Approved: 9/15
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

2:00 p.m. on April 30, 1992 in room 527-S of the Capitol.

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

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

Conferees appearing before the committee:
Wendy Roach, Topeka
Dr. Dean Collins, Menninger Clinic Director of Psychiatry
Chip Wheelen, Kansas Medical Society and Kansas Psychiatric Society

Chairman Winter called the meeting to order by opening the hearing for HB 2253.
HB 2253 - reporting of sexual exploitation of patient by mental health professional.

Wendy Roach, Legislative Intern for Representative Joan Wagnon, explained the provisions of HB 2253 and stated that it was intended as a companion to HB 2426, which had been amended into SB 358 by the House of Representatives. She presented written testimony from Representative Wagnon in support of HB 2253. (ATTACHMENT 1)

Ms. Roach further testified in support of HB 2253 by relating her personal experience of sexual exploitation by a mental health professional. (ATTACHMENT 2) Written materials from Dr. Stuart Twemlow were distributed to the Committee in support of HB 2253. (ATTACHMENT 3)

Dr. Dean Collins, Menninger Clinic Director of Psychiatry, addressed the Committee on behalf of the professional staff of the Menninger Clinic in support of HB 2253. (ATTACHMENT 4)

Responding to questions by the Committee, Dr. Collins stated that although the American Psychiatric Association does not address sexual treatment in its code of ethics, the Menninger Clinic operates under the assumption that once a person is a patient, the professional relationship remains indefinitely. The proposed sanction he offered for the behavior addressed in HB 2253 was expulsion from membership in the professional society.

Committee members expressed concerns with the issue, particularly that it was not limited to the area of mental health professionals. Concern was also noted that HB 2253 was too broad in defining who would be affected.

Chip Wheelen, Kansas Medical Society and Kansas Psychiatric Society, presented testimony in support of HB 2253 and offered amendments to the bill. (ATTACHMENT 5)

Written testimony was submitted by Joseph Kroll, Bureau of Adult and Child Care Director of the Kansas Department of Health and Environment, in support of HB 2253. (ATTACHMENT 6)

Written testimony was submitted by Penny Sue Johnson, President of The Kansas Coalition, Inc., in opposition to HB 2253. (ATTACHMENT 7)

This concluded the hearing for HB 2253. Due to the loss of a quorum of the Committee, the following actions were taken as a Subcommittee of those members remaining.

Senator Moran moved to offer a **Subcommittee** recommendation to amend HB 2253 to remove the remuneration requirement on page 1, line 20, and page 2, lines 3 and 4. Senator Yost seconded the motion. The motion carried.

It was noted that no criminal sanctions were included in HB 2253.

Senator Yost moved to offer a **Subcommittee** recommendation for the Committee to recommend HB 2253 favorable for passage as amended. Senator Petty seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 527-S, Statehouse, at 2:00 p.m. on April 30, 1992.

A letter and suggested amendments regarding HB 3054 from Patrick Barnes, Kansas Motor Car Dealers Association, were distributed to the Committee. (ATTACHMENTs 8, 9 and 10)

HB 3054 - statute of limitations on product liability claims

Chairman Winter announced that the Committee would attempt to meet one additional time. However, due to the waning hours of the 1992 Legislative Session, that meeting would be announced on extremely short notice.

The meeting was adjourned at 3:12 p.m.

Date April 30, 192

VISITOR SHEET

Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
Dean Collins, M.D.	Menninger Clinic
Chip Wheelen	KS Psychiatric Soc.
Wendy L. Koch	Intern - Wagnon
[illegible]	NOW
Bill Henry	Pharm. Mfg. Assn
PATRICIA HENSHALL	OJA

STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIR: TAXATION
MEMBER: ECONOMIC DEVELOPMENT
FEDERAL & STATE AFFAIRS
LEGISLATIVE POST AUDIT

February 19, 1992

To: Judiciary Committee
Re: HB 2253

This proposal adds language to the various practice acts of mental health service providers that allows for disciplinary action for sexual exploitation of patients or former patients.

A similar bill was introduced in the 1990 session which was also heard by the Judiciary Committee rather late in the session. Their recommendations were incorporated into the language used this session.

The idea for the bill came from Dr. Stuart Twemlow from his practice and a book, Sexual Exploitation in Professional Relationships. Since he is not able to be present today, I have attached his testimony which describes in detail the problems professionals experience and remedies which have been in use in other states.

Since originally introducing the bill, I have been contacted by a number of women who have been exploited by providers. In conversations with them, I have come to understand that the problem is much more prevalent than I initially believed (a point also made by Dr. Twemlow in this book); and that this kind of exploitation is best dealt with by drawing clear lines about acceptable behavior for providers as well as informing victims of what constitutes acceptable professional behavior.

I would urge your favorable consideration.

Senate Judiciary Committee
April 30, 1992
Attachment 1

TO: Representative Solbach, Chairman, and Members of the Judiciary Committee

FROM: Wendy J. Roach

DATE: February 19, 1992

SUBJECT: **HB 2253 AND HB 2426**

I am here today to testify in support of House Bills 2253 and 2426 in the capacity of one who has experienced the trauma of having been sexually exploited by a licensed psychologist in the State of Kansas. These two bills deal with an issue that is adequately addressed in no current Kansas statute: what it means to be sexually exploited by a professional to whom you turn when you are physically and/or emotionally distressed.

