Approved 3/5/90
Date

MINUTES OF THE SENATE COMMITTEE ON FINANCIAL INSTITUTIONS AND INSURANCE.

The meeting was called to order by SENATOR RICHARD L. BOND
Chairperson at

9:00 a.m./~~p.m.~~ on WEDNESDAY, FEBRUARY 28, 19 90 in room 529-S of the Capitol.

All members were present ~~except~~:

Committee staff present:
Bill Edds, Revisors Office
Bill Wolff, Research Department
Louise Bobo, Committee Secretary

Conferees appearing before the committee:
Lori Callahan, Kansas Medical Mutual Insurance Company
Robert Frey, Kansas Trial Lawyers

Chairman Bond called the meeting to order at 9:15 a.m.

SB 747 - Relating to exemptions from coverage for the Health Care Stabilization Fund.

Lori Callahan, Kansas Medical Mutual Insurance Company, appeared before the committee in behalf of the above-mentioned measure. Ms. Callahan informed the committee that, under present statute governing the Health Care Stabilization Fund, a defense is provided to the health care provider accused of sexual misconduct but a claim will not be made if a judgment is entered against the health care provider for acts deemed "repugnant to public policy." This policy is based upon common law that prohibits insurance for acts abhorant to the public welfare. Under the proposed bill, the Fund will not be liable to pay but must provide a defense. (Attachment 1)

Discussion followed Ms. Callahan's testimony with a committee member concerned about how prevalent this whole area of misconduct was. Ms. Callahan said that her organization has had no claims but they are a new group and she thought the problem should be addressed before it did become a major problem. Another member inquired who pays the claim if the Fund does not and Ms. Callahan stated that the doctor must pay the claim himself if he loses his case although the Fund will defend him. She added that most physicians subscribe to umbrella policies. Ted Faye, Kansas Insurance Department, remarked that the Department felt that they should not have to pay such claims, however, the courts are usually lenient and the settlement quite large if the doctor is determined to be guilty. Mr. Faye also informed the committee that this type of sexual misconduct was the only medical malpractice act that could be contrived between patient and doctor.

Robert Frey, Kansas Trial Lawyers, informed the committee that his organization strongly disapproved of this measure. Mr. Frey stated that the reason for any mandatory insurance program is to assure that the patient that has been wronged will have adequate funds from which to seek compensation. He added that another reason for opposition to this bill is that the Legislature should not be involved in the writing of insurance policies. Mr. Frey concluded by stating that the greatest injustice would be that a wronged patient could not be compensated for an injustice as they are supposed to be under the Health Care Stabilization Fund. (Attachment 2)

Discussion followed Mr. Frey's testimony. A committee member theorized that if proper criminal penalties were in place, then these acts might not occur but Mr. Frey replied that it was very difficult to establish a criminal law intent. Another committee member inquired if the Fund would be required to defend if the charge was alleged sexual misconduct. Ms. Callahan replied that, even with this proposed legislation, the Fund would be required to provide a defense but not to pay claims.

There being no further conferees, the Chairman announced the hearing on SB 747 closed. The committee expressed concerned reservation about the language referring to the duty to defend and the duty to pay. Chairman Bond requested Mr. Faye to work with Staff on an amendment which would clarify this gray area.

The meeting adjourned at 10:05 a.m.

GUEST LIST

COMMITTEE: FINANCIAL INSTITUTIONS & INSURANCE COMMITTEE DATE: Wed. Feb. 28, '90

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Lisa Callahan	Topeka	KAMMCO
RG Drew	TOPEKA	KTLA
JEFF SONNICH	TOPEKA	KNLSI

KaMMCO

KANSAS MEDICAL MUTUAL INSURANCE COMPANY
AND
KANSAS MEDICAL INSURANCE SERVICES CORPORATION

February 28, 1990

TO: Senate Financial Institutions and Insurance Committee

FROM: Lori M. Callahan
Legislative Counsel

SUBJECT: S.B. 747

The Kansas Medical Mutual Insurance Company, KaMMCO, is a Kansas, physician-owned, non-profit professional liability insurance company formed by the Kansas Medical Society. KaMMCO currently insures 400 Kansas doctors and has capitalized and anticipates insuring in the next few months 400 more. KaMMCO feels it is in a unique position to provide insight to the Kansas legislature with regard to professional liability insurance for doctors and, therefore, appreciates the opportunity to testify today.

