Approved: February 14, 1995

MINUTES OF THE HOUSE COMMITTEE ON HEALTH AND HUMAN SERVICES.

The meeting was called to order by Chairperson Carlos Mayans at 1:30 p.m. on February 8, 1995 in Room 423-S of the State Capitol.

All members were present.

Committee staff present: Norman Furse, Revisor of Statutes
Bill Wolff, Legislative Research Department
Lois Hedrick, Committee Secretary

Conferees appearing before the committee:
Representative Vincent Snowbarger
Carol Foster, R.N., Olathe
Linda Herrick R.N., Olathe
Laura Griggs, Olathe
Chip Wheelen, Kansas Medical Society
Tom Bell, Kansas Hospital Association
Cassie Lauver, Director, KDHE Bureau for Children, Youth and Families
Willie Craft, KDHE Laboratory Technician
John Federico, Pete McGill & Associates
Reid F. Holbrook, Attorney, Kansas City
Bob Corkins, Kansas Chamber of Commerce and Industry
Gary Robbins, Executive Director, Kansas Optometric Association
Charles T. Engel, Legal Counsel, Kansas Optometric Association
Dr. Larry Harris, Optometrist, Topeka
Randy Forbes, Attorney, Kansas State Board of Examiners of Optometry

Others attending: See Guest List, Attachment 1.

HB 2221 - Administration to infants of tests for genetic diseases

Chairperson Mayans opened the hearing.

Representative Vincent Snowbarger, author of the bill, spoke in support (see Attachment 2). He noted that the bill does not eliminate the requirement for genetic testing, but that the bill will eliminate the hospital's responsibility. The bill eliminates double testing and places the responsibility for testing onto the attending physician. Representative Snowbarger stated he understood the Kansas Medical Society has some amendments to clarify the requirements and believes they will not damage the bill.

Carol Foster, Registered Nurse, Maternal Care, from Olathe, presented testimony on the bill. She first offered into record the written testimony of Douglas G. Brooks, M.D., also from Olathe (see Attachment 3). Ms. Foster, in her testimony, questioned existing contradictory rules and regulations as to when genetic tests will be performed. Ms. Foster asked why there are differing standards with regard to phenylketonuria (PKU) testing between home births and hospital births. She stated there is no debate that screenings be done but statistics indicate that perhaps in the case of PKU tests, babies are subjected to second tests because the first one was done too early.

Linda Herrick. Registered Nurse, Maternal Care, from Olathe, testified that, because the length of hospital stays for childbirth is decreasing, the required PKU test on newborns, in many cases, is causing double testing. She testified the tests are only about 85% reliable; and the remaining 15% need to be re-tested after hospital release. (See written testimony, Attachment 4.)

Laura Griggs, a resident of Olathe, testified as to her family's experience with respect to the PKU test on her youngest son and asked if the law could be changed to require tests within a certain time frame (see Attachment 5).

Chip Wheelen, Director of Public Affairs, Kansas Medical Society, testified in support of **HB 2221** to place responsibility for genetic tests onto the attending physician. He raised questions about newborns who are not delivered in a hospital and most likely do not receive baby checkups by a physician. Mr. Wheelen suggested that the Legislature engage in an in-depth interim study to assure testing and follow up medical attention that may avoid disabilities. Mr. Wheelen also offered amendments to the bill which would define "attending physician" and add other verbage, and asked their adoption before final action is taken on the bill by the committee. (See Attachment 6.)

Tom Bell, representing the Kansas Hospital Association, testified in support of **HB 2221** and the amendments offered by the Kansas Medical Society, stating the current law is obsolete (se Attachment 7).

Chairperson Mayans opened the meeting for questions of the proponents. Representative Wells asked Representative Snowbarger how tests have been handled and what follow up was done for the tests. Representative Snowbarger replied that hospitals have been (and are) responsible for administering the tests, except to those few who request exception because of religious beliefs; and that he has no knowledge about the follow ups.

