

Approved February 26, 1990

Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Jerry Moran at
Chairperson

10:00 a.m./~~p.m.~~ on February 12, 1990 in room 514-S of the Capitol.

All members were present except: Senator Yost who was excused

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

Roger Werholtz, Kansas Department of Corrections
Chuck Simmons, Kansas Department of Corrections
Bob Frey, Kansas Trial Lawyers Association

Vice Chairman Moran called the meeting to order by opening the hearing for SB 562.

SB 562 - concerning community corrections; relating to corrections advisory boards; state purchase of services from grant-receiving county.

Roger Werholtz, Kansas Department of Corrections, testified in support of SB 562. He explained the Department had requested this legislation to strike part of a "dead statute". He further stated that an NIC consultant had suggested elimination of community custody and to approach the situation from this attitude as there are already five levels of custody classifications. He added that the directors of community corrections were included in the Department's discussions on this matter with positive responses.

As no other conferees appeared, this concluded the hearing for SB 562.

Chairman Winter opened the hearing for SB 563.

SB 563 - concerning the Kansas tort claims act; relating to the definition of employee.

Chuck Simmons, testified in support of SB 563. (ATTACHMENT I) He also distributed a letter from John W. Campbell, Deputy Attorney General, in support of SB 563. (ATTACHMENT II)

Bob Frey, Kansas Trial Lawyers Association, testified in opposition of SB 563. (ATTACHMENT III)

This concluded the hearing for SB 563.

The hearings were opened for HB 2646, HB 2647, HB 2648, and HB 2649.

HB 2646 - concerning municipal courts; relating to the right to counsel.
HB 2647 - concerning crimes and punishments; relating to expungement.
HB 2648 - concerning criminal procedure; relating to release prior to trial.
HB 2649 - concerning criminal procedure; relating to diversion agreements.

Gordon Self, Committee staff from Office of Revisor of Statutes, explained that these four bills were conflict resolution bills resulting from dual legislation on affected statutes from the 1989 Legislative Session. He added that there is no substantive changes in any of the four bills before the committee.

This concluded the hearings for HB 2646, HB 2647, HB 2648, and HB 2649.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on February 12, 1990

Senator Moran moved to report HB 2646, HB 2647, HB 2648 and HB 2649 favorable for passage and that they be placed on the Consent Calendar. Senator Morris seconded the motion. The motion carried.

Senator Oleen presented three bill requests to the committee on behalf of William E. Kennedy III, Riley County Attorney. (ATTACHMENT IV)

Senator Oleen moved to introduce the three bills as requested by Mr. Kennedy. Senator Gaines seconded the motion. The motion carried.

The meeting was adjourned.

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: FEBRUARY 12, 1990

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R.G. Frey	Topeka	KJHA

February 12, 1990



DEPARTMENT OF CORRECTIONS

OFFICE OF THE SECRETARY

*Landon State Office Building
900 S.W. Jackson—Suite 400-N
Topeka, Kansas 66612-1284
(913) 296-3317*

Mike Hayden
Governor

Steven J. Davies, Ph.D.
Secretary

RE: SENATE BILL 563

Purpose of Amendment:

Expand definition of "employee" to include employees of independent contractors who are under contract to provide program services to inmates and who are engaged in providing such services.

Basis for Amendment:

Through contracts with program providers, the Department requires that teachers, counselors, instructors, and other personnel employed by these providers enforce department and institution rules. This may result in an inmate receiving a disciplinary report or being removed from a program. On occasion, an inmate will respond by filing a lawsuit against the contractor's employee. Under current law, the state may not defend these individuals. As a result the contractor or employee must hire private counsel for their defenses.

The large majority of such lawsuits are frivolous or unsuccessful. However, the contract must bear the cost of the legal expenses. This amendment would allow the state to represent these individuals the same as department employees, either through department legal staff or the Attorney General's office.

Note: In 1989, K.S.A. 75-6116 was amended to include health care providers who provide professional services at a state correctional institution within the definition of "employee" for purposes of that section.



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

February 12, 1990

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

The Honorable Wint Winter, Jr.
Chairman of the Senate Judiciary Committee
Capitol
Topeka, Kansas

Re: Senate Bill No. 563

Dear Senator Winter:

I am writing on behalf of the Attorney General in support of SB 563.

