Approved 4-27-89
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 March 21, 19 89 in room 514-S of the Capitol.

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

Committee staff present:

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

Conferees appearing before the committee:

Kent Roth, Physicians National Risk Retention Group
Dennis M. Clyde, Kansas Trial Lawyers Association
Ron Smith, Kansas Bar Association
Wayne Stratton, Medical Society and Kansas Hospital Association

The chairman welcomed the Close-Up Students of Kansas who were visiting the committee.

Senate Bill 174 - Health Care Stabilization Fund; liability
Senate Bill 223 - Medical Malpractice Liability Act; Health Care Stabilization Fund.
Senate Bill 225 - Civil procedures; limitations of actions
Senate Bill 285 - Medical malpractice screening panels
Senate Bill 364 - Medical malpractice liability actions; pretrial screening panels.
House Bill 2113 - Discovery of risk management records
House Bill 2181 - Eliminating sunset for joint underwriting for medical malpractice insurance
House Bill 2501 - Medical malpractice claims; phase out of health care stabilization fund

The chairman announced the testimony given today will be in opposition to the bills.

Kent Roth, Physicians National Risk Retention Group, testified we can sell policies today to doctors in Kansas except when the doctor comes up for renewal he can have his renewal refused. We have our separate bill, House Bill 2458, that provides the insurance can be with a licensed insurance carrier. He stated we will have the wording ready as an amendment for House Bill 2501 and will present it in subcommittee. We can offer the insurance for less. In order to be able to do this we need to market our product when the fund fades out. Please consider including our proposal in the bill.

Dennis M. Clyde, Kansas Trial Lawyers Association, appeared in opposition to Senate Bill 225. He stated a further reduction in the statute of limitations will only serve to arbitrarily deny damages to injured victims by effectively cutting off their right to relief in those cases where the injury was hidden and undiscoverable, as is often the case, for a substantial period of time. A copy of his testimony is attached (See Attachment I). He asked the committee to read a recent Kansas Supreme Court case dealing with asbestos exposure. A

committee member inquired do you share the opinion of the trial lawyers that a large part of this problem doctors are confronted with is really caused by insurance companies? Mr. Clyde replied no, I think the problem is much deeper rooted than that. I think the doctors have been treated unfairly by the insurance industry. Considerable committee discussion was held with Mr. Clyde.

Ron Smith, Kansas Bar Association, appeared in opposition to Senate Bill 225. He stated if the bill is enacted as introduced, Kansas perhaps becomes the most conservative state in the country in terms of its general statutes of limitations and statutes of repose. It creates the unique philosophy that if a person is injured partially because a design defect in the automobile caused an accident, and that accident occurred four years and one day after the car was purchased, that person has no opportunity to sue for damages. The car might still be under a new car 5-year warranty. You could get the car fixed, but get no damages for the injury of your child. A copy of his testimony is attached (See Attachment II). He stated the American Tort Reform Association does not recommend a statute of limitations even remotely familiar with Senate Bill 225.

Wayne Stratton, Kansas Medical Society and Kansas Hospital Association, testified in opposition to Senate Bill 285 and Senate Bill 364. He stated in 1976 and again in 1986 the screening panel procedure was extensively reviewed, and at both times the legislature believed that its purpose was to quickly and expediently allow determination based solely upon the record and the written contentions of the parties as to whether there was a deviation from the standard of care which caused injury to the plaintiff. The assessment of attorneys' fees will rarely, if ever, be done against a plaintiff. Plaintiffs in medical malpractice cases all have one thing in common, they have had a poor outcome and usually are impaired. A copy of his testimony is attached (See Attachment III). Mr. Stratton added I have been involved in panels that have been resolved in 90 days. He said he was surprised to hear yesterday some panels take two to three years to resolve matters.

Dennis Clyde, Kansas Trial Lawyers Association, testified in opposition to Senate Bill 364. Mr. Clyde stated in effect, Senate Bill 364 will serve to prolong and exaggerate the cost and expense of litigation. Screening panels will become the rule which will add additional costs to every claim and, in many cases, will most likely be tried solely because of the opportunity to recover attorneys fees. The genesis of statutes of limitations and the resulting constitutional analysis of such statutes appears to allow differentiation of time limits among various torts, providng there is a rational relationship to the legislative goal and the limitations themselves are not arbitrary or unreasonable. Farley does not mandate a change in the present law. This committee should realize that the present statute, K.S.A. 60-513(c), has worked well and has provided malpractice insurers with the predictability necessary to write and evaluate policies. A copy of his handout concerning statutes of limitations for Medical Malpractice Actions After Farley V. Engleken is attached (See Attachment IV).

The meeting adjourned.

