Approved: 4/15/92
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

1:00 p.m. on April 8, 1992 in room 527-S of the Capitol.

All members were present except:
Senators Bond, Feleciano and Gaines who were excused.

Committee staff present:
Mike Heim, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:
Representative George Gomez
Jolene Grabill, for Speaker of the House of Representatives Marvin Barkis
Onan Burnett, Topeka USD 501
James Yonally, Shawnee Mission Public Schools
Helen Stephens, Blue Valley USD 229 and
Kansas Police Officers Association
Roberta Sue McKenna, Kansas Department of Social and Rehabilitation Services
Ben Coates, Kansas Sentencing Commission
Roger Werholtz, Kansas Department of Corrections
Joan Bengtson, Vice Chairperson of the Kansas Parole Board
Bob Alderson, Kansas Bar Association Legislative Committee
John Wine, Secretary of State General Counsel

Chairman Winter called the meeting to order by opening the hearing for HB 2692.
HB 2692 - disclosure of records regarding children in need of care and juvenile offenders.

Representative George Gomez testified in support of HB 2692 by stating that the intent of the bill was to address the issue of juvenile confidentiality and expanding the range of people who could communicate in regard to a particular child. He stated the bill would clarify in a single statute who could exchange information. He responded to questions by explaining that the inclusion of "licensed social worker" in the bill would create a conflict between the law and the Behavioral Sciences Regulatory Board. The law would be more lenient, thereby creating penalties for social workers who legally share information but are in violation of the rules and regulations of the professional regulatory entity.

Jolene Grabill testified on behalf of House Speaker Marvin Barkis in support of HB 2692. She stated the Special Committee on Children's Initiatives received repeated messages on the prohibitions in trying to work out problems with families. The Committee identified this matter as a goal for passage by the 1992 Legislature. She added that Melissa Ness, Kansas Children's Service League, and Larry Rute, Kansas Legal Services, Inc., supported HB 2692 as it was amended by the House.

Ms. Grabill presented a copy of Judge Michael Corrigan's Administrative Order No. 91-4 as an example of how the disclosure could be handled. (ATTACHMENT 1) She added her assurance that there was no attempt to jeopardize any child abuse funds and wanted to resolve any concerns stated for passage of HB 2692. She suggested a possible changing of the effective date. She expressed no objection to the alternative of including a severability clause to provide for federal funding if necessary. She concluded by stressing that the desire was to work to wrap services around the children.

Onan Burnett, Topeka USD 501, stood to endorse the concepts of HB 2692 and urged the Committee's support.

James Yonally, Shawnee Mission Public Schools, stood to express their support of HB 2692. Mr. Yonally added that the City of Overland Park wished to have its support of the bill expressed.

Helen Stephens, Blue Valley USD 229 and Kansas Police Officers Association, spoke in support of HB 2692. She stated both groups she represented would like to cooperate and coordinate to provide what would be in the best interest of the children.

Roberta Sue McKenna, Kansas Department of Social and Rehabilitation Services, spoke in opposition to HB 2692. (ATTACHMENT 2) She responded to questions by stating that they prefer a specific list of providers who qualify for sharing of information rather than a broad, generalized terminology. She stressed that they greatly preferred the federal language to the bill being heard.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 527-S, Statehouse, at 1:00 p.m. on April 8, 1992.

This concluded the hearing for HB 2692. Committee discussion followed which resulted in a request by the Chairman to staff to contact the interested parties to develop language to incorporate a conceptual amendment to change lines 30 to 32 of HB 2692, which would add the "laundry list" of providers, including legislators or committees in the course of performing their duties, but not to include clergy.

Chairman Winter opened the hearing for HB 3105.

HB 3105 - retention of original depositions and interrogatories.

Ron Smith, Kansas Bar Association, presented the Committee with copies of a letter from Rex Beasley, Associate General Counsel of KOCH Industries, Inc., in support of HB 3105. (ATTACHMENT 3)

As no other conferees appeared, this concluded the hearing for HB 3105.

Chairman Winter noted that due to the loss of a quorum of the Committee, any action taken would be submitted to the full Committee as a Subcommittee report. Those present were Senators Kerr, Morris, Petty, Rock and Winter.

Senator Rock moved a Subcommittee report be submitted to recommend HB 3105 favorable for passage. Senator Morris seconded the motion. The motion carried.

Chairman Winter opened the hearing for HB 3120.

HB 3120 - grant payments to community correction programs.

Ben Coates, Kansas Sentencing Commission Executive Director, testified in support of HB 3120. (ATTACHMENT 4)

Roger Werholtz, Kansas Department of Corrections, presented testimony on behalf of Secretary Gary Stotts in support of HB 3120. (ATTACHMENT 5)

This concluded the hearing for HB 3120.

Senator Morris moved to submit a Subcommittee report to recommend HB 3120 favorable for passage. Senator Petty seconded the motion. The motion carried.

The hearing was opened for SB 792.

SB 792 - requiring one parole board member to be an attorney.

It was noted that Carla Stovall, out-going Chairman of the Kansas Parole Board, had suggested introduction of SB 792 as she was the sole attorney on the current board and felt it would be beneficial to the Parole Board to have an attorney member at all times.

Joan Bengtson, Vice Chairperson of the Kansas Parole Board, testified in opposition to SB 792. (ATTACHMENT 6)

This concluded the hearing for SB 792. It was the consensus of the acting Subcommittee that SB 792 recommend the bill be reported adversely, or not reported and allowed to die in Committee.

