Approved 1-25-89
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Wint Winter, Jr. at
Chairperson

10:00 a.m./~~p.m.~~ on January 23, 1989 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~: Senators Winter, Moran, Bond, Feleciano, Gaines, D. Kerr, Martin, Morris, Oleen, Parrish, Petty and Rock.

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Jane Tharp, Committee Secretary

Conferees appearing before the committee:

Attorney General Robert Stephan
Lieutenant William Jacobs, Kansas Highway Patrol
Jim Clark, Kansas County and District Attorneys Association
Cheryl Stewart, Osage County Attorney
Cliff Hacker, Lyon County Sheriff
John Torbert, Kansas Association of Counties

The chairman called the committee's attention to the article from the Kansas Bar Association journal concerning tort reform (See Attachment I).

Senate Bill 9 - Establishing the office of district attorney in each judicial district.

Attorney General Robert Stephan appeared in support of the bill. He stated the bill will provide a means of prosecution that will furnish more uniform results, as well as be more responsive to the needs of the most important people thrown into the criminal justice system - the innocent victim. A copy of his testimony is attached (See Attachment II). In response to a question from a committee member, General Stephan responded, I believe it is absurd to continue to expect prosecutors to work on a part-time basis. If you want people to stay on the job, we need to raise the position and standard of pay. He said there are so many violations of the law that are not prosecuted because there just is not time for district attorneys to handle the matter. We have to put problems on priority basis. A committee member inquired do you have any win or loss record of county attorneys and district attorneys? General Stephan replied there is much to say for experience and retaining the same staff. In response to a question, General Stephan responded, I always think it is better to be elected than appointed for any office. Further committee discussion was held.

Lieutenant William Jacobs, Kansas Highway Patrol, testified the patrol supports the district attorney concept proposed in the bill. We continue to believe the establishment of a full-time, totally dedicated prosecutor's office is an absolute necessity in rounding out the criminal justice system in Kansas. A copy of his testimony is attached (See Attachment III).

Jim Clark, Kansas County and District Attorneys Association, testified his association has supported a district attorney system for Kansas for 15 years. He presented reasons for supporting the DA system and the lack of general support for the plan. Mr. Clark explained the proposed amendments of his association. A copy of his testimony and proposed amendments are attached (See Attachments IV). Committee discussion was held with Mr. Clark.

Cheryl Stewart, Osage County Attorney, testified I am against the current bill. The county attorney has a lot more responsibility other than just that office. The bill would take away control of citizens of the county. She said I am accessible to the people of my county. The way I operate the job is not part-time. The bill will not only take back from citizens, it will create more bureaucracies.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on January 23, 1989.

Senate Bill 9 - continued

When the district attorney plan is set up, you are taking the victim's ability to have impact on what is happening in their community. She said I don't feel swamped in my job. In response to a question she replied, I have a very small private law practice.

Cliff Hacker, Lyon County Sheriff and Chairman of Kansas Peace Officers Association Legislative Committee, testified the KPOA endorses the bill. He stated as crime is becoming more complicated we need advice and assistance of continual personnel. We have problems with the current system because of the high turnover rate. We need all the experience we can get and feel this proposal will help.

John Torbert, Kansas Association of Counties, testified his association is opposed to the legislation in its current form. He stated they do support the amendments proposed by Mr. Clark of the Kansas County and District Attorneys Association. A copy of his testimony is attached (See Attachment V).

Senator Bond moved to approve the minutes of January 19, 1989, and January 20, 1989. Senator Petty seconded the motion. The motion carried.

The meeting adjourned.

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

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 1-23-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
CLIFFORD HACKER	LYON Co	KPOA
Paul Shelby	Topeka	Supreme Court
Cheryl A. Stewart Esq.	Osage County	County Attorney
Richard George	Osage	County AA
FRED JOHNSON	TOPEKA	KHP
Mary Shaybaugh	Topeka	SRS
[illegible]	[illegible]	[illegible]
John Torbert	"	KLAC
Jim Clark	"	KCDAA
Kathy Taylor	Topeka	KBA
Chuck Stones	"	"
Dawn Stephen	Baldwin	Intern for Sen. Burke
Lt BILL JACOBS	TOPEKA	K.H.P.
DAVE JOHNSON	"	K.B.I.
Paula Sue Offerman	Lawrence	Intern Feleciano
Nancy Lindberg	Topeka	A.G.
Jacque Oaks	Topeka	KPOA
[illegible]	"	KTP
Cat McCarter	Top	UPI
Mary Horsch	Top	AG's office
Sabin Fabbs	Top	Budget Div.

Attachment VI
Senate Judiciary
1-23-89

A Practitioner's Guide to Tort Reform of the '80s:

What Happened and What's Left after Judicial Scrutiny

By Jerry R. Palmer and Martha M. Snyder

Introduction — Four Years of Legislation, 1985-1988

On June 8, 1966, a small group of law students studying for the Kansas bar examination emerged from the basement of Washburn Law School to see the devastation wrought by the most destructive tornado in the state's long history of tornadic activity. The landscape had totally changed; where buildings had stood, there was rubble. Where there had been long rows of evergreens, there was twisted debris and an overwhelming pungent smell.

Downed electric lines made the trip from the Washburn campus extremely treacherous, but as we looked to the east we saw the tornado pass from the city limits of Topeka and blue sky emerge. A brilliant sun was beaming through the settling dust. I was fortunate to have that experience at the very beginning of my legal career, better to appreciate what would happen in Topeka in the legislative sessions of 1985 through 1988 as the sun starts to shine through the settling dust.

In 1985 Governor Carlin signed a medical malpractice bill known as SB 110, which permitted evidence of collateral sources to be admitted in medical negligence trials.[1] The bill limited punitive damage awards to 25 percent of a defendant's gross income for any one of the previous five years or $3 million, whichever was less.[2] The legislation also required 50 percent of a punitive damage award to be paid directly to the Health Care Stabilization Fund.[3]

In 1986 another sweeping act concerning medical negligence was enacted. Its primary features were a $250,000 cap on non-economic loss and a $1 million overall cap[4] with a provision for catastrophic medical expense up to $3 million under certain conditions.[5] Also included were provisions for the admissibility of findings by panels,[6] restrictions on the qualification of witnesses to testify as experts,[7] and the structured payout of judgments.[8]

A potpourri of "reform" enacted in 1987 included (1) itemized jury verdicts,[9] (2) amendments to the Kansas Tort Claims Act[10] designed to overcome the impact of two Supreme Court decisions[11] and to establish the claims procedure for municipalities,[12] (3) an across-the-board punitive damage limitation,[13] (4) panels for all professional negligence actions,[14] (5) limitations on venue for persons suing public utilities and common carriers,[15] (6) a $250,000 pain-and-suffering cap,[16] (7) some limitations on liability for certified public accountants[17] and corporate directors[18] as well as (8) a bill immunizing volunteers under certain circumstances.[19]

At the close of the longest session ever, 1988 reform legislation resulted in modifications of the across-the-board punitive damage bill,[20] the adoption of an across-the-board collateral source bill,[21] and an extension of the $250,000 cap to cover all non-economic damages.[22]

In response to a perceived threat from the Kansas Supreme Court exercising its "check" in the Kansas constitutional government scheme, legislators toyed with a modest proposal to revise the Kansas Constitution to make the Article II powers of the legislature supercede the Bill of Rights when it came to tort reform legislation.

