Approved January 21, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

10:00 a.m./~~p.m.~~ on January 19, 19 88 in room 514-S of the Capitol.

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

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Staff presented briefings of the following supreme court decisions: Farley v. Engelken concerning collateral source rule, State, ex rel Stephan v. Smith concerning appointment of counsel for the indigent, Osage County v. Burns concerning legal obligation to provide counsel for the indigent, Haney v. Hamilton concerning Kansas Parole Board denying an inmate's parole, State v. Fraker concerning driving under the influence of alcohol or drugs, Pope v. Illinois concerning obscenity case and Hartigan v. Zbaraz concerning a waiting provision in the Illinois Parental Notice of Abortion Act. Committee discussion was held on the cases. A copy of the memorandum reviewing the cases is attached (See Attachment I).

The meeting adjourned.

A copy of the guest list is attached (See Attachment II).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 1-19-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
~~Frank~~ Frank Kohlasch	1900 Longfellow Hays, KS 67601	Close Up Kansas
Georgia Smith	514 W. 27th Hays, KS 67601	Close-Up Kansas
Amy Johnson	2920 Skyline Dr. Hays KS 67601	close-up Kansas
Kevin Myers	2602 Donald Hays KS 67601	Close-Up Ks.
L MCORNISH	KS a Topeka	KS Assoc of Prop + Cas
Robb Mechai	2717 Walnut Hays	Close-UP KAN.
Wendy Hills	3008 Tam O'Shanter [Hays]	Close-up Kansas
CHRISTOPHER SOOK	204 WEST 34th HAYS, KANSAS	CLOSE-UP KANSAS
Lanya S. Shapiro	513 W. 30th Hays KS 67601	"
Tonya Rupp	RR-1, Box 498 Hays, KS 67601	Close-up Kansas
~~Erin~~ Mackendach	RR1 Box 104 Hays, Ks	"
Gloria Anderson	5733 Reinhardt Lenexa KS 66205	
Ann Thompson	2204 W. 59	Johnson Co.
PATRICIA HENSHALL	TOPEKA	OJA
Glenn. Cogswell	Topeka	Alliance of Am. Ins.
[illegible]	Topeka	[illegible]
Amy Apity	Topeka	Manufactured Housing Institute
Linda Stephens	Topeka	Topeka area Chapter NFO
Martha Jane	Topeka	KMHA
[illegible]	"	KMHA
[illegible]	"	Assoc Credit Bureaus

Attch. II

1-19-88

MEMORANDUM

January 18, 1988

TO: Senate Judiciary Committee

FROM: Mike Heim, Kansas Legislative Research Department

RE: Recent State and Federal Cases of Interest

The following is a brief summary of several recent state and federal appellate cases which have resulted or likely will result in the introduction of legislation in the 1988 Legislature or will have a bearing on legislation.

1. The 1985 statutory abrogation of the collateral source rule in actions against health care providers was declared unconstitutional in Farley v. Engelken, 241 Kan. 663 (1987). The majority opinion authored by Justice Herd held that the 1985 law, K.S.A. 1987 Supp. 60-3403, violated the equal protection clause of Section 1 of the Bill of Rights of the Kansas Constitution. The provision states, in part, that "All men are possessed of equal and inalienable natural rights . . . ." The opinion determined that a "heightened scrutiny" test was the appropriate standard for reviewing the legislative enactment. This test requires that the statutory classification substantially further a legitimate legislative purpose and that there be a direct relationship between the classification and the state's goal. The Court determined that the 1985 law impairs a medical malpractice victim's remedy if a jury determines he is not entitled to full compensation due to benefits from collateral sources. The court noted that the legislative purpose of the law may have been to increase the quality and availability of health care but that the statute was counterproductive to that goal since it actually has the effect of rewarding negligent health care providers and penalizing certain malpractice victims who have collateral sources of benefits. The Court concluded that the burden should be placed on negligent health care providers rather than on victims, their insurers, and the general public. The Court said law created unconstitutional classes of both injured plaintiffs and of negligent defendants.

