a policy analyst with the Heritage Foundation.

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible to inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Code Comparison

This Rule has no direct counterpart in the Disciplinary Rules of the Code. DR 6-101(A)(3) provides that a lawyer shall not "neglect a legal matter entrusted to him." DR 9-102(B)(1) provides that a lawyer "shall promptly notify a client of the receipt of his funds, securities, or other properties." EC 7-8 states that "a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 states that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A lawyer's fee shall be reasonable but a court determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery. All such expenses shall be deducted before the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the client's share and amount and the method of its determination. The statement shall advise the client of the right to have the fee reviewed as provided in subsection (e).

(e) Upon application by the client, all fee contracts shall be subject to review and approval by the appropriate court having jurisdiction of the matter and the court shall have the authority to determine whether the contract is reasonable. If the court finds the contract is not reasonable, it shall set and allow a reasonable fee.

(f) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a contigent fee in any other matter in which such a fee is precluded by statute.

(g) A division of fee between lawyers who are not in the same firm may be made if the client is advised of and does not object to the participation of all the lawyers involved, and the total fee is reasonable.

(h) This rule does not prohibit payments to former partners or associates or their estates pursuant to a separation or retirement agreement.

Kansas Comment

Origin

Rule 1.5 as adopted contains 1.5(a) and (b) as promulgated in the Model Rules. (c), (d) and (e) have been modified. The Kansas Committee recommended adoption of Model Rule 1.5 with no changes. Rule 1.5 as adopted followed a study of attorney fees by a special committee of the Kansas Judicial Council formed pursuant to Concurrent Resolution 5053 of the Kansas House of Representatives adopted April 8, 1986. The rule as finally adopted took into consideration Model Rule 1.5, the Kansas Committee recommendations and the recommendations of the special committee of the Kansas Judicial Council.

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist, or when a lawyer refers a matter to a lawyer in another jurisdiction. Paragraph (g) permits the lawyers to divide a fee by agreement between the participating lawyers if the client is advised, does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. The fact that a fee may be lower than the customary fee charged in the locality for similar service shall not be a basis for finding the fee to be unreasonable.

Code Comparison

DR 1-106(A) provides that, "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." It also provides that, "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." The factors to be considered in determining reasonableness are identical to those in Rule 1.5(a). EC 2-17 states that, "A lawyer should not charge more than a reasonable fee . . . ."

There is no counterpart to Rule 1.5(b) in the Disciplinary Rules of the Code. EC 2-19 states that, "It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

With regard to Rule 1.5(g), DR 2-107(A) permits a division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation . . . ." Rule 1.5(g) permits division without regard to the services rendered by each lawyer if the client is advised, does not object, and the total fee is reasonable.

DR 2-106(B) provides that, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal

SB 631
begins on Pg 2.

Tort Reform Issues
RECORD OF DEBATES
Senate Floor
April 1, 1988
Transcribed by the Kansas Bar Association

[Senator Arasmith is in the Chair.]

* * * * *
Debate on
Limits on Noneconomic Losses
HB 2692
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Chair: "The Chair recognizes the Senator from Sedgwick, Senator Yost, on HB 2692.

Yost: Mr. Chairman, House Bill 2692 is the first of four bills pertaining to tort reform. This is the bill that would place a limit on what is called 'noneconomic damages.'

It came out of House committee as a limit on noneconomic loss. It was amended on the House floor to be a limit on pain and suffering. It was amended again in Senate committee to go back to noneconomic damages. It would place a limit of $250,000 on any of those types of damages. I would stand for questions.

Chair: The Senator stands for questions. Senator Parrish.

Parrish: I know we're running a little bit late. The Senator described what changes were made in committee on this particular bill. I just think we need to go over the differences. Could the Senator explain to the body what the cap will be now, what all is included under the category of noneconomic damages?

Yost: Economic damages are generally those tied to damages, such as the actual damages for medical bills, lost wages, that sort of thing. Things that are very easily determined. Noneconomic damages include all other types of items such as pain and suffering, disfigurement, items which are less easily determined than actual lost wages and that sort of thing.

Parrish: The rest of the senate should realize there was discussion in the committee whether or not we would except the House's version which dealt just with a cap on pain and suffering or whether we would adopt a cap which ended up being adopted by the committee, which ended up on noneconomic damages. I think many of our preferences would be to use the pain and suffering limitation as we did last year when we passed the general tort reform legislation, that dealt with the caps. That that particular piece of legislation we did adopt a cap on pain and suffering rather than the broader cap on noneconomic loss. The concern by many members of the committee was that we do limit those damages that to the effect that some people would not be able to qualify for that type of a damage. They might if we allowed the broader damage not to be under the cap. The body ought to realize that.

In cases of someone that has severe disfigurement, I'm not sure ... I don't do any personal injury cases so I'm not sure whether any pain and suffering would be included under disfigurement, or whether the person would be able to, if the cap was $250,000, if the person would only get that cap and not others. The body needs to understand the difference between the two amounts we were talking about.

Chair: Other questions or comments? I see none.

Yost: Mr. Chairman, I move when the committee rises and reports it report HB 2692 favorable for passage.

Chair: You've heard the motion. All in favor "AYE, those opposed NO? The Ayes have it.

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Debate on
Statutory Limits on Attorneys Fees

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Chair: The Chair recognizes the Senator from Reno, on SB 631.

D. Kerr: Thank you. Back in 1976, in response to the first medical malpractice crisis, the legislature created the Health Care Stabilization Fund [hereafter "HCSF"]. Back then it seemed to be a noble idea. The plan was we wanted to be certain that every doctor could get insurance and we wanted to be sure that if a person were provably injured, there would be adequate money there for compensation.