The hearing was opened for HB 3152.

HB 3152 - amendments to the corporation code.

Bob Alderson, Kansas Bar Association Legislative Committee, testified in support of HB 3152. (ATTACHMENT 7)

John Wine, Secretary of State General Counsel, presented testimony in support of HB 3152. (ATTACHMENT 8)

This concluded the hearing for HB 3152.

The meeting was adjourned at 2:05 p.m.

Date April 8, 12

VISITOR SHEET
Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
Ron Smith	Ks Bar
Patricia Ginonall	OJA
Joan Singleton	KPB
Roberta Sue McKenna	KDSRS
Lisa Getz	Keys for Networking
Ben Coates	KSC
Roger Werholtz	KDOC

Date 8- 14 A

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS

ADMINISTRATIVE ORDER

91-4

WHEREAS, activities of "youth gangs" (i.e., a group working to unlawful or antisocial ends) in and around schools imperils the safety of students and the educational environment on school campuses, and participation in youth gangs imperils the health, safety, and future of juveniles involved;

WHEREAS, concerns about confidentiality may have restricted communication between the juvenile department of this court and public school officials, law enforcement agencies, and social workers employed by the state;

WHEREAS, lack of communication among these public agencies impedes identification of juveniles at risk of participating in or becoming victims of youth gang activities, the prevention of participation in gang activities, the identification and prosecution of certain juvenile offenders, the evaluation and placement of adjudicated juvenile offenders, and the ability of educators to provide the best education possible for juveniles; and

Senate Judiciary Committee
April 8, 1992
Attachment 1

WHEREAS. K.S.A. 38-1506 and 38-1607 authorize the Court to disclose information concerning juvenile offender and child in need of care cases and the welfare of the juveniles at risk and the welfare of the community would be served by sharing information from this court's records with appropriate agencies.

IT IS THEREFORE ORDERED that court services officers of this court are authorized to disclose information regarding a juvenile/child who is subject to this court's jurisdiction from this court's files and records to (1) the chief administrative officer of a school where the juvenile or child is enrolled, (2) the U.S.D. 259 area superintendent in whose area the school is located, (3) the superintendent of any other school district in Sedgwick County, (4) any social worker employed by a school district or the Kansas Department of Social and Rehabilitation Services who is working with the juvenile/child or the family of the juvenile/child, (5) any law enforcement officer conducting an investigation regarding the juvenile's activities and/or (6) the supervisor of security for any of such school district.

IT IS FURTHER ORDERED that any individual receiving information pursuant to this authorization shall recognize and respect the confidential nature of such

information and, while such information may be shared with others within that agency on a "need to know" basis, shall take all precautions necessary to avoid an unwarranted or indiscriminate disclosure of such information to others.

IT IS FURTHER ORDERED that the information released under this order shall be that which relates to participation in or victimization by youth gang activities including but not limited to:

1. Offenses relating to the possession or sale of drugs, offenses against persons, weapons offenses, and offenses which if committed by an adult would be Class A, B, or C felonies,

2. Offenses of any nature if a juvenile is sixteen years of age or older or if a juvenile under the age of sixteen has been adjudicated a juvenile offender on three (3) occasions,

3. Any information disclosed by a juvenile to a court service officer or other court related personnel.

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument filed on the 8th day of March, 1991, and recorded in this Court of the Eighteenth Judicial District in Sedgwick County, Kansas. Dated this 8th day of March, 1991

Clerk of the District Court

By Arlene Hunter

MICHAEL CORRIGAN

Michael Corrigan
Administrative Judge

DISTRICT COURT SEAL SEDGWICK COUNTY, KANSAS

1-3/3

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Donna Whiteman, Secretary

Committee on the Judiciary
Wint Winter Jr., Chairperson

April 8, 1992
Testimony in Regard to H.B. 2692 As Amended

AN ACT concerning children; relating to disclosure of certain records; amending K.S.A. 38-1508 and K.S.A. 1991 Supp. 38-1506, 38-1507, 38-1607, and 38-1608 and repealing the existing sections.

Mr. Chairperson, Members of the Committee, I am appearing today in opposition to H.B. 2692. While the Department supports making information from confidential records available to those to whom the care or treatment of children is entrusted, we believe that this bill does not provide adequate protection for the privacy of children and their families and will not sigificantly enhance the Department's ability to share information with persons who have a need to know.

Purpose of the bill:
As amended, the bill changes the Kansas Code for Care of Children and the Juvenile Offenders Code to allow greater access to court official files and authorizes the Secretary of SRS to provide access to any individual, or public or private agency having custody of a child under court order or who is providing social, educational, medical, mental health, services to the child or who is a court-approved advocate for the child. The major focus of this testimony is on the statutes pertaining to children in need of care but the issues raised impact juvenile offenders and their families as well.

Background:
As originally drafted provisions of the bill would have made the State ineligible for certain Federal grants for child abuse and neglect prevention and treatment. It is unclear whether the amendments to the bill have resolved the issue of eligibility but difficulties with the language of the bill remain.

Discussion:
Kansas statutes regarding confidentiality of records concerning alleged child abuse and neglect were written to follow closely the requirements of the federal Child Abuse and Neglect Prevention and Treatment Act (CAPTA)(P.L. 100-294). The regulations promulgated pursuant to this act set forth in detail those entities with whom the State may share information. Limitations in CAPTA on access to confidential information are not arbitrary but are rooted in well established constitutional and societal values about families' rights to privacy as well as the need for protecting children.