The Courts have long held that insurance contracts will not be construed to insure against activities which are repugnant to public policy. Thus, public policy has precluded liability insurance for punitive damages, criminal acts, as well as acts of clearly unprofessional conduct. This serves to punish those for participating in activities which are abhorant to the public welfare.

Currently in Kansas, medical malpractice insurance carriers may not exclude from coverage items which the Health Care Stabilization Fund may not exclude from coverage. The Health Care Stablization Fund is, of course, governed by statute. While the Health Care Stablization Fund has made a determination to provide a defense for health care providers who are alleged to have engaged in sexual activity, the Health Care Stabilization Fund does so under a reservation of rights, meaning that while they will provide a defense to the health care providers, they will not pay any claim if a judgment is entered against the health care provider for such acts. This is based upon the common law that prohibits insurance for acts repugnant to the public policy and clearly outside professional conduct.

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Attachment 1
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KaMMCO, however, in order to place this exclusion specifically in the contracts with its insureds believes this common law exclusion must be codified. Such codification is the effect of S.B. 747.

S.B. 747 would require the Health Care Stabilization Fund, as well as private medical malpractice carriers, to provide a defense for health care providers alleged to have engaged in sexual activity with their patients, but would not require them to be liable for any claims which might finally be awarded as a result of such allegations. This is the current practice of the Fund and would simply clarify the right of the Fund and the private carriers to such an exclusion. As with punitive damages, under S.B. 747 victims of sexual conduct would not be without recourse, rather, they would be able to recover against the health care provider's assets. At the same time, the state would serve to preclude such conduct by disallowing health care providers from obtaining insurance to avoid being personally financially punished for such activity.

KaMMCO respectfully requests your consideration of this legislation which would serve to codify current practice in the state of Kansas which serves to protect the public policy interests of the state. If there are any questions regarding this, I would be happy to answer them.

KANSAS TRIAL LAWYERS ASSOCIATION

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TESTIMONY
of the
KANSAS TRIAL LAWYERS ASSOCIATION
on

SB 747

February 28, 1990

The Kansas Trial Lawyers Association represents nearly one thousand lawyers and law students in the state of Kansas. Many of the members of the Association represent injured people, some of whom are those who are injured by the negligence of physicians or the employees of other health care providers which acts involve sexual acts or activities.

The Kansas Trial Lawyers Association opposes SB 747 in the strongest possible terms, as being detrimental to the welfare of patients/clients in this state.

The Act and its two provisions do two things. First, it says that the Health Care Stabilization Fund shall in no event be liable for claims against a health care provider due to "sexual acts or activities", and second, permits liability insurance companies to exclude from coverage for health care providers "sexual acts or activities".

The School of Hippocrates (late fifteenth century B.C.) provided the ethical guide of the medical profession more than two thousand years ago. Included within its injunctions are the following: "In every house where I come, I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially from the pleasures of love with women or with men, be they free or slaves."

For more than two millennia physicians have recognized that the relationship involves the risk of inappropriate sexual behavior. Most frequently, sexual encounters between a health care provider and a patient will be found in the psychotherapeutic relationship. It must be remembered that psychotherapy in this state can be practiced by a variety of people, including psychiatrists, psychologists, social workers, ministerial counsellors, and others having some training in the field of psychology. The essence of the therapeutic relationship was recognized in the Kansas case of Seymour v. Lofgren, 209 Kan. 72 (1972), the Court related this phenomena:

Attachment 2
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> "What is perhaps regarded as the most significant concept in psychoanalytical therapy, in one of the most important discoveries of Freud, is the emotional reaction of the patient towards the analyst known as the transference ... Inappropriate emotions, both hostile and loving, directed toward the physician are recognized by the psychiatrist as constituting a special aspect of the patient's neurosis - the transference. The psychiatrist looks for manifestation of the transference, and is prepared to handle it as it develops ... transference may be positive, when the feeling and reactions are affection, friendly, or loving ... Understanding of transference forms a basic part of the psychoanalytic technique."