However, over the intervening 12 years, enormous problems have developed, as we all know. Right now doctors are paying a 90% surcharge, on their medical malpractice, their base premiums. And the fund today contains about 45 million dollars in cash; however, it is believe that projected liability is about 105 million dollars, or about a $60 million unfunded liability. So obviously that 90% surcharge is going to have

to go up. Next year's projection is 150% and will probably go much higher than that later.

The fund that was established for the idea of compensating victims pays out other parties as well. The next biggest party paid out of that fund are the plaintiff's attorneys. I'm told the customary fee on a contingency basis on a suit that actually does reach the health care fund is about 40%. So of that $105 million that is projected to be the liability, some $40 million of it is projected to go to plaintiff attorneys.

The question is whether that is good public policy. Forty Million dollars going to those attorneys means doctors have to pay that much more in premiums. That means they'll pass it on in health care bills to presumably third party payers in the health insurance payers. And finally we the people will have to end up paying it. It seems like a vicious and ruinous cycle. We the legislature created a vehicle for it. I think it is now time that we declare the situation not in the public interest and begin to take some action to take control of the money monster we've created.

Page 6 of SB 631 takes direct action to insure the HCSF compensates the victims and not attorneys. As amended by the Judiciary committee, the bill would limit fees paid by the fund to 25% of the first half million dollars coming from the fund, and 20% of the next half million dollars and 15% thereafter. This would only apply to payments from the fund. Settlements and awards do not gain access to the fund until they exceed a $200,000 threshold. We've made no attempt to control the percentage of legal fees out of the first 200,000 dollars.

I'm sure the critics will say to us that this bill will not have an effect on malpractice premiums. Or health care costs. I certainly do not make any claims that a direct line can be drawn between controlling the attorney fees being paid out of the fund and lower health care costs.

What we can say for sure is that more of the money in this fund can be used to compensate the victim rather than be paid to the attorney. It is possible it will have an effect on health care costs and the premiums paid by doctors on health care costs. If the perception that attorneys are going to be getting half of the money or 40% of the money is, over time, is eroded over time by this control then I think it is entirely possible that victims, victims attorneys, will be willing to settle for a somewhat reduced amount and thereby an effect could be had, could be, to benefit the HCSF and actually lower the payments. But that is problematical. We can't insure that. This will benefit the victims. That is what the the fund was established for. That is what this bill helps to do.

Mr. Chairman, the only thing left to explain is that we did leave an exception on page 6 on line 223 that would allow for those claimants those plaintiffs, who wish to pay an hourly rate, instead of a contingent fee, could do so. I doubt that language is actually necessary because I'm sure they could still have an hourly fee if they so chose. The language is in there. I'll stand for questions.

Chair: Chair recognizes the Senator from Sherman.

Gannon: Thank you--

Chair: Excuse me, Senator, there were committee amendments. Have you adopted those--

D. Kerr: We have not. I'd move the adoption of the committee amendments.

Chair: You have the motion. All in favor AYE, opposed NO. Ayes have it. Proceed.

Gannon: I don't have any questions. I do have an amendment I hope the Senator from Reno considers a friendly amendment. It inserts in SB 631 the language the Senate passed 40-0 in SB 624. That was the issue concerning tail insurance. Maybe the reader can read it; it is a very short amendment. Once again it passed 40-0.

[Reader reads the amendment.]

Mr. Chairman, the gist of this amendment is a Senate bill we passed a few weeks ago is to, to provide some additional problems for that doctor who leaves the state of Kansas and who enters another state to set up practice at a lesser rate than what he or she is paying here in the state of Kansas. This is, of course, the reason he or she can set up shop at a lesser rate is because, they don't bring any history with them. The state of Kansas I believe is the only state in the union which provides this [tail] coverage for those doctors, and it is terribly unfair for those doctors who have to stay in the state, to set up like an island like this, and consequently, that's why I'm offering this amendment to SB 631.

Chair: Senator from Reno.

D. Kerr: I'd ask the Senator from Sherman why he feels it necessary to put this clause into this bill?

Gannon: Well, I was informed this is the best vehicle. I can't answer above and beyond that. That's how I was advised. It is one of those things, that apparently got hung up in a House committee. They killed the bill over there. I think since we passed the bill 40-0 the House should be given the opportunity to study it again.

D. Kerr: So the Senator is say, that this bill, uh 640 . . .

Gannon: 624, Mister Chairman.

D. Kerr: 624 was killed by the House. So that message was sent strongly to us. That the House opposes this language. For that reason, despite the Senate vote, I'd have to oppose the amendment. It runs the risk of making it no longer a clean issue, of whether or not we're going to control the attorney fees being paid out of the HCSF. This is certainly not a directly related matter, and it could easily hurt the buoyancy of the bill. I have to wonder a little bit if that could be the goal of offering the amendment here; I hope that is not the case; but in any case, I would not support the amendment. We have a clean bill on a very clear cut issue that I'm very hopeful will pass this body and the other side.

Gannon: Mr. Chairman, the Senator from Reno and I have discussed this whole issue concerning all the bills we're debating today. He understands my feelings. I have assured him I'm not trying to place anything on his bill to put his bill in jeopardy. I tend to support his bill with or without the amendment. Let's keep in mind the Senate felt strongly about the issue. We passed it. It went to a House committee. The House committee killed the bill. It would appear to me this bill will be assigned to a committee with different jurisdiction when it goes over to that other body and again I suppose they could strike it again, but I think they ought to have the opportunity to reassess their position. Once again I'm not trying to add dead weight to your bill.

Chair: Questions or comments on the amendment? Move your amendment, Senator.

Gannon: I move my amendment.

Chair: Question arises on the floor amendment on the Senator from Sherman. All in favor AYE, opposed Nay, the chair rules the nos have it. Division is called. [They begin counting.] The motion failed, 12-18. Back to the Senator from Reno.

D. Kerr: Other questions?

Chair: Recognize Senator from Shawnee, Senator Parrish.

Parrish: Thank you, Mr. Chairman. Basically he said he was offering this bill because more money would go to the victim. Basically I would question the Senator from Reno whether victims groups, and we do have some victims coalitions, have they asked for this bill?