House Bill 2253 is meant to facilitate a more accurate picture of the frequency of sexual exploitation among mental health professionals by allowing non-offending professionals to file reports to appropriate licensing boards without fear of recrimination. This will also permit us all to gain a better understanding of the offenders, the victims, and how we can work to prevent sexual exploitation.

House Bill 2426 is intended to restructure our criminal code to include penalties that reflect society's views of sexual exploitation: stronger penalties place a stronger emphasis on the crime. But the most important feature of the bill is the New Section 1(4) which states that, in short, consent by the victim to the sexual contact by a mental health provider is not a defense. The majority of lay persons, like myself at one time, are not educated enough about the field of mental health to understand the

potential dangers and long-term consequences of becoming involved in a physical relationship with a mental health provider, especially in an on-going relationship that is supposed to be therapeutic. Most people do not even know it is against the law for a professional to do so.

The State of Kansas has a rational basis for holding health care providers to a much higher standard of care than other professionals in that the nature of the relationship between the professional (whether he or she is a physician, a psychologist, or other type of health care provider) and a client creates within itself an emotional dependency on the part of the client. This can and does happen to anyone: it happened to me, it can happen to you, your spouse, your child. We are all vulnerable when it comes to a relationship with a health care provider, particularly a mental health provider.

I am placing emphasis on the area of mental health providers not only because of my own experiences, but also because of the length of time sexual exploitation normally occurs in these types of relationships. Like rape, sex is a secondary issue to the perpetrator. The primary focus in on control. Unlike rape, however, sexual exploitation is not a one-time incident. The exploitation occurs over a period of years, as in my case, which began in August of 1980 and continued until June of 1984.

When reviewing House Bills 2253 and 2426, I ask that the committee consider these objectives:

1. To enact legislation that will require health providers, particularly mental health professionals, to disclose information to his or her client **prior to** the commencement of any treatment about the laws regarding sexual contact between the professional and the client as well as what legal remedies are available should such an incident occur.
2. To set a public policy regarding the education of health care providers to improve the awareness and treatment of both victims and offenders of sexual exploitation.
3. To provide criminal legislation that accurately reflects the severity of the damage that can be done by a sexually abusive professional.
4. To give professional licensing boards the tools necessary to thoroughly investigate sexual misconduct claims by consumers.

The Behavioral Sciences Regulatory Board is currently regulating over 5,400 professionals in the State of Kansas. That Board consists of volunteer members, all of whom work in full-time positions outside of the Board. None of them are qualified to investigate consumer complaints for the purpose of any legal prosecution. While $5,000 was included the 1992 fiscal budget for the Behavioral Sciences Regulatory Board to hire a private investigator, one legitimate claim of professional misconduct could easily consume the entire allocated amount of funds.

As members of the Judiciary Committee, you have each been given a copy of the written testimony of Dr. Stewart Twemlow, whom I have worked with regarding my own case. I urge you to read his testimony in its entirety: it explains sexual exploitation in a manner which I fully support and can attest to its accuracy.

STUART W. TWEMLOW, M.D.
PSYCHIATRY AND PSYCHOANALYSIS

TO: Judiciary Committee

FROM: Stuart W. Twemlow, M.D.

RE: House Bill #2253 and 2426

I am a board certified psychiatrist who has been in practice in Kansas for the past 22 years. A brief biographical sketch summarizing my clinical and professional background is attached. I support these bills based on my clinical and research activities with people who have been victims of sexual exploitation by professionals. In addition, I have had numerous occasion to treat the exploiting professional, who has sought my help either stimulated by peer group and/or legal threats or by virtue of his own realization of the pathological nature of his relationship with the patient/client.

In the edited collection entitled Sexual Exploitation in Professsional Relationships(1), published by the American Psychiatric Association in 1989, I authored a chapter entitled "The Lovesick Therapist" together with the editor of the volume, Dr. Glen O. Gabbard, who has already presented his views to committees concerned with penalties for such exploitation. That chapter addresses the psychodynamic pathology behind the abusing therapists.

Bills 2253 & 2426 should be taken as an expression of the current increased concern with exploitation in relationships where there exists an element of emotional dependency between the client or patient and the professional individual. The legal term, "fiduciary relationship", has

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Attachment 3 1/9

been used for this phenomenon. Although this term is a legal one, it is more widely known and understood than most psychoanalytic ideas and thus is useful because of widespread acceptance. In Black's Law Dictionary, such a relationship is defined as one; "Where there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence." (P. 753-754). All of the professional groups named in this bill are fiduciaries within that definition by virtue of their licensure and/or practice. This bill does not address other fiduciary relationships such as school teachers, attorneys, etc. It is apparent that such fiduciary trust occurs in these groups as well and that similar exploitation is likely as frequent as in the groups named in this bill. I am pleased to see that the bill addresses not only psychiatrists, but the physician group as a whole. Non-psychiatric physicians are much less aware of the problems associated with emotional dependency and more in need of such training. Our research into the nature of physician-caused (iatrogenic(2 & 3)) illness has indicated that frequently in relationships between doctors and patients, an unconscious dependency exists in which the patient relates to the doctor in a child-like way, expecting the same care, attention and consideration as they would from a parent. The vast majority of clinicians respect that unconscious trust. A small percentage of the various professions do not. At least this was the view until recently. A number of surveys