As you know, the Kansas prison system is under supervision by the federal courts. Arney, et al. v. Hayden, et al., U.S.D.C. #77-3045-R. One of the Court's concerns is proper medical care for inmates. In order to meet this concern, independent health care providers have been retained for the prisons. These health care providers are often subjected to suit by litigious prisoners.

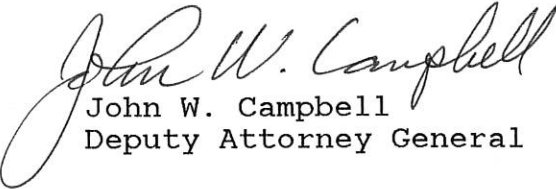
Under current law, prison health care providers are represented and indemnified by the state in civil rights litigation pursuant to K.S.A. 75-6116. However, for non-civil rights actions (torts), such providers are neither represented, nor indemnified. Further, they may not use the exceptions to tort liability given to state employees pursuant to K.S.A. 75-6104.

SB 563 is an attempt to correct this situation. It would expand the definition of "employee" contained in the Kansas Tort Claims Act to include our prison's health care providers. Of course, health care providers would still have to purchase insurance when required by the Health Care Providers Act, K.S.A. 40-3401, et seq. (See also, K.S.A. 75-6108, 75-6109). What this amendment would do is allow such providers to utilize the defenses of the Tort Claims Act, and in certain circumstances, provide the state with the option of having a self-insured prison health care provider.

The prison system needs this legislation. Most of the prison litigation is frivolous. However, much of it can not be summarily dismissed. Passage of SB 563 will work to assist the Kansas prison system comply with federal law.

Sincerely,

OFFICE OF ATTORNEY GENERAL
ROBERT T. STEPHAN


John W. Campbell
Deputy Attorney General

JWC/mb



KANSAS TRIAL LAWYERS ASSOCIATION

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RICHARD H. MASON
EXECUTIVE DIRECTOR

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE by THE KANSAS TRIAL LAWYERS ASSOCIATION regarding S.B. 563

Senate Bill 563 would change the Kansas Tort Claims Act to provide that private, non-governmental contractors would be afforded the protection of limited immunity from tort actions. From the inception of the Kansas Tort Claims Act the Kansas Trial Lawyers Association has taken a position that governmental immunity should be afforded to those persons and activities which are purely governmental and that private citizens, contractors and businesses should not be given the special protection that the Act gives.

The concept of narrowly defined limited immunity remains a rational and viable approach to the treatment of tort claims against government agencies and its employees. The desired effect of limiting liability insurance costs to government has largely been met. The protection of government against unreasonable claims has been effective and the public generally has benefited in the trade-off of limited liability for efficient, cost effective government services which have been provided to the public.

If S.B. 563 is adopted, it would go against the expressed policy of the State of Kansas to not provide limited immunity to independent contractors who contract with government to provide services. Independent contractors have the ability and the right to provide for the tort liability protection that they feel they may need by purchasing liability insurance or by self insuring themselves. The need for liability protection will vary substantially from contractor to contractor depending upon the function which they perform but it is universally true that they can best determine what that cost will be and how that cost can be factored into their contracts.

If you grant immunity to these contractors through the Kansas Tort Claims Act, you will be making an unwarranted expansion of that Act into the private sector and extending a substantial benefit to the private companies with no commensurate benefit being granted to the

consuming public. It may be true that the consuming public in this case is prisoners in the Kansas prison system who would be deprived of their right to full compensation for damages which may be caused by the independent contractors, but that is no reason to take those rights away.

The Kansas Trial Lawyers Association urges this Committee to move cautiously in this area. We see no compelling reason why this bill should be passed and that is especially so where, as in this case, the sole benefit of the change would be to grant private contractors immunity that heretofore has been intended for government operations only.

JAN 19 1990



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GENIECE A. WRIGHT
Legal Specialist

539-8016

January 17, 1990

*Jim Clarke -
District Co. Atty. Assn.*

Lana Oleen
State Capital
Room 143 North
Topeka, KS 66612

Dear Lana:

Enclosed are copies of legislation in which I have an interest.