A concurring opinion authored by Justice Lockett and subscribed to by Justice Allegrucci agreed with the result in the case but said the proper test was a rational basis test which the law did not meet. The opinion stated, however, that the Legislature has the power to abrogate the collateral source rule if it does so for all who are injured by the negligent acts of another.

The dissent was authored by Justice Holmes and concurred with by Justices McFarland and Miller. The dissent agreed with the concurring opinion that the proper standard or test for review was the rational basis test and said the 1985 law passed constitutional muster under this test.

2. In the case of State, ex rel Stephan v. Smith, the Kansas Supreme Court on December 15, 1987 (242 Kan. _____ (1987)) in a unanimous decision determined the present system for the appointment of counsel for the indigent, as administered, violated the equal protection clause of the United States Constitution and Article 2, Section 17 of the Kansas Constitution which requires all laws of a general nature have a uniform operation throughout the state.

Attch. I

The key to understanding this case is to understand the current system the state uses in providing indigent defense services. Such services are provided through the Board of Indigent Defense Services, a nine-member board appointed by the Governor. The system involves provision of defense services through public defender offices created in four of the 31 judicial districts and through the appointment of court-appointed private counsel. Judicial districts which have created public defender offices include: the 3rd District (Shawnee County), the 8th District (Geary, Dickinson, Marion, and Morris counties), the 28th District (Ottawa and Saline counties), and the 18th District (Sedgwick County).

The fee structure for private counsel set by the board is as follows: $30 per hour for preparatory work and in court time with a maximum in nontried cases of $400 in certain types of cases, $250 in certain others, and $100 in others. Maximum compensation in cases going to trial is $1,000 and for appellate cases it is $750. For certain exceptional cases, $5,000 may be paid. Provision is also made for the reimbursement of expenses.

This particular case arose from a somewhat complex factual situation wherein an attorney in Anderson County who had been appointed to represent three indigent defendants in criminal cases asked to be discharged from these duties after spending 40 hours on one case which had only gone through the preliminary hearing stage. An attorney in Osage County, who apparently claimed he was not qualified, had also been cited for contempt by a district magistrate judge for refusing to accept an indigent appointment. Both cases were consolidated before Judge James Smith. Judge Smith, among other things, set the compensation rate for one of the indigent cases at $68 per hour and ordered the charges against two of the criminal defendants to be dismissed without prejudice and for them to be released within 30 days unless effective counsel could be obtained for them at the rate the State Board of Indigent Defense Services was willing to pay or unless the Board provided "reasonable compensation."

With this background, Judge Smith then issued a general order establishing Anderson County rules and panels for indigent defense services. On the following day, Judge Phillip Fromme issued an identical order for Coffee County. These general orders stated that counsel for indigent persons cannot be required to serve unless reasonable compensation is provided. Reasonable compensation was defined to be $68 an hour or more for the amount of hours required for effective counsel. Included was a provision ordering the charges to be dismissed without prejudice against any indigent defendant within 30 days of being charged if effective assistance of counsel is not made available.

The Attorney General brought suit in the form of a mandamus action to compel the two judges to perform their statutory duties regarding the appointment of counsel for indigent defense and to rescind their general orders.

On the equal protection constitutional challenge to the present system, the Supreme Court held that the ethical obligation to provide legal services to indigents may justify a reduced fee but not less than a lawyers' average expenses statewide. Next, the Court noted the current system involves three schemes, i.e., the public defender system in some counties which relieves the private bar of the responsibility in most cases, systems where participation on the indigent defense panel is voluntary, and systems where participation on such panels is mandatory. Also government employed attorneys are exempt from such

service. The result is that about 65 percent of the attorneys in Kansas are not subject to appointment. The Court said it was difficult to articulate a rational basis for requiring some attorneys to donate a considerable amount of their time and money to indigent criminal defense and other attorneys none, simply because of their geographic location. Further, there is an additional differential effect between the treatment of assigned attorneys and public defenders. The 3.8 percent budget cut ordered by the Governor in 1987 was passed on only to private counsel in the form of reduced fees and expense allowances. No cut was made in public defender salaries or overhead. The Court concluded the present system as administered violates the equal protection clause of the United States Constitution.