The Supreme Court of Kansas then had its chance to review the constitutional issues raised in two early

Footnotes

1. K.S.A. 1985 Supp. 60-3403.
2. K.S.A. 1985 Supp. 60-3402(d).
3. K.S.A. 1985 Supp. 60-3402(e).
4. K.S.A. 1986 Supp. 60-3407.
5. K.S.A. 1986 Supp. 60-3411.
6. K.S.A. 1986 Supp. 65-4904.
7. K.S.A. 1986 Supp. 60-3412.
8. K.S.A. 1986 Supp. 60-3409.
9. K.S.A. 1987 Supp. 60-3408 and K.S.A. 1987 Supp. 60-249(a).
10. K.S.A. 1987 Supp. 75-6104(d) and (e).
11. Fudge v. City of Kansas City, 239 Kan. 369 (1986) and Allen v. Kansas Department of S.R.S., 240 Kan. 620 (1987).
12. K.S.A. 1987 Supp. 12-105b(d).
13. K.S.A. 1987 Supp. 60-3701.
14. K.S.A. 1987 Supp. 60-3501.
15. K.S.A. 1987 Supp. 60-606.
16. K.S.A. 1987 Supp. 60-19a01(b).
17. K.S.A. 1987 Supp. 1-402.
18. K.S.A. 1987 Supp. 17-6002(b)(8).
19. K.S.A. 1987 Supp. 60-3601.
20. H.B. 2731.
21. H.B. 2693.
22. H.B. 2692.

Attachment I
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challenges, Farley v. Engelken, 241 Kan. 663 (1987) and Malpractice Victims Coalition, et al. v. Bell, ____ Kan. ____ (June 3, 1988). In Farley, the Court ruled unconstitutional those provisions of the 1985 Act which revised the collateral source rule in medical malpractice actions as repugnant to the equal protection provisions of Section 1 of the Bill of Rights.

In Malpractice Victims, the Court found violations of the "remedy by due course of law" and "right of trial by jury" provisions of the Kansas Bill of Rights, thus overruling the legislature's attempts to cap non-economic and overall losses and to require structured judgments.

The subject of attorney fees, which had been addressed as a legislative matter in 1985, was ultimately handled by the Supreme Court in Model Rules of Professional Conduct (M.R.P.C.) 1.5(d) in 1988.

What the Court has said in Farley and Malpractice Victims should preordain what will happen to the limitations on damages imposed in both 1987 and 1988. It seems appropriate then, as the dust settles after the adjournment of the legislature, to try to sort out which laws are currently in effect and how a practicing lawyer might choose to deal with them in the representation of clients. This article will not discuss the subjects of workers' compensation or no-fault vehicle insurance.

That effort included a $6.5 million national advertising campaign to "change the widely-held perception of an insurance crisis to a perception of a lawsuit crisis."

A Brief and Unobjective Overview of the Tort Reform Movement

Following a meeting of the National Association of Insurance Commissioners in December of 1984, the Insurance Information Institute, the public relations arm of the industry, announced an "effort to market the idea that there was something wrong with the civil justice system in the United States."[23] That effort included a $6.5 million national advertising campaign to "change the widely-held perception of an insurance crisis to a perception of a lawsuit crisis."[24]

The basic theme also adopted by the American Tort Reform Association (ATRA) was that judges had radically changed tort law to stack the deck against defendants, leading to an explosion in the number of tort lawsuits and in the amounts that juries awarded to plaintiffs. That development had, in turn, resulted in huge losses to the insurance industry which necessitated premium increases.

In February 1986 the Department of Justice released its report, "The Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability."[25] The document was intended to promote the adoption of a proposed package of tort reform measures.

While the task force had not accumulated any data of its own, it relied upon the interpretation of selected data. The findings of the working group essentially adopted the ATRA position. A letter from President Reagan also joined the call for tort reform.

The Kansas Tort Reform Association, an outgrowth of the Kansas Association of Commerce and Industry, and the Kansas Medical Society were the primary carriers of "tort reform" in the Kansas legislature.

The 1988 agenda of the Kansas Medical Society, which became the focus of the 1988 legislature's tort reform movement, in general included four proposals: (1) a cap on non-economic damages at $250,000, (2) a structured judgments bill, (3) a limitation on punitive damages, and (4) a collateral source bill.

The premise in the 1985 legislature for tort reform focused on the affordability of liability insurance and to some extent its availability. This persisted through 1987. However, by 1987, the markets were turning around, and the liability insurance business had become quite profitable again. This fact was exerting the downward pressures on rates, except in the medical malpractice area where rates continued to ascend.

Also by 1987, some of the information concerning the litigation explosion was tempered by the National Center

23. National Underwriter, Dec. 21, 1984 at 1, 2 and 46.
24. Journal of Commerce, Mar. 19, 1986 at 1, 20.
25. U.S. Department of Justice publications.
26. See, for example Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla, 1987); Duren v. Suburban Community Hospital, 24 Ohio Misc.2d 25, 482 N.E.2d 1358 (1985); Baptist Hospital of Southeast Texas, Inc. v. Baber, 672 S.W.2d 296 (Tex. App. 1984); and Boyd v. Bulula, 672 F.Supp. 915 (W.D. Va. 1987).

About the Authors

JERRY R. PALMER is a partner in the Topeka firm of Palmer, Marquardt & Snyder, P.A. He received his B.A. from the University of Kansas in 1962, and his J.D. from the University of Kansas School of Law in 1966. From 1975 to 1985 he was on the faculty of the Washburn University School of Law in Topeka, teaching trial law, and law and medicine. Mr. Palmer has published numerous articles in professional journals, including those of the Kansas Trial Lawyers Association and the Kansas Bar Association.

MARTHA M. SNYDER is also a partner in the Topeka firm of Palmer, Marquardt & Snyder, P.A. She received her B.S. in journalism from Kansas State University in 1976, and her J.D. from the University of Kansas School of Law in 1982. She is a member of the Topeka, Kansas, and American Bar Associations, Kansas Trial Lawyers Association, the Association of Trial Lawyers of America, Women Attorneys Association of Topeka, and the American Judicature Society.

for State Courts' report of actual figures on litigation in the state courts. The Kansas Supreme Court statistics for 1986 and for 1987 showing actual awards also diminished the hysteria surrounding the hypothecated "run-away jury."