Copy of the guest list is attached (See Attachment V).
Copy of a letter from the Kansas Society of Architects is attached (See Attachment VI).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-21-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
William C. Rein	Topeka	KDHE
Ron Smith	"	Ks Ran Assoc
Michelle Ryder	Hays	Close-Up Kansas
Jenny Clapp	Hays	Close-Up Kansas
Allison Bump	Hays	Close-Up Kansas
Kelly Brungardt	Hays	Close-Up Kansas
Chrissy Roth	Hays	Close-Up Kansas
Stephanie Corn	Eudora	Close-Up Kan
Jason A. Fish	Eudora	close up KANSAS
Dan Grodicks	Eudora	Close Up Ks
Jason Buckley	Eudora	Close-Up Ks
Tracey Hennikson	Eudora	close-up ks
Jim Gabriel	Eudora	Close-up
Melanie Dean	Eudora	close-up
Amy Arbuckle	Hutchinson	Close-up
Cherie Ahrman	Hays	"
Jennifer Schwalb	Hays	Close-Up
Joel Isaac	Hays	Close Up
Don Lindsey	Osawatomie	KTA
K.G. Frey	TOPEKA	KTLA
Kara Hartzler	Hesston	Close-Up Kansas
Kerrie Price	Hesston	Close-Up Kansas
Laura Gerber	Hesston	close-up Kansas
Corey Quiring	Hesston	Close Up Kansas
Carl Boyer	Hesston	Close Up

Attachment V
Senate Judiciary Committee
3-21-89

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-21-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Michelle Holt	Hutchinson	Close-Up
Kathy Shaw	Hutchinson	Close-Up Kansas
Teresa Gleason	Topeka	KDHE
Virginia Hutson	Topeka	KDHE
Bob Corkins	Topeka	Ks. Hospital Assn.
Robert Menly	Topeka	Spkr Pro Tem Ofc
Kent Roth	Great Bend	Physicians National
Connie Biggs	Lawrence	
Dave Hansen	Lawrence	
Andy McCullough		
Betty Wiegers	Topeka	LWV
Sheila Frahm	"	St Senate
Jon Bahr	Topeka	Kansas Humane
[illegible]	Overland Park	KTLA
C.W. Hetherington	Topeka	Ks. Head Injury Assn.
Christine Chung	Manhattan	Kansas Close-Up
Brad Smoot	Topeka	KTRC
Harold Rienow	Topeka	KAOM
Greg Morris	Hutch	Close Up Kansas
Michael Zyskowski	Hutchinson	Close-Up
Brian Kelly	Butler	Close-up
Ted Fay	Topeka	Ks Ins. Dept
Bob Hayes	Topeka	Ks Ins. Dept
Sue Boyd	Overland Park	
[illegible]	Ogden	KHA/KNS

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-21-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Bydett Loomis	Lawrence	KANA

POSITION PAPER ON SENATE BILL NUMBER 225
AGAINST THE PROPOSED CHANGE IN THE STATUTE OF LIMITATIONS

BEFORE THE SPECIAL COMMITTEE ON JUDICIARY

DENNIS M. CLYDE APPEARING ON BEHALF
OF THE KANSAS TRIAL LAWYERS ASSOCIATION

An amendment to K.S.A. 60-513 to enact a complete bar to the bringing of a tort action more than ~~two~~ Four years after the exact date of the negligent act, regardless of the circumstances, cannot be supported by any sense of fair-mindedness or logical reasoning.

In its present form, the statute provides that a tort action shall be brought within two years. However, the statute provides certain limited and very important necessary circumstances under which the two year limitation can be extended. Specifically, in relevant part the statute (K.S.A. 60-513(b) provides that if

> . . . if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

Prior to the enactment of sub-section (c) by the legislature in 1976 any extension of the two year statute of limitations against negligent health care providers, as in all other negligence actions, was governed pursuant to K.S.A. 60-513(b).

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Sub-section (b) was enacted in 1963 and sub-section (b) is essentially identical to sub-section (c) except that under sub-section (b) the period of limitations could be extended up to as much as 10 years beyond the time of the act giving rise to the cause of action under the same circumstances as set forth in sub-section (c) above.

In 1976 the legislature singled out health care providers for a reduced statute of limitations and sub-section (c) was enacted in 1976 as part of a larger package of medical malpractice legislation. Therefore, prior to 1976 a negligence action against a health care provider was governed by the same statute of limitations as all other negligence actions and the effect of sub-section (c) was only to provide that no action against a health care provider shall be commenced more than four years after the negligent act. In effect, health care providers have already been given special interest protection and selective treatment due to the enactment of sub-section (c) in 1976.

Prior to 1063 (the enactment of the Code of Civil Procedure) the statute of limitations for all negligence actions was strictly limited to two years. Prior to 1963 there was no exception or extension of the limitation period where the fact of the negligent act was not discovered at a date occurring much later after the date the negligent act had actually been committed. Therefore, in cases like McCoy v. Wesley Hospital and Nurse Training School, 188 Kan. 325, 362 P.2d 841 (1961) and Hill v. Hayes, 193 Kan. 453, 395 P.2d 298 (1964) the plaintiffs were

barred from bringing their action for the negligent rendering of health care services.

