Approved 4-11-91
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative John M. Solbach
Chairperson at

3:30 a.m./p.m. on February 26, 19 91 in room 313-S of the Capitol.

All members were present except:

Representatives Douville, Sebelius and Vancrum who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Office of Revisor of Statutes
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

John Johnson, Kansas Trial Lawyers
Bob Corkins, Kansas Chamber of Commerce and Industry
Brad Smoot, Coordinator, Kansas Civil Law Forum
Jerry Slaughter, Kansas Medical Society
Paul Shelby, Office of Judicial Administration
Edwin A. Van Petten, Deputy Attorney General
Dr. Wike Scammon, District Coroner, Third Judicial District
Senator Norma Daniels
Alan C. Hancock, M.D., President, Kansas Coroner's Association
William F. Hirschman, President, Kansas Professional Chapter of the Society of Professional Journalists
Davis Merritt, Editor, The Wichita Eagle
James W. Clark, Executive Director, Kansas County and District Attorneys Association
Helen Stephens, Lobbyist for Kansas Peace Officers

The Chairman called the meeting to order and called for hearing on HB 2397, cap on damages in wrongful death actions; jury instructions.

John Johnson, representing Kansas Trial Lawyers, appeared in support of HB 2397. (See Attachment # 1).

Committee questions followed.

Bob Corkins, representing Kansas Chamber of Commerce and Industry, appeared in opposition to HB 2397. (See Attachment # 2).

Committee questions followed.

Brad Smoot, Coordinator, Kansas Civil Law Forum, appeared in opposition to HB 2397. (See Attachments # 3 and # 4).

Committee questions followed.

Jerry Slaughter, representing the Kansas Medical Society, appeared in opposition to HB 2397. (See Attachment # 5).

Committee questions followed.

There being no further conferees, the hearing on HB 2397 was closed.

The Chairman called for hearing on HB 2395, SRS subrogation, attorney fees.

John Johnson, representing Kansas Trial Lawyers appeared in support of HB 2395. (See Attachment # 6).

Committee questions followed.

There being no further conferees, the hearing on HB 2395 was closed.

The Chairman called for hearing on HB 2385, coroners' reports in suspected homicides.

Paul Shelby, representing Office of Judicial Administration, withdrew his testimony and did not appear regarding HB 2385.

Edwin A. Van Petten, Deputy Attorney General, appeared in support of HB 2385. (See Attachment # 7).

Committee questions followed.

Dr. Wike Scammon, District Coroner, Third Judicial District, appeared in opposition to the amendment proposed by HB 2385. (See Attachment # 8).

Committee questions followed.

Senator Norma Daniels appeared in opposition to HB 2385. Senator Daniels distributed written testimony from Alan C. Hancock, M.D., President, Kansas Coroner's Association, opposing HB 2385. (See Attachment # 9).

Also Senator Daniels provided her own written testimony (Attachment # 10).

Committee questions followed.

William F. Hirschman, President, Kansas Professional Chapter of the Society of Professional Journalists, appeared in opposition to HB 2385. (See Attachment # 11).

Committee questions followed.

Davis Merritt, Editor, The Wichita Eagle, submitted written testimony in opposition to HB 2385. (See Attachment # 12).

Committee questions followed.

Jim Clark, Ks. Co. and District Attorney's Association, appeared in support of HB 2385 (See Attachment # 13).

Helen Stephens, Lobbyist for Kansas Peace Officers, appeared to express support of HB 2385. Ms. Stephens said that their conferee was unable to be present but would furnish written testimony; that the Association would not expect the proposal of HB 2385 to be used on a daily basis, but only in unusual cases, not to be abused; that there should be a time limit imposed for review.

Committee questions followed.

There being no further conferees, the hearing on HB 2385 was closed.

The Chairman called for hearing on HB 2384, court fees for foreign judgments.

Paul Shelby, Assistant Judicial Administrator, Office of Judicial Administration, appeared in support of HB 2384. (See Attachment # 14).

Committee questions followed.

The meeting adjourned at 5:25 P.M. The next scheduled meeting will be on February 28, 1991, 3:30 P.M. in room 313-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY DATE: 2/26/91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
JIM CLARK	TOPEKA	KCDAA
Jalynn Copp	Topeka	Attorney General
ED VAN PETTEN	TOPEKA	" "

KANSAS
TRIAL LAWYERS ASSOCIATION
Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756 FAX (913) 232-7730

TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
HOUSE JUDICIARY COMMITTEE

HB 2397 - Wrongful Death

Thank you for the opportunity to speak with you and your committee on behalf of the Kansas Trial Lawyers Association in support of HB 2397.

HB 2397 would raise the existing cap on nonpecuniary damages in wrongful death actions from $100,000 to $250,000. K.S.A. 60-19a01 and 19a02 limit damages for pain and suffering on personal injury actions to $250,000. We believe that since the legislature and the courts have determined a $250,000 cap on similar damages for those who are injured is proper and constitutional, then certainly the cap on damages in cases involving a death should be no less than $250,000.

As you know, K.S.A. 60-1903 permits the heirs of a decedent to bring an action for damages against a person or entity whose wrongdoing caused the decedent's death. Damages allowed are specified as (1) nonpecuniary, (2) expenses for the care of the deceased caused by the injury, and (3) pecuniary damages.

Nonpecuniary damages generally are described as those damages for mental anguish, suffering, and bereavement. It is the emotional loss sustained by the surviving heirs.

The wrongful death statute was recodified in 1963, and a limit of $25,000 for all damages was established. In 1967, it was raised to $35,000 and then to $50,000 in 1970.

In 1975, nonpecuniary damages were identified separately and capped at $25,000. Finally, the nonpecuniary damage cap was last raised in 1984 to $100,000.

There are several reasons we believe this bill should be enacted. I have already described how it is a matter of fairness when contrasted with the caps on personal injuries.