On the state constitutional issue under Article 2, Section 17 requiring laws of a general nature have a uniform operation throughout the state, the Court concluded the present system does not operate uniformly throughout the state citing many of the same reasons cited regarding the equal protection arguments.

Other important issues which the Court decided in the course of arriving at its decision include the following: Judges should not put on panels attorneys who are not competent to handle criminal litigation despite what the Board's rules may otherwise require. The general orders issued by the two judges violated their duty to appoint counsel according to statutes and regulations. Attorneys generally have an ethical obligation to provide pro bono services for the indigent but individual attorneys, likewise, have a right to make a living. Requiring an attorney to donate a reasonable amount of time to indigent defense work bears a real and substantial relationship to a legitimate government interest in the protection of Sixth Amendment rights of indigent defendants. When a system requires an attorney to advance expense funds out-of-pocket for an indigent, without full reimbursement, the system violates the Fifth Amendment and results in a taking of property without due process. The same taking occurs when an attorney is required to spend an unreasonable amount of time on indigent appointments so there is a substantial interference with his private practice.

3. In the very recent case of Osage County v. Burns (Case No. 60,934 filed January 15, 1988) 242 Kan. _____ (1988), the Court concluded that a county has a legal obligation to provide counsel for the indigent who are charged with misdemeanors when imprisonment is a real possibility. The county is not required to pay more than the hourly rate fixed for attorneys representing indigents in felony cases. The scale should be resolved by the administrative judge and the board of county commissioners. The hourly rate to be determined in felony cases under the guidelines set forth in State, ex rel Stephan v. Smith could well establish the misdemeanor rate.

4. In a recent district court case, Haney v. Hamilton, No. 87 C 3255 (18th Judicial District, December 24, 1987), Judge Paul Clark concluded the Kansas Parole Board acted arbitrarily and capriciously as a matter of law in denying an inmate's parole. The Court concluded that the Governor did not have the authority to require a unanimous vote for the parole of felons convicted of class A and B felonies. The court ruled that a majority decision by the board is all that is required.

5. In State v. Fraker, No. 60,307 filed January 15, 1988, 242 Kan. ____ (1988), the Kansas Supreme Court affirmed but modified a Court of Appeals

decision (12 KA2nd 259 (1987)) which held that a prosecution for driving under the influence of alcohol or drugs under state law could only be commenced by the filing of verified complaint or information and not by the use of a written and unsworn traffic citation and notice to appear. The Court said, however, that a defendant who did not raise the issue in a timely fashion would be considered to have waived the defect. The Court of Appeals had held the defect was jurisdictional and could not be waived. The case keys on the construction of several statutes including K.S.A. 8-2104(d) and 8-2106.

Two United States Supreme Court decisions may prompt the introduction of legislation this session or have a bearing on such legislation.

6. In Pope v. Illinois 55 USLW 4595 decided May 4, 1987, the Court held in an obscenity case that the proper standard for the third prong of the test used to determine if material is obscene should be whether a reasonable person would find value in the material as a whole rather than applying the "contemporary community standards" test which must be used for the first two prongs of the test. The other two prongs of the obscenity test are appeal to prurient interest and patent offensiveness.

7. In Hartigan v. Zbaraz 56 USLW 4053, December 15, 1987, the Supreme Court affirmed by a split four to four vote the decision of the Seventh Circuit Court of Appeals, 763 F.2d 1532 (1985), which struck down a 24-hour waiting provision in the Illinois Parental Notice of Abortion Act. The Court of Appeals also enjoined the enforcement of the law until the Illinois Supreme Court issues rules governing hearings of minors' waiver of notice to parents petitions. Since a four to four affirmance is not binding precedent for all lower courts, the decision is only binding within the 7th Circuit, i.e., Illinois, Indiana, and Wisconsin.