A guiding principle of the law is a bona fide need to know. One of the Department's concerns about this bill is that it opens up the possibility of sharing information with no clear requirement that there be some demonstrated need connected to the reason for the involvement of the person with the child. This proposed language increases the likelihood that the Department and the courts will be burdened with demands from individuals and groups who have agendas independent of the best interest of the child and family involved.

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April 8, 1992
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The changes in K.S.A 38-1507 over time have resulted in a patchwork of provisions which are, at times, confusing and inconsistent. Protection for the identity of reporters of abuse and neglect is a keystone of the reporting system (and eligibility for federal funds) but is not uniformly applied; protection from further disclosure of the records appears to apply in some sections and not in others; and while many persons and agencies have access to information, the child who is the subject of the information does not. The provisions of the amended bill authorizing disclosure to "a court-approved advocate for the child" appear either to echo already existing provisions of the law (regarding court appointed special advocates) or to create a new, undefined, class of persons with whom information may be shared.

There is also a need for coordination of the provisions of the proposed legislation with the statutes and regulations pertaining to the licensed practice of social work in Kansas. Without careful consideration and clear direction on this issue, Department staff could easily find themselves penalized by the Behavioral Sciences Regulatory Board for having exercized discretion authorized under the statutes modified by this bill.

It may be that the time has again come for the State to consider who needs to know and what they need to know concerning child abuse and neglect and juvenile offender records. If so, the Department believes that a comprehensive and detailed look at the issue of confidentiality is a better way to approach this issue than adding another patch to the statute. We agree with the report of the Legislature's Special Committee on Children's Initiatives which recommended that "the confidentiality requirements of both state and federal laws and regulations be examined" to allow exchange of client information between public and private providers serving families (p. 56).

Effect of passage:
The effect of passage of the bill as it is currently constructed is difficult to to predict. Some of the apparent intended recipients of information can already receive information under current law. Other categories, such as "educational" or "court approved advocates" appear to be so broad as to open requests for confidential records to virtually anyone claiming to represent such a group.

Of great concern is whether passage of this bill, even as amended, would render the State ineligible for over $420,000 in Federal child abuse and neglect grants annually.

Recommendation:
The Department supports making information from confidential records available, under suitable protections, to those to whom the care or treatment of children is entrusted. We must, however, ask that H.B. 2692 not be recommended for passage.

Roberta Sue McKenna
Staff Attorney
Youth and Adult Services
Department of Social and
Rehabilitation Services
(913) 296-3967

CRH:dr

protection, the State must provide emergency services to protect the child's health and welfare. These services may include emergency caretaker or homemaker services; emergency shelter care or medical services; review by a multidisciplinary team; and, if appropriate, criminal or civil court action to protect the child, to help the parents or guardians in their responsibilities and, if necessary, to remove the child from a dangerous situation.

(g) *Guardian ad litem.* In every case involving an abused or neglected child which results in a judicial proceeding, the State must insure the appointment of a guardian ad litem or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem, to represent and protect the rights and best interests of the child. This requirement may be satisfied: (1) By a statute mandating the appointments; (2) by a statute permitting the appointments, accompanied by a statement from the Governor that the appointments are made in every case; (3) in the absence of a specific statute, by a formal opinion of the Attorney General that the appointments are permitted, accompanied by a Governor's statement that the appointments are made in every case; or (4) by the State's Uniform Court Rule mandating appointments in every case. However, the guardian *ad litem* shall not be the attorney responsible for presenting the evidence alleging child abuse or neglect.

(h) *Prevention and treatment services.* The State must demonstrate that it has throughout the State procedures and services deal with child abuse and neglect cases. These procedures and services include the determination of social service and medical needs and the provision of needed social and medical services.

(i) *Confidentiality.* (1) The State must provide by statute that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense.

(2) If a State chooses to, it may authorize by statute disclosure to any or all of the following persons and agencies, under limitations and procedures the State determines:

(i) The agency (agencies) or organizations (including its designated multidisciplinary case consultation team) legally mandated by any Federal or State law to receive and investigate reports of known and suspected child abuse and neglect;

(ii) A court, under terms identified in State statute;

(iii) A grand jury;

(iv) A properly constituted authority (including its designated multidisciplinary case consultation team) investigating a report of known or suspected child abuse or neglect or providing services to a child or family which is the subject of a report;

(v) A physician who has before him or her a child whom the physician reasonably suspects may be abused or neglected;

(vi) A person legally authorized to place a child in protective custody when the person has before him or her a child whom he or she reasonably suspects may be abused or neglected and the person requires the information in the report or record in order to determine whether to place the child in protective custody;

(vii) An agency authorized by a properly constituted authority to diagnose, care for, treat, or supervise a child who is the subject of a report or record of child abuse or neglect;

(viii) A person about whom a report has been made, with protection for the identity of any person reporting known or suspected child abuse or neglect and any other person where the person or agency making the information available finds that disclosure of the information would be likely to endanger the life or safety of such person;

(ix) A child named in the report or record alleged to have been abused or neglected or (as his/her representative) his/her guardian or guardian ad litem;

(x) An appropriate State or local official responsible for administration of the child protective service or for oversight of the enabling or appropriating legislation, carrying out his or her official functions; and

(xi) A person, agency, or organization engaged in a bonafide research or evaluation project, but without information identifying individuals named in a report or record, unless having that information open for review is essential to the research or evaluation, the appropriate State official gives prior written approval, and the child, through his/her representative as cited in paragraph (i) of this section, gives permission to release the information.