D. Kerr: No victims group has approached me asking for this bill. However, I would comment on its possible popularity. I sent out a poll earlier this session with a number of ques-

tions to constituents dealing with prison overcrowding and spending windfall taxes, and so forth. About 7 questions, each having about four possible answers. Out of those 28 possible answers the single answer on that entire survey that got the most support was controlling attorney fees paid on medical malpractice cases at 25%.

Parrish: I would wonder if a question was asked if constituents would like to see limits put on the fees of real estate agents or some other on homes, or some other profession, if we would control those percentages of fees received by others, would not the answers be 'yes' there, too. I think the general public would like to see lower fees paid by all professions. I would wonder what the Senator would think if we added on some other professions to other bills.

D. Kerr: I'll try it in next year's survey, Mr. Chairman.

Parrish: In light of that last, I would ask the Senator if we, by statute, regulate any other profession's fees they charge?

D. Kerr: I've not done a survey, but within the legal profession, we do regulate the amount of fees paid in workers comp claims. That is one example to me in the same general area.

Parrish: The question would still be, Mr. Chairman, what about other professions? Can you give us an example of another profession whose fees are regulated? Insurance? Architectural fees? Engineering fees? Anyone else? Doctors, for example? Are there any other fees the state legislature tends to regulate?

D. Kerr: I'm not sure we directly regulate, but we certainly do cap the fees that doctors can charge us on some of our medical practices they perform on our indigent people that hand in a medical card when they come in. We pay them, in may cases, about the cost of the overhead. So I would say that is a case when we cap, indirect if not quite direct, just as we're doing here, as an excellent example of how we do cap fees.

Parrish: Certainly that type of capping of fees is approved for attorneys in other areas, say the indigent defense fund, but I would say this is a private contract between the person hiring the attorney and the attorney. It seems to me that we have not, in the legislature, delved into those private contracts between two groups, the person that is hiring the professional, and the professional. It seems to me we're doing something we've not done in the past in this area.

I would also cite to the Senator and the body that this may be done supposedly to benefit victims but according to a Rand study in 1980, and I will quote:

> "Restriction of contingent fees would also tend to be regressive, deterring low-and middle-income plaintiffs from filing even meritorious suits. ... Thus, in the absence of the contingent fee, the number of cases filed would certainly be less."

I think this is what we're trying to get at. I think this will help so that there is less claims filed, but I think there are going to be a lot of people that are disadvantaged by this. Low income persons, who have meritorious claims, should be able to recover for that particular claim. They may not be able to, because they may not find an attorney who will take their case. We're getting into an area we should not be getting into.

Chair: Senator from Douglas.

Winter: Thank you Mr. Chairman. I do have an amendment to the bill. If I can get one of the pages. The amendment is relatively simple. If you'll look on page 6 where the language exists limiting fees, the committee will see Subsection 2 says a claimant has a right to elect to pay for attorney fees on a mutually satisfactorily basis. Such election shall not be exercised except at the time of employment. This amendment restructures that sentence. We strike lines 223 all after 'claimant.' and in line 224 striking all after the period. In lieu thereof we put, "A claimant may elect not to enter into a contingency fee arrangement provided in subsection 1 and pay attorney fees on an hourly basis." I don't know what per diem means and I think it means so much per day, but it is confusing the way it reads. This is merely intended to make it clear a lawyer and a client can still enter into an hourly fee agreement.

If for example someone is wealthy and they wish to not gamble on the contingent fee agreement, the lawyer is willing to accept that arrangement, then this makes it clear they can enter into an hourly fee arrangement. It is not accurate to say it is technical, but it is a little more than technical, but it is meant to clarify that a lawyer and his or her client can use hourly fee arrangements.

Chair: Senator from Reno.

Kerr: Did the Senator from Douglas say that the second sentence of that subsection 'such election shall be exercised in writing' . . . I'm told it is still in. I was concerned about that.

Winter: No the requirement in the bill is such that the agreement is in . . . hourly agreement be in writing, is still in the bill.

Chair: Senator from Sedgwick, Senator Yost.

Yost: I'd ask the Senator from Douglas, the real ramification of this amendment. Do you believe an attorney representing a person allegedly harmed could sign an agreement, if your amendment passes, calling for particularity high hourly rates, which would basically benefit the attorney as under current law the same as the contingent fee allows them to benefit?

Winter: As the newest lawyer in the Senate, Senator from Sedgwick, you know better than I the Supreme Court has promulgated new rules, one of which is to enact clearer restrictions and guidelines on fees, both hourly, fixed and contingent. It would be my opinion that this amendment if adopted, will simply keep in place existing law that lawyers and clients can enter into hourly fee agreements. Whatever that is, it can be entered into. It does not change the supreme Court rule which limits the amount of those hourly rates to reasonable rates and rates that are not unethical, exorbitant or out of the market. I don't know how I can answer it better than that.

Yost: What would happen if no damages were awarded? How would the fee be paid? Can the attorney waive the fee that is owed to him?

Winter: If there is an hourly fee agreement, then by definition, no; the fee is due regardless of the outcome. And would be due.

Yost: Thank you, Mr. Chairman.

Chair: Senator from Butler? Okay. Any other comments on the floor amendment? Move your amendment.

Winter: I move the amendment.

Chair: Question arises on the floor amendment on the Senator from Douglas. All in favor AYE, opposed Nay, the chair rules the nos have it. Division is called. [They begin counting.] The motion fails, 10-15. Senator from Butler.

Gaines: Thank you. I wanted to respond to the remarks from the lovely lady from Shawnee about the subject of contingent fees. Basic public policy in Kansas and throughout most of the 50 states of the country is that our laws should not be predicated on wagering or gambling. Las Vegas and New Jersey are the exceptions in the nation.