In McCoy v. Wesley Hospital and Nurse Training School, supra, plaintiff was hospitalized for the removal of his prostate. Following surgery, and while the plaintiff was heavily sedated and unconscious, he was permitted to fall from his hospital bed as a result of which his hip was broken. Not only did the plaintiff fail to discover that he had been allowed to fall from the bed while he was unconscious, or that his hip was broken, but not even the hospital discovered that the plaintiff's hip had been broken in the fall for several months. Plaintiff brought his cause of action against the hospital within two years from the date he discovered that he had fallen from the bed while unconscious and that his hip had been broken, but it was more than two years after the date he fell from the bed and broke his hip. Under the former statute, the Kansas Supreme Court was forced to find that plaintiff's cause of action was barred by the statute of limitations.

In Hill v. Hayes, supra, the plaintiff was originally operated on by the defendant physician for an injury suffered to his left shoulder. Following the surgery plaintiff's injury was unresolved and he continued to have further complications for a period of two years during which he was continuously treated by the physician who had performed the surgery and was continuously reassured that his shoulder would heal completely. After having reposed trust in his physician and confidence of the doctor's

competence and ability, the plaintiff finally sought examination and treatment by another physician more than two years after the surgery only to find that the original surgery had been negligently performed. Again, under the former statute, the Kansas Supreme Court was forced to find that plaintiff's cause of action against the negligent physician was barred by the strict two year statute of limitations.

There are many more cases dealing with similar, or even more egregious circumstances, under which an injured victim's claim for relief was precluded by the pre-1963 statute of limitations. The courts and the public were continuously frustrated with the obvious harsh results of such a rule and, therefore, it was as a result of the unfairness of this harsh rule that in 1963 the legislature enacted sub-section (b) to K.S.A. 60-513 which extended the statute of limitations in those cases where the "fact of injury" could not be discovered by the injured party for sometimes months, or even years, after the actual occurrence of the negligent act which gave rise to the injury. By adopting Senate Bill 225 the legislature, in effect, will be taking a 25 year step backwards. The wisdom of the present statute has already been debated and decided. I strongly submit that it is unjust and incredulous that the special committee and the legislature even be asked to undertake the burden and untenable position of second guessing the wisdom and propriety of the prior legislatures. There is simply no basis to un-do the current statute which was specifically enacted to cure the many prior

years of harsh results and unfairness and determined by the 1963 legislative session.

Furthermore, the Kansas Supreme Court has repeatedly acknowledged that a shorter limitation period can violate state constitutional provisions protecting the right to recover damages for injuries if the limitation period is so short as to extinguish the right. Stephens v. Schneider Clinic Association, 230 Kan. at 115, 631 P.2d 222 (1981). Certainly, it seems clear that a reduction in the statute of limitations which does not allow for an extension of the statute of limitations in those cases where the plaintiff was unable to discover the negligence within the two year period, will effectively act to completely deny the injured victim the right to recover damages for injuries.

In conclusion, I respectfully submit that Senate Bill 225 is absolutely unwarranted and totally defies and ignores the logic and wisdom recognized by the 1963 legislature, as well as the sound reasoning as artfully described by the honorable members of our judiciary throughout the past several decades. A further reduction in the statute of limitations will only serve to arbitrarily deny damages to injured victims by effectively cutting off their right to relief in those cases where the injury was hidden and undiscoverable, as is often the case, for a substantial period of time.

A SECOND CENTURY OF SERVICE

1882

KANSAS BAR ASSOCIATION

Senate Judiciary Committee
SB 225
March 21, 1989

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

If SB 225 is enacted as introduced, Kansas perhaps becomes the most conservative state in the country in terms of its general statutes of limitation and statutes of repose. It creates the unique philosophy that if a person is injured partially because a design defect in the automobile caused an accident, and that accident occurred four years and one day after the car was purchased, that person has no opportunity to sue for damages. None at all. Yet the car might still be under a new car 5-year warranty. You could get the car fixed, but get no damages for the injury to the flesh and blood of your child.

Under our product liability statutes, the presumption is the useful safe life of a product is ten years. There has been a recent case in the state supreme Court that held a man with asbestosis could not sue for damages in Kansas if the asbestosis was discovered more than ten years after he was exposed. This came about because of a 1987 law that this legislature passed to protect Homebuilders from latent defects in a house that later caused property damage. If you enact SB 225 you shorten that span to 4 years, not 10. And you raise the legitimate question of whether the product liability statute imposing a ten year statute of repose is any longer applicable. The 1987 action appears to have created a 10 maximum statute of repose, meaning if you discover your injury ten years after the activity giving rise to your injury, you cannot sue.