(3) If a State chooses, it may authorize by statute disclosure to additional persons and agencies, as determined by the State, for the purpose of carrying out background and/or employment-related screening of individuals who are or may be engaged in specified categories of child related activities or employment. Any information disclosed for this purpose is subject to the confidentiality requirements in paragraph (i)(1) and may be subject to additional safeguards as determined by the State.

(4) Nothing in this section shall be interpreted to prevent the properly constituted authority from summarizing the outcome of an investigation to the person or official who reported the known or suspected instances of child abuse or neglect or to affect a State's laws or procedures concerning the confidentiality of its criminal court or its criminal justice system.

(5) HHS and the Comptroller General of the United States or any of their representatives shall have access to records, as required under 45 CFR 74.24.

[48 FR 3702, Jan. 26, 1983, as amended at 50 FR 14887, April 15, 1985; 52 FR 3995, Feb. 6, 1987]

§ 1340.15 Services and treatment for disabled infants.

(a) *Purpose.* The regulations in this section implement certain provisions of the Child Abuse Amendments of 1984, including section 4(b)(2)(K) of the Child Abuse Prevention and Treatment Act governing the protection and care of disabled infants with life-threatening conditions.

(b) *Definitions.* (1) The term "medical neglect" means the failure to provide adequate medical care in the context of the definitions of "child abuse and neglect" in section 3 of the Act and § 1340.2(d) of this part. The term "medical neglect" includes, but is not limited to, the withholding of medically indicated treatment from a disabled infant with a life-threatening condition.

(2) The term "withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's (or physicians') reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in the treating physician's (or physicians') reasonable medical judgment any of the following circumstances apply:

(i) The infant is chronically and irreversibly comatose;

(ii) The provision of such treatment would merely prolong dying, not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or otherwise be futile in terms of the survival of the infant; or

(iii) The provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

(3) Following are definitions of terms used in paragraph (b)(2) of this section:

(i) The term "infant" means an infant less than one year of age. The reference to less than one year of age shall not be construed to imply that treatment should be changed or discontinued when an infant reaches one year of age, or to affect or limit any existing protections available under State laws regarding medical neglect of children over one year of age. In addition to their applicability to infants less than one year of age, the standards set forth in paragraph (b)(2) of this section should be consulted thoroughly in the evaluation of any issue of medical neglect involving an infant older than one year of age who been continuously hospitalized birth, who was born extremely pre

KOCH INDUSTRIES INC

LEGAL DEPARTMENT
LITIGATION SECTION

REX G. BEASLEY
ASSOCIATE GENERAL COUNSEL

April 7, 1992

The Honorable Wint Winter Jr.
Chairman of Senate Judiciary Committee
Kansas Senate
State Capitol Building
Topeka, Kansas 66612

Re: House Bill No. 3105

Dear Senator Winter:

I regret that I am going to be unable to testify in support of the above bill. This letter contains an explanation of the need for the passage of the bill; please feel free to share it with the your committee.

Prior to changes in K.S.A. 60-230(f), original deposition transcripts obtained in litigation were filed with the Clerk of the District Court in the Judicial District where the legal proceedings were pending. Supreme Court Rule No 108 gives the clerk guidance on the retention and disposition of "court record". Presumably to ease the burden on the Court of storing original deposition transcripts, the Legislature made changes to K.S.A. 60-230(f) which transferred the burden of maintaining the original deposition transcripts to the litigants or their counsel. However, neither the litigants nor their counsel have the benefit of any rule providing guidance concerning the retention or disposition of the original deposition transcripts. In addition to original deposition transcripts, litigants and their counsel are frequently in possession of many other original discovery documents after a case is closed. Guidance should also be given concerning those materials as well.

Senate Judiciary Committee
April 8, 1992

4111 East 37th Street North • Wichita, Kansas 67220 • P.O. Box 2256 • Wichita, Kansas 67201
316/832-4030 • FAX 316/832-8950

Attachment 3 1/2

I first recognized the need for House Bill No. 3105 while preparing a closed litigation file for storage. There was no need to retain the original deposition transcripts yet there did not appear to be any authority to relieve me of the obligations imposed by the provisions of K.S.A. 60-230(f). The question was investigated by the Wichita Bar Association's Civil Practice and Procedure Committee. No answer could be found. The Board of Governors of the Wichita Bar Association authorized the Committee to make a proposal to the Kansas Supreme Court that it adopt a new Supreme Court Rule to address the problem. A rule very similar to House Bill No. 3105 was proposed to the Supreme Court. The Supreme Court determined that the problem should be addressed by the Legislature.

House Bill No. 3105 provides the necessary authority and guidance that is presently lacking and should be passed as proposed.

Very truly yours,

Rex G. Beasley
Associate General Counsel

RGB/am

3-2/2

HB - 3120

An act concerning community corrections; relating to county grants.

This bill would alter the frequency of grant payments to community corrections programs. Currently, those programs receive quarterly grant payments. This bill would change the community corrections act to provide for two payments annually, versus the current four payments.

The task force heard testimony that the current method of distributing quarterly grant payments results in some needed, necessary, and approved purchases being delayed until the end of the fiscal year - when sufficient funding has accrued to proceed with those purchases.

The proposed change would allow counties to proceed with necessary purchases earlier in their grant year.