You know that members of the Kansas Trial Lawyers Association have never favored limitations on the power of the jury to decide damages, but the reality is the legislature has passed a $250,000 cap and the Supreme Court has upheld it. In other words, lawmakers and the Court have determined $250,000 is an acceptable limit on noneconomic damages.

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An inconsistency now exists with the $250,000 cap on personal injury actions and $100,000 cap on wrongful death actions. Who can say the losses suffered as a result of a death are any less than the suffering of a bodily injury?

An important distinction must be made as to who shares in any compensation awarded by a court or jury in wrongful death cases. Distinctive from a personal injury loss, compensation for wrongful death extends to all heirs at law who have sustained a loss. That means one payment of $100,000 may be awarded regardless of the number of heirs entitled to compensation. Please do not misinterpret the statute as allowing a maximum payment of $100,000 to each heir sustaining a loss. In a personal injury action the entire award for noneconomic loss goes to the single injured victim.

Of the states bordering Kansas, only Colorado caps recovery for nonpecuniary damages, and it is $250,000 (which may be raised to $500,000 by the judge under certain circumstances). As best we can determine, only four states nationally have this type of cap on wrongful death actions. Kansas is obviously in the minority. Thus, the bill we are proposing this morning is quite modest.

HB 2397 is eminently fair and will allow more appropriate awards to be made for the survivors of some Kansans who have lost a loved one due to another's negligent action. Furthermore, it eliminates inconsistency in the law for awards of nonpecuniary damages.

HB 2397 further amends K.S.A. 60-1903(b), 60-19a01 and 60-19a02 by requiring the Court to instruct the jury on the monetary limitation of $250,000 for noneconomic and nonpecuniary damages.

Comparison can be made with K.S.A. 69-258(a) wherein the rule of comparative fault is applied to a civil tort action. Plaintiff is entitled to recover if his or her fault is less than 50 percent. The plaintiff's award of damages from any party is diminished in proportion to the amount of fault attributed to the plaintiff.

In cases involving comparative fault, it is the general rule for the judge to instruct the jury on the effect of finding a percentage of fault on the plaintiff. Furthermore, counsel are permitted to discuss such effects of comparative fault as they relate to the plaintiff.

Precluding the Court and counsel from advising the jury on the $250,000 cap for nonpecuniary damages in effect is perpetrating a fraud upon the jury as to the effect of its deliberations. Kansas law now requires in personal injury and wrongful death actions for the verdict to be itemized concerning various elements of nonpecuniary damages. Both wrongful death and personal injury actions receive specific awards by the jury. Failure to advise the jury of the applicable cap on noneconomic and nonpecuniary damages may, in many instances, defeat the jury's true intent as to how damages are to be allocated and awarded.

We encourage you to act favorably on HB 2397. Thank you.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

HB 2397

February 26, 1991

KANSAS CHAMBER OF COMMERCE AND INDUSTRY
Testimony Before the
House Judiciary Committee
by
Bob Corkins
Director of Taxation

Mr. Chairman and members of the Committee:

My name is Bob Corkins, representing the Kansas Chamber of Commerce and Industry, and I thank you for the opportunity to express our opposition to HB 2397 and its proposed increase in the maximum recoverable non-pecuniary damages in wrongful death actions.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The Chamber maintains that there is no quantifiable justification for permitting an increase in these awards. Such awards are, in practice, provided to compensate for

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emotional losses sustained by survivors of the decedent in question -- losses upon which no monetary value can be placed.

Nor do we believe there is merit to a theoretical, equity-based rationale for increasing these awards. Clearly, the emotional and physical damages sustained by surviving victims of negligence are greater than the non-economic losses to those victims' families (or to the surviving family members, should the victim die), thus validating the current verdict cap distinction from other tort actions.

Consequently, this proposal would increase the liability exposure of Kansas businesses for no justifiable reason. Not only could businesses be forced to pay higher awards for wrongful death cases in which they are directly implicated, they could be forced to pay higher premiums for liability insurance despite a clean litigation history.

KCCI therefore urges you to reject this proposal.

Thank you for your time and consideration.

KANSAS CIVIL LAW FORUM

STATEMENT OF BRAD SMOOT, COORDINATOR
KANSAS CIVIL LAW FORUM
BEFORE THE HOUSE JUDICIARY COMMITTEE
CONCERNING 1991 HOUSE BILL NO. 2397
February 26, 1991

Mr. Chairman and Members:

Thank you for this opportunity to appear regarding 1991 House Bill No. 2397. I appear on behalf of the Kansas Civil Law Forum, formerly known as the Kansas Coalition for Tort Reform. Our membership includes numerous businesses, professionals and their associations. A partial listing of our membership is attached to the prepared statement for your reference.

On behalf of these members we appear today in opposition to H-2397 which would amend K.S.A. 1990 Supp. 60-1903 to increase the liability exposure for non-economic damages in wrongful death cases from $100,000 to $250,000. (There are no statutory limits on actual economic losses in either personal injury or wrongful death cases.) Proponents of this amendment attempt to justify this 150% increase by comparing wrongful death actions to personal injury cases. While, at first glance, this comparison may have a certain appeal, I trust the committee will agree that it is a classic case of "comparing apples and oranges".

To begin with, the legal history of wrongful death actions is markedly different from that of personal injury actions. Under common law there was no right to recover for wrongful death. This cause of action has been created exclusively by statute while the exposure and costs associated with it have expanded radically in the last 100 years. Originally, recovery by beneficiaries was limited to actual economic losses. It was later expanded to include emotional (non-economic) damages within statutory caps. Later, caps were lifted completely for economic losses (1975) and caps on non-economic losses were generously increased 400% to $100,000 in 1984.