The physician who negligently reads a pathology slide that shows a melanoma and doesn't tell his patient, if the secret can be kept for four years, SB 225 says the doctor is absolutely immune from liability.

If a lawyer writes a will and leaves out the heir, but the person making the will lives four years after the will is drawn, that immunizes the lawyer for any negligence in the naming of heirs in the will. In fact, the heirs can't find the error because Grandma hasn't died yet.

The time limit for prosecution for embezzlement is two years after the crime is discovered. If the embezzlement takes place over a period of years undetected, the criminal prosecution could still be brought. Yet SB 225 says civil liability for recovering the money from the embezzler ends if the thief can conceal the fact of the crime for four years and if the court won't buy the argument that this was a continuous tort.

Attachment II

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Why does the state have an interest in protecting criminals from civil liability that is even covered by insurance anyway?

And this law, had it been in effect in Missouri at the time of the Hyatt Regency disaster, means of those people who had their legs amputated at the accident site could not have collected a dime from the engineers, architects and others responsible for that disaster.

This bill is rather draconian in its sweep. It is not tort reform. It is not aimed at marginal suits because its main effect is to clip meritorious lawsuits out of the legal system simply because the claimant has not yet had time to discover the injury.

Jerry Slaughter was the only proponent yesterday. His basic argument is that making the discovery rule four years for all types of actions in KSA 60-513 provides "equal protection," as if that was something magnanimous on his part. All Kansas now enjoy a ten year discovery rule except adults in medical malpractice.

Equal protection has never been the law's concern with statutes of limitation and statutes of repose. The question has always been whether such statutes provide due process and the right to a remedy under our constitution. All of the cases that are included in this paper are cases that tossed out narrow discovery rules and statutes of limitation -- not because of equal protection but because of due process.

Example. The state could probably draw a statute that says a person must file an automobile action within six months after a car accident. Most accident victims could comply with it because a car accident is easy to discover. If the same law said that heirs had six months from the date a will was written to determine if they were injured by the lawyer's negligence, you have provided equal protection but unless the testator dies within six months there is no way the heirs can learn they've been negligently left out of the will. Their concern is due process.

Certain types of negligent conduct are not discoverable in four years. Toxic positioning, for example. Exposure to carcinogens is another. SB 225 these people from coming to a court and seeking redress of grievances. The only way people can protect themselves under this new rule in order to discover whether negligence has occurred within four years is to always hire another doctor to review the work of the treating doctor, or to always hire another lawyer to immediately review the work of the lawyer who drew the will. Such duplication is expensive and impractical.

Purpose of Statutes of Limitation and Repose

Statutes of limitation define the period of time after an injury is discovered within which an injured party must initiate a suit or be barred. A statute of repose prohibits filing of claims more than a specified period of time after the date of manufacture or sale of the product or the provision of services -- regardless of whether the injury is discovered.1/

SB 225 is both a statute of repose -- and limitation. The statute of limitation is two years. The state of repose is four years.

Statutes of limitation were intended to bar actions which are not otherwise barred by repose statutes but on the theory the defendant need not defend a claim when the evidence has become "stale."2 / The "discovery" rule which originated about 1969 held statutes of limitation do not apply until the plaintiff has discovered he has suffered injury, or by the exercise of diligence, should have discovered it.3 / Statutes of repose were developed, legislatively, primarily so there isn't an unlimited discovery rule.

K.S.A. 60-513(b) and (c) merges both theories. The statute limits the Kansas "discovery period" to two years in medical malpractice actions by adults, ten years for other actions listed.

Exceptions to SB 225

There are several exceptions. Ordinarily the statute of limitations does not begin running until the doctor-patient relationship ends. A negligent doctor has a fiduciary relationship with the patient, one built on trust, and if the relationship is still ongoing or there is a breach of that trust, the statute of limitation may not begin running until the end of the relationship. In Nebraska, the Supreme Court ruled October 28th the state's two-year medical malpractice statute of limitation did not apply to a doctor who allegedly misrepresented the cause of an infant's death in 1976. In Muller v. Thaut, ___ NW2d ___ (Oct., 1988), the doctor allegedly told the parents of a daughter who died at birth that the child's lungs had congested and respiratory problems caused the death. In 1985, the Mullers obtained a copy of their daughter's death certificate and found "brain hemmorrhage caused by traumatic injuries" was listed as the cause. Justice Robert Burkhard said that fraudulent concealment of negligence, if proven, voids the time limit.

In Ohio, the Supreme Court recently ruled that a four year statute of repose for medical malpractice was an unconstitutional denial of the right to a remedy under their constitution.4 / What is important about that Ohio decision is that the 1859 Kansas constitution, and our bill of rights was copied almost verbatim from the 1848 Ohio constitution, especially §18 which guarantees a remedy for personal injury. Our four year statute of repose for medical malpractice has been upheld. Ohio did not.