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have been performed by anonymous questionnaire and reported in the book, providing us with a much more worrying picture. It appears that in most groups surveyed, the prevalence of sexual contact with patients or clients exceeds the rare event one might have hoped for. A variety of estimates have been given, ranging from 6% to 12%, but one must remember that anonymous questionnaires probably only tap the tip of the iceberg. It is conceivable that perhaps even 12-20% of patients are the victims of a variety of forms of inappropriate sexual contact representing a manipulation of the fiduciary relationship with the professional concerned. From a common sense point of view, one would expect that the exploiting professional would be an extremely disturbed individual. From time to time, patients who have been the victims of perverse and bizarre sexual abuse will publish autobiographical sketches. The physicians or professionals represented in these types of books in general fall into either severely disturbed criminal elements (anti-social personality) or psychotic professionals. One recent publication in that regard is the book Therapist(4). Unfortunately, the experience of ethical committees of the American Psychiatric Association and professionals such as myself indicate that such dramatically disturbed medical professionals are only a very small percentage of the exploiting group, a majority of which never actually come to the attention of the law courts nor do the patients or physicians report the relationship. They come in the typical context of my practice, which is in the strictly

confidential pyschoanalytic one-on-one contact. In our chapter, we summarize the pathology of this neurotic group who are not severely disturbed and who probably represent at least 90% of the abusing professionals. We have found that such professionals tend to be middle-aged men who abuse women on the average of 16 years younger than they are in the context of an unhappy marriage and family relationship and unsatisfying professional life.

With regard to the prevention of this tragic situation; I quote here from page 85 of our chapter entitled "Prevention".

> Prevention of lovesickness in therapists and the countertransference acting out that accompanies it is a formidable task. Clearly, a personal treatment experience for the therapist is not a fool-proof method of prevention. The Chapter 1 survey by Gartrell et al. found that offenders were more likely than nonoffenders to have undergone therapy or analysis. Profiles of susceptible therapists, such as those by Brodsky in Chapter 2 and by Pope and Bouhoutsos (1986), provide some guidelines for detecting which therapists might be at risk. The middle-aged male therapist, who is in the midst of a divorce or other problems in his intimate relationships should be alert to any tendencies toward overinvolvement with his patients. Does he inappropriately disclose aspects of his personal life to his patients? Does he think about a particular patient when she is not in the office with him? Does she enter his dreams? Does he begin to think that what his patient needs is love to make up for the lack of love she received in childhood? Finally, does he begin to think that he sees aspects of himself in his patients?
>
> The primary difficulty with preventing therapist-patient sexual intimacy is that all of these questions must be asked by the therapist

3-4/9

himself. Many of them are simply standard questions that every well-trained therapist uses to monitor his countertransference on a continual basis. However, the fact remains that no one can monitor these internal states other than the therapist himself. If the therapist does not seek out help at the first sign of these warning signals, he will rapidly descend into the chasm of lovesickness and no longer be amenable to help. Moreover, we are aware of some therapists who developed lovesickness while they were in regular supervision and simply withheld the information about the developing sexual relationship from their supervisors. These therapists felt that the relationship was so special that no supervisor could truly understand it. They concealed the information from supervision precisely because they did not want to stop the sexual relationship.

One prophylactic measure—one that therapists must enforce for themselves—is the avoidance of nonsexual dual roles with patients. A therapist-patient relationship should be a strictly professional one that is not contaminated with financial deals (other than fee arrangements) or various forms of socializing outside the therapy hour. An extensive questionnaire survey of 4,800 psychiatrists, psychologists, and social workers (Borys and Pope, in press) revealed that therapists involved in nonsexual boundary violations during psychotherapy are at an increased risk of becoming sexually involved with their patients.

While education about ethical problems in the practice of psychotherapy is important, if not essential, in training programs and continuing education workshops, the surveys reported in this book indicate that inadequate training is not the main problem. The narcissistic disturbance in the lovesick therapist is so pervasive among psychotherapists in general (see Buie 1982-83; Finell 1985; Miller 1981) that we would be hard pressed to delineate some point on the continuum at which a therapist's wish to receive certain affirming responses from his patient becomes so extreme that it places him at risk for falling in love with the patient and acting out his sexual wishes with her. Psychotherapists would do far better to assume that everyone is at risk and to engage in a continual intrapsychic monitoring process as part of their professional practice.