In 1988 attorneys general in several states filed a class action lawsuit against members of the insurance industry claiming that it had artificially created a crisis in various lines of insurance. Popular magazines and the working press started to question more closely the tort reformers, and the pace of enactments of tort reform measures around the country dropped off in 1988.

In 1988, attorneys general in several states filed a class action lawsuit against members of the insurance industry claiming that it had artificially created a crisis in various lines of insurance.

At approximately the same time, the supreme courts of several states and United States district courts started to dismantle the enactments of the preceding years as being offensive to state constitutions, particularly those provisions dealing with open courts and remedies by due course of law.[26]

Enactments Found to be Unconstitutional and Others Most Likely to Fall

The first significant constitutional test of Kansas tort reform legislation was the case of **Farley v. Engelken**, *supra*, decided July 17, 1987. This was a consolidated appeal of three cases and dealt with a statute providing that evidence of any collateral source payment, such as insurance benefits, workers' compensation payments and social welfare benefits, was admissible in medical malpractice actions and that the jury should consider such payments in determining damages.

The case was decided by a plurality. Justice Herd, joined by Chief Justice Prager, found that the statute violated the equal rights guarantee of the Kansas Constitution under Section 1 of the Bill of Rights. They determined that the statute impinged on important interests and was therefore subject to a heightened level of scrutiny described as the "intermediate level" of scrutiny.

These justices viewed the malpractice victims as being politically powerless and a "semi-suspect" group. Such groups traditionally had received enhanced judicial review when legislation affected their rights. Justices Prager and Herd declined to look at the Section 18 "remedy by due course of law" provision of the Bill of Rights as they felt that was unnecessary. They believed that if a crisis existed the remedy should not be placed on the shoulders of malpractice victims, rather it was more appropriate that it be placed on the "negligent health care providers."[27]

Justices Lockett and Allegrucci, issuing a separate concurring opinion, disagreed with the use of the intermediate use of scrutiny because they viewed this as dealing only with an evidentiary issue. They did find the legislation to be "unjust and patently unfair and not even meeting the minimal requirements of a rational basis test."

Justice Holmes, dissenting for the rest of the Court even though expressing serious doubts that the reform statute would accomplish the results sought by the legislature, took the view that the rational basis standard of review applied and that the enactment passed muster under the test.

Simultaneously being processed at the district court level was the challenge to the 1986 Act in **Malpractice Victims Coalition, et al. v. Bell.** More recently, the decision of the trial court was substantially upheld in the June 3, 1988 opinion by the Kansas Supreme Court, *supra*.

When certain sections of the 1986 Act were reviewed by the high court, five of the justices agreed that the provisions for caps ($250,000 non-economic loss, $1 million overall, up to $3 million for medical expenses) as well as the provision dealing with structured judgments offended Section 5 of the Kansas Constitution's Bill of Rights pertaining to the right to trial by jury as well as Section 18's guarantee of a remedy by due course of law. No equal protection analysis was deemed necessary.

The way in which the Supreme Court dealt with the 1986 medical malpractice legislation clearly implies that the portions of the 1987 and 1988 Acts pertaining to the $250,000 caps on pain and suffering and non-economic loss, respectively, could not be found constitutional.

The Current Law

What follows is a description of the bills or the portions of bills that remain intact as of July 1, 1988 and some thoughts about practical application of these laws.

The 1986 House Bill 2661 provided limitations of $250,000 for all non-economic damages and total recovery of one million dollars from all providers of medical services,[28] subject to a "pinhole" provision,[29] which provided for a supplementary grant equivalent to no more than $2 million upon application by the plaintiff for future medical care.

The Supreme Court in **Malpractice Victims Coalition et al. v. Bell** struck down all of this language as violating the Kansas Constitution's Bill of Rights Section 5, guaranteeing the "inviolate" right to trial by jury, and Section 18, guaranteeing "remedy by due course of law."

The Court found that no adequate substitute remedy had been provided, and thus these sections were unconstitutional.

The majority distinguished the malpractice legislation from enactments such as Workers' Compensation and the No-Fault law because in those cases the legislature had initially provided an adequate substitute remedy. When the argument for substitute remedy raised by the appellants (the Commissioner of Insurance, the Kansas Hospital Association and the Kansas Medical Society) was considered, the court found that no adequate substitute remedy

27. 241 Kan. at 667.
28. K.S.A. 1986 Supp. 60-3407.
29. K.S.A. 1986 Supp. 60-3411.

had been provided, and thus these sections were unconstitutional.

There were, though, other sections of the medical negligence law which were not addressed in the case or considered by the Court and which remain viable. This is not to say, however, that successful constitutional attacks could not be made against them. The provisions which remain and are controlling are as follows:

a. **Itemized verdict:** K.S.A. 60-3408 provides that the verdict shall specify the period of time over which the payment for future economic losses will be needed. This may have been a predicate to the caps on liability in K.S.A. 60-3409 which were struck down in the **Malpractice Victims** Opinion, but K.S.A. 60-3408 was not specifically addressed.

The lawyer in a malpractice case should make a record noting the apparent conflict between the language in the malpractice act and K.S.A 60-249a pertaining to itemized verdicts in personal injury actions.

b. **The qualification of expert witnesses:** Under the act, the requirement for medical expert testimony will not be met unless the witness called devotes at least 50 percent of his or her professional time for the two-year period next preceding the incident at issue to "actual clinical practice" in the same profession in which the defendant is licensed.

This statute references the standard of care of a "practitioner of the healing arts." Presumably that means "health care providers" as defined within K.S.A. 1987 Supp. 40-3401, which includes the individuals licensed by the Board of Healing Arts such as optometrists, podiatrists, pharmacists and certified registered nurse anesthetists. It would arguably not then cover registered nurses and licensed practical nurses.

c. **Settlement conferences:** A settlement conference must be held not less than 30 days before a trial and must be conducted by the trial judge or a designee of the trial judge. Attorneys who conduct the trial and all parties or persons with authority to settle the claim are required to attend unless excused by the Court for good cause shown. To protect the sanctity of the process, offers, admissions and statements made in conjunction with the settlement conference are not admissible at trial or in any other action.[30]

d. **Health Care Provider insurance coverage:** K.S.A. 40-3403(e) was amended in 1986 to reduce the coverage from $3 million for any one judgment or settlement per provider with a $6 million limitation for an entire fiscal year down to a $1 million limit on the Fund per occurrence per provider, in accordance with the limitation of liability of $1 million per occurrence.[31] Therefore, after noting that the legislature could do anything with the Health Care Stabilization Fund that it wanted to including abolition, the Court in **Malpractice Victims** determined that no modification would be recognized until further enactments by the legislature.

e. **Vicarious liability:** The side issue which the district judge had considered in **Malpractice Victims**, but which had not been raised by any party, was whether or not there could be a limitation of vicarious liability by health care providers who were qualified for coverage. The appellate court took a neutral position on that question and found that it procedurally was not correct for the trial court to have decided that issue.[32] Thus, the question of whether a physician's professional corporation or partnership needs to be named as a party remains an open question.

f. **Screening panels:** The previous provisions excluding evidence of the screening panel report were changed in K.S.A. 65-4904 to provide that the written report of the screening panel or testimony of members of the panel shall be admissible in any subsequent legal proceeding.