There is one place we've allowed gambling and that is in the contingent fees. It is a fee predicated only upon winning. It would be common a few years ago in England that one way for the poor people to get access to the judicial system was contingent fees, and it was an excellent system.

Many years ago while the whole body of common law was developing from England there was a trade-off, without me going into all the academics, between employers and employees. The factories of those days, or the people who operated the factories, didn't much care whether or not you were hurt. These workmen. There needed to be some type of social legislation passed to control this type of thing. So the workers compensation laws were passed. In those laws, we said, if you do indeed suffer an injury in and out of the course of your employment, according to a schedule, you'll be reimbursed and the government imposed a tax upon the employer to provide the funds. We decided in most of the states at the time to put a restriction on the amount of money that could be paid for attorney fees, and that continues to be the law today.

Now there are those who say, for the HCSF, that there should be an exception because it is more complicated than proving workers compensation arising out of the course of employment. I dispute that. I can tell you one time of a case I was involved with tearing down a building this old gentlemen, I don't know how old he was at the time, it was his job when the bricks came in to use his hammer to chip off the foreign matter from these bricks. He had a vascular accident occur to him and the whole question was whether the accident occurred out of the strenuous activity that was occurring in the heat of the day. It became very complicated, and finally went to the supreme court of Kansas. The fee was 25%. You have all kinds of medical opinions whether or not that job caused him to have that vascular accident that day. He was just sitting there tapping on these bricks.

Now, let's talk about the HCSF and what it is. The HCSF is a tax that we impose upon a special group of people on the doctors just like we do employers. And so my common sense says to me, and I have a different figure than the Senator from Reno quoted earlier, that there is about $50 million in that fund today. And if I see $50 million in that fund today and the attorneys enter into the contract, that is approved by the appellate court, or by the judge, of up to 50% that is, looks to me like, $25 million is going to go to the legal profession and $25 million is going to the victim. That is unconscionable in my way of thinking. The proposal that the Senator from Reno and I have with SB 631 is good, the bottom line effect is only to allocate more of the money to the fund to those injured persons who are hurt.

You're talking about the biggest pot of gold in Kansas. You're talking the only place in Kansas where there is about 50 million dollars laying out there for the people in the legal profession, they're all very bright people, to know where they can go get it. They don't have to worry about satisfying that judgment; its right there. I think it is sound public policy to pass this bill.

Chair: Senator from Shawnee, Senator Parrish.

Parrish: Thank you. I'd like to respond. to the comments made by the Senator from Butler. First, in the workers compensation area, when they adopted workers comp, it was basically a quid pro quo, which means that certain rights were given up in order to gain some rights. And basically, it is a no fault system. Negligence does not have to be proven. It is a vastly different type of system than medical malpractice or any other type of malpractice suit, for that matter. Basically, plaintiffs gave up their right to a large recovery that they might have had a prior to any implementation of any medical malpractice [sic] action. In return, for their injuries occurring during their employment. There was a quid pro quo. They gained some rights and they gave up some rights. And in that situation, I think it made some sense to have some limits on recoveries, your recovery is assured if you can prove your injury came out of that employment.

We're in a different situation in a medical malpractice action. I think we don't really provide an equal opportunity for the plaintiff if we limit the attorney fees. They may have a difficult time hiring an attorney that is representing them. You're requiring that attorney by the plaintiff, really, to not be on an even playing field. Right now, according to the Rand Study I quoted earlier, and this is a 1980 Rand Study where they were looking at the subject of contingency fees, and I quote: "What little empirical evidence is available confirms that, averaging over cases won and lost" -- because a lot of these cases are not won by the plaintiffs attorney so you have to factor that in that the plaintiff some of the time is not going to be winning these cases, the majority of the time -- "in averaging over cases won and lost the effective hourly earnings of attorneys paid on a contingent basis are similar to the hourly earnings of defense attorneys paid by the hour."

If you lower that amount of the attorney fees then you are going to put them at a disadvantage. The defense attorneys can draw out the case, they can elect for it to be a lot longer all the time, the clock ticks away, the attorney representing the plaintiff simply loses money on a lot of the cases. These medical malpractice cases are very complex and complicated type cases, and many times there has to be a lot of discover and a lot of work prior to having the case brought to trial, so there is a lot of money that has to be advanced for some of these cases, prior to the case coming to trial. This is not going to be possible unless there is a possible recovery. In small cases, where there is a meritorious cases, many times there may be no attorney to take those cases.

One thing we might point out, although there is an exemption to the first $200,000, and I'm not sure what we do when we

talk about the Plan, which represents those doctors which cannot get insurance through any other means. If the Plan is what we're talking about I don't know whether this particular legislation affects recoveries out of this particular plan. I would ask the Senator from Reno to respond from this; if the doctor is covered by the Plan if the first $200,000 is exempted? The first 200,000 or not?

Chair: Senator from Reno.

Kerr: Mr. Chairman, the bill makes no provision for that, so I think the . . . the limitation would apply to the first half million from the fund. No matter the type of doctor or not.

Parrish: Well, then. . . then I'm confused. I'm not clear. I thought the first 200,000 of private carrier coverage was exempt? If a doctor has insurance through the plan, which is not quasi, not quite private coverage, uh, is offered, is that exempt as well or not?

Kerr: No, it would not be. The bill makes no provision for that. It applies only to payments from the plan. It makes no difference whether or not a doctor has underlying insurance. So it is payments from the plan. Fund, I mean--

Parrish: There is a difference between the Plan and the Fund and I'm not sure --

Kerr: I meant to say Fund.

Parrish: Okay. Then, if a doctor is insured by the Plan are a higher risk doctor because they cannot get insurance through a private carrier then in those cases, the payments to the attorney representing the victim suing the doctor that has coverage under the plan would be limited from the first dollar at 25%?

Kerr: That is correct.