The data in Chapter 1 by Gartrell et al. indicate that only 41 percent of offenders sought out consultation because of their sexual involvement. Obviously, we have no data on the number of therapists who seek out consultation before getting involved as a way of preventing it. The therapist who wishes to seek help may be faced with a dilemma. As Pope (1987) points out, neither consultation nor supervision provide the extensive privilege under some state laws that the therapist-patient relationship provides. The therapist may wish to enter psychotherapy rather than pay for supervision or consultation simply to assure himself that whatever he says will be held in strict confidence. This situation may change in the near future, however, as many states are currently considering whether to allow either mandatory or discretionary reporting of therapist-patient sex even when therapist-patient privilege applies, similar to the current situation in most states regarding child abuse. For those who do seek out therapy, Pope (1987) has provided a useful model of intervention.

Finally, nothing can be more important than attention to one's private life. Far too many therapists put more energy into treatment relationships than into their marriages, where one can rightfully expect to seek personal gratification. The best prophylaxis is a satisfying personal life.

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In commentary on this excerpt; clearly for the abusing professional psychotherapist there is comprehensive supervisory and peer review, including impaired physician groups available for detection of sexually exploiting medical psychotherapists and for their treatment. I am not implying that training is the only solution to the problem, but it's certainly a very important one. The other authors in this book strongly support the need for training in the ethics and problems associated with intense emotional feelings for patients. For professional counselors including sex therapists and ministers, the rules, regulations and monitoring and licensing bodies are far less formally structured and monitored, largely because of the less clearly defined nature of the professional boundaries in such groups. Such counselors are also often trained in ways which are more technique-oriented and much less attuned to subtle nuances of the relationship which can lead to unconscious emotional dependency.

The bill might well be criticized by some groups who would perhaps correctly imply that their professional licensing and monitoring authorities already contain sufficient safeguards against this type of behavior (e.g. psychiatrists), yet still in my opinion, it would be useful to specify this relationship as a unique case for this broad range of professional groups. The reasons for this include the following:

1. The problem is more widespread than had been thought.

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2. The effect on patients or clients of sexually exploitative relationships is incredibly destructive. Clinical opinion of most therapists concur that at least 90% of patients are very severely damaged by such contact, including a very high suicide rate. This has also been my clinical experience. Patients who have been exploited in such a way are not psychologically dissimilar to veterans who have been severely traumatized in war. Both groups often show signs of a Post Traumatic Stress Disorder, and significant psychological disorganization, often out of proportion to any preexisting psychopathology in the patient.

3. There is a natural enough tendency in all professional groups to avoid facing issues that are distasteful to the image of the profession. No professional group is immune to this particular problem. By specifying the uniqueness of this problem, the licensing authorities and professional therapists are forced to deal directly with something that often is unconsciously swept under the carpet. To imply that such abuse occurs only rarely and in very disturbed professionals is not supported by the facts.

In summary these bills provide a specific category for sexual exploitation, and a specific protection for those who report such offences.

Footnotes:

1. Twemlow, S., Gabbard, G.O.: The Lovesick Therapist in Sexual Exploitation in Professional Relationships. Edited by Gabbard, G.O. Washington, DC, American Psychiatric Press, 1989; 71-87.

2. Twemlow, S., Gabbard, G.O: Iatrogenic Disease or Doctor-Patient Collusion? American Family Physician, 24:3; 129-134. September 1981.

3. Twemlow, S., Gabbard, G.O.: Iatrogenic Disease or Folie a Deux? in The Iatrogenics Handbook. Edited by Morgan, R. Toronto, Ontario, IPI Publishing, 1983; 109-119.

4. Plasil, E. Therapist. New York, St. Martins, 1985.

3-8/9

Brief Biographical Sketch Revised January, 1990

Stuart W. Twemlow, M.D., married with five children, was born in New Zealand and has traveled widely. He graduated from medical school in New Zealand and entered General Practice in New Zealand and Australia emphasizing Surgery, Obstetrics and Trauma Medicine until 1970. He then traveled to the U.S.A. to study psychiatry and became a Fellow in The Menninger School of Psychiatry, Topeka, Kansas. He is Board Certified in General Psychiatry, a Fellow of the American Psychiatric Association, and is certified in Adult Psychoanalysis by the Topeka Institute for Psychoanalysis, Menninger Foundation.

He started writing with an educational book and since has published over 75 articles and book reviews in various areas such as health care delivery systems, the doctor-patient relationship, psychotherapy, drug abuse and alcoholism, psychiatric hospital treatment, biofeedback, altered states of consciousness, guided affective imagery, intensive meditation and neuropathology. His newest book with Dr. Glen Gabbard is entitled "With the Eyes of the Mind: An Empirical Analysis of Out-of-Body States" published by Praeger Special Studies, New York, 1984.

His current professional writing includes articles on clinical aspects of Out of Body Experiences, a Psychoanalytic study of the sexually abusing psychotherapist and incest. He has a Veterans Administration funded research study of the Doctor-Patient relationships derived from his clinical research into iatrogenic disease. This questionnaire and interview study investigates unconscious factors distorting communication between doctor and patient. The study will also follow-up subsequent health and practice patterns of physicians who graduated from a medical school which placed special emphasis on doctor-patient relationships. He has begun a tentative excursion into writing on psychological topics for the general public. His first book, now under contract, is entitled "Stopping Violence: A Survival Guide for the 21st Century". This book explores the pyschology of the victim and attacker with techniques to avoid bodily harm.