For more information contact:

Kansas Sentencing Commission
(913) 296-0923

Ben Coates, Director
Blaine Carter, Management Analyst

Senate Judiciary Committee
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STATE OF KANSAS

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

Joan Finney
Governor

Gary Stotts
Secretary

MEMORANDUM

DATE: April 8, 1992

TO: Senate Judiciary Committee

FROM: Gary Stotts, Secretary of Corrections

SUBJECT: House Bill No. 3120

HB 3120 changes the community corrections grant funding schedule for counties from quarterly to semiannual payments. The bill also specifies that grant amounts can be paid commencing on January 1 or July 1. The current method of distributing grant payments to the counties seems to be working well. However, HB 3120 was requested by local programs who view the current method of quarterly payments as precluding large equipment purchases until the last quarter of the fiscal year.

The Department of Corrections does not oppose HB 3120. However, we wish to clarify for the committee that currently it is not unusual for quarterly payments to be made as much as 10 to 15 days after the beginning of a calendar quarter due to the time required to process payment after the Department of Corrections generates the payment voucher. The department does not interpret the bill's language to mean that payment will be made on January 1 or July 1. Rather, we will process two semi-annual payments in the same manner that we now process four quarterly payments. If this is not the intent, the department recommends consideration of amendments to the provisions.

GS:dja

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Testimony Regarding SB 792
House Judiciary Committee
April 8, 1992
by
Joan Bengtson, Vice-Chairperson of the Kansas Parole Board

Senate Bill 792 adds language that would require that an attorney serve on the Parole Board. Previous testimony described in the House Committee of the Whole Recommendations indicates the "agency" requests that in lieu of increasing time that the Assistant Attorney General spends on Parole Board issues, that an attorney always serve on the Parole Board, so that particular attorney could perform legal duties for the Parole Board.

As Vice-Chairperson of the Parole Board, I am here to say that this "agency request" by no means represents a consensus of the Parole Board, and is a flawed recommendation for responding to legal threats to the State of Kansas and the Parole Board.

I have made it clear to anyone that will listen, that the Parole Board needs a staff attorney that is not a Parole Board member for the following reasons:

1. A staff attorney would be avaliable for both staff and Board consultations, since he/she would not be emeshed in Parole hearings. A Board member attorney would not be able to respond in a timely manner to legal issues, because of being schedule into Parole hearings.

2. A staff attorney would be working for the best interest of the Parole Board, and the State of Kansas. A Parole Board attorney could not effectively defend the Parole Board and perform duties as a Parole Board member.

3. As well meaning as I am sure an attorney on the Parole Board would be, I think his/her objectivity would be damaged by the demands of a dual focus on protecting society from criminals, and protecting the Board from litigation of inmates.

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4. A Parole Board member serving as a Board attorney would be easily accussed of a conflict of interest by plantiffs.

5. A staff attorney could consult with the Board and staff to establish a system for protecting the Board from lawsuits, that could go far to stem the tide of lawsuits filed by inmates.

In addition to the above reasons for hiring a staff attorney and not employing an attorney on the Parole Board to defend the Parole Board, prescribing types of professions to sit on the Parole Board opens up arguments about prescribing a full array of professions to be a appointed. It can be easily argued that psychologists, social workers, psychiatrists, human behaviorists, criminologists, sociologists, correctional professionals, etc. should be appointed as well. This could lead to establishing specific qualifications for members on any governmental board.

In conclusion, I believe that the State of Kansas can not afford to not have a staff attorney for the Parole Board. An attempt to save time for the Assistant Attorney General, could easily result in major expenses from lawsuits that would not have had the advantage of the full attention of an objective legal defense. I urge the committee to reject the amendment to KSA 22-3707 to require the appointment of an attorney on the Parole Board.

ALDERSON, ALDERSON, MONTGOMERY & NEWBERY

ATTORNEYS AT LAW

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MEMORANDUM

TO: Senate Committee on Judiciary

FROM: Bob Alderson, Chair, KBA Legislative Committee

RE: House Bill No. 3152 (As Amended by House Committee)
Amendments to Kansas General Corporation Code

DATE: April 7, 1992

The purpose of this Memorandum is to provide brief explanatory statements regarding each of the amendments that would be effected in the General Corporation Code by the enactment of HB 3152, which was drafted to implement current KBA legislative policy. In furtherance of recommendations of the KBA Legislative Committee, which I have chaired for the past three years, the KBA Board of Governors recommended essentially three types of amendments to the Code: (1) To incorporate recent changes in the Delaware Corporation Code, so as to maintain the Kansas Code's substantial conformity with the corresponding Delaware corporation laws; (2) to clarify certain of the changes made in the Code as a result of the last two legislative efforts to maintain conformity with the Delaware Code in 1986 and 1988; and (3) to delete the requirement that any instrument which is required by any provision of the Code to be filed with the Secretary of State must also be recorded with the Register of Deeds of the county in which the corporation's registered office is located in this state.

The latter amendments, however, were rejected by the House Committee on Judiciary. That committee also included in the bill an amendment to K.S.A. 17-1708 proposed by the Secretary of State's office.

The following is a summary of the amendments made by each section of the bill, as it has been amended by the House Judiciary Committee.

Section 1 (17-6002).