In addition, it is important to remember that personal injury actions and wrongful death actions attempt to compensate different plaintiffs and different injuries. In personal injury claims we compensate the actual victim for any pain and suffering, disfigurement and disability. In wrongful death actions, the heirs are compensated for their emotional losses. Of course, actual economic damages in both cases are

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Attachment #3
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unlimited and frequently result in multi-million dollar judgments for plaintiffs, their families and their counsel.

Moreover, the survivorship statute permits heirs to also recover for any pain and suffering prior to death even when that period of time is a matter of minutes. See Ingram v. Howard-Needles-Tanner & Bergendoff, 234 Kan. 289, 627 P.2d 1083 (1983). In the recently-decided Lieker v. Gafford case, which upheld the $100,000 wrongful death cap, the deceased's heirs recovered full economic damages and non-economic damages for both the personal injuries of the deceased and the statutory $100,000 maximum for wrongful death. In all, plaintiffs recovered more than $2.3 million dollars.

Although no amount of money can replace a loved one, between full compensation for economic losses and the frequent opportunity for heirs to collect on both wrongful death and survival claims, it would appear that plaintiffs can be fairly compensated under current Kansas law.

In 1986, a well-reasoned article appeared in the Kansas Trial Lawyers own journal and concluded:

> "The legislature's increase in the limit on non-pecuniary damages dramatically improves recovery possibilities in all cases. Further, the liberal attitudes courts have taken with survival actions and pecuniary damages, allows claimants to overcome prior legal restrictions on recovery. For years the barriers to relief in wrongful death cases have been artificial legal restrictions and limitations. Now most of those obstacles are gone."

In summary, we believe an increase in the wrongful death damage cap is unnecessary. Moreover, there is no reason for the non-economic damage caps in personal injury and wrongful death claims to be identical since each attempts to compensate a different victim for different injuries. And since personal injury claims are frequently tried and compensated together with wrongful death claims, we have no reason to believe the current legal framework is unfair to heirs and beneficiaries. Finally, we believe that such a drastic increase in the wrongful death caps will have an adverse affect on businesses and consumers who must ultimately pay the costs of the tort liability system.

Thank you for your time and attention.

1991 Kansas Civil Law Forum Members

Kansas Medical Society

Kansas Railroad Association

Southwestern Bell

Kansas Hospital Association

Boeing

Kansas Optometric Association

Pharmaceutical Manufacturers Association

Kansas Association of Defense Counsel

KPL Gas Service

The Coleman Company

Beech Aircraft Corporation

HCA Wesley Hospital

Kansas Insurance Industry (2 memberships)

TRADITIONAL CLAIMS FOR DAMAGES IN WRONGFUL DEATH CASES (PER K.S.A. 60-1901 et seq.) WITH ACCOMPANYING PERSONAL INJURY ACTION ON BEHALF OF DECEASED (SURVIVORSHIP ACTION) PER K.S.A. 60-1801 et seq. (See also PIK § 9.01 et seq.)

I. Personal Injuries

a. Economic Damages (unlimited)

Medical care (past & future)
Hospitalization (past & future)
Loss of time or income (to date & future)
Aggravation of pre-existing ailments

b. Non-Economic Damages (limited)

Pain & suffering
Disabilities
Disfigurement
Mental anguish

c. Loss or Impairment of Services (Loss of Consortium)

II. Property Damages

Cost of repairs not to exceed value (difference in FMV) (unlimited)
Loss of use (unlimited)

III. Wrongful Death

a. pecuniary losses (unlimited)

1. loss of service, attention, marital care, parental care, advice and protection

2. loss of education, physical, moral training and guidance

3. loss of earnings

4. expense for care of deceased prior to death and funeral expenses

b. non-pecuniary (limited)

1. survivor's mental anguish, bereavement, loss of society, loss of companionship

HJUD
Attachment # 4
2-26-91

KANSAS MEDICAL SOCIETY
1300 Topeka Avenue • Topeka, Kansas 66612 • (913) 235-2383
Kansas WATS 800-332-0156 FAX 913-235-5114

February 26, 1991

TO: House Judiciary Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: HB 2397; Concerning Wrongful Death Limitations and Cap on Non-Economic Damages

The Kansas Medical Society appreciates the opportunity to appear in opposition to HB 2397. This bill would not only increase the wrongful death limitation from $100,000 to $250,000, but it would also make a subtle, but significant change in the application of the cap on non-economic damages. It is this latter provision to which we will address our concerns today.

Sections 2 and 3 of the bill amend K.S.A. 60-19a01 and 60-19a02, provisions which were enacted in 1988 as part of the tort reform package of bills. That legislation was a culmination of several years of hard work and study by the Legislature which was aimed at reducing the severity of the liability problem in general, and the medical malpractice crisis in particular. It is worth noting at this point that the Kansas Supreme Court has upheld the constitutionality of the cap on non-economic damages in the Samsel case.

It is also worth noting that since the cap on non-economic damages applies only to causes of action accruing after July 1, 1988, that in the area of medical malpractice at least, we have few, if any, cases in which this limitation has yet to be applied. Yet the KTLA is asking that a subtle, but significant change in the non-economic cap be made before the ink is barely dry on the law. Their change is found on page 2, lines 12 and 35, in which they strike the word "not." The effect of this deletion is significant because in a jury trial, the judge would tell the jury that a $250,000 limitation on non-economic damages applied, whereas current law does not allow instructing the jury that such a limitation exists. The law was specifically drafted this way, because the jury should arrive at its assessment of damages (including non-economic damages) independent of any information that is not relevant to their consideration. If the jury is instructed that a limitation exists, it will tend to become the norm in such awards, instead of the ceiling. The Legislature enacted this provision because the evidence showed that many awards for non-economic damages bore little resemblance to other damages sought, and tended to be driven more by emotion than reason. If this proposed change in law is allowed to be enacted, it will have the effect of substantially diluting the impact of the limitation on non-economic damages, which is just now beginning to hold promise for systemwide stability.