Parrish: I have some real problems with that, Mr. Chairman, because it seems like we are making two classes of people: victims who have a case against a doctor who has insurance coverage through the plan, and those against a doctor who has a private carrier. We have two different types of situations that we set up. Particularly when we think of many of the people that are being, have services through the plan are going to have higher risk or people because they have numerous claims prior to what we're talking about, they may be just the very people who have a lot of claims against them and it seems to me we disadvantage victims in that situation. I have some real concerns about this legislation. We need to do some more work on it; it is an issue, as I understand it, and people can correct me, but I don't believe this is, that the representatives of the medical society or the

HCSF asked for this bill. I think we need to take a minute and a careful look at it and I would ask the body to reject this particular bill.

Chair: Senator from Sedgwick, Senator Yost.

Yost: I would just respond generally to the Senator from Shawnee. She asked earlier of the Senator from Reno whether any other profession had their fees limited, and I would respond as the Senator from Reno responded that doctors throughout the profession, although not regulated by provisions in the Kansas statutes, there are limits placed on them by medicaid and Medicare programs.

Second, there is no other profession required to purchase insurance as the physicians are required to purchase. It is that captive audience that has driven up the cost of insurance for, in my opinion, physicians.

The Senator pointed out the cases brought on contingency are very expensive cases, and very complicated, and she's right. But I would point out that expenses run up on a case come right off the top of any recovery. The contingency fee applies to the remainder.

The limitation that applies in this bill only applies to that amount that exceeds the $200,000 threshold that triggers the fund. There is no limit on the contingency fee on the first 200,000 dollars. I'm sure on most cases I'm sure the attorney will be getting at least 50%, and if this passes, even more than that. I don't think it unreasonable to think beyond that very large amount, especially for a fund that we have responsibility for, a fiduciary responsibly for, that we would somehow try to limit the amount that would be going to the plaintiff attorneys and help with what goes to the victims, whether malpractice, and in this case is malpractice.

Chair: Other questions? Senator from Labette.

Johnston: Not being a lawyer, and not being on Judiciary, I've not had the benefit of this explanation of this bill, and I'm trying to reason my way through it as I listen.

I'm not going to take long, and I'm not in a position to legally quarrel with the explanations given by my friend from Butler. Presumably this bill is in this package of tort reform bills, and has been promoted as a way of dealing with the issue of malpractice. Presumably, that is a clue that this bill will have a salient effect on malpractice claims.

It seems to me, Members of the committee, I have not yet found as I've listened, how this measure would have any effect at all on the issue of medical malpractice premiums. And If, Mr. Chairman, members, if it does, it seems .....

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Tape Changed to Next Side
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Johnston, continuing:

...no reason to divide judgments which are a claimant against the Fund. It says the attorney will get so much if there is a recovery, and the victim gets the remainder. It says nothing about how much this becomes a claim on the Fund? And if it does not discourage a single person from bring claims against the fund, and therefore would not affect future judgments, it does not in any way have a salient effect on this issue of malpractice. At all!

We have all kinds of contradictions in this body. Each of us is contradictory from time to time unto ourselves. It seems to me a contradiction from time to time to promote this bill as in favor of making sure that claimants injured people get more of the judgment and at the same time argue that we ought to limit what that judgment can be for certain other things. We can't have it both ways. We can't argue we ought to limit certain things, then turn around and argue that we ought to limit certain other things so that it inures to the benefit of that injured party.

That's what we're arguing here. The Senator from Butler is about to spring out of his chair. I'll yield when I'm done. But the final thing that troubles me on this, as I listen to the response of the Senator from Reno, as he talked about this survey he ran among his people. The thing that is troubling about it -- and all of us do it from time to time -- is that we can predispose the answer we get to questions we ask.

And whether we like it or not, attorneys throughout the general public are not revered to the extent that I wish -- and I think the extent they wish -- they were. We certainly can appeal to an innate kind of prejudice to a group, and we can get the kind of answer to the question we want. I could ask a whole series of questions and I know the kind of answers I would get. But I haven't heard anything in this debate that is going to make that fund any sounder, that is going to reduce any future claims against the fund or have any effect on the premiums or surcharge that is levied against physicians. If there is anything that changes it, it seems to me, it can only come about as the result of fewer people bringing actions against the fund. I don't know how in the word we can get to any other outcome unless and until that occurs.

So I respect the motives of my friends from Reno and Butler, and I respect the explanation of the legality and the parallels it may or may not have with other areas of law, but in this whole context this afternoon, we're talking about

tort reform, and this has nothing to do with tort reform. Maybe it should have been debated in another framework entirely. I yield to the Senator from Butler.

Gaines: My good friend from Labette, I know, grew up in a poor family without a lot of dollars and ran up and down the same alleys I've been up and down. I don't know, but I bet he's been in some crap games in his life. You shoot them craps. You get to thinking. If you raise them odds and you're good at it you can calculate until those odds get up high enough and you get to watching those dice down there, and if the money is high enough you just gotta keep workin them odds until that pot is all built up and I'm going to guarantee that the law of averages is such that you're going to get em. That's what takes place with the Fund. There's too big a money. If there is a million dollars, you got a shot at it.

I know before we changed this law back to a million dollars of coverage, I knew a lawyer, who represented an injured child. Before I say this, I want you to know that this lawyer is a good personal friend of mine, he's a fine Christian man. As he was sorting all that thing through, and he was thinking like he was in the heat of this crap game, he said, "You know, I've got to have a million dollars for the firm." Now, to me that's unconscionable. But that's what is involved in this whole thing. The bucks are too big. All we're saying, the victim gets more of the money, and it is only a fair share for the attorney to get 25% on the first 500,000 dollars, 20% on the next 500,000 and 15% over a million. No interference with the right to contract with the client on the first two hundred thousand dollars.

It's like a crap game to me. I tell you and I'm sincere when I say it, an attorney fee bill in addition to being a measure that will help the victim of malpractice, in addition to everything else, it will cause those lawyers who are really rolling craps who are trying to get that big money to go to Switzerland and buy that villa to get realistic in those settlements.