Constitutionality of a Narrower Statute

In Marbury v. Madison,5 / Chief Justice John Marshall stated "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

Statutes of limitation constitute a method by which those receiving an injury can be denied these basic protections. Limitations are, however, subject to "reasonable" legislative regulation, but not arbitrary regula-

tion. This is because access to the courts for resolution of civil disputes between private parties is protected by First and 14th amendments.6 /

Our current medical malpractice "two plus two" statute of limitations is constitutional.7 / However, the case also indicates that a statute of limitations governing medical malpractice actions is "not violative of due process where the time to bring suit is reasonable." The corollary is if the time limitation is unreasonable, then a straight two-year statute is contrary to due process considerations and probably will be struck down as unconstitutional on a case by case basis.

Presumably, the court would look to the nature of the injury as to whether the "injury" could reasonably be determined within two years of the provision of medical services. Medical malpractice is a complicated tort both legally and medically. Dr. Halprin, of Wichita, testified last summer as a victim of medical malpractice. A pathologist missed a melanoma when reviewing Dr. Halprin's slide. It was Dr. Halprin's opinion that there should be no statute of limitation on medical malpractice, a discovery rule only.

New Hampshire ruled that the statute imposing a shorter statute of limitation was unconstitutional because there was no fair and substantial relation to the object the legislature sought to curb.8 /

Arizona had enacted a straight 3-year limitation statute in medical malpractice cases, without a discovery provision. Their Supreme Court struck the law as infringing on the fundamental right to bring a lawsuit.9 / The court held:

> "The abolition of the discovery rule for some medical malpractice claimants is valid only if its serves a compelling state interest and is necessary to the attainment of that interest. . . . [A] partial abolition of the discovery rule in medical malpractice claims has little relevance to promoting meritorious claims and discouraging frivolous ones, nor in promoting settlement or decreasing the cost of litigation. . . . It is difficult to find a compelling or even legitimate interest in [abolishing meritorious claims].
>
> " . . .The state has neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by, the judicial system. If such a hypothesis were once approved, any profession, business or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts by those whom they have damaged. Under such a system our constitutional guarantees would be gradually eroded, until this state became no more than a playground for the privileged . . ."10 / (emphasis added)

The Texas Supreme Court ruled a 2-year statute of limitation in legal malpractice did not "accrue" (and thus begin to run) until the legal injury is actually discovered.11 / Laypersons rely on doctors and lawyers --

professionals -- for advice and services. A layperson, by definition, does not have the training to determine when malpractice has occurred. The fiduciary relationship between a lawyer and client (or doctor and patient) creates a system of trust based on confidentiality, and if negligence occurs during that relationship, the client is ordinarily in no position to make an independent determination ("discover") the negligence.12 / The Texas Supreme Court reasons the only way a person could protect himself against professional malpractice without a discovery rule is to hire a second professional to physically oversee the work of the first -- a situation that is intolerable in the medical community, duplicates costs, and is impractical.13 /

The Kansas legislature has attempted narrow statutes of limitation before, and the Kansas Supreme Court has struck them on due process and equal protection grounds.14 / The court held:

> "For a statute (of limitation) to be a proper exercise of the police power, it must be reasonable in its operation upon the person whom it affects, must not be for the annoyance of a particular class, and must not be unduly oppressive, discriminatory, capricious, whimsical or arbitrary. . . . Stated in a rather blunt manner, the legislature cannot use a cannon to kill a cockroach."15 /

Our court declared that Kansans had a "fundamental constitutional right to have a remedy for injury to person or property by due process of law."16 / Citing other cases which distinguish between common law actions at law (such as medical malpractice) the court held that with statutory causes of action, e.g. wrongful death, since the legislature created the cause of action the legislature can regulate when it is invoked, or if it is invoked at all.17 / In Ernest, the court concluded a 60-day notice of claim statute " . . . creates an unreasonable barrier and impediment to a civil remedy which simply is not fair and reasonable under the circumstances."18 /

Other Approaches

The American Tort Reform Association has been active in reforms of the tort system. The Kansas Tort Reform Association is affiliated with ATRA. The ATRA workbook for legislators discusses statutes of limitation and repose. They offer a model bill regarding statutes of limitation in all torts. ATRA's legislation keeps the concept that all torts should have a 2-year statute of limitation that begins from the time "the injury, disease, disability or death is or, in the exercise of reasonable diligence, should have been discovered by the plaintiff."

ATRA recommends: "There is a great need for a uniform statute of limitation for tort claims, based on the date that the plaintiff discovered, or in the exercise of reasonable care, should have discovered both the injury and cause of the injury." Thus, the chief proponents of tort reform in this country come down squarely on the side of a full discovery rule.