We respectfully urge that you report HB 2397 unfavorably. Thank you for the opportunity to offer these comments.

JS:ns

HJUD
Attachment #5
2-26-91

K NSAS
TRIAL LAWYERS ASSOCIATION
Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756 FAX (913) 232-7730

TESTIMONY
OF THE
KANSAS TRIAL LAWYERS ASSOCIATION
BEFORE THE
HOUSE JUDICIARY COMMITTEE

HB 2395 - SRS Attorney Fees

Thank you for the opportunity to speak with you and your committee on behalf of the Kansas Trial Lawyers Association in support of HB 2395.

HB 2395 would require the secretary of Social and Rehabilitation Services to pay attorney fees proportionately with the injured person when the department has a subrogation lien for medical expenses arising out of a personal injury or wrongful death action. Furthermore, it provides for the reduction of the department subrogation lien proportionately with any finding of fault on behalf of the injured party.

HB 2395 essentially makes K.S.A. 39-719 consistent with other legislative enactments requiring the payment of attorney fees on subrogation liens and the sharing of fault thereon. The Automobile Injury Reparations Act has a similar provision under K.S.A. 40-3113(a) which requires an injured party's insurance company to pay in a proportionate amount attorney fees for all subrogation interests collected pursuant to a personal injury claim. Furthermore, the insurer's right of subrogation is reduced by the percentage of negligence attributable to the injured person.

The same provision is allowed under the Kansas Worker's Compensation Act statutes. K.S.A. 44-504(d) and (g) allow for the same payment of attorney fees and reduction in lien according to fault.

Under its current provisions, K.S.A. 39-719 (a) places a burden not only upon the attorney representing the injured party, but also the injured party himself. The majority of cases wherein the Department claims a subrogation interest involve motor vehicle accidents. If the injured party has substantial injuries requiring state assistance in paying the medical expenses, any recovery on behalf of the injured party is greatly reduced if the liability insurance coverage is limited. The effect becomes even more harsh when a percentage of fault is attributed to the injured party, thus reducing his or her overall recovery from the tortfeasor.

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Attachment # 6
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An example of the harsh effects may be illustrated as follows:

> Assume the injured party is involved in a motor vehicle accident and has sustained, pursuant to a jury verdict, $250,000 worth of damages. Further assume the tortfeasor has $100,000 in liability insurance and the Department of Social and Rehabilitation Services has asserted a lien for medical expenses in the amount of $50,000. Although the injured party has sustained $250,000 in damages, he or she can only collect $100,000 from the insurance carrier. Furthermore, the recovery is reduced by the $50,000 lien payable to SRS. Out of the remaining $50,000, the injured party must then pay for litigation expenses and attorney fees. This rule becomes even more burdensome if it is assumed the jury allocates 25 percent of the fault to the injured party. In that case, the injured party is allowed to recover from the insurance carrier $75,000, which is further reduced by the $50,000 lien, allowing for a net recovery of $25,000. Of that $25,000, again, the injured party must pay expenses and attorney fees.

Under HB 2395, the Department of Social and Rehabilitation Services would be required to participate in paying a proportionate share of attorney fees and reduce its lien in accordance with any fault attributable to the injured party. This change in the law benefits the injured party in a realistic manner and provides incentive for attorneys to handle such cases on behalf of the Department of Social and Rehabilitation Services and the injured party. Many times attorneys decline to take these cases if the subrogation lien is large and the insurance coverage is minimal. In essence, the attorney may be working for the Department of Social and Rehabilitation Services exclusively without being adequately compensated therefor.

Your favorable consideration of HB 2395 is requested.

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
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TESTIMONY OF
DEPUTY ATTORNEY GENERAL EDWIN A. VAN PETTEN
OFFICE OF ATTORNEY GENERAL
BEFORE THE HOUSE JUDICIARY COMMITTEE
FEBRUARY 26, 1991
RE: HOUSE BILL 2385

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of Attorney General Stephan I thank you for this opportunity to voice the support of the Attorney General for House Bill 2385.

I believe the critical item to be considered is that House Bill 2385 in no way imposes any changes on the duties of the coroner, or will inconvenience that office in any way. The changes merely allow a law enforcement agency to petition a Court for an order prohibiting disclosure of the Coroner's report which has been determined to be an open record pursuant to K.S.A. 44-215, the Kansas Open Records Act as set out in the attached Attorney General's Opinion.

The benefits of such an action to law enforcement depend on the investigation involved, however there are cases when the cause of death is a critical element in a homicide investigation, which investigators want to keep from being released to the public at large, for various reasons.

HJUD
Attachment # 7
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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

January 21, 1986

ATTORNEY GENERAL OPINION NO. 86- 5

Edwin M. Wheeler, Jr.
Marion County Attorney
Marion County Courthouse
Marion, Kansas 66861

Re: Laws, Journals and Public Information -- Records Open to Public -- Disclosure of Coroner's Reports

Counties and County Officers -- District Coroner -- Disclosure of Coroner's Reports

Synopsis: Reports prepared by a district coroner or deputy district coroner pursuant to K.S.A. 19-1032 are public records open to inspection by any person under the Open Records Act, K.S.A. 1984 Supp. 44-215 et seq. Cited herein: K.S.A. 19-1026; 19-1032; 19-1033; 19-1034; 22-4701; K.S.A. 1984 Supp. 45-216; 45-217; 45-221.

* * *

Dear Mr. Wheeler:

As county attorney for Marion County, you request our opinion regarding coroner's reports. You ask whether such reports are public records which must be disclosed to an insurance company which requests a copy of any report filed with the clerk of the district court.