Chair: Senator from Reno.

Kerr: The claim that I made here is that it will benefit victims. I clearly did not claim that it will lower malpractice premiums. I think a case could be made, and I'll make one right now, that it could happen. Picture a claimant who feels that he has been injured and needs $1 million to be made whole, is it not true that if this bill passes, that claimant will breach the $1 million threshold into their pocket at an earlier stage in the offering situation than they would if they did not have this, if it there were a forty percent contingent fee for example. I think they would clearly reach it at

an earlier level. It does actually have the potential of lowering the payouts from the fund.

Another comment was made about the defense attorneys and what they are paid out of the fund. I did take the precaution of checking that very recently and I believe of the current payouts we are seeing, the defense attorneys are being paid about 7% percent of the total payout.

The Senator from Shawnee mentioned that in workers' comp we give up some rights and as a result it means it's okay to control attorneys fees there because we've given up the right and the need to prove guilt. But we've done something here too, we've guaranteed recoverability. If you are injured and are able to prove that and win your suit, we've guaranteed there will be money there to pay you off. So there is something very different about this than if you someone, for example, a manufacturers liability and they've not properly built a piece of equipment; that's very different because there is not guarantee of recovery there but there is a guarantee here. We created this fund and it is now our responsibility to control it and make sure that it goes for the purpose it was original designed for and that is compensating the victims of medical malpractice.

Chair: Senator from Haskell.

Frey: We're talking about a subject dear to my heart. Like the oil man has a bumper sticker that says, "oil and gas feeds my kids and puts food on my table"; it's the same with attorneys and attorneys fees so naturally we like to talk about it.

The Senator from Reno is beginning to sound more and more like an insurance man every day saying that 'this could possibly lower premiums; I'm not going to guarantee it but it could possibly.' I have been hearing that all the years I've been in the legislature and every year here the premiums have been going up. Everything we've ever done has been sold on the basis that this could lower premiums but I'd ask any of you to remember the last time you received a notice from your company notifying you that the premiums are going down. It's rare and I think the Senator should say it straight out that this is not going to lower premiums anywhere for anyone in the state of Kansas.

We had hearings on these bills in the Senate and House of Representatives and nobody has ever said that this measure will result in any lowering of any premiums. In fact, some pretty good experts have said that it would not. I would ask you to keep in mind, if you want to pass this of legislation, do so but don't do it on the basis that you think you're going to lower someone's insurance costs because you're not going to have that effect.

In regards to Social Security, which is of course federally regulated, Congress has seen fit to discourage the involvement of attorneys in representing clients who make claims against the Social Security administration. I don't know about any of you, but I've represented some people in the past who had a disability claim, or some other claim, against the Social Security administration and the trouble is that the rules and regulations of Social Security have now gotten to the point where they have pretty much totally restricted the payment of attorneys fees for anyone who represents someone in a Social Security claim. I represented a lady in a major disability claim and who was denied her disability benefits by Social Security, we had to fight for well over one year in order to finally get her in a position where she was awarded her benefits. After that year of effort, the my share of the award was a little over $1,200 which would have been substantially more valuable work had I been paid on an hourly basis. I willingly accepted the $1,200 but I did resolve in my mind that I'm not going to take anymore Social Security claims; I don't care if the lady has a broken back and has to go on welfare.

I think that is a common response now when people who are in distress and have claims that they know are good claims but who have been denied them. They can't get attorneys to represent them. I fear when we begin along the road of limiting people access to legal counsel for pursuing whatever claim they have, you're going to establish the very serious problem here in Kansas of forcing these people just let it go. They are going to have to let their injury and disability go and will simple have to do without any remedy for the injury they are caused. That may sound real good to you as long as you're sitting here happy and well and your family is secure, but if you find yourself in a position where you're not happy and well; I would say, similar to the Senator from Sedgwick who is now lying in a hospital, who I'm sure a few days ago wouldn't have predicted he'd be in intensive care in the hospital. Then you begin to think about things like this and what will happen.

I would say the bill, as we have it now, is not going to seriously affect anything. I think it's a limitation surely, but it's not an oppressive one to the point where people will be denied access to legal counsel for purposes of seeking redress in the courts. However, if you get to the point where you drive attorneys away from these cases, they are still going to be filed, it's just that the people will file them without benefit of counsel. Over the past few years, I've been representing a county that has had suits filed on a regular basis by people who don't have attorneys representing them; and I see that more and more as we deny access to the courts by denying them access to attorneys. We should remember that the courts are there for the purpose of settling disputes between parties. If you don't want people to go

into court, you could eliminate the judicial branch but I don't think that is something you would wish to do. All in all, I don't think this bill is all that bad except that it does establish an attitude on the part of the legislature that may or may not have merit. I think it doesn't. I have a lot of prejudice involved in this and I've seen the system work fairly well the way it is. I'm voting against the bill.

Chair: Senator from Douglas.

Winter: I do have an amendment and I would like to make a few comments about the bill whichever way the amendment goes. This amendment again tries to get out what I tried to get out in the first amendment only it does so in a little differently. It strikes subsection two of the language on page six so that if the amendment is adopted there will be no discussion at all in the bill about the ability to have a per diem arrangement. I think that now fixed fees, hourly fees and contingent fees are legal and ethical and this bill, if the amendment is adopted, would limit contingent fees and I think the safest way to go would be to strike subparagraph two so we aren't confusing people. I think the result would be that since hourly fees and fixed are otherwise legal under appropriate circumstances, then striking the language will leave us with less confusion. I move the adoption of floor amendment.

Chair: Questions on the Amendment? All those in favor AYE, opposed NO, the Nos have it. Division has been called. (They stand and be counted.) The amendment is adopted 19-14. Senator from Douglas.