In 1985 the Menninger Foundation published a paper[1] recognizing some of the risks involved in transference and counter-transference, and said "The more troublesome form of counter-transference acting out is the romantic or sexual involvement of a staff member with a patient. This involvement violates all the ethics of the therapeutic contact ..."

There are many cases that specifically recognize sexual misconduct in this setting between psychotherapist and patient as malpractice. (Zipkin v. Freeman, 436 S.W. 2d 753 (Mo. 1968), Anclote Manner Foundation v. Wilkinson, 263 S. 2d 256 (Fla. 1972), Roy v. Hartog, 85 Misc. 2d 891, (NY app. div. 1976), Marston v. Minneapolis Clinic of Psychiatry and Neurology, 329 N.W. 2d, 306 (Min. 1982), Simmons v. U.S., 805 F.2d 363 (9th Cir. 1986) in which case the Court said "When the therapist mishandles transference and becomes sexually involved with a patient, medical authorities are nearly unanimous in considering such conduct to be malpractice." Another case, L.L. v. Medical Protective Company, 122 Wis. 2d 455 (1984) concluded "We believe the centrality of transference to therapy renders it impossible to separate an abuse of transference from the treatment itself. The District Court correctly found that the abuse of transference occurred within the scope of Mr. Kamer's employment." A review of these cases shows consistently that sex in therapeutic relationships is almost always to held to be within the terms of a malpractice insurance policy, and also within the scope of agency between an institution (health care provider) that employs a therapist and the mistreating therapist.

The reason for the Fund or any mandatory insurance program, is to assure that the patient that has been wronged and thereby damaged will have adequate funds from which to seek compensation. The rationale is the same as in the field of automobile insurance where we are securing the public against the risk of negligent injury by the use of an automobile. This law is instituted so that patients who have been malpracticed will have an adequate resource from which to collect damages.

These type of injuries are devastating. I have personally handled two specific cases which shed light on this issue. One involved a psychiatrist who had victimized no less than three people, and who conceived a child by my client, putting her in the situation of a quite painful extrication from the relationship. She had great difficulty re-establishing a therapeutic relationship with any other therapist. My other client committed suicide prior to the time that she was able to conclude her case against a non-physician therapist employed by one of the most respected institutions of mental health in the country. To attempt to remove the security for the remedy afforded by law would be a substantial injustice to patients who are not only negligently treated, but those who have been negligently treated to the point of actual abuse.

These are not cases of simple seduction where a physician/ therapist makes love to someone with whom he or she has a professional contact. They are more tantamount to rape. However, not in defense, but in explanation, the therapist is involved in a risky business, and one of the risks of the business is the personal involvement which will cause harm to the patient. It is just as much the inability of the therapist to pay attention to his role, as it is to the surgeon to pay attention to his scalpel, and when the therapist goes awry, the patient is damaged. No serious discussion by intelligent people indicates that the therapist does this simply for exploitation or other motives that might be involved in a simple seduction. All recognize that it is an inherent risk of the therapeutic process, but that persons doing this are supposed to be skilled enough and recognize the risk and keep themselves from being sexually involved with their patients. Only to the unsophisticated are these "intentional acts", such as would be excluded from most insurance policies for voluntary conduct.

Another separate reason this bill should not be passed is that it should not be the role of the Legislature to write insurance policies, either for the Fund, or for the health care practitioner, and start authorizing exclusions. If insurance companies want to exclude this kind of conduct, they can try to do so subject to the Court's interpretation of their policies.

The great injustice, though, is that severely injured victims will not be compensated as they were supposed to be in the great bargain which resulted in the creation of the Health Care Stabilization Fund, whereby patient traded longer statutes of limitations for the security of the judgment being paid. Enough inroads have been made into that basic covenant, that no further inroads should be made.

[1] Counter-transference in hospital treatment - Basic Concept & Paradigms, Ira Stamm, Phd. An occasional paper from the Menninger Foundation, No. 2 of a series.