The primary responsibility of a district coroner or deputy district coroner is to determine the cause of death of a person who dies from other than natural causes. State v. Gordon, 219 Kan. 643, Syl. ¶6, 549 P.2d 886 (1976). The duties of a coroner are stated in K.S.A. 19-1032:

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> "Upon receipt of such notice, the coroner shall take charge of the dead body, make inquiries regarding the cause of death, and reduce the findings to a report in writing. Such report shall be filed with the clerk of the district court of the county in which death occurred." (Emphasis added.)

Pursuant to K.S.A. 19-1033, an autopsy shall be made on a dead body if the coroner believes it is advisable and in the public interest, or if the county or district attorney makes a written request for an autopsy. K.S.A. 19-1033 also requires that:

> "A full record and report of the facts developed by the autopsy and findings of the person making such autopsy shall be promptly made and filed with the coroner and with the clerk of the district court of the county in which the decedent died."

It is clear that a coroner's report is distinguishable from an autopsy report as an autopsy may not always be done in each case. Such reports are admissible evidence pursuant to K.S.A. 19-1034:

> "The records of the coroner filed with the clerk of the district court and other public records of the coroner made by the coroners or by anyone under the direction or supervision [of the coroner] and transcripts certified by the coroner shall be received in any court or administrative body in the state as competent evidence of the matters and facts therein contained. All records filed under this section shall be on a form approved by the director of the Kansas bureau of investigation. The records which shall be admissible under this section shall be records of the results of views and examinations of or autopsies upon the bodies of deceased persons by such coroner or by anyone under such coroner's direct supervision or control, and shall not include statements made by witnesses or other persons."

Under the Open Records Act, public records are to be open for inspection by any person unless otherwise provided. K.S.A. 1984 Supp. 45-216. A "public record" is defined to include recorded information in any form in the possession of a public agency. K.S.A. 1984 Supp. 45-217(f)(1). A "public agency" includes any officer of the state or political or taxing subdivision. K.S.A. 1984 Supp. 45-217(e)(1). As the office of district coroner is established by K.S.A. 19-1026, a coroner is therefore included within the act, and a coroner's report is a public record.

A public record is to be open unless it falls within one of the thirty-five categories of records which the act has indicated public agencies are not required to disclose. K.S.A. 1984 Supp. 45-221(a). The first category exempts records for which disclosure is specifically prohibited or restricted by federal law, state statute, or rule of the Kansas Supreme Court. K.S.A. 1984 Supp. 45-221(a)(1). Coroner's reports are not listed among the exceptions to disclosure of public records. A coroner's report does not fall within the criminal investigation record exception, as the office of district coroner is not a criminal justice agency as defined in K.S.A. 22-4701(c). K.S.A. 1984 Supp. 45-217(b); K.S.A. 1984 Supp. 45-221(a)(10). In addition, there is no specific statute or rule which exempts coroner's reports from public disclosure.

In conclusion, reports prepared by a district coroner or deputy district coroner pursuant to K.S.A. 19-1032 are public records open to inspection by any person under the Open Records Act, K.S.A. 1984 Supp. 44-215 et seq.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Rita L. Noll

Rita L. Noll
Assistant Attorney General

RTS:JSS:RLN:crw

7-5

SCAMMAN & ASSOCIATES, P.A.
2115 WEST 10TH STREET
TOPEKA, KANSAS 66604
PHONE (913) 232-2322

February 26, 1991

W. W. SCAMMAN, M.D., PATHOLOGIST

Testimony on House Bill No. 2385
by W. Wike Scamman, MD
District Coroner, Third Judicial District
Shawnee County Kansas

I am opposed to the amendment of Coroners Law for the following reasons:

1. It takes away the authority from the District Coroner and gives it to any Law Enforcement agency whether it be the Police Dept., Sheriff's Dept. or District Attorney in determining the filing of reports on any death that may be a suspected homicide. Most Coroner's cases may be regarded as suspected homicides until proven otherwise.

2. There would be difficulty for some families in receiving Life Insurance payments because most Insurance Companies require a copy of the autopsy if one has been performed, prior to them making any payments.

3. The proposed change indicates that the order would terminate upon filing of criminal charges, arising out of the suspected homicide. However, in a number of cases no suspect is found and the case could go on endlessly without being filed.

4. There is no problem with the present system. If a Law Enforcement Agency wants the findings from an Coroner's case withheld, they only need to contact the Coroner to ask that this be done. I know of no incidences where the Coroner has not complied with such a request.

Therefore, I find no need for a change in the present law.

HJUD
Attachment #8
2-26-91

Alan C. Hancock, M.D.
9201 PARALLEL
KANSAS CITY, KANSAS 66112

OFFICE PHONE 299-1474

February 25, 1991

Dear Senator Daniels,

I am writing in opposition to Kansas House bill no. 2385.

The coroner's office was created as an independent agency whose purpose is to provide unbiased conclusions regarding cause and manner of death based upon all available information including scientific information developed at autopsy. Any bill which reduces the autonomy of the office must be carefully considered and passed only if there is a compelling need to do so.

In my opinion, this bill addresses a non problem. The coroner's report only becomes a public document when it is filed with the Clerk of the District Court. This is not done immediately: a period of several days to a few weeks is required to complete the autopsy if microscopic and toxicological studies are done. These studies are done routinely in homicide cases. Also, if, in the opinion of the coroner, the report contains sensitive information which would jeopardize the law enforcement investigation he can withhold the information from the public as long as necessary by simply delaying the filing of the report until the investigation is completed.

Although the coroner normally cooperates with law enforcement agencies, he also investigates police shootings and deaths in custody. In these cases there would be a potential conflict of interest if law enforcement agencies were able to prevent the release of his findings.

Although I do not know the origin of this bill, I suspect that it is a reaction to a disagreement somewhere between a law enforcement officer and a coroner which should have be resolved locally rather than by state legislation.

Sincerely,

Alan C. Hancock M.D.

Alan C. Hancock M.D.
President, Kansas Coroner's Association

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H.B. 2385

I am Senator Norma Daniels.