Some lawyers, on behalf of claimants, found this to be a pretty cheap way to get an expert opinion.

Other amendments deal with the panel's compensation and allocate the cost of the panel to the party in whose favor the majority rules. When the panel makes no recommendation, each side pays one-half the cost. Some lawyers, on behalf of claimants, found this to be a pretty cheap way to get an expert opinion. A panel would be requested and if the plaintiff won the plaintiff would pay the relatively low cost involved in the panel proceeding and automatically have a favorable piece of evidence which was admissible plus at least two experts available to be subpoenaed. So it appears that one method intended to diminish litigation may actually have contributed to increasing the number of claims.

Other Personal Injury Actions After July 1, 1988

What follows is a description of the bills or the portions of bills that remain intact as of July 1, 1988 and some thoughts about practical applications of these laws.

1. **Attorney fees:** The tort reform agenda called for a regulation of attorney fees. The legislature declined to limit attorney fees even in the area of medical malpractice cases where funds would be collected from the Health Care Stabilization Fund (a live issue until the final hours of the 1988 session).

However, when the Supreme Court adopted the rules relating to the discipline of attorneys published March 1, 1988, M.R.P.C. 1.5 did address some of the issues and in a sense represents the Court's exercise of jurisdiction in the field of contingency fees after a special committee of the Judicial Council considered the issue.[33]

Another attorney fee provision, relating solely to medical negligence actions, was a 1986 amendment to K.S.A 7-121b, which provided that both parties' attorneys' fees be approved by the judge prior to final district court level disposition of the case, "after an evidentiary hearing" where

30. K.S.A. 1987 Supp. 60-3413.

31. Malpractice Victims Coalition, et al. v. Bell, et al., Slip Opinion No. 61,945, dec'd June 3, 1988, p.27.

32. Id, at p. 29.

33. The result is subparagraph d, and its requirements are that (a) the contingency fee agreement be in writing, (b) it contain a statement of the method by which the fee will be determined and the amounts that accrue to the lawyer as a result of settlement, trial or appeal, (c) litigation and other expenses must be deducted from the recovery before computation of the fee, (d) the attorney provide the client with a written statement showing the outcome of the matter, the client's share and the method of determination, (e) the statement must advise the client of the right to have the fee reviewed by an appropriate court, and (f) the court has the authority to determine whether the contract is reasonable. If the court makes the predicate finding that the fee is not reasonable then the court sets and allows a reasonable fee.
It should be noted that contingent fees are not the only fees subject to being reviewed by the court, but it is the only fee arrangement that requires a disclosure by the attorney to the client in writing that the client has the right to have the fee reviewed by a judge.

the reasonableness of the fees would be determined.[34] This statute sunsets July 1, 1989, unless re-enacted.

2. **Panels for all professionals:** With the liberalized use of pretrial screening panels, the 1987 legislature adopted malpractice liability screening panels for all professional licensees.[35]

Either party may file a memorandum with the district court, whether or not a lawsuit has been filed, and the court shall convene a professional malpractice screening panel.

Each side designates a person licensed in the same manner as the defendant. A third person is selected by the parties or, if joint selection fails, the court makes the appointment. The court also appoints a lawyer as a non-voting member to chair the panel. The licensing agency is responsible for maintaining a current list of the licensees available to serve on the screening panels. The panel is directed within 90 days after it has commenced to make a written report on the issue of whether or not the licensee departed from the standard of conduct in a way which caused the complaining party damage.

Written opinions are to be supported by corroborating references to published literature and other relevant documents. The panel is charged with the responsibility of notifying the parties as to when their decision is to be handed down and within seven days of the decision provide a copy of the opinion with any concurring or dissenting opinions to the parties, their lawyer and to the Commissioner of Insurance.

As in medical negligence actions, this screening panel report is admissible in any subsequent legal proceeding and either party may subpoena any or all members of the panel as witnesses for examination relating to these issues at trial. A party may reject the final determination and proceed with the action in the district court.[36] Costs are also assessed, as with medical screening panels, to the prevailing party.

The statute of limitations is tolled by the filing of a memorandum requesting the convening of the panel until a period 30 days after the screening panel has issued its written recommendation.

3. **Modifications to the Collateral Source Rule:** After the 1986 medical malpractice revisions of the Collateral Source Rule were struck down by the Supreme Court in **Farley v. Engelken, supra**, the Kansas Medical Society proposed legislation that would affect all tort litigation in compliance with the invitation extended by the concurring justices.

The legislative history of this particular bill is so complicated that little could be gained from a research standpoint except to review the written and oral testimony of Washburn University Law School Dean (then Professor) James Concannon, who is primarily responsible for the portions of the act that integrate this collateral source rule with the Kansas Comparative Negligence Act.[37]

Some highlights of the bill are:

a. Collateral source benefits are defined as benefits which have been received or "are reasonably expected to be received by the claimant" for expenses incurred or reasonably expected to be incurred. Excluded are life or disability insurance benefits or benefits gratuitously bestowed on the claimant. Neither does the term include any services or benefits for which there is a valid lien or subrogation interest (such as workers' compensation, P.I.P. benefits under the no-fault automobile insurance act and benefits from the Veterans Administration) nor are amounts from criminal restitution or compensation paid through victims' assistance considered collateral source benefits.

b. The cost of collateral source benefits includes the amounts paid or to be paid in the future to secure the benefit (either paid by the claimant or someone on behalf of the claimant). If the amount of a benefit paid (or to be paid) encompasses amounts paid over a period of time which enhance the benefit, then those amounts paid shall also be admissible in determining the cost.

c. Net collateral source benefits are then defined as "collateral source benefits" minus cost of collateral source benefits.

d. The evidence of collateral source benefits or their cost is inadmissible in cases involving a demand for judgment less than $150,000.

e. The trier of fact determines the net collateral source benefits received and those reasonably expected to be received in the future. If the trier of fact is a jury, that is done by itemization of the verdict.

f. The court has the duty to reduce the judgment by the amount of the net collateral source benefit but then takes into consideration certain adjustments which include: (1) the percentage of comparative fault attributed to the claimant; (2) the uncollectible portion of a verdict caused by the comparative negligence of parties joined by defendants (such as an employer covered by Workers' Compensation); (3) losses due to the claimant's inability to recover because of the insolvency or bankruptcy of a "person;" (4) the amount the award of damage has been reduced because of a statutory limit upon the recovery of damages (for example, the wrongful death non-pecuniary limit of $100,000).

The evidence of collateral source benefits or their cost is inadmissible in cases involving a demand for judgment less than $150,000.

g. The Act affects only those causes of action accruing on or after July 1, 1988.