Formerly he was Chief of Research Service, Topeka Veterans Administration Medical Center and a faculty member of the Menninger School of Psychiatry. Currently he is in the private practice of Psychiatry in Topeka, Kansas, and is an instructor in the Topeka Psychoanalytic Institute. He is also Associate Clinical Professor of Psychiatry in two Kansas University Medical Schools; Kansas City and Wichita, Kansas. He is a member of a number of professional and Scientific Societies including the Sigma Xi Scientific Research Society, the Shawnee County Medical Society, and the American Psychoanalytic Association.

His main (even consuming) extraprofessional interests are the Martial and Meditative Arts. With his children he studies Karate and is ranked Advanced Black Belt in three systems including the Okinawa Kobudo (weapons) system. He is a Member of the Board of Directors and Head of Certification for the United States Kempo Federation and is listed in Who's Who in American Martial Arts. He is also studying and practicing the Zen Meditative approach to Mind-Body integration and teaches these techniques to students in his Topeka School of the Martial & Meditative Arts.

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TESTIMONY

before the

Senate Judiciary Committee

on HB2253

My name is Dean Collins. I am Director of Psychiatry at the Menninger Clinic. I am appearing in support of House Bill 2253 concerning mental health service providers.

Sexual abuse, misconduct or exploitation of a patient in mental health services is a very serious matter. Such services are provided in a relationship of trust, but with power and influence granted to the provider by virtue of the vulnerability of the patient's emotional condition. Professional ethical codes require that treaters protect the patients in the provision of services. When the trust the patient places in the treater is betrayed, it is likely to be harmful to the patient directly by negating benefits from that treatment, harmful to the patient indirectly by making much more difficult any subsequent treatment, and harmful to other patients in the future by making them hesitant or reluctant to seek the mental health services they may need.

Professional organizations have limited sanctions to apply to protect potential users of mental health services - their most severe action is expulsion of the abuser from membership in that organization. Action by a licensing authority is necessary to restrict future practice in any way.

Senate Judiciary Committee
April 30, 1992
Attachment 4 1/2

This act provides reporting by a subsequent treater of sexual exploitation of a patient by a previous treater. It is important that be done with the permission of the patient, since investigation of allegations necessitates the participation of both parties. It is rare that anyone else ever has direct knowledge of the activity.

Studies have shown that sexual exploitation is perpetrated by a few, but significant number of treaters. Since other studies indicate the consequences for subsequent treatment are serious, it is important to provide for notification of the licensing authority, so that the offending treater may have an appropriate limitation of practice - a limitation that may provide protection for others who may need and seek mental health services.

Thank you.

Dean T. Collins, M.D.

April 30, 1992

Joint Statement
to the
Senate Judiciary Committee
from the
Kansas Medical Society and the Kansas Psychiatric Society
April 30, 1992
House Bill 2253

Although psychiatrists specialize in diagnosis and treatment of mental illness, many other physicians also provide mental health services, and HB 2253 defines "mental health service provider" in a manner that includes all physicians. Therefore, this testimony regarding HB 2253 is a joint statement on behalf of both the Kansas Medical Society and the Kansas Psychiatric Society.

We generally support the provisions of House Bill 2253. You will note that the amendatory language contained at lines 24-26 on page 8 constitutes very little change in the Healing Arts Act regarding the prohibition against sexual misconduct. We do, of course, have reservations about the reporting requirements spelled out in the bill, but would emphasize the importance of the wording at lines 22-23 of page 2 which requires informed consent by a patient prior to the reporting of misconduct or exploitation. So long as the patient is required to consent to the disclosure of information that was communicated during a confidential information exchange, and the due process rights of the accused are upheld, we have no objection to the concepts embodied in HB 2253.

Our only objection to HB 2253 is that it is too narrowly focused. It implies that the only category of professional who ever manipulated and exploited a client or patient is a provider of mental health services. The scientific research on this subject indicates otherwise. Although the client or patient of a mental health professional might be more vulnerable than the client or customer of some other type professional, the psychological and emotional injuries of exploitation can be equally damaging. Therefore, we have attached to this statement balloon-style amendments to HB 2253 that we believe would improve upon its content.

The amendments on page 1 would broaden the definition of client to include any person who obtains services from a professional. Professional would be defined as a person who receives a license, registration, or certification under Kansas law. Also, we would define the student of a teacher to be a client for purposes of this section of the statutes. On page 2 we would broaden the reporting requirement to include any client who has been sexually abused or exploited by any professional.

We respectfully request that you adopt our amendments to HB 2253 prior to taking action on the bill. Thank you for considering our comments and recommendations.