I appreciate this opportunity to appear before this committee in opposition to H.B. 2385. I have been associated with the Coroner's Office in Sedgwick County for over 26 years.

In 1963, the Kansas Coroner's law was revised and many necessary changes were made. One of the more visible changes was that of requiring a Coroner to be a person licensed by the Board of Healing Arts. Before this, the Coroner was a lay person (elected) who had very little or no knowledge of the science of medicine, or of the link between medicine and the law (Forensics) when investigating violent or undetermined causes of death. Forensic Pathology has become a unique specialty beginning with the first boards being given in 1959.

The television show "Quincy" has brought to the public a much broader awareness of the authority and responsibilities of a Coroner.

"Quote" from Dr. Hancock

"The Coroner's office was created as an independent agency whose purpose is to provide unbiased conclusions regarding cause and manner of death based upon all available information, including scientific information developed at autopsy".

I stand in opposition to this bill for several reasons.

1) The Coroner's office is autonomous and independent. It must be free from coercion - and it must be free from being a partner in any attempted cover-up.

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2) In Sedgwick County, we are having a 3-fold increase in requests for copies of autopsies from bereaved families. Many of them are telling me that they need to have them in order for their insurance company to settle a death claim. Withholding this information for an undetermined length of time would be a detriment to the family.

3) Another concern would be that if the Coroner does feel he needs to conduct an inquest, how could one be held if all reports and evidence were sealed?

4) The death certificate, which must be signed as soon as possible, also contains information discovered by the Coroner - and these death certificates must be signed by the Coroner and returned to the funeral director conducting the funeral arrangements. If the Coroner's information is sealed by law, these death certificates could not be completed as required.

For these major reasons - and others, I believe this legislation would allow the suppression of Coroner's investigative information for an undetermined length of time - and would ultimately "tie the hands" of the Coroner to fulfill the purpose of the office - particularly in any attempted cover-up - including incompetence.

I will be glad to stand for questions.

February 25, 1990
To: Kansas House Judiciary Committee
Re: HB 2385

Mr. Chairman, ladies and gentlemen, good afternoon. I am Wm. F. Hirschman. I am president of the Kansas Professional Chapter of the Society of Professional Journalists. We represent reporters, photojournalists, editors, producers and publishers in the print and broadcast media. I also speak as a reporter who has covered police and courts for more than 20 years, more than 12 for The Wichita Eagle .

My organization and my newspaper oppose House Bill 2385. Legislators showed their wisdom when they specifically required coroner's reports to be placed in the public record.

The saying goes, ``If it isn't broke, don't fix it.'' Despite the hundreds of murders covered by the Kansas media, despite unrestrained access to coroner's reports in every one of those cases, neither I nor any colleague nor any law enforcement official I know can cite a single instance in which the release of that information hindered or jeopardized an investigation or a prosecution. Not one.

Only once have we ever heard anyone even attempt to claim that the release <u>might</u> conceivably endanger a case and I will address that case later.

Sedgwick County's Chief Criminal Judge Paul Clark sees no advantage to such a law. Dr. William Eckert, Sedgwick County`s Deputy Coroner and one of the world`s leading pathologists, vehemently opposes the move. Even Sedgwick County District Attorney Nola Foulston, who favors this bill, cannot cite a single instance from personal knowledge in which the release of autopsy information crippled a pending investigation or prosecution.

But why does the media care at all? Isn't it just to sell newspapers, to pander to a few readers' macabre tastes?

In answer, I'd like to read a statement to you from the Eagle's executive editor Davis Merritt, and then finish my own statement.

Mr. Merritt's statement

It is possible to glimpse a future under such a bill.

In the summer of 1989, our community was shocked by the brutal murder of legal secretary Terri Maness. But authorities were frustrated at their inability to make a case against their prime suspect, Richard Grissom.

When the media asked to see the coroner's report, the district attorney and police asked a judge to seal the report. That motion was granted providing that the report be released after criminal charges are filed, as provided in this bill.

Now, more than a year and half later, some authorities have made it clear that charges will likely never be filed, particularly now that Grissom has been convicted of murdering three other women. Therefore, we will never know how she died or whether information exists in the autopsy that is being overlooked.

We do know that the murder was unusually savage. Could authorities, struggling with a difficult case, simply want to avoid added pressure from a public further incensed by the crime? Could

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it be the result of law enforcement's very human preference to do their work without the public evaluating what they are doing?

These are serious questions in Wichita where the public has expressed some concern about the competence of authorities in light of such unresolved cases as the Butterworth/Fager killings and the Flicker Lounge murder.

In the Maness motion, authorities hammered one point. The autopsy contained details of the crime that only the killer knows. They wanted to withhold as many details as possible to sort the real killer's confession someday from that of mentally unbalanced people who confess.

But any detective or police reporter knows every investigation develops dozens, sometimes scores of details that only the killer would know. It is unnecessary to toss in even more details from the autopsy, given the conflicting interest of the public.

In the unlikely, unforseen possibility that information might damage a case, the media has repeatedly proven that it cooperates in the larger public interest.

On occasion, law enforcement officers or prosecutors have asked the media not to disclose facts that would jeopardize a case. When that contention has been proven -- and only when it has been proven -- the media has agreed.

A classic case in point: several years ago, the entire Wichita news media discovered that police had quietly reopened a high-tech investigation into the unsolved case of Kansas' most notorious serial killer, BTK. Although it was the biggest crime story in years, every reporter held off revealing the probe for a year and half when authorities explained that publicity might scare off suspects.

Obviously, any concern about pre-trial publicity is groundless. Under existing conditions, with coroner's reports available, Kansas judges rarely believe a change of venue is required to protect a defendant's right to a fair trial, even with cases that have drawn massive publicity such as the Richard Grissom and Bill Butterworth trials. This is, of course, because judges have ruled that the guiding principle is not whether a juror has read about the case, but whether they are able to consider only the evidence presented in court.