Subsection (a)(1) sets forth the various "words of incorporation" that may be used in a corporation's name, and it requires that a corporation's name must be such as to distinguish it "upon the records in the office of the secretary of state" from names of other corporations, limited liability companies and "partnerships." The amendment to this subsection appears in line 27 on page 1, where the word "limited" is inserted before the word partnerships, not only to conform with the corresponding provision of the Delaware Code, but also in recognition of the fact that only limited partnerships must be registered with the Secretary of State. General partnerships are not required to be registered under Kansas law. The

Senate Judiciary Committee
April 8, 1992
Attachment 7

further amendment on page 1 in line 30, by inserting "limited liability company or limited partnership," is made to correspond with the prior requirement as to the names of entities which are registered with the Secretary of State.

Section 2 (17-6009).

The amendments proposed to 17-6009 reflect an effort to clarify some ambiguities which resulted from the Legislature's amendments to this section in 1988, so as to conform with the corresponding section of the Delaware Code. The 1988 conforming amendments paid substantially more attention to form, than substance, employing archaic language and outdated drafting techniques which generally have been discarded in Kansas for nearly 20 years. Moreover, one of the so-called "clarifying" amendments produces more confusion than clarity.

As a result of those amendments, the initial sentence of 17-6009 now provides that the original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators or by the initial directors if named in the articles. That provision is substantially the same as it was prior to the 1988 amendment, although it is extended now to "other" bylaws not just the original bylaws and the powers now include the amendment or repeal of the bylaws, not just the adoption. The confusion arises, however, from the fact that engrafted onto this provision is a statement that, prior to the corporation receiving any payment for its stock, the board of directors may adopt, amend or repeal bylaws. This is confusing, in light of the fact that the "initial directors" constitute a "board of directors," and these initial directors serve until the first annual meeting of stockholders or until their successors are chosen and qualified. During that time, certainly, stock is normally issued to stockholders. Otherwise, there can be no meeting of stockholders.

Thus, the 1988 amendments create uncertainty as to the extent of the power of the initial directors to adopt bylaws. There are other confusing aspects of these prior amendments, particularly as they relate to the respective powers of stockholders and directors to adopt bylaws, and as they govern the adoption of bylaws in nonstock corporations.

The amendments proposed in this section have attempted to clarify these situations.

Section 3 (17-6204).

The substantive changes occur in subsection (c), where the term "registered agent" is changed to "resident agent" to be consistent with Kansas law. Subsection (c) was added as one of the 1988 conforming amendments, but the terminology used in the Delaware law was not changed to correspond to the language which always has been used in Kansas. The Legislature made a conscious decision in 1972 that it would not change the prior practice of referring to this officer as a "resident" agent merely for the sake of conforming to Delaware's reference to this officer as "registered" agent.

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Section 4 (17-6301).

The conforming amendments of 1988 included an amendment to subsection (c) of 17-6301. However, in conforming this provision to the corresponding provision of the Delaware Code, the Legislature perpetuated an ambiguity which exists in the Delaware law regarding powers of committees of the board of directors. Substantially all of the powers of a board of directors may be conferred upon any of its committees, with certain stated exceptions. One of those exceptions is that no committee shall have the power or authority with reference to amending the articles of incorporation. The "conforming amendment" of 1988 added an "exception" to that exception concerning the board's powers relating to designations, preferences, and other rights regarding the corporation's shares of stock.

However, this "exception" to the exception requires that these powers be exercised pursuant to K.S.A. 17-6401, which specifically provides that the resolution contemplated must be adopted pursuant to authority "expressly vested" in the board by the articles of incorporation. Accordingly, where such resolution is adopted and it provides for the exercise of authority by a committee of the board, it does not operate as an amendment of the articles of incorporation, but rather pursuant to authority expressly provided therein. Thus, stating a committee's authority respecting the corporation's shares of stock as an exception to the prohibition against a committee exercising any power or authority regarding amendment of the articles of incorporation is inappropriate.

To clarify, the language which is stricken on page 12 in lines 37 and 38 is reinserted on page 13 in lines 6 and 7. As a result, the powers of a committee regarding the corporation's stock pursuant to a resolution specifically authorized by the board becomes one of the enumerated powers of a committee, and the exception regarding amendment of the articles of incorporation is repositioned in connection with the other prohibited powers of committees, where it was prior to the 1988 amendment.

The other substantive amendment to this section appears in subsection (k)(2) on page 15. The insertion of the new language in lines 5 and 6 not only conforms to the corresponding provision of the Delaware law, it also recognizes the fact that, in 1988, the Legislature eliminated the mandatory requirement that there be cumulative voting for directors, and made cumulative voting permissive. Even though that change was effected in the same bill which added subsection (k) to 17-6301, the change in cumulative voting was not recognized in subsection (2) as it is in the Delaware law.

Section 5 (17-6302).

The amendments to this section appear in subsection (d) on page 15, lines 38 to 41, inclusive. Currently, this subsection provides that the failure to "elect" the corporation's officers shall not dissolve a corporation. However, "election" of officers is not required. Subsection (b) provides that "[o]fficers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of

directors or other governing body." Accordingly, the change proposed in subsection (d) recognizes that officers may be selected in some manner other than election.

Section 6 (17-6401).

Subsequent to the 1988 conforming amendments to the Code, subsection (b) of the corresponding Delaware law was entirely rewritten. The Delaware law, as rewritten, is substituted for the existing subsection (b) of 17-6401.