Winter: On the bill as a whole, I was the author of the amendment adopted by the committee which provided the sliding scale. There have been good discussions about this issue on the floor by people on both sides of this issue and I share many of the concerns articulated by the my friend from Seward; I also share in the concern that we all have about trying to address, in some fashion, small, though each of our attempts may be to address the real problem with increased medical malpractice premiums. I would not have supported the bill as originally introduced, I think a flat fee of 15% was too low.

I do, however, feel I am able to support the bill as it is now; although I do so with some reluctance. There is clearly a distinction that we must draw between cases of medical malpractice which attempt to access the health care insurance fund on the one side the other kinds of personal injury cases on the other. Medical malpractice cases where the fund is accessed are, by definition, very large damage cases. There aren't any small damage cases where the Fund is accessed. On the other hand, other personal injury cases often aren't small; there are small cases and large cases. In these kinds

of cases where the funds are accessed in which we acknowledge large damage cases, it does make sense to me to provide some reasonable limitation on the amount of attorneys fees.

If you realize that the first $200,000 is not limited at all and the next half million is 25%, you blend those together and the first $700,000 can be a rather large contingent fee. I think what this bill attempts to do in this case is not solve the medical malpractice problem; we can't solve it on this floor with any of the bills even if we pass all of them. It is a mistake to try to suggest to ourselves or to others that this bill will resolve any significant change. But I do think as we all strive for solutions that this not an unreasonable approach. I would prefer not to have to do it but I'm willing to vote in favor of the bill as it stands now in one small effort to help begin to address the problem.

Chair: Senator from Reno to close on the bill.

Kerr: I move when the Committee rises and reports it report SB 631 favorable for passage.

Chair: You heard the motion. All those in favor say AYE, opposed NO. Motion carried. Senator from Allen on HB 2693.

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Collateral Source Legislation
HB 2693

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Talkington: This is the collateral source bill. As part of this package there where committee amendments and I move the adoption of committee amendments.

Chair: Those in favor of the motion say AYE, Opposed NAY, motion carried. Proceed.

Talkington: HB 2693 is a modification of the common law collateral source rule. Under the current common law rule, juries cannot be informed of the benefits received by injured parties from collateral sources. Consequently, awards frequently result in double recovery by the plaintiffs.

Consideration to this concept is not new, we previously enacted a change in this in 1985 and the Supreme Court struck that down in the Farley case. HB 2693 applies across the board to all personal injury actions and in doing so it should satisfy the court. Under the current version, juries will still not be informed of collateral sources; instead evidence of collateral source benefits received by the plaintiff will be presented to the judge in a post-trial hearing. The judge will then reduce the award by the amount of the net collateral source benefits. Any amounts in favor of the plaintiff to secure the benefits will be taken into consideration by the judge.

Initially the judge will take into to consideration the fact there may be a subrogation interest involved with some of the benefits. The bill is necessary to reduce the instances of double recovery in personal injury litigation; nothing in this bill will prevent the plaintiff from recovering their actual economic losses; it does allow the judge to reduce awards in those cases which are duplicate payments to the extent that some awards will be reduced and should have a beneficial affect on initial claim costs and would ultimately help stabilize premiums.

The largest amendments there now are those proposed by the Kansas Bar Association which takes it to the court, not to the jury, and the other thing in there that seemed to be controversial was the effective date and how this is handled. When introduced it was treated as a procedural matter and would go into effect, on July 1, all pending cases or any brought after that date in regards to when the cause of action occurred. The House changed that to July 1, 1988, the Senate committee changed it back to the original version. That would amendment would have to be a floor amendment and at this time I will yield to the Senator from Butler who has that amendment to place that in effect.

Chair: Senator from Butler.

Gaines: HB 2693 is a statutory modification of the common law collateral source rule. As HB 2693 now stands, it would allow the judge, in the post-trial hearing, to consider collateral sources paid on behalf of the plaintiff so that awards can be reduced accordingly. This amendment would do the following two things: (1) it makes the provisions of this collateral source rule change apply prospectively to actions occurring after July 1, 1988, and (2) it would allow the judge to consider evidence of the collateral source benefits to be received in the future in addition to those received in the past.

This will only apply to those causes of action occurring after July 1 of this coming year. I've asked the Kansas Medical Society to tell us what are those outside sources we are going to consider. In their writing they said,

> "... the rationale for allowing the judge to consider benefits to be received in the future is that, especially in medical malpractice cases involving minors, there are frequently collateral source benefits paid which can have a substantial impact on award costs. For example, in addition to the traditional benefits of health insurance etc., there are many publicly funded programs for children such as rehabilitation and counseling services, the providing of equipment in services for special needs educational purposes in physical or occupational therapy services programs."

These are all examples of benefits which were generally provided by government programs which can be a significant part of the malpractice award. To the extent benefits such as these can be credited against the judgement by the court in a post-trial hearing, it would substantially help reduce malpractice awards. With that, I move the adoption of the amendment. I stand for questions.

Parrish: I need a clarification about some of the other language. I know we are making collateral source provisions applicable only after July 1 to actions that accrue after July 1. What else is in the amendment?

Gaines: If it would please the Senator from Shawnee, I tried to explain that as best I could by reading it. When they approached me and said, 'we want the judge to be able to consider the fact that there are many federal programs out there that substantially would result in a double payment. The government is going to provide those despite any type of a judgement or award and we want credit to that extent.' Those are vested types of benefits that aren't going to run away from anyone; they aren't conjectural. It applies particularly to a brain injured child.

Frey: As I read the proposed amendment, it does two things; (1) it changes what the judge will consider in determining what is a collateral source to be computed and (2) it changes the effective date of this act so that this act will apply only to causes of action that occur after July 1, 1988. I support one and oppose the other. I think this is a case where we should divide the question because they are two separate issues. I request that the question be divided and that each be discussed separately.

Chair: If thee are no objections? I see none.