Insurance Commissioner Fletcher Bell appointed a blue ribbon commission in 1985 to look into the medical malpractice problem. While it makes other recommended tort law changes, the commission did not recommend changes to the statute of limitation.

The American Bar Association's Action Commission to Improve the Tort Liability System made its report to the 1987 ABA convention in February, 1987. While they discussed a number of tort reforms, the statute of limitations was not considered as an appropriate problem area.

In January, 1986, the Colorado Governor's Special Task Force on Tort Liability and Insurance issued its report on Colorado's tort liability law. Their committee agreed there should be uniformity of the time limitation interval, primarily because nonuniformity results in "instability in the law because it encouraging interest groups to make repeated attempts to amend their particular limitation period." The Task Force could not agree except that "one year limit" was too short "and four years was too long." The narrower one year limit has the same problems a straight two-year limit, and the problems were:

1. Shorter periods encourage the precipitous filing of lawsuits;

2. A "cooling off" period between the negligent incident and the anger of the victim is desirable. With an appropriate cooling off period, the claim may not be filed, which is good for the insurance side of the equation. A short statute of limitation shortens the action time, and heightens that anger.

Interim Study

The 1988 interim Judiciary committee that studied the need for further reduction of the statute of limitations concluded that no such action be taken.

KBA Recommendations

The Kansas Bar Association has a policy position generally opposing changes in the statute of limitations unless the proponents of such change can demonstrate a clear and convincing public need for such change and that the change demonstrates clearly defined public benefit. We aren't saying do no further research. You would need to know:

1. How many injuries are discoverable within four years?

2. What kind of injuries are not?

3. How many malpractice claims are filed between the 2nd and the 4th years after the medical incident giving rise to the negligence claim?

March 21, 1989

Re: Kansas Medical Society and Kansas Hospital Association
Senate Bill 285 and Senate Bill 364

Mr. Chairman and Members of the Committee:

My name is Wayne Stratton and I am an attorney practicing in Topeka. I represent both the Kansas Medical Society and the Kansas Hospital Association.

My firm does a considerable amount of defense of personal injury cases, including medical malpractice. The comments that I have with regards to the foregoing bills are based principally upon my recollection of the reasons for the creation of the medical malpractice screening panels and our experience with these panels.

Senate Bill 285 would appear to make a modest change in the law to permit the Committee to consider the deposition of the health care provider involved. In actuality, this is a fundamental change and we do not support this legislation for the following reasons:

1. The screening panel procedure was extensively reviewed in 1976 and again in 1986, when the current amendment allowing the admission of the results was adopted. At both times, the Legislature believed that its purpose was to quickly and expediently allow determination based solely upon the record and the written contentions of the parties as to whether there was a deviation from the standard of care which caused injury to the plaintiff. It was recognized that there may be situations in which the panel could not reach this determination. It was anticipated that it would be done prior to the commencement of any lawsuit.

2. For the most part, the majority of screening panel requests have been from plaintiffs. Under the present method of funding, the costs involved gives a claimant an opportunity to

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have a professional review of his claim on an inexpensive basis. If he does not prevail, the health care provider pays the costs of the panel members.

3. Over the years, there have been suggestions that depositions, written statements or reports of other experts should be submitted and utilized by the panel. These have generally been rejected for the reason that they violate the original concept of the statute. It was never intended as, nor should it be, a mini-trial in which panel members attempt to resolve conflicting issues of fact. Even if the statute were broadened to allow the plaintiff's deposition to be used, as well as the defendant health care provider, the approach would be more balanced but would still just be a mini-trial or swearing match between parties and the panel would be left with trying to resolve contested issues of fact.

4. The rendition of health care is unlike almost any other service in that contemporaneous records are maintained as the treatment is afforded. In many instances, decisions <u>can</u> be made by the Committee based upon the record.

5. Ordinarily, lawyers do not question their own client at a deposition. If the suggested procedure is followed, defense counsel will not know if the deposition will be used for discovery or as evidence in a screening panel case.

Senate Bill 364 provides that in some instances attorneys' fees could be assessed following the determination of a screening panel.

This is not a new concept. The Legislature has explored this in prior years. I believe the reasons why such legislation has never been enacted previously, still exist:

1. The assessment of attorneys' fees will rarely, if ever, be done against a plaintiff. Plaintiffs in medical malpractice cases all have one thing in common, they have had a poor outcome and usually are impaired. They frequently are the object of sympathy and few of any judges will be inclined to make an award against a plaintiff who has sought to exercise his rights to proceed with litigation.

2. Occasionally, malpractice does occur and it may be documented by the opinions of three physicians, who serve on the panel. This does not mean, however, that there is justification for an award of attorneys' fees, as defense counsel may earnestly

be attempting to settle the case but is unable to do so at a realistic level. The adoption of this bill will only compound the situation and discourage settlement.