In subsection (g), amendments are made to accommodate the elimination of the requirement that instruments be recorded with the register of deeds. Also in that subsection (page 19, lines 29 and 30), the words "or series" are deleted. Not only will the deletion of these words achieve conformity with the corresponding provision of the Delaware corporation law, it will permit the accomplishment of the clear intent of the Kansas statute. It is apparent that the limitation imposed by the Delaware statute on increasing the number of shares of a series of any class of stock is the total number of authorized shares of such class. However, the limitation in the Kansas statute is the total number of shares of the "class or series." Since that language does not appear in the corresponding provision of the Delaware law, it is unclear why that has been included in 17-6401.

On page 20, lines 23 to 36, inclusive, subsection (h) has been deleted. This subsection was added to 17-6401 in 1986, and at that time, the language was in substantial conformity with the language contained in the corresponding Delaware law. However, the Delaware provision was contained in subsection (f) of the corresponding Delaware statute, and not in a separate subsection (h). Thus, when the Kansas statute was further amended in 1988 to conform its provisions to Delaware law, subsection (f) was amended by the addition of language that is substantially the same as the last two sentences of subsection (h). Moreover, the first sentence of subsection (h) has been substantially duplicated by a 1988 amendment to 17-6408. Thus, the entirety of subsection (h) duplicates other Code provisions and is superfluous.

Section 7 (17-6418).

The phrase "new uncertificated shares or" is added to subsection (b) of 17-6418 on page 21, line 28. The addition of this language not only achieves conformity with the corresponding provision of the Delaware law, but also achieves consistency within the subsection. The new language was omitted from the 1988 conforming amendments to this statute, an apparent oversight.

Section 8 (17-6422).

Conforming amendments were made to 17-6422 in 1988. However, portions of the corresponding Delaware statute were omitted, apparently by inadvertence, and other language in the Kansas statute has become confused as a result of the drafting changes in 1988. The first of these inconsistencies is reconciled by the amendments on page 21, lines 42 and 43. The pertinent portion of this statute now relates to the "amount of the assets,

liabilities and net profits of the corporation, or both." The phrase "or both" makes no sense, since there are more than two items identified and they are joined by the conjunctive "and." The proposed change is in conformity with the corresponding Delaware statute.

Similarly, the new language shown in lines 1 and 2 at the top of page 22 was omitted from the 1988 conforming amendments and was replaced by the stricken language in line 1. Not only does the statute as currently drafted make no sense because of these changes, it does not conform to the Delaware law. The amendments rectify this problem.

Section 9 (17-6423).

This section is currently in conformity with the corresponding Delaware law. However, the last sentence thereof (lines 14 to 18, inclusive, on page 22) is of questionable value. It provides that no designation as capital by the board of directors shall be necessary where shares are being distributed pursuant to a "split-up" or division of its stock, rather than as payment of a dividend which has been declared payable in shares of the corporation's capital stock. Since the provisions preceding that sentence require the designation as capital only where dividends are declared and paid in shares of the corporation's capital stock, and since a "split-up" or stock division is not the equivalent of a stock dividend, this sentence appears to be unnecessary and merely states the obvious.

Section 10 (17-6506).

As a result of the conforming amendments in 1988, this section conforms to the corresponding Delaware law. However, both codes contained some rather imprecise language, and the amendments in HB 3152 attempt to provide clarity. In several places, this statute and the corresponding Delaware statute attribute voting power to shares of stock, when in reality, voting power is exercised by the holders of the stock. Shares of stock are not "entitled to vote" as the statute declares, but rather the holders thereof are so entitled. While this is not an "earthshaking problem," HB 3152 provides an opportunity to provide precision to existing language.

Section 11 (17-6508).

The only substantive amendments to 17-6508 appear in lines 22 and 25 on page 23. Both amendments are designed to achieve conformity with the corresponding Delaware statute.

Section 12 (17-6513).

Even though 17-6513 is nearly identical to its Delaware counterpart as a result of the 1988 conforming amendments, neither statute adequately addresses the problem of filling vacancies or newly-created directorships. While subsection (a) of the statute deals with the situation where there are no directors then in office, by reason of death, resignation or other cause, the statute does not provide a procedure to deal with the situation where there may be directors in office who were elected by all of the

stockholders, but there are no remaining directors in office who were elected by the holders of a particular class or series of stock and for whom a vacancy or newly-crated directorship is to be filled. The statute does not provide any apparent authority for the directors who are elected by all stockholders to fill such vacancy or newly-created directorship, and except to the extent provided in subsection (c), there is no authority for the persons identified in subsection (a) to call a special meeting of stockholders or apply to the district court, since the overriding condition of subsection (a), that there be no directors then in office, has not been satisfied.

Accordingly, the new paragraph appearing in lines 2 to 15, inclusive, on page 25 has been prepared in an effort to accommodate this hiatus.

Section 13 (17-6515).

"Registered agent" in line 29 on page 26 is changed to "resident agent."

Section 14 (17-6602).

A new subsection (c) has been added, in order to maintain the section's conformity with the corresponding Delaware statute. Subsection (c) was added to the Delaware statute subsequent to the 1988 conforming amendments to 17-6602.

Section 15 (17-6701).

In subsection (b) of 17-6701, the amendments in lines 34 and 35 on page 31 are designed to achieve conformity with the Delaware Code. In addition, the amendments are necessary to make sense of this provision. When two or more corporations merge, there is only one surviving corporation.

Similar amendments are made in subsections (c) and (d), by inserting in several instances the phrase "or resulting" after the word "surviving." In each of these instances, the context is referring to a merger or consolidation. On the one hand, when two or more corporations merge, there is but a single "surviving" corporation; whereas, the new corporation formed when two or more corporations consolidate is the "resulting" corporation.