The changes in K.S.A. 21-3302 and K.S.A. 21-3303 are designed to be certain that when an adult uses a child in a drug deal, the adult can still be prosecuted (juvenile can't commit crimes).

The change in K.S.A. 28-125 allows the county to pay food and lodging for witnesses as appropriate.

The new crime K.S.A. 21-3414a is designed to take some pressure off the Aggravated Battery statute, and also to avoid the special intent element of that crime.

I hope you would see fit to propose these modifications. If I can help, please do not hesitate to ask.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

William E. Kennedy III
Riley County Attorney

WEK/blh

38-1606. **Right to an attorney.** (a) Appointment of attorney to represent juvenile. A juvenile charged under this code is entitled to have the assistance of an attorney at every stage of the proceedings. *There shall be no presumption that a juvenile requires parental consent to waive his rights to have an attorney present while being questioned by police.* If a juvenile appears before any court without an attorney, the court shall inform the juvenile and the juvenile's parents of the right to employ an attorney. Upon failure to retain an attorney, the court shall appoint an attorney to represent the juvenile. The expense of the appointed attorney may be assessed to the juvenile or parent, or both, as part of the expenses of the case.

Submitted by:

William E. Kennedy III
Riley County Attorney

*21-3414a. **Criminal battery.** Criminal battery is unlawful touching or application of force to the person of another in any manner whereby great bodily harm, disfigurement, dismemberment, or death can be inflicted. Criminal battery is an E felony.*

Submitted by:

William E. Kennedy III
Riley County Attorney

28-125. **Witness fees and mileage; oath.** (a) Witnesses shall receive the following fees:

(1) For attending before any court or grand jury, or before any judge, referee, or commission, \$10 per day;

(2) for attending on an inquest, \$10;

(3) for each mile necessarily and actually traveled in going to and returning from the place of attendance, mileage at the rate prescribed by law if the distance is more than one mile; and

(4) *in criminal cases, reasonable out-of-pocket expenses for food and lodging expenses as determined by the appropriate county commission.*

(b) No witness shall receive per diem or mileage in more than one case covering the same period of time or the same travel, and each witness shall be required to make oath that the fees claimed have not been claimed or received in any other case. No juror shall receive pay as a witness while serving as a juror.

(c) Witnesses shall be entitled to receive, for attending before any attorney general, county attorney or assistant attorney general, under any provision authorizing the officers to compel the attendance of such witnesses, the sum of \$10 per day, together with mileage at the rate prescribed by law for each mile necessarily traveled in going to and returning from the place of attendance.

(d) Witness fees shall be paid by the board of county commissioners where the violation of the law being investigated is alleged to have occurred.

Submitted by:

William E. Kennedy III
Riley County Attorney

21-3303. **Criminal solicitation.** (a) Criminal solicitation is commanding, encouraging or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating the felony.

(b) It is immaterial under subsection (a) that the actor fails to communicate with the person solicited to commit a felony if the person's conduct was designed to effect a communication.

(c) It is an affirmative defense that the actor, after soliciting another person to commit a felony, persuaded that person not to do so or otherwise prevented the commission of the felony, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purposes.

(d) *The term felony as used in this statute includes matters that would be felonies if the involved persons were adults.*

(e) Criminal solicitation of a class A or B felony is a class D felony. Criminal solicitation of a felony other than a class A or B felony is a class E felony.

Submitted by:

William E. Kennedy III
Riley County Attorney

21-3302. **Conspiracy.** (1) A conspiracy is an agreement with another person to commit a crime or to assist to commit a crime *or to commit or assist in committing what would be a crime if the individual involved had been an adult.* No person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by him or by a co-conspirator.

(2) It shall be a defense to a charge of conspiracy that the accused voluntarily and in good faith withdrew from the conspiracy, and communicated the fact of such withdrawal to one or more of his co-conspirators, before any overt act in furtherance of the conspiracy has been committed by him or by a con-conspirator.

(3) Conspiracy to commit a class A felony is a class C felony. Conspiracy to commit a felony other than a class A felony is a class E felony. A conspiracy to commit a misdemeanor is a class C misdemeanor.

Submitted by:

William E. Kennedy III
Riley County Attorney