Representative Gilmore asked who's responsibility it was to see that genetic tests are performed. Representative Snowbarger indicated the present law places it on the hospitals. In reality it falls to the parents when they take early leave from the hospital before the tests are done.

Representative O'Connor questioned the role of midwifery in this process. Mr. Wheelen stated that Health and Environment may need to elaborate on the question, and indicated that a different focus may be required of this law and should be studied.

Cassie Lauver, Director of KDHE's Bureau for Children, Youth and Families, testified in opposition to **HB 2221**, stating that removing responsibility from the hospitals will place infants at risk for mental retardation and developmental disabilities. Her written testimony outlines the department's reasoning for opposing the bill (see Attachment 8).

Chairperson Mayans noted that the written testimony in opposition to **HB 2221** of Dr. Sechin Cho, Director of Genetic Services at Wesley Medical Center, Wichita, has been given each member (see Attachment 9).

Representative Rutledge asked Ms. Lauver if there are more effective PKU tests on the market than is being used in Kansas. She replied that she was not acquainted with the newer tests but turned to Willie Craft, KDHE Laboratory Technician, to reply. Mr. Craft testified there are new tests on the market that were being investigated. One test appears to be more reliable but depends on development of new microtype equipment that is now being researched.

The hearing on **HB 2221** was closed.

HB 2164 - Practice of optometry, lease provisions permitted

The hearing was opened. John Federico, of Pete McGill & Associates, representing Cole Vision and LensCrafters Association, presented testimony in support of the bill, stating the reason for it was the Board of Optometry's latest rules and regulations on maintenance of an office, advertising, and direct and indirect control of professional judgment of optometrists who lease space in proximity to retail companies. Mr. Federico stated several optometrists have become objects of investigation for purported violations of the optometry law and its rules and regulations because they lease space next to retail companies (see Attachment 10).

Reid F. Holbrook, an Attorney from Kansas City, spoke in support of **HB 2164**, stating he represents six optometrists who are being subjected to investigation by the State Board of Optometry because they practice in areas where it is convenient for their patients to have access and choice of optical dispensers (see Attachment 11). Mr. Holbrook stated that at a pre-arranged meeting with the attorney for the Optometry Board, the meeting was cut short because he and his clients appeared with a certified court reporter to record the meeting and the Board's attorney refused to proceed. Mr. Holbrook then introduced three of the optometrists being investigated: Dr. Steve Abbott; Dr. Larry Smith of Topeka; and Dr. John W. Page II, of Overland Park.

Richard Homeir, an Optician from Manhattan, spoke as a proponent of **HB 2164**, stating it was his belief that the current law restricts trade and may be unconstitutional. It is restrictive for optometrists. (See testimony, Attachment 12.)

Bob Corkins, Director of Taxation for the Kansas Chamber of Commerce and Industry, presented testimony in support of **HB 2164**, stating it was the Chamber's position that freedom of contract by optometrists has been curtailed not by legislation, but by a regulatory agency. It is the Chamber's contention that consumers would benefit from passage of the bill (see Attachment 13).

Chairperson Mayans opened the meeting to questions of the proponents. Representative Freeborn asked if Mr. Rozac could give the committee a copy of a contract by one of these optometrists. Mr. Rozac said to his knowledge the lease agreements are those of third parties. If a copy of a contract was provided, there would need to be agreement that it is strictly confidential and could not be shared with anyone else. Mr. Rozac stated the issue is whether the landlord is telling the doctor how to examine the patient and how to prescribe treatment. Representative Kirk asked how this arrangement impacts the consumer. Mr. Rozac stated his company competes with one organization, called Vision Service Program, the largest managed care program in America (serving 65-70% of the population). They are solely optometrists. The provider (an insurance company or another organization) can argue and demand better price and quality. In order to compete, Mr. Rozac's clients must have the ability to offer that particular company or trade organization the examination and eye glasses at a reasonable cost. That the independent doctor of optomerty is leasing space at Sears, Roebuck and Company, or at another place, has no bearing on the optometrist's professional responsibility.

Chairman Mayans then opened the hearing to the opponents of **HB 2164**.