An additional substantive amendment is made in subsection (d) by the insertion of the new language in lines 19 and 20 on page 33. Subsection (c) permits the filing of a certificate of merger or consolidation in lieu of filing the agreement of merger or consolidation itself. Accordingly, the new language proposed for insertion in subsection (d) would accommodate that provision. It is to be noted, however, that the new language is not found in the corresponding Delaware statute. Nonetheless, it would appear to be necessary.

The amendments to subsection (f) are designed to achieve conformity with the corresponding provision of the Delaware law.

7-6/8

Section 16 (17-6702).

As was the case in 17-6701, amendments are proposed to this section to reference the surviving "or resulting" corporation, when referenced in context of a merger or consolidation. In addition, changes are made to accommodate the elimination of the requirement that instruments be recorded with the register of deeds. All of the amendments to this section appear in subsection (c) on page 36.

Section 17 (17-6703).

The substantive amendments to 17-6703 occur in subsection (a) thereof and, for the most part, are designed to achieve conformity with the corresponding Delaware statute, which was not achieved by the 1988 amendments.

Section 18 (17-6704).

Subsection (b) of this statute is amended to achieve conformity with the 1990 amendments to the corresponding Delaware section. It would appear that no real substantive change has been effected; rather, it improves clarity.

In subsection (c), the amendments are intended to accomplish the conformity apparently intended by the 1988 amendments to this section. However, because of an apparent, inadvertent drafting error, conformity was not achieved.

Similarly, the amendments to subsection (d) are designed to achieve conformity with Delaware law, and with one exception, these amendments merely clarify the existing statute. The only new, substantive provision appears on page 42 in lines 7 to 10, inclusive, by including a new sentence providing for the effective date of an agreement of merger or consolidation where the surviving or resulting entity is a joint-stock association.

Subsection (f) also is amended to conform to Delaware law, by including "charitable joint-stock associations" within the contemplation of the subsection's declaration that nothing in 17-6704 shall be deemed to authorize the merger of such entity into a stock corporation or joint-stock association if the charitable status would be lost by such merger or consolidation.

Section 19 (17-6706).

Subsequent to the 1988 conforming amendments to this section, the corresponding Delaware statute was amended to broaden its scope. Whereas the Kansas statute applies to the merger or consolidation of nonstock, nonprofit corporations, the Delaware statute applies to the merger or consolidation of all nonstock corporations, irrespective of whether they are nonprofit or profit. The amendments to 17-6706 incorporate the recent Delaware amendments.

Section 20 (17-6707).

K.S.A. 17-6707 does not presently conform with the corresponding section of the Delaware Code, because of amendments made to the Delaware statute in 1988. Conformity would be achieved by the amendments proposed in HB 3152. Some of these amendments are primarily to clarify the section's intent. However, the new language on page 47 in lines 1 to 14, inclusive, provides for the contingency that shares of a stock corporation or membership interest of a nonstock corporation are not to be converted solely into shares or other securities of the stock corporation or membership interests of the nonstock corporation surviving or resulting from the merger or consolidation.

Section 21 (17-6805).

The 1988 conforming amendments to this statute failed to achieve complete conformity with the corresponding Delaware statute. Subsection (a) of the Kansas statute applies to the dissolution of a nonprofit, nonstock corporation, while the Delaware statute applies to the dissolution of any nonstock corporation. The amendments proposed in HB 3152 would achieve conformity with the Delaware statute.

Subsection (b) of 17-6805 also has been amended to achieve conformity with the Delaware counterpart, by deleting the language at the end of the subsection in lines 40, 41 and 42. Although deletion of this language achieves conformity with the Delaware statute, the amendment is somewhat insignificant, since the deleted language merely explains the nature of the certificate prescribed by K.S.A. 17-6803.

Section 22 (17-7508).

The amendment of 17-7508 was requested by the Secretary of State's Office. The amendment appears on page 60, lines 17 through 22, and it prescribes a time limit of three years for filing a claim for refund of an overpayment of franchise taxes.

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STATE OF KANSAS

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE
HOUSE BILL NO. 3152

April 8, 1992

The office of the Secretary of State supports House Bill No. 3152 and encourages this committee to favorably recommend it for passage. It passed the House 124 - 0.

The technical provisions prepared by the Kansas Bar Association clarify the existing corporate code and keep our code in conformity with the Delaware corporate code. The technical provisions of this bill will will have no fiscal impact on this office or on Kansas corporations.

Originally, this bill also ended the requirement that a copy of corporate filings be recorded in the office of the register of deeds. Those controversial provisions were removed by the House.

The House also adopted an amendment requested by this office that would clearly limit the length of time in which a corporation may seek a refund of a franchise tax overpayment. Current statutes give taxpayers three years to file a claim with the Department of Revenue for a refund of an overpayment of income taxes. This bill makes similar language applicable to corporate franchise tax refunds.

We have recently learned that a number of corporations are considering amending prior annual reports to utilize a different accounting method that would reduce the franchise tax due. With no clear statute of limitations on these claims, the fiscal impact could be significant. We urge this committee to adopt three years as a reasonable time for corporations to make such claims.

Again, we encourage this committee to favorably report House Bill No. 3152 for passage.

Thank you.

John Wine, General Counsel

Senate Judiciary Committee
April 8, 1992
Attachment 8