In summary, we submit that neither bill will help alleviate the fundamental problem of the severity of the medical malpractice exposure and both potentially will increase the cost with corresponding premium increases.

The Statute of Limitation Reduction Act

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. [Short title.]

This Act may be cited as The Statute of Limitation Reduction Act.

Section 2. [Limitation period.]

In any action for (A) personal physical injury, illness, or death; (B) mental anguish or emotional harm; (C) damage to property, except as such actions are governed by the Uniform Commercial Code; (D) wrongful death; or (E) any loss of consortium or services or other loss deriving from any type of harm described in clauses (A), (B), (C), or (D), the plaintiff must commence a cause of action within two (2) years of the time that the injury, disease, disability, or death is or, in the exercise of reasonable diligence, should have been discovered by the plaintiff.

Section 3. [Legal disability.]

The time limitations in this Act shall apply to all persons, regardless of minority or other legal disability.

Section 4. [Severability clause.]

Section 5. [Repealer clause.]

Section 6. [Effective date.]

(American Tort Reform Association
Model Bill)

Issue: Changing the adversarial practice of law.

KBA Position: *The Kansas Bar Association OPPOSES changes in the existing adversarial tort law system including, but not limited to (1) rules governing residency of expert witnesses; (2) creation of dollar caps on nonpecuniary losses in personal injury actions; (3)changes in the collateral source rule regarding insurance proceeds or other economic considerations not amounting to post-injury personal mitigatin of damages; (4) changes to statutes of limitation, or (5) overall limits on awards unless proponents of such changes can demonstrate a clear and convincing public need for such change and such change can demonstrate a clearly defined public benefit.*

Rationale: Fault-based tort law grew from our common law heritage, with some statutory modifications. While the antiquity of a law does not guarantee its reasonableness, it does insure that reasonable minds have discussed the underlying theories and the law.

The purpose of our tort system is to maintain a system of "individual justice." There are two goals: (1) the wrongdoer compensates the victim of such wrongdoing so that society in general will not have to provide care; and (2) deter the defendant from repeating such socially-undesirable conduct.

While modifications to a pure common law system have been made in the past, none have evolved without strong public involvement and a well-studied look for alternatives. The public must derive some basic and substantial benefit from tort changes before such change is warranted. Changes often involve tradeoffs that the public must recognize and understand before such change will have lasting public acceptance.

While KBA is not unalterably opposed to changes in the common law, we believe it should not happen without an exhaustive legislative process of review which hears all sides and gathers supportive evidence needed to resolve these complex issues.

KANSAS
TRIAL LAWYERS ASSOCIATION

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TESTIMONY
IN OPPOSITION OF S.B. 364

DENNIS CLYDE
FOR THE
KANSAS TRIAL LAWYERS ASSOCIATION

A screening panel at which a Health care hrovider is in essence judged by his or her colleagues, is not a substitute for a full trial on the merits. In a trial in a law suit both sides are given the opportunity to present all of the evidence after having had ample time and ability to conduct a thorough search for the truth through discovery. Discovery by way of depositions, interrogatories and request for the production of documents, is used to find relevant and admissible evidence which tends to prove or disprove the parties theories and factual allegations. Often, this process takes months or even years, and important evidence is sometimes obtained only through court orders which compel disclosure. Thereafter, when the case is tried it is tried to a jury of twelve fair and impartial persons with hopefully no bias or predisposition toward either side.

A screening panel consists of three doctors. In theory the statute provides that each side pick a doctor and those two doctors in turn pick a third doctor to sit on the panel. In fact, and in practice, all members of the screening panel are colleagues of the health care provider who is the subject of the action. Simple reason and logic dictates that the dice are obviously loaded in the favor of the health care provider in the screening panel process. The screening panel makes its decision based on little more than the medical records of the patient and prior to the claimants ability to utilize the discovery process. The outcome of a screening panel has come and, therefore, has little to do with the realistic evaluation of a claim.

Presently in Kansas our legal system does not contemplate the award of attorney fees to prevailing party as a general rule. A general rule is, rather, that attorney fees are not recoverable unless it is specifically authorized by statute. SB 364 is an effort to deviate from the general rule and, in fact, give attorneys fees to the prevailing party. Award of attorneys fees is not based upon the fact that the party prevailed in the lawsuit, but is based on the vote of the screening panel. If the Legislature believes that the award of attorneys fees to the prevailing party in litigation has merit, then a bill should be introduced which does just that in all cases, not just health care provider cases in which screening panels were utilized.

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KSA 60-2007 already allows either party to seek the recovery of attorneys fees and costs in situations involving frivolous claims or defenses. SB 364 purports to follow the language of KSA 60-2007, but does not require the court to actually make such findings in order to award attorneys fees. As written, SB 364 would only require the court to take into consideration the factors enumerated in KSA 60-2007. There is a distinct difference in actually requiring such findings in order to award attorneys fees and simply telling the court to take such factors into consideration.