Gary Robbins, Executive Director of the Kansas Optometric Association, testified in opposition to the bill, stating that the law, when updated in 1990, raised some of the same issues being discussed today. It is the Board's conclusion that **HB 2164** represents a disguised attempt to turn a lease into an employment contract or at least influence the judgment of an optometrist (see Attachment 14).

Charles T. Engel, Legal Counsel to the Kansas Optometric Association, testified in opposition to **HB 2164**, expressing concerns that the bill needs to define certain lease terms. He noted the bill does not require the lease to be written. The Association believes the bill challenges the prohibition of the practice of optometry by a general corporation or a corporation acting through a licensed practitioner (see Attachment 15).

Dr. Larry Harris, a practicing optometrist from Topeka, testified in opposition to **HB 2164**, stating that the bill is inappropriate and has the practical effect of an employment contract (see Attachment 16).

Randy Forbes, Attorney for the Kansas State Board of Examiners of Optometry, stated the Board attempts to prevent damage to the public through administrative hearings and observations. In response to the Board's inquiries with respect to the six optometrists represented by Mr. Holbrook, the six filed a lawsuit in federal court which was later dismissed. With respect to the pre-arranged meeting and the issue of a court reporter, Mr. Forbes indicated he contacted several boards (including the Board of Healing Arts) who indicated they do not permit court reporters to take notes at such meetings.

Representative Landwehr asked what is the advantage of signing a non-compete agreement with LensCrafters or someone else. Mr. Rozac replied nothing. The point is to memorialize in writing that if the optometrist elects to leave early (within the terms of the lease) he will not practice within a specific geographic area for a given period of time. Mr. Rozac said the organization he represents believes it is unfair to permit a non-compete to occur between one optometrist and another or between a HMO and an optometrist.

Representative Merritt asked Mr. Engel about his testimony regarding the IRS questioning leases as to the definition of an independent contractor. Mr. Engel stated that the IRS makes the determination of status according to the terms of an agreement whether it is written or oral.

Chairperson Mayans then announced that because this issue is important, that debate will continue by means of a Subcommittee. He appointed the following to the Subcommittee on **HB 2164**: Chairperson: Representative Jim Morrison; Members: Representatives Becky Hutchins and Nancy Kirk.
Representative Morrison then announced that the Subcommittee will meet at 8:00 a.m., Monday, February 13, 1995, in Room 521-S Statehouse. The Subcommittee will also meet on Wednesday, February 15, 1995, in Room 423-S Statehouse.

The Chairperson anounced that at tomorrow's meeting, the committee will hear **HB 2216** (pharmacists' participation in the management of patient's drug therapy.)

The meeting was adjourned at 3:23 p.m.

The next meeting is scheduled for February 9, 1995.

HOUSE COMMITTEE ON HEALTH AND HUMAN SERVICES COMMITTEE
GUEST LIST
FEBRUARY 8, 1995

NAME	REPRESENTING
Carl Foster	proponent 2221
Linda Hertzler	Olathe Medical Center - proponent 2221
John Federico	Pete McGill + Assoc.
Allison Peterson	Kansas Medical Society

HOUSE H&HS COMMITTEE
2-8 - 1995
Attachment 1

HOUSE OF REPRESENTATIVES
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TOPEKA

VINCENT K. SNOWBARGER
MAJORITY LEADER

COMMITTEE ASSIGNMENTS
CALENDAR AND PRINTING, CHAIRMAN
INTERSTATE COOPERATION
LEGISLATIVE COORDINATING COUNCIL

TESTIMONY BEFORE THE HOUSE
HEALTH AND HUMAN SERVICES COMMITTEE
February 8, 1995

H. B. 2221

The matter of testing for certain congenital and genetic diseases came to my attention through my role as legal counsel for our local hospital. There were some parents who did not want the testing performed by the hospital. I was asked to give an opinion about a release to be signed by the parents relieving the hospital of the testing responsibility. In my research, I found that the only refusal allowed was for religious reasons. Further, KDHE indicated that this ground could only be used by someone in an established religion with specific tenets regarding health care.