Senate Judiciary Committee
April 30, 1992
Attachment 5 1/3

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1991

HOUSE BILL No. 2253

By Representatives Wagnon and Sebelius

2-13

AN ACT concerning ~~mental health service providers~~; relating to certain acts of sexual abuse, misconduct or exploitation by such ~~providers~~; amending K.S.A. ~~1990~~ 1991 Supp. 65-1120, 65-2837, 65-4209, 65-5809, 65-6311, 74-5324 and 74-5369 and repealing the existing sections.

professionals

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

New Section 1. (a) As used in this section:

(1) "Client" means a person who seeks or obtains ~~mental health~~ services ~~for remuneration~~ from a ~~mental health services provider~~ and who is not married to the ~~mental health services provider~~. For purposes of this section, a patient of a physician or nurse shall be considered a client if the patient seeks or obtains mental health services from the physician or nurse.

delete

professional

For purposes of this section, a student shall be considered a client of a teacher or instructor if the student is or was enrolled within a one year period at the school or educational institution where the teacher or instructor is or was employed.

(2) "Emotionally dependent" means that the nature of the patient's or former patient's emotional condition and the nature of the treatment provided by the mental health service provider are such that the mental health service provider knows or has reason to know that the patient or former patient is significantly impaired in the ability to withhold consent to sexual contact or sexual intercourse by the mental health service provider. [A patient or former patient shall be presumed to be emotionally dependent if the provider-patient relationship is ongoing or has been terminated within one year.]

(3) "Knowledge" means acquired information which is clearly not the product of delusional thinking or the imagination of a client.

(4) "Mental health service" means the treatment, assessment or counseling of another person for a cognitive, behavioral, emotional, mental or social dysfunction, including any intrapersonal or interpersonal dysfunction.

(5) "Mental health service provider" means a physician, psychologist, masters level psychologist, nurse, mental health technician, [marriage and family counselor,] professional counselor, social

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Chip Wheelen
Director of Public Affairs

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worker, alcohol or drug counselor, member of the clergy or any other person, whether or not licensed or registered by the state, who provides or purports to provide mental health services for remuneration.

(6) "Sexual abuse, misconduct or exploitation" means sexual intercourse or sodomy, as defined by K.S.A. 21-3501 and amendments thereto;[; sexual battery, as defined by K.S.A. 21-3517 and amendments thereto;] or any lewd fondling or touching of the person of either the client or the mental health service provider, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the client or the mental health service provider, or both. [Sexual abuse, misconduct or exploitation may exist regardless of whether the client consents when there exists a therapeutic or counseling relationship between the mental health service provider and the client.]

(b) A mental health service provider who possesses knowledge that a ~~second mental health service provider~~ has committed an act of sexual abuse, misconduct or exploitation against a ~~patient~~ or former ~~patient~~ of such ~~second mental health service provider~~ shall lawfully report such knowledge to the state agency, ~~if any,~~ which licenses, registers or certifies such ~~second mental health service provider~~ after acquiring written permission from the ~~patient~~ or former ~~patient~~ of such ~~second mental health service provider~~.

(c) Any mental health service provider who makes a report to a state agency as required by this section must appear in person at any subsequent investigative proceeding involving the alleged sexual abuse, misconduct or exploitation in order to corroborate such report and submit to questioning by members of the board or staff of the agency.

(d) Any person who, in good faith, makes a report as authorized by this section shall not be liable in a civil action for damages or other relief arising from the reporting except upon clear and convincing evidence that the report was completely false and that the falsity was actually known to the person making the report at the time thereof.

Sec. 2. K.S.A. ~~1990~~ 1991 Supp. 65-1120 is hereby amended to read as follows: 65-1120. (a) *Grounds for disciplinary actions.* The board shall have the power to deny, revoke, limit or suspend any license or certificate of qualification to practice nursing as a registered professional nurse, as a licensed practical nurse or as an advanced registered nurse practitioner that is issued by the board or applied for in accordance with the provisions of this act in the event that the applicant or licensee is found after hearing:

¶ "Professional" means any person who receives a license or other credential from the state of Kansas which allows that person to engage in an occupation or to use a title that is registered pursuant to law.
¶ (7)

professional

client

professional

delete

professional

client

professional

5-3/3

State of Kansas
Joan Finney, *Governor*

Department of Health and Environment
Azzie Young, Ph.D., *Secretary*

Reply to:

TESTIMONY PRESENTED TO THE

SENATE JUDICIARY COMMITTEE

BY

THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

House Bill 2253

House Bill 2253 requires any mental health services provider to report to the state licensure/registration board another mental health services provider who has sexually abused or exploited a patient or former patient upon consent of the patient. "Mental health services provider" means a physician, psychologist, nurse, professional counselor, social worker, alcohol or drug counselor, marriage and family therapist, member of the clergy, or any other person, whether or not licensed or registered by the state, who provides mental health services for remuneration.

It is indeed appropriate to require such reporting upon consent of the patient. Compared to the projected number of incidents of sexual exploitation, very few victims choose to file complaints on their own to regulatory boards. However, mandatory reporting upon consent of the patient should assist in stimulating additional complaints, particularly since the therapist who made the report is to appear in person at the investigation/hearing to provide information.

In addition, this bill amends the licensing/registration acts for nurses, mental health technicians, professional counselors, social workers, and master's level psychologists. The amendments allow disciplinary action to be taken if the practitioner has committed an act of sexual abuse, misconduct, or exploitation of a patient or former patient who is emotionally dependent on the practitioner.