In addition, the Act repeals K.S.A. 60-3403, the Medical Malpractice Collateral Source Rule, which had previously been found unconstitutional by the Kansas Supreme Court. The practical effect of the Act is to reduce the verdict by the amount of medical insurance paid or reasonably expected to be paid by private medical insurance such as Blue Cross Blue Shield.

34. The old law had only two criteria by which the fee would be judged: (a) the nature and difficulty of the issues involved in the case, and (b) the time reasonably necessary to prepare and present the case. The new law uses the same eight criteria as are found M.R.P.C. 1.5 on the determination of a reasonable fee, so in addition to the time and the nature of the issues inquiry, the following are relevant: (a) the skill requisite to perform the legal service properly, (b) preclusion of other employment, (c) the fee customarily charged in the locality, (d) the amount involved and the result obtained, (e) time limitations imposed by the client or the circumstances, (f) nature and length of professional relationship with the client, (g) the experience, reputation and ability of the attorney performing the services, and (h) whether the fee is fixed or contingent.

35. K.S.A. 1987 Supp. 60-3501 et seq.

36. K.S.A. 1987 Supp. 60-3506.

37. K.S.A. 1987 Supp. 60-258a.

Does the employer's payment count? The argument can be made by claimant that it is part of an employment contract and it is paid to him in lieu of other compensation. The claimant could argue that by being a member of a group the payment for the entire group should be taken into consideration.

A further argument would be that it is not just the premiums from the date of the accident through the date of the expected last payment by the medical insurance that should be considered, but all payments for medical insurance that have ever been made by or on behalf of the individual claimant. Defendants might raise issues concerning the appropriate amount of the payment in the case of a family rather than individual plan.

Representative Wunsch, chair of the House Judiciary Committee, was the author of that portion of the cost section dealing with "amounts paid over a period of time, thus making the benefit greater." It is uncertain, though, whether any evidence exists in the record as to what he meant by those words or what type of insurance he had in mind. The phrase is left unclear in its application and might encompass various federal programs that have no subrogation rights and state welfare benefits.

This is a bill that may well deserve to be revisited by the legislature and will certainly be subject to considerable interpretation as the various examples of collateral source benefits and the payments for them are offered in evidence at the district court level. Presumably the act will apply to actions in the U.S. District Courts.

4. **Punitive Damages:** There are three punitive damage bills. K.S.A. 1987 Supp. 60-3402 was in effect from July 1, 1985 up to, but not including, July 1, 1988 for causes of action occurring between those dates in medical negligence actions. Its principal provisions are as follows: (a) bifurcated trial — the trier of fact first determines, along with all other issues, whether or not any exemplary damages should be allowed. If the jury finds in the affirmative, then a separate proceeding is conducted to the court to determine the amount of the damages to be awarded.

Punitive damages cannot be awarded against the principal or employer unless the conduct was authorized or ratified by a person empowered to do so.

(b) At the separate subsequent hearing, the court will consider evidence of the financial condition of the defendant, including gross income earned from professional services in the five years next preceding the wrongful act. There is no explanation of other evidence that might be admitted except the limitation on the defendant's gross income.

(c) The burden of proof for the trier of fact as to whether any damages should be awarded is "clear and convincing evidence" that the actions of the defendant toward the plaintiff were "willful conduct, wanton conduct, fraud or malice."

(d) The amount of punitive damages is limited to 25 percent of the annual gross income from professional services based on the highest annual income within the five-year period before the act, but, in no event can a punitive damage award exceed $3 million.

(e) Of the punitive damages awarded, 50 percent goes to the plaintiff and 50 percent is paid to the state treasurer for deposit in the Health Care Stabilization Fund.

(f) Punitive damages cannot be awarded against the principal or employer unless the conduct was authorized or ratified by a person empowered to do so. This rule also applies to a professional corporation.

The second punitive damages act is K.S.A. 1987 Supp. 60-3701, passed in 1987. This statute applies to all actions other than medical malpractice actions. Essentially the 1988 session of the legislature simply amended the 1987 act to include health care providers in the third punitive damages bill, effective July 1, 1988.

The principal features of the across-the-board punitive damages act are as follows:

(a) The trier of fact shall determine, concurrent with all other issues, whether punitive damages shall be allowed. If they are, then a separate proceeding is conducted by the court to determine the amount of the damages.

(b) What the court may consider at this separate subsequent hearing is the likelihood at the time of the wrongful act that "serious harm would arise from the defendant's misconduct;" the defendant's awareness of the likelihood that harm would result from the misconduct; the profitability of the misconduct; the duration of the misconduct and any intentional concealment thereof; the attitude and actions of the defendant after discovering the misconduct; the financial condition of the defendant; and the "total deterrent effect" of other damages either compensatory or exemplary or fines to which the defendant has been or "may be subjected."

(c) The burden of proof in the initial phase of the trial is "clear and convincing evidence" that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.

(d) Vicarious liability for punitive damages follows the same rule as the 1985 act requiring ratification of the act by the principal.

(e) The award cannot exceed 100 percent of the annual gross income in the highest year out of the last five years next preceding the wrongful act or $5 million, whichever is less. However, if the court finds the profitability of a defendant's misconduct exceeds or is expected to exceed these limitations, then the court may award an amount equal to one and one-half times the amount of profit that the defendant gained or is expected to gain by reason of the misconduct.

The statute also changes the way in which matters are pled by amending K.S.A. 60-209. In the original pleadings, no claim for punitive damages may be asserted. Plaintiff must later file an amended pleading claiming punitive damages on motions supported by affidavits that plaintiff has established a "probability that plaintiff will prevail on the claim." The motion must be filed at or before the pretrial conference.

Practitioners should note that most probably the procedure affects any case filed after July 1, 1988. A question arises as to whether this applies to cases filed in the U.S. District Court. A question arises as to how this applies to cases filed in federal court, i.e. whether the provisions are

procedural or substantive in nature. The 1987 law affects all personal injury actions arising after July 1, 1987 for non-medical malpractice cases and all cases arising after July 1, 1988.

It is worth noting that there is no severability provision in the statute. This becomes significant in view of the fact that punitive damages are to be assessed by the court and not by the jury. One who confronts the limitations of these statutes should consider the implications of **Malpractice Victims Coalition, et al. v. Bell**, supra, and the discussion of the Kansas Constitution's Bill of Rights §5 that the right to trial by jury remain inviolate.

There may be a doubtful claim of right to collect exemplary damages. However, the language of §5 of the Bill of Rights, as it has been interpreted, may have grave implications for the constitutionality of all three punitive damage bills and should be researched by counsel confronting these problems.