There are other persons here today who can give you more detailed information about the tests. Briefly, however, the test is done by obtaining a blood sample from the newborn by way of a heel stick. The sample is then sent to KDHE for the lab work. By statute, both the physician and the hospital are responsible for the testing (for those born in hospitals). By inconsistent rules and regulations, it appears that the test must be performed prior to discharge from the hospital. The tests are not reliable if performed prior to 24 hours. Many newborns are now being

discharged prior to 24 hours. Therefore, the hospitals are required to perform the test and make provision for a follow-up test to be performed at a later time.

Put very simply, this bill places full responsibility for doing these tests on the attending physician. It is the physician who should have the full authority and discretion for determining when these tests should be performed.

CONTRARY TO SOME OF THE CALLS YOU MAY HAVE BEEN RECEIVING, THE BILL DOES NOT ELIMINATE THE REQUIREMENT FOR THE TESTING. If the physician is concerned that the parent will not follow through with later testing, he can still order that the test be done in the hospital setting. If the baby remains in the hospital for a longer period of time, he can order the testing to be done. On the other hand, for the vast majority of patients who will follow through with the testing, this will eliminate double testing.

By elimination of the double testing and the related paper work, there should be cost savings both to the state and to patients.

RULES AND REGULATIONS RELATED TO

PKU, GALACTOSEMIA AND HYPOTHYROIDISM SCREENING

K.A.R. 28-4-374 relating to admission and discharge policies for maternity centers:

> (e) Written criteria for discharge of the infant shall be on file in the maternity center and available to staff and shall include the following:
>
> > (6) Assurance that phenylketonuria (PKU), galactosemia and hypothyroidism screening will be performed between 72 hours and seven days after birth. A copy of the laboratory report shall be filed in the infant's medical record;

K.A.R. 28-4-503 relating to screening of newborn infants and timing of specimen collection:

> (a) Initial specimens, of healthy full-term infants born in an institution shall be obtained prior to discharge or between three to five days of age if the infant is still hospitalized.

K.A.R. 28-34-18a relating to obstetrical and newborn services in a hospital:

> (e) Procedures and policies. The directors of the obstetrical and newborn services, in cooperation with nursing service, shall develop procedures and policies which shall be available to the medical and nursing staff. Minimal procedures shall include the following:
>
> > (5) Each infant shall be tested for phenylketonuria, congenital hypothyroidism an galactosemia prior to being discharged.

Written Testimony in favor of House Bill No. 2221
Douglas G. Brooks, MD
February 8, 1995

Phenylketonuria is an inherited metabolic disorder due to the defectiveness or absence of a certain liver enzyme. It affects approximately 1 in 15,000 infants. It can lead to serious neurological injury resulting in permanent mental retardation. If detected early this damage can be entirely prevented. Although testing within the first twenty-four hours of life can detect the problem, levels can remain within normal limits for as long as six days after birth before becoming abnormal.

Congenital Hypothyroidism is a result of absent or ineffective thyroid function in a newborn and may occur in as many as 1 in 5000 newborns. Lack of detection can lead to permanent mental retardation. However, detection within the first few months of life can prevent any serious damage. Although detection during the first twenty-four hours is possible, thyroid levels can remain normal for several days after birth before abnormalities begin to occur.

Galactosemia is an inherited metabolic disease that occurs in about 1 in 60,000 live births that can result in kidney, liver, and brain damage. Early detection can prevent all of these problems. This problem is not detected until feeding has been initiated and can be missed in screening during the first twenty-four hours of life.