The bill's provisions concerning disciplinary action that may be taken against nurses, social workers, psychologists, and professional counselors who sexually abuse or sexually exploit patients is appropriate. However, physicians and psychiatrists already can be disciplined for sexual abuse or exploitation of a patient and the threat of revoking one's license has not been an effective system of control. As you are aware, national surveys show that approximately five to seven percent of licensed male psychiatrists, PhD psychologists, and physicians reported having had sexual intercourse with patients during treatment stages. Once a therapist becomes sexually involved with one patient, there is repetition of the behavior in 75 to 80 percent of the cases.

Senate Judiciary Committee
April 30, 1992

Landon State Office Building • 900 SW Jackson • Topeka, Kansas 66612-1290 • (913) 296-1500

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This proposal is also limited in that it only applies to disciplinary actions that can be taken against professionals who are regulated by the state. The bill does not provide for the reporting of or disciplinary process for an act committed by a nonregulated practitioner. There is a problem with nonregulated practitioners. For example, the Kansas Attorney General's office concluded that there were 25 to 35 complaints filed in 1985 against nonregulated mental health services providers. The most common complaint made against these individuals was that the practitioners made sexual advances or actually engaged in sexual conduct with clients. In addition, no action could be taken on the complaints received about the nonregulated therapists unless the therapists misrepresented themselves as licensed or registered professionals.

The Department endorses the bill as a welcome effort in attempting to confront a serious problem that has not received proper attention. However, as noted above, this measure alone is not adequate to address the issue of sexual exploitation of patients by mental health services providers. The limitations of this bill are addressed in House Bill 2426 which makes it a criminal offense for a mental health services provider to sexually exploit a patient. This bill and House Bill 2426 provide a more comprehensive approach to addressing the issues of sexual exploitation.

The Department recommends House Bill 2253 be reported favorably.

Presented by: Joseph Kroll, Director
Bureau of Adult and Child Care
Kansas Department of Health and Environment
April 30, 1992

4/10/92

To: Senator Winter & Judiciary Committee
from: Penny Sue Johnson, The Ks. Coalition, Inc. President.
Re: HB 2253
Dear Senators,

While the intent of H.B. 2253 is with merit, all Kansans have the right to be served by one set of criminal codes. We must put teeth into those statutes which already exist. We must insist our District Attorneys, and Judges provide due process, not merely to the rich of our state. To know only one trial has occurred per example in (Judicial District #10) in 10 years points up how well our evidentiary standards serve folks and not well in seeking true wellness and to come to a point of not being in a servitude state under dept. of mental health.

Again, I rise to oppose this bill - the subjective problems throughout equates to no "due process"

I am at the committee's call

Penny Sue Johnson

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KANSAS MOTOR CAR DEALERS ASSOCIATION
800 Jackson, Suite 808 • Topeka, Kansas 66612 • (913) 233-6456 • (800) 279-8566 (KS only) • FAX (913) 233-1462

April 30, 1992

Members, Senate Judiciary Committee
State House
Topeka, Kansas

Re: Substitute for House Bill No. 3054, Product Liability and Statute of Limitations Issues

Dear Senate Judiciary Committee Members:

We have distributed revised amendments for those which accompanied our April 29 testimony. The thrust is the same, but these amendments are keyed to the substitute bill itself, which we did not have available when drafting the amendments. There are two forms of amendment to choose, A and B. We prefer A as it would relieve us of liability for goods our members only sell. This is justifiable as our members have no input into actual construction, design or other production of the products we sell. In cases where we do these things, liability claims would be saved, as in other cases where our members' negligence resulted in injury. B would keep the limitations period to ten (10) years for licensed automobile dealers and represents an alternative.

One other point is important to make. The proposed bill can affect people rather broadly, particularly sole proprietors. It would mean one is subjected to potential loss for many years after ceasing business. For example, in a case where one retires at age 65, liability insurance, a potentially great expense, would have to be carried to age 85 to avoid losing one's life assets, presumably needed to survive. There would likely not be any offsetting income to cover this risk or expense, past or present. This seems somewhat unjust since many accidents with products arise from fortuitous circumstances and it is the cost of the lawsuit itself, not just the liability exposure, which can be so devastating.

Very truly yours,

SCOTT, QUINLAN & HECHT
Patrick R. Barnes

Patrick R. Barnes
Legislative Counsel

PRB:cad

Senate Judiciary Committee
April 30, 1992
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Amendments Proposed by
Kansas Motor Car Dealers Association

Exhibit "A"

[As Amended by House Committee of the Whole]

Session of 1992

Substitute for HOUSE BILL No. 3054

By Committee on Judiciary

3-20

AN ACT concerning civil procedure; relating to the statute of limitations; amending [K.S.A. 60-3302, and] K.S.A. 1991 Supp. 60-513 and 60-3303 and repealing the existing sections.

K.S.A. 60-3306

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

Section 1. K.S.A. 1991 Supp. 60-513 is hereby amended to read as follows: 60-513. (a) The following actions shall be brought within two years:

(1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(5) An action for wrongful death.

(6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments thereto.