5. **Itemization of Verdicts:** K.S.A. 1987 Supp. 60-249(a) provides that in personal injury actions the trier of fact will itemize as follows: (a) non-economic injuries and losses — including pain and suffering, disability, disfigurement and any accompanying mental anguish; (b) reasonable expenses of necessary medical care, hospitalization and treatment received; and (c) economic injuries and losses other than medical expenses. The court is advised to instruct the jury only on those categories of damages set forth in P.I.K. Civil 2d 9.01 "upon which there is some evidence to base an award."

The statute provides that further itemization may be required if another statute requires breaking the injuries and damages into those sustained to date and those for injuries and losses "reasonably expected to be sustained in the future."[38] A question for future resolution is whether "reasonably expected" is a lesser standard than "more probably than not."

6. **Venue Over Public Utilities, Common Carriers and Transportation Systems:** The 1987 amendment to the statute[39] provides that public utilities, common carriers or transportation systems may be sued for liabilities, penalties or forfeitures in any county in which the entity operates regularly. Subsection b requires that personal injury or wrongful death actions shall be brought either in the county in which the injury occurred or in the county in which the plaintiff resided at the time of the injury. The practical effects of this statute will be to reduce the amount of litigation in Wyandotte County, Kansas and to prevent cases arising in rural areas from being filed in the urban counties.

7. **Modifications to the Tort Claims Act:** Two Supreme Court opinions raised concerns in the 1987 session of the legislature. They were the cases of **Fudge v. City of Kansas City**, 239 Kan. 369 (1986) and **Allen v. Kansas Department of S.R.S.**, 240 Kan. 620 (1987).

The response to **Fudge** was to adopt a new Section (d) to K.S.A. 75-6104 exempting from liability the following: "adoption or enforcement of, or failure to adopt or enforce, any written personnel policy which protects persons' health or safety unless a duty of care, independent of such policy, is owed to the specific individual injured, except that the finder of fact may consider the failure to comply with any written personnel policy in determining the question of negligence."

The intent was to overcome that part of **Fudge** where the court based liability on the violation of a personnel policy requiring officers to take a suspected drunk driver into custody. In the **Fudge** situation, an apparently intoxicated driver was not detained by officers and subsequently caused a head-on automobile collision with the plaintiff. The jury assessed a percentage of fault to the City of Kansas City, Kansas.

The new statute seems to require that some common law duty pre-exist to render the personnel policy admissible on the subject of negligence.

The new statute seems to require that some common law duty pre-exist to render the personnel policy admissible on the subject of negligence.

The response to the **Allen** case was a modification of the discretionary function clause in the exemptions to liability section. That exemption now reads, "any claim based upon the exercise or performance [of] or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved."[40]

The **Allen** case involved a Social and Rehabilitation Services client who had vomited in a hallway in a building where S.R.S. leased space. The building management failed to respond to the request from S.R.S. to clean up the mess. Someone from S.R.S. did the cleaning, and thereafter plaintiff slipped and fell on the patch of floor which had not been cleaned properly. S.R.S. was held liable for the negligent cleaning even though it had no duty under the lease to clean this common area adjacent to its leased space.

It is interesting to compare the legislative remedy with the definition of "discretionary function" that was adopted by the Kansas Supreme Court in **Hopkins v. State.**[41] The Court reasoned at page 610, "Discretion implies the exercise of discriminating judgment within the bounds of reason. . . . It involves the choice of exercising of the will, of determination made between competing and sometimes conflicting considerations. Discretion imparts that a choice of action is determined, and that action should be taken with reason and good conscience in the interest of protecting the rights of all parties and serving the ends of justice."

Governmental discretion is an esoteric subject and deserving of a separate treatise. The language that has been used to attempt to overcome the impact of **Allen** does not seem to fit, and the word "level" is bound to be troubling. It presumably is meant to imply something about whether a person is a low "level" employee versus a supervisory "level" employee. It could equally apply to an agency director

38. K.S.A. 1987 Supp. 60-249a(b).
39. K.S.A. 1987 Supp. 60-606.
40. K.S.A. 1987 Supp 75-6104(e).

who decides on a reorganization plan for the agency (a high "level" decision) rather than the same person's decision on the number of paper clips to order (a low "level" decision).

The issue of abuse of discretion begs the question. If one exercises a discretionary function and does not abuse discretion, liability does not follow. If one abuses one's discretion, and the act was within the terminology "discretionary function," then the issue of abuse is irrelevant because the "function" itself is exempt. It is extremely hard to predict how this language will be asserted as a defense and even more questionable as to what an appellate court will do when it tries to construe this language for application to a given set of facts.

A new exemption[42] to the tort claims act excludes claims for damages arising from the performance of certain community service work (except for operation of motor vehicles). Community service work is defined as work performed by a person as a result of a diversion contract, court ordered supervised community corrections program, condition of probation or other court ordered disposition.[43]

Other sections of the law were liberalized to assist governmental employees in obtaining reimbursement of their attorney fees incurred in defending tort claims.[44]

A tort claims procedure against "municipalities" was enacted by amending K.S.A. 12-105b. The definition of "municipalities" under K.S.A. 105a was expanded greatly.

The new provision requires a written notice "before commencing such action."[45] The notice is to be filed with the clerk of the governing body of the municipality and it should contain:

There is a prohibition on commencing a tort action for 120 days after the notice has been filed.

- name and address of the claimant and the claimant's attorney.
- a concise statement of the factual basis of the claim with date, time, place, circumstances and the description of the negligent act,
- name and address of public employee involved,
- a description of the nature and extent of the injury claimed, and
- a statement of the amount of monetary damages claimed.

"Substantial compliance" with these provisions is required.

There is a prohibition on commencing a tort action for 120 days after the notice has been filed. The statute provides that a claim is "deemed denied" if the municipality fails to approve the claim within the 120-day period, provided settlement has not been reached. The statute of limitations that would ordinarily have applied to the claim still applies, except that if compliance with a provison for the notice would otherwise result in the barring of the action such time period shall be extended by the time period required for compliance with the provisions of the section.

41. 237 Kan. 601 (1985).
42. K.S.A. 1987 Supp. 75-6104(s).
43. K.S.A. 1987 Supp. 75-6102(e).

Practitioners should consider a number of traps for the unwary. The first occurs when the claim is filed and the 120 days run shortly before the statute of limitation expires. In that situation, prudence would require an immediate filing upon the denial.

A second trap is where the 120 days run or the denial itself is made after the statute of limitation has expired. There is no time set for extension within which to file nor is a reasonable period even suggested. Certainly a filing on the same day as the denial would comply with the statute, but anything beyond that is going to create some jeopardy for the plaintiff and for plaintiff's counsel.

Another approach may be to recognize that the statute of limitation is only a defense to be pled by the municipality and to obtain an agreement from the governing board that no such defense will be raised in consideration of plaintiff's forbearance of suit until a date certain.

8. **Immunities and Limitations of Liability:**

a. **Qualified immunity for volunteers** K.S.A 1987 Supp. 60-3601 provides for the immunity from liability of volunteers of certain non-profit organizations. Non-profit organizations are those recognized under 501(c) of the Internal Revenue Code. "Volunteer" includes the unpaid person who works with the non-profit organization either in the executive director or other agency role but does not include those who deliver health care services to patients in a medical care facility.