Frey: I would like to address the issue of reasonably expected benefits being included in the computation of collateral sources. The bill doesn't include benefits that are reasonably expected in the future and there is a simple reason for that. In our modern day and age it's hard to identify what you can reasonably expect to happen in the future. Given that uncertainty, it was decided in the House, and I think rightfully so, that we should not try to limit the recovery of injured parties based upon what they might have in the way of a collateral source in the future. So it's not in the bill and this bill says we will put it in. I think it's a bad choice; it's too difficult to administer; if it's going to be administered, it will be done so in error much of the time and it will probably be against the injured party. For that reason, I oppose that part of the amendment. I do support the first part, however.

Gaines: I tried to answer as best I could about what those would be. I envision those as applied by the trial judge to be things that are vested. Let me read again, for example, "in addition to the traditional benefits of health insurance etc., there are many publicly funded programs for children such as rehabilitation in counseling services, the providing of equipment and services for special needs educational purposes in physical or occupational therapy services programs." That's not difficult for a judge to determine. If those things are available, why do we want the HCSF to pay for that a second time? The logic to that is understandable. I think we all understand the issue. I don't object that the Senator from Seward wants to divide those issues.

Chair: The question arises on the first portion of the proposed amendment. All those in favor AYE, opposed NAY, the ayes have it. As to the second portion, are there discussions? None. All those in favor of the second portion, say AYE, opposed NAY. The amendment is adopted. Back to the Senator from Allen.

Talkington: I move the committee report HB 2693 favorable for passage.

Chair: All in favor AYE, opposed NAY, the motion carried. The Chair reminds the Senate that we have one more of the tort reform measures but that is not the end of our debate schedule for the day. There are several other non-exempt bills that will be worked and I understand that we'll be taking final action on these bills yet today. So those of you interested in getting home for Easter; it may be that it's Memorial Day we're trying to get home for. Senator from Sedgwick, senator Yost, on HB 2731.

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Punitive Damages
HB 2731

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Yost: There were committee amendments and I move for adoption of committee report.

Chair: In favor of the motion say AYE, opposed NAY. Motion carried.

Yost: HB 2731 is the fourth of four bills in the tort reform package. It pertains to a limit on punitive damages. The limit is spelled out very clearly. It's a bit of a formula in Section (e) on page 5 and 6 on into Section (f). In addition it says that no claim for punitive damages will included in a pleading at the beginning of the law suit but must receive a certain tentative support from the judge at a pretrial conference. I would stand for questions.

Winter: Does this apply to all cases?

Yost: Yes.

Winter: Would this apply to a case, for instance, if I was walking down the street and somebody slugged me in an intentional tort case?

Yost: We might make an exception for that Mr. Chairman, but generally speaking, an intentional tort would be liable for punitive damage, yes.

Winter: So that if your cause of action was based on an intentional tort, that someone intentionally beat you up, you still can't plead a punitive damage claim even though the whole basis of your claim is intentional in the first place?

Yost: Mr. Chairman, of course I didn't say you can't plead at all, I just said you cannot plead it when the case is first filed and you go to pretrial conference. That's in New Section 4 and I'm sure the Senator has read that section. I don't think it's an unreasonable restraint. I think the reason for the New Section 4 is that number of these cases have been filed with a certain amount for real damages and then a tremendous amount of punitive damages. That figure has been used as a bit of a hammer on the defendants to get them to settle for what the real damages were for or maybe in excess of that. This says that the punitive damages cannot be requested unless the court deems it appropriate.

Winter: As I understand it, there is nothing else in the bill that changes current law. The definition of punitive damages is the same?

Yost That's correct.

Winter: The bill, I suppose, makes people feel better. I think all of us lawyers have, under existing ethical restraints and Supreme Court rules, already are constrained not to file punitive damage claims, whether it's when we originally file or later, unless we have done sufficient discovery to know exactly that a basis exists for that claim. I don't that it does much; it's a nice little bill, but it's not any great windfall for our attempt to solve the medical malpractice crisis.

Frey: I would differ from the Senator from Douglas. He said it's a nice little bill. It is a nice little bill except that the environmental people who came to testify made a good case for the fact that it's not going to be a nice little bill if will give protection to people who will pollute the environment and who are restrained from doing that by virtue of the current punitive damages law.

It seems that pollution of the environment occurs in an identifiable pattern. First, it usually occurs slowly over a

period of time so people don't realize what is happening to them until it's too late. Second, it usually occurs as the result of activity of very large, very well funded corporation. That's a common pattern. By limiting the amount of damages that can assessed in the way of punitive damages, we are indirectly saying to those very large and powerful corporations who pollute the environment that we won't hold them responsible for what they do. In that respect, this is not a nice little bill. This is a bill that sends a message to the state of Kansas, if we adopt it, that we would condone that sort of activity. I'm happy to say that in my community I don't know of any pollution that exists that's causing people to incur physical injury or harm or death but I do know around in the state there are places where pollution has occurred to a significant level and I also know that some of that pollution has occurred as a result of some deliberate acts on the part of some very powerful and well funded corporations or organizations. We won't be able to get at them anymore with our law if we pass this. I don't approve of that.

Chair: Senator from Sedgwick.

Yost: First of all, this is a punitive damage bill; it does not place any limits on actual damages that that pollution might cause. In addition, I would point out to the Senator from Seward the language on page 4 which says that if the damage occurred and there is a certain amount of profit to be made by the company by creating that damage, that the damages in the amount of one and one half times the amount that they profited by that could be awarded. I think that is pretty strong dis-incentive for a company to pollute the environment.

Chair: Further questions? I see none.

Yost: Mr. Chairman, I move that when the committee rise to report, that they report HB 2731 favorably as amended.

Chair: All in favor say AYE, opposed NAY, motion passes.

[The Senate then moved on to other legislation that afternoon. On April 4, 1988, all four bills passed the Senate. See the Senate Journal. End of transcription.]