There is no debate about the necessity of screening all newborn children for these diseases. Testing can and does save lives, it prevents serious disease, and it saves societal resources in the long run as well. However, with the advent of hospital discharge before twenty-four hours from vaginal birth becoming the norm across the state, the current statute is outdated and needs to be changed to better meet the needs of the children of Kansas. These diseases are not able to be reliably detected by the time most newborns are being dismissed from the hospital so most newborns need repeat testing. Not only does this cause undo suffering for these children but it also adds a significant financial burden to the state as well. I know that some will argue that the cost is miniscule compared to what it will cost if one child is missed and severe disease ensues. I do not disagree with this point. However, in our part of the state, sufficient systems are already in place to ensure that this testing can be done after dismissal from the hospital but before any problems from the diseases would occur. I feel confident that these systems are probably in place throughout the state as well. As a taxpayer in this state, I feel strongly that this is another area where improvements in the system can and should be done to end government waste and inefficiency while still protecting our most precious resources, our children.

Testimony in favor of House Bill No. 2221
Carol Foster, RNC

While evaluating patients/legal guardians rights according to the laws in regards to PKU screenings. There are rules and regulations that seem contradictory in relation to PKU testing.

A. House Bill No. 2740, Sec. 4. K.S.A. 65-180 addresses the responsibility of the secretary of health and environment:

(c) Provide a follow-up program by providing test results and other information to identified physicians; locate infants with abnormal newborn screening test results; with parental consent, monitor infants to assure appropriate testing to either confirm or not confirm the disease suggested by the screening test results; with parental consent, monitor therapy and treatment for infants with confirmed diagnosis of congenital hypothyroidism, galactosemia, phenylketonuria or other genetic diseases being screened under this statute; and establish ongoing education and support activities for individuals with confirmed diagnosis of congenital hypothyroidism, galactosemia, phenylketonuria and other genetic diseases being screened under this statute and for the families of such individuals.

It is difficult to understand the reasoning of this bill. If a parent chooses not to obtain further testing and treatment, then why is it illegal to choose deferring PKU testing to be completed at time when the results are accurate.

B. The Department of Health and Environment; Article 4.- Maternal and Child Health,

28.4.503. **Timing of specimen collection.**

(a) Initial specimens, of healthy full-term infants born in an institution shall be obtained prior to discharge or between three to five days of age if the infant is still hospitalized.

(e) Initial specimens, on infants born outside of an institution shall be obtained not later than 21 days of age.

Perhaps clarification is needed here, A home birth has 20 days longer to obtain an initial PKU than a hospital born infant? Why are there different standards in regards to PKU testing depending on the where parents choose to deliver their baby?

testimony (cont.)- Carol Foster RNC

Frequency of PKU testing

Newborns discharged less than 24 hours of age are requested to return to the lab for a repeat PKU. A survey of our 3 pediatrician offices revealed they routinely draw a PKU during the 2 week office visit. Therefore, some of our infants possibly are tested 3 times in a two week period. Results of tests performed in the physicians office and mailed by the office are not sent to the hospital lab. Therefore, there is no verifiable tracking method available to see what infants were unnecessarily tested.

Number of births in Kansas: approx. 37,000

Number of PKU's done in Kansas: approx. 47,000

It was reported that 2-4.5% of the tests are rejected as unsatisfactory specimens: approx. 2,000

This data indicates that potentially 8,000 extra tests are performed annually. The issue is the cost of performing a test that is not fully reliable on for diagnosis. With pre-established programs in place for follow-up to 30% of our families, it would seem reasonable to allow this mechanism to be utilized to its fullest and decrease the number of unnecessary initial and/or repeat tests. Physicians and hospital personnel assess which families have these programs in place during hospitalization. Because all tests require a physicians order, it would seem reasonable that the physician may write the order of when PKU screening is to be done; taking into consideration the availability of follow-up programs and compliance history of each client individually.

Written Testimony in favor of House Bill No. 2221
Linda Herrick RNC
February 8, 1995

Hospital length of stay following birth

With rising health care costs, hospital stays are decreasing for "normal, routine" admission diagnosis such as term pregnancy. Many mothers and infants today are discharged at 12-18 hours after delivery. There is discussion that all deliveries will be on an outpatient basis by the end of 90's and follow-up programs will be the standard.

The follow-up process in place refers to programs designed to assess, provide education, perform tests, etc. to mothers and infants following discharge from the hospital. Insurance plans; PPO's, HMO's, medicaid, etc. have established programs for this purpose of meeting the needs