If these non-profit organizations carry general liability coverage, their volunteers are immune from liability for their acts or omissions not constituting willful or wanton misconduct or other intentionally tortious conduct. If the volunteer is required to be insured by law (such as maintenance of minimum limits on an automobile), then the volunteer's liability is extended only to the extent of insurance coverage.

Volunteers who are in an executive or directorial capacity are not vicariously liable unless they ratify the type of act for which the volunteer would be liable (willful, wanton, intentional acts). Essentially, the statute does not operate to limit liability where insurance is already in place but requires the organization to have general liability insurance coverage if it seeks to have its volunteers qualify for immunity within the act.

b. **Special rules for CPAs:** Certified public accountants obtain some limitation of their liability under K.S.A. 1987 Supp. 1-402 and 1-403. The limitation is a restriction on standing to bring such claims.

The plaintiff must have directly engaged the CPA or the firm to perform the professional accounting services, unless the defendant knew at the time of the engagement or the client agreed with the professional during the period of service that the work product would be made available to the plaintiff. This understanding must have been memorialized in writing and the defendant must have known the plaintiff intended to rely upon the professional accounting services rendered in connection with specified transactions described in writing.

c. **Limits on personal liability of corporate directors:** Corporate directors obtained some special language and a modification of K.S.A. 1987 Supp. 17-6002(b)(8). This sec-

44. K.S.A. 1987 Supp. 75-6108(f).
45. K.S.A. 1987 Supp. 12-105b(d).

tion permits in the articles of incorporation a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders, policy holders or members for monetary damages for breach of fiduciary duties as a director.

Corporate directors obtained some special language and a modification of K.S.A. 1987 Supp. 17-6002(b)(8).

The provision is limited though in that it may not eliminate the liability of a director for:

- breach of the director's duty of loyalty to the corporation, its shareholders, policy holders or members;
- acts or omissions not in good faith which involve intentional misconduct or a knowing violation of the law;
- violations under K.S.A. 17-6424 (relating to unlawful dividend, stock purchase or stock redemption);
- transactions from which the director derived an improper personal benefit; and
- any act prior to the date on which the provision became effective (July 1, 1988).

9. **Arbitration:** K.S.A. 5-401 was amended to refer specifically to the arbitration of tort claims, and the key words in the statute remain "existing controversy." Arbitration agreements are valid for later-arising controversies, unless they deal with contracts of insurance, contracts between employers and employees or their representatives or claims in tort.

Thus, persons with tort claims which have already arisen may enter valid, enforceable and irrevocable agreements for arbitration. The law remains in effect, though, that arbitration agreements for controversies "thereafter arising" are not valid with respect to claims in tort.

Conclusion

Although some things have changed, much remains the same. This reassurance follows the **Farley** and **Malpractice Victims** decisions in which the Kansas Supreme Court tested much of the 1980s tort reform legislation.

The case resolving the implied invalidation of K.S.A. 1987 Supp. 60-19a01's $250,000 cap on pain and suffering and its amendment in 1988 applying to all non-economic damages[46] remains to be tested. However, no consistent ruling of the Supreme Court could be made to reject the reasoning of the Court in the **Malpractice Victims** case.

"H.B. 2661, without question, eradicates the right to a remedy by due course of law for certain injuries . . ."

As stated in the majority opinion by Chief Justice Prager, "H.B. 2661, without question, eradicates the right to a remedy by due course of law for certain injuries. . . It eliminates the right to a remedy for those injured by a certain favored group of tortfeasors."

"The cap and annuity provisions of H.B. 2661 infringe upon a medical malpractice victim's constitutional right to a remedy by due course of law, and no **quid pro quo** is provided in return. The trial court was correct in holding the caps and the annuity provisions unconstitutional as a violation of Section 18."[47]

While some statutes await judicial scrutiny, for example, those dealing with punitive damages, others may be eligible for testing but discretion and broader political considerations might restrict the interest in such a challenge, for example, our unique collateral source law.

The dust is settling, the sun is shining, the tornado has run out of wind and the rebuilding can commence. ■

46. H.B. 2692.
47. Malpractice Victims Coalition, et al. v. Bell, et al., Slip Opinion No. 61,945, June 3, 1988, pp. 27-28.

STATE OF KANSAS

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Testimony of Attorney General

Robert T. Stephan

Before the Senate Judiciary Committee

Re: Senate Bill 9

January 23, 1989

As Chief Law Enforcement Officer of the State of Kansas, I commend this committee and the Kansas Legislature for its early initiative in this session to create a plan to improve our presently outdated system of prosecution.

Senate Bill 9, establishing a state-wide district attorney system, will at long last provide a means of prosecution that will furnish more uniform results, as well as be more responsive to the needs of the most important people thrown into the criminal justice system - the innocent victim. The system will provide a full-time professional to prosecute the criminal, supervise investigators, and address the needs of our citizens.

Since this proposal provides for one district attorney for each judicial district rather than one county attorney for each county as we have now, there will be problems with the initiation of such a program due to our multi-county judicial districts. We

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should be able to adjust our system to deal with issues as they arise, and I feel comfortable that the proposal in Senate Bill 9 is such that future adjustments are possible.

Another possible concern deals with the problem of counties funding offices and personnel who may be working on criminal matters arising in other counties in the same judicial district. I would like to point out that while this possibility will exist, there must be flexibility within the system to ensure adequate handling of criminal matters at all times within the district.

We are no longer living in a world where crime occurs only in the metropolitan areas. We are bombarded with reports of brutal and complex crimes in every corner of our state. My office has assisted in the prosecution of all types of crime, including rapes, murders, and white collar crime. These cases require an extensive amount of time to properly prosecute. The county attorney is confronted with serious crimes on a daily basis, but is asked to work for a fraction of what his counterpart at the defense table is being paid. This can no longer be tolerated.

Our County Attorneys are fighting a good fight, but the odds are continually mounting against them. We must renounce crime and support the rights of victims by taking a step toward professionalism in prosecution for multi-county districts and bolster the valiant efforts of other law enforcement professionals.

Let us remember, our problems do not lie with the people operating our present system, but with the system itself. It is time for us to make a much needed change.

SUMMARY OF TESTIMONY

Before the Senate Judiciary Committee

January 23, 1989

Senate Bill 9

Presented by the Kansas Highway Patrol

(Lieutenant William Jacobs)

Appeared in Support of Senate Bill 9

The Kansas Highway Patrol supports the district attorney concept proposed in Senate Bill 9. We are on record as supporting each attempt in the past to enact legislation establishing a full-time prosecution staff. We think it is a much desired step in assuring a more professional and successful prosecution of crimes against this state.