We find this bill heinous in any form. But if it must pass, we request a formal provision for a full hearing before a judge makes any ruling and that any interested party might address the court on this issue.

In recent years, our organization has been preoccupied in fighting open records battles with city clerks and school board officials. But our vigilance lapsed regarding prosecutors and police trying to exempt themselves from the responsibility and accountability essential to the survival of a democratic society.

We do not seek to hamper law enforcement's pursuit of public safety. And we do not believe anyone has proven that defeat of this bill would affect that pursuit. But even if it did, we must weigh that negligible hindrance against Kansan's right to be know what it's public servants are doing in their name on their behalf.

February 25, 1991

To: House Judiciary Committee

From: Davis Merritt, Editor, The Wichita Eagle

Re: HB 2385

I apologize that, because of short notice, I am unable to appear in person to be heard on these amendments, and I hope you will include the following in your consideration and in the record of your committee.

I trust that the committee will think carefully and broadly about the ramifications of this bill that would close coroner's reports for an indefinite period following the death of a citizen.

It undercuts, in the most fundamental way, one of our society's most important checks and balances -- that of the independent coroner in matters of unattended deaths.

The coroner is not a part of the police apparatus. In fact, the origins of the office are just the opposite, as is recognized in the very statute that these amendments would so greatly weaken. Law enforcement authorities may not require the coroner to perform an autopsy, for instance; they must request it. Or, more importantly, the coroner may act on his or her own motion and authority.

Thus it is clear that long-existing practice and law recognize the independence of the coroner's office.

Why? Because our system of government, at many levels, is built upon independent checks and balances, a practice that arose out of the sure knowledge that any authority -- no matter how well intentioned -- cannot safely be left to exercise ultimate power in a vacuum.

How that indispensable theory applies in the practical context of these amendments is this:

1. Under these amendments, combined with existing statutory restrictions on investigative information, it is entirely possible for citizens of Kansas to die unattended and no one save authorities know how or why or under what circumstances, until and unless the investigating authorities decide to make it public. That presents a obvious danger in the hands of ill-intentioned officials.

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2. It is equally possible for citizens to die at the hands of law enforcement officials themselves and no one save those law enforcement officials know how or when or why the person died. The amendments do require a judicial finding of necessity, but they do not include a requirement of a public hearing on closure. Indeed, a question exists as to whether the Legislature has the authority to require the judiciary to do so, though it probably could require law enforcement officials to do it openly.

3. Under these amendments, citizens will have one less way of judging how well or how poorly their law enforcement mechanism is working. Surely this is a vital function of citizens--to oversee the government they support with their taxes, elect with their votes and to whom they lend, not give, authority. Many investigations of unattended deaths never get to the point of charges being filed. Traditionally, the coroner's report has been one place where citizens can go to get forensic information to judge the effectiveness of their law enforcement in such cases. These amendments would end that citizen empowerment in the very instances where that information is most needed and of most potential value.

Given the above, the amendments will add yet another reason for citizens to be unduely suspicious of their governments. In an era when such mistrust is dangerously widespread, the thrust of legislation should be in just the opposite direction, toward more openness, not less.

I know of no case, in my 15 years in Kansas and 37 years in the newspaper business, in which information from a coroner's report has in fact been of detriment to an investigation, and I doubt that the bill's proponents can cite persuasive examples either. Certainly they have not done so.

Given that, it would seem foolish to let the vague fear of some imagined, possible interference cause us to enact a law which will destroy a fundamental check and balance within our system.

Our law enforcement authorities are well-intentioned public servants, and the vast majority of them would never deliberately or maliciously engage in activities that undercut the basis of our freedom. But laws exist not to regulate the honest citizen or official, but to guard against the dishonest. Citizen acccess to information is one of the most important of those regulating devices.

Tampering with important democratic unpinnings for the illusory reason of the convenience of authorities is a dangerous idea that could lead to grave consequences. I urge you to reject these amendments.

Thank you.

Davis Merritt

Kansas County & District Attorneys Association

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(913) 357-6351 • FAX # (913) 357-6352
EXECUTIVE DIRECTOR • JAMES W. CLARK, CAE

Testimony in Support of

House Bill No. 2385

The Kansas County and District Attorneys Association requested HB 2385, and we are grateful to the House Judiciary Committee for introducing it.

Our primary concern is that information contained in a coroner's report in a suspected homicide be kept confidential until the law enforcement investigation is completed. This confidentiality is required for three reasons: 1) in many cases, the only other person with such knowledge of the manner of death is the perpetrator; 2) such particular knowledge may lead to the possibility of "copy cat" crimes; and 3) such particular knowledge may lead to false confessions.

While this need for confidentiality has been observed in the past through informal agreements, the issuance of Attorney General Opinion No. 86-5 on January 21, 1986, which declared that reports prepared by the district coroner are public records under the Open Records Act effectively makes such informal agreements obsolete. Under the Opinion, continued reliance on informal agreements subject the coroner to injunction or mandamus actions, which may include the awarding of attorneys fees.

The provisions of HB 2385 give clear authority for the coroner, upon the request of a law enforcement agency and with the approval of the district court, to keep reports involving suspected homicides confidential, either until a suspect has been charged or until further order of the court.

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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

January 21, 1986

ATTORNEY GENERAL OPINION NO. 86- 5

Edwin M. Wheeler, Jr.
Marion County Attorney
Marion County Courthouse
Marion, Kansas 66861

Re: Laws, Journals and Public Information -- Records Open to Public -- Disclosure of Coroner's Reports

Counties and County Officers -- District Coroner -- Disclosure of Coroner's Reports

Synopsis: Reports prepared by a district coroner or deputy district coroner pursuant to K.S.A. 19-1032 are public records open to inspection by any person under the Open Records Act, K.S.A. 1984 Supp. 44-215 et seq. Cited herein: K.S.A. 19-1026; 19-1032; 19-1033; 19-1034; 22-4701; K.S.A. 1984 Supp. 45-216; 45-217; 45-221.