(7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

(b) Except as provided in ~~subsection~~ *subsections* (c) *and (d)*, the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act

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

(d) ~~The provisions of this section as it was constituted prior to July 1, 1987, shall continue in force and effect for a period of two years from that date with respect to any act giving rise to a cause of action occurring prior to that date.~~ *A cause of action arising out of a product liability claim, as defined in K.S.A. 60-3302, and amendments thereto, shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until such time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 20 years beyond the time of delivery of the product.*

[Sec. 2. K.S.A. 60-3302 is hereby amended to read as follows: 60-3302. (a) "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor or retailer of the relevant product.

[(b) "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer, or that is owned in whole or in part by the manufacturer.

[(c) "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any action based on, strict liability in tort, negligence, breach of express or implied warranty, breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent, misrepresentation, concealment or nondisclosure, whether negligent or innocent, or under any other substantive legal theory. *Product liability claim as defined in this subsection does not include any claim or action relating to the improvement of real property, except that it does include any claim or action against the original manufacturer of defective equipment which is used in any such im-*

"A"

Amendment to Page 2 of Substitute for House Bill No. 3054

,and no more than 10 years beyond the time of the act giving rise to the cause of action where the claim is against a licensed new vehicle dealer or a used vehicle dealer as defined by K.S.A. 8-2401(b) and (c), and amendments thereto.

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person whose cause of action had accrued, as defined in subsection (d) on or after March 3, 1987; or (2) any person who had an action pending in any court on March 3, 1989, and because of the judicial interpretation of the ten-year limitation contained in subsection (b) of K.S.A. 60-513, and amendments thereto, as applied to latent disease caused by exposure to a harmful material the: (A) Action was dismissed; (B) dismissal of the action was affirmed; or (C) action was subject to dismissal. The intent of this subsection is to revive causes of action for latent diseases caused by exposure to a harmful material which were barred by interpretation of K.S.A. 60-513, and amendments thereto, in effect prior to this enactment.

Sec. 3 ~~[4]~~.5 K.S.A. [60-3302 and K.S.A.] 1991 Supp. 60-513 and 60-3303 are hereby repealed.

Sec. 4 ~~[5]~~.6 This act shall take effect and be in force from and after its publication in the statute book.

Sec. 4. K.S.A. 60-3305 is hereby amended to read as follows:

60-3305. Seller not subject to liability, when. A product seller shall not be subject to liability in a product liability claim arising from an alleged defect in a product, if the product seller establishes that: (a) Such seller had no knowledge of the defect;

(b) such seller in the performance of any duties the seller performed, or was required to perform, could not have discovered the defect while exercising reasonable care;

(c) the seller was not a manufacturer of the defective product or product component;

(d) the manufacturer of the defective product or product component is subject to service of process either under the laws of the state of Kansas or the domicile of the person making the product liability claim; and

(e) any judgment against the manufacturer obtained by the person making the product liability claim would be reasonably certain of being satisfied.

History: L. 1981, ch. 231, § 6; July 1.

(1)

(2) A product seller shall not be subject to liability in a product liability claim if the product seller was a licensed new vehicle dealer or a licensed used vehicle dealer as defined by K.S.A. 8-2401(b) and (c), and amendments thereto, at the time of sale or delivery of the relevant product and the product seller was not the manufacturer of the relevant product.

and K.S.A. 60-3305

A

9-3/3

Amendments Proposed By
Kansas Motor Car Dealers Association

Exhibit "B"

[As Amended by House Committee of the Whole]

Session of 1992

Substitute for HOUSE BILL No. 3054

By Committee on Judiciary

3-20

AN ACT concerning civil procedure; relating to the statute of limitations; amending [K.S.A. 60-3302 and] K.S.A. 1991 Supp. 60-513 and 60-3303 and repealing the existing sections.

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

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(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(5) An action for wrongful death.

(6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments thereto.

(7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

(b) Except as provided in ~~subsection~~ *subsections* (c) *and (d)*, the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act

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

(d) ~~The provisions of this section as it was constituted prior to July 1, 1987, shall continue in force and effect for a period of two years from that date with respect to any act giving rise to a cause of action occurring prior to that date.~~ *A cause of action arising out of a product liability claim, as defined in K.S.A. 60-3302, and amendments thereto, shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until such time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 20 years beyond the time of delivery of the product.*

[Sec. 2. K.S.A. 60-3302 is hereby amended to read as follows: 60-3302. (a) "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor or retailer of the relevant product.

[(b) "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer, or that is owned in whole or in part by the manufacturer.

[(c) "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any action based on, strict liability in tort, negligence, breach of express or implied warranty, breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent, misrepresentation, concealment or nondisclosure, whether negligent or innocent, or under any other substantive legal theory. *Product liability claim as defined in this subsection does not include any claim or action relating to the improvement of real property, except that it does include any claim or action against the original manufacturer of defective equipment which is used in any such im-*

"B"

Amendment to Page 2 of Substitute for House Bill No. 3054

,and no more than 10 years beyond the time of the act giving rise to the cause of action where the claim is against a licensed new vehicle dealer or a used vehicle dealer as defined by K.S.A. 8-2401(b) and (c), and amendments thereto.

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