In this regard, our experience within the judicial districts now employing the district attorney concept has been excellent. The concept provides for the desired level of training for assistant and deputy prosecutors and the total devotion of their efforts to the prosecution challenge.

The Patrol, as a law enforcement agency, is but one arm of the criminal justice process which includes enforcement, prosecution and adjudication. As such, our primary responsibility is the detection and apprehension of those persons violating the state statutes, both traffic and criminal.

The mandate does not end at that point. We must actively support the prosecution and successful adjudication of these matters. In any criminal prosecution, a successful conclusion is totally dependent on proper amassing of evidence within the established legal framework and a vigorous and enlightened prosecution. All previous efforts are in vain if the latter of these elements is not present.

We believe the state is gradually progressing toward the desired goal as witnessed by implementation of the statewide court system and the increased training mandates for police officers. From our standpoint, one element still must be addressed — that of the dedicated prosecutors. We would certainly not imply that there are not dedicated prosecutors at present, but in many situations, there is a lack of continuity. For example, and particularly in our instance, traffic violations constitute by far the majority of cases filed each year. Unfortunately, more citizens are killed and injured in this respect every year than in any other, but "traffic" continues to be viewed as a minor offense in many instances — a condition that has evolved over the years. In the interest of keeping abreast of the problem, many technological advances have been made as evidenced by scientific chemical testing of body substances in the prosecution of alcohol offenses, the use of highly technical devices in speed detection and others. Successful prosecution in these instances will largely depend on the prosecutor's knowledge in these areas. It is not unusual to have the prosecutor gain this knowledge and then, leave office, and the cycle must repeat.

We continue to believe the establishment of a full-time, totally dedicated prosecutor's office is an absolute necessity in rounding out the criminal justice system in Kansas.

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

Testimony on Senate Bill No. 9

by

James W. Clark
KCDAA Executive Director

I. HISTORY OF DISTRICT ATTORNEY SYSTEM IN KANSAS.

A. The Kansas County and District Attorneys Association has supported a district attorney system for Kansas for 15 years.

B. Reasons for supporting d.a. system.
1. Association's goal of improving professionalism.
2. Recognition that criminal law is highly specialized.

C. Lack of general support for D.A. plan.
1. Cost
2. Loss of elected official in multi-county districts.
3. Compromise in five counties.

II. RECENT EVENTS

A. The Increased funding for indigent defense services.
1. Provides full-time defense attorneys in most counties.
2. Central administration of defense efforts

B. Death Penalty

III. Senate Bill 9

A. A step in the right direction.
1. State funding.
2. Full-time prosecutors.

B. Problems with S.B. 9.
1. Abolishes county official.
2. Expensive

IV. Felony D.A. in Multi-County Districts.

A. Establishes a full-time professional prosecutor.

B. Provides some state funding for serious offenses.

C. Keeps locally elected county attorney.

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The Kansas County and District Attorneys Association's
Proposed Amendments to SB No. 9

Senate Bill No. 9 is hereby amended as follows:

Section 1 (a).

Line 31: Change date to "January 14, 1991."

Line 36: Change date to "November of 1990."

Section 1 (b).

Delete entire section.

Section 1 (c).

Line 62: Change date to 1988.

Section 2.

No changes.

Section 3.

Line 100: Change date to January 14, 1991.

Line 102: After attorney, insert " in judicial districts 3, 7, 10, 18, and 29".

Line 117: After act, insert "In all other judicial districts, it shall be the duty of the district attorney to prosecute or defend, on behalf of the people therein, all felony criminal matters arising under the laws of this state."

Section 4.

Line 124: Change date to January 14, 1991.

Section 5. (a)

Line 138: Change date to January 14, 1991

Line 141: After district, insert "except for judicial districts 3, 7, 10, 18 and 29," and delete from "such assistant district attorneys" through "district" on Line 175. Insert "one secretary.".

Section 5 (b)

Delete entire section.

Section 5 (c)

Line 190: After "attorney", delete "district" through "deputies" on Line 191.

Section 6.

Delete entire section.

KCDAA Proposed New Sections

New Section 7. A county may exempt itself from jurisdiction of district attorneys created under this act whenever there shall be submitted to the secretary of state a petition concerning said exemption signed by qualified electors of the county, equal in number to not less than 5% of the electors of the county who voted for the office of secretary of state at the last preceding general election, the secretary of state shall place said question on the ballot in the general election, and if such proposition receives a majority of the votes cast, the district attorney's jurisdiction in said county shall be abolished, and the county attorney shall assume full felony jurisdiction.

New Section 8. The counties comprising judicial districts 3, 7, 10, 18, and 29 shall be reimbursed in an amount equal to the salary and fringe benefits of the district attorney.

New Section 9. No county within any judicial district in which a district attorney is created by this act may reduce the amount of expenditures for the office of county attorney below the level established for calendar year 1989.

New Section 10. By mutual agreement between the district attorney of the judicial district and the county attorney of a county within that judicial district, the district attorney may appoint the county attorney as deputy district attorney within that county. Said deputy district attorney shall assist the district attorney in fulfilling said district attorney's duties within that county.

KANSAS ASSOCIATION OF COUNTIES
"Service to County Government"

212 S. W. 7th Street
Topeka, Kansas 66603
(913) 233-2271

Testimony

Subject - SB 9 - District Attorney System

For - Senate Judiciary Committee

By - John Torbert, Executive Director
Kansas Association of Counties

The Kansas Association of Counties recognizes and is cognizant of the problems that the interim Special Committee on the Judiciary was attempting to address in recommending the concepts now contained in SB 9. While the proposed legislation has some positive aspects, it contains several major problem areas which led our organization's Board of Directors to officially go on record in opposition to the legislation in the form in which it is currently proposed.

First of all, we are very concerned about any proposal that would remove the county attorney from the ranks of elected officials. We simply do not feel that anything positive is gained by removing a locally elected public official. We like that aspect of the current system and I believe that the voters do too.

Secondly, this legislation will increase our costs. Currently, as you know, most county attorneys play a dual role for the county - they are the chief prosecutor for various crimes that have been committed and they advise the county board of commissioners and other county officers and employees on matters of civil law (19-704). Further, in a large number of counties, the county attorney also has responsibility to be present when bills are paid and accounts settled to verify the amount and "pass upon it." (19-716)

As I read SB 9, the assistant or deputy district attorney in each county would not be available for those other functions. Therefore, those counties without county counselors would have to hire one or establish some other means, probably through a contractual arrangement, to obtain the other assistance. This would be at a cost above and beyond what we're currently paying and those costs would go right on top of an already over-burdened property tax.

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I've conferred with Mr. Clark of the County and District Attorney's Association about amendments that association will be recommending to you which would put a district attorney system in place and essentially overlay the county attorney system. That general approach would be preferable to our association. It speaks to our concern with respect to retaining the county attorney as an elected officer and keeping that person available for other legally prescribed duties. It also addresses the state concerns with respect to professional experienced prosecutors.

I thank you for your time.