* * *

Dear Mr. Wheeler:

As county attorney for Marion County, you request our opinion regarding coroner's reports. You ask whether such reports are public records which must be disclosed to an insurance company which requests a copy of any report filed with the clerk of the district court.

The primary responsibility of a district coroner or deputy district coroner is to determine the cause of death of a person who dies from other than natural causes. State v. Gordon, 219 Kan. 643, Syl. ¶6, 549 P.2d 886 (1976). The duties of a coroner are stated in K.S.A. 19-1032:

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> "Upon receipt of such notice, the coroner shall take charge of the dead body, make inquiries regarding the cause of death, and reduce the findings to a report in writing. Such report shall be filed with the clerk of the district court of the county in which death occurred." (Emphasis added.)

Pursuant to K.S.A. 19-1033, an autopsy shall be made on a dead body if the coroner believes it is advisable and in the public interest, or if the county or district attorney makes a written request for an autopsy. K.S.A. 19-1033 also requires that:

> "A full record and report of the facts developed by the autopsy and findings of the person making such autopsy shall be promptly made and filed with the coroner and with the clerk of the district court of the county in which the decedent died."

It is clear that a coroner's report is distinguishable from an autopsy report as an autopsy may not always be done in each case. Such reports are admissible evidence pursuant to K.S.A. 19-1034:

> "The records of the coroner filed with the clerk of the district court and other public records of the coroner made by the coroners or by anyone under the direction or supervision [of the coroner] and transcripts certified by the coroner shall be received in any court or administrative body in the state as competent evidence of the matters and facts therein contained. All records filed under this section shall be on a form approved by the director of the Kansas bureau of investigation. The records which shall be admissible under this section shall be records of the results of views and examinations of or autopsies upon the bodies of deceased persons by such coroner or by anyone under such coroner's direct supervision or control, and shall not include statements made by witnesses or other persons."

Under the Open Records Act, public records are to be open for inspection by any person unless otherwise provided. K.S.A. 1984 Supp. 45-216. A "public record" is defined to include recorded information in any form in the possession of a public agency. K.S.A. 1984 Supp. 45-217(f)(1). A "public agency" includes any officer of the state or political or taxing subdivision. K.S.A. 1984 Supp. 45-217(e)(1). As the office of district coroner is established by K.S.A. 19-1026, a coroner is therefore included within the act, and a coroner's report is a public record.

A public record is to be open unless it falls within one of the thirty-five categories of records which the act has indicated public agencies are not required to disclose. K.S.A. 1984 Supp. 45-221(a). The first category exempts records for which disclosure is specifically prohibited or restricted by federal law, state statute, or rule of the Kansas Supreme Court. K.S.A. 1984 Supp. 45-221(a)(1). Coroner's reports are not listed among the exceptions to disclosure of public records. A coroner's report does not fall within the criminal investigation record exception, as the office of district coroner is not a criminal justice agency as defined in K.S.A. 22-4701(c). K.S.A. 1984 Supp. 45-217(b); K.S.A. 1984 Supp. 45-221(a)(10). In addition, there is no specific statute or rule which exempts coroner's reports from public disclosure.

In conclusion, reports prepared by a district coroner or deputy district coroner pursuant to K.S.A. 19-1032 are public records open to inspection by any person under the Open Records Act, K.S.A. 1984 Supp. 44-215 et seq.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Rita L. Noll

Rita L. Noll
Assistant Attorney General

RTS:JSS:RLN:crw

Session of 1990

HOUSE BILL No. 3044

By Committee on Judiciary

2-20

AN ACT concerning district coroners; relating to the filing of reports; amending K.S.A. 1989 Supp. 22a-232 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1989 Supp. 22a-232 is hereby amended to read as follows: 22a-232. Upon receipt of notice pursuant to K.S.A. 22a-231 and amendments thereto, the coroner shall take charge of the dead body, make inquiries regarding the cause of death and reduce the findings to a report in writing. Such report shall be filed with the clerk of the district court of the county in which death occurred, *provided that if the death is a suspected homicide, such report shall not be filed without the approval of the district or county attorney.* If the coroner determines that the dead body is not a body described by K.S.A. 22a-231 and amendments thereto, the coroner shall immediately notify the state historical society.

Sec. 2. K.S.A. 1989 Supp. 22a-232 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

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House Bill No. 2384
House Judiciary Committee
February 26, 1991

Testimony of Paul Shelby
Assistant Judicial Administrator
Office of Judicial Administration

Mr. Chairman:

I appreciate the opportunity to appear today to discuss with you House Bill No. 2384. This bill amends K.S.A. 60-3005, relating to court fees for foreign judgments.

Last year House Bill No. 3021 raised civil docket fees by $5 which was effective January 1, 1991. However, K.S.A. 60-3005 relating to court fees for foreign judgments was overlooked, and that docket fee remains at $55 instead of $60..

This proposal will make the foreign judgment docket fee the same as regular civil which historically it has been. Our amendment would place this docket fee into K.S.A. 60-2001, and amendments thereto in order that it will not be overlooked in the future if docket fees are ever increased.

I understand that this proposal was amended into House Bill No. 2051 which addresses alternative dispute resolution fees and passed the House today 122 to 1. We appreciate the actions of the House in making this amendment and passing the bill but we do not know at this time how the Senate might respond to the issue of ADR fees. As you know alternative dispute resolution can be a very controversial subject. Conceivably, the Senate could amend or kill House Bill No. 2051 which would affect the amendment on this foreign judgment docket fee issue.

Therefore we request that this proposal be recommended favorably by this committee.

HJUD
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