In effect, SB 364 will serve to prolong and exaggerate the cost and expense of litigation. Screening panels will become the rule which will add additional costs to every claim and, in many cases, will most likely be tried solely because of the opportunity to recover attorneys fees. By the time the case is ready for trial, only one side stands to gain on the attorney fees issue in the event of trial, that being the side on whose favor the unanimous vote was made by the screening panel. This will leave little incentive for settlement.

Thank you.

Wayne T. Stratton
Goodell, Stratton, Edmonds & Palmer

STATUTES OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS AFTER FARLEY V. ENGELKEN

During the 1988 Legislative Session Senate Bill 626 was introduced. Senate Bill 626 attempted to change the present statute of limitations for medical malpractice claims. Although the statutory time limit to file claims would generally be two years, Senate Bill 626 would expand the allotted time by providing that the time begins to run when the action first causes substantial injury rather than running from the date of the action.

Apparently, the underlying purpose of Senate Bill 626 is to conform medical malpractice statutes of limitations to statutes of limitations for other personal injury torts. The Farley v. Engelken, 241 Kan. 663 (1987) decision seems to be the basis for the bill. However, Farley does not necessarily require such action.

In Farley v. Engelken, the Kansas Supreme Court held that K.S.A. 60-3402 violated the equal protection clause of the Kansas Constitution by allowing health care providers to introduce evidence of collateral source benefits when other tortfeasors were prohibited from introducing evidence of this type. The reasoning used by the Supreme Court in reaching this decision must be carefully examined before enacting changes in the present statute of limitations.

Even though the Court premised its decision on equal protection, it is apparent that Section 18 of the Kansas Bill of Rights was utilized to reach the final result. Section 18 guarantees the right to a remedy by due course of law. The Court said that introduction of collateral source benefits impairs a remedy since the jury, in evaluating the evidence, would find that the injured party is not entitled to full compensation from the tortfeasor. Since the right to a remedy was sufficiently threatened, the Court used a more stringent standard when it evaluated K.S.A. 60-3403.

In Farley, the Court distinguished its decision from the cases upholding shortened statutes of limitations in medical malpractice actions. The Court stated that statutes of limitation do not prevent a party from obtaining a full remedy from a negligent tortfeasor.

Statutes of Limitations are genetically different from the collateral source rule. The collateral source rule specifically existed at common law. The common law predecessor of statutes of limitations is the doctrine of latches, which basically provides

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that an injured party cannot wait too long a time to sue. Statutes of limitations generally follow this broad policy by specific legislative enactment

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only be legislative grace and to be subject to a relatively large degree of legislative control.

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1944) (citations omitted).

Modern statutes of limitations are purely statutory creations. The legislature's power to enact such statutes has long been acknowledged by the courts. The Kansas Supreme Court recognized this distinction when it found K.S.A. 60-513(c), the present medical malpractice statute of limitations, constitutional. The court in Stevens v. Snyder Clinic Ass'n, 230 Kan. 115 (1918) found that there was no violation of equal protection in the special statute of limitations for medical malpractice actions. See also Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984) (following Stevens).

The genesis of statutes of limitations and the resulting constitutional analysis of such statutes appears to allow differentiation of time limits among various torts, providing there is a rational relationship to the legislative goal and the limitations themselves are not arbitrary or unreasonable. Farley does not mandate a change in the present law. This committee should realize that the present statute, K.S.A. 60-513(c), has worked well and has provided malpractice insurers with the predictability necessary to write and evaluate policies.

THE KANSAS SOCIETY OF ARCHITECTS, AIA

A Chapter of the American Institute of Architects

The Jayhawk Tower 700 Jackson, Suite 209 Topeka, KS 66603 913•357•5308

March 16, 1989

The Honorable Wint Winter, Jr. and
Members of the Senate Judiciary Committee
State Capitol
Topeka, KS 66612

Dear Senator Winter and Members of the Committee:

The Kansas Society of Architects supports Senate Concurrent Resolution 1610 and urges you to support its passage.

The Kansas Society of Architects is part of the Kansas Coalition for Tort Reform. We have been supportive of the changes the legislature has made, to date, to overhaul our outdated tort system.

Although the Kansas Supreme Court ruled that the Legislature could not limit the amount of money awarded to plaintiffs in personal injury cases without first amending the state constitution, we strongly support that constitutional amendment.

We believe that the voters of Kansas want the right to decide if the courts have the exclusive authority over tort liability. We seek your support in a favorable vote for Senate Concurrent Resolution 1610.

The constitution of Kansas belongs to the people. We encourage you to let the people decide.

Sincerely,

Trudy Aron

Trudy Aron
Executive Director

Attachment VI
JJC
3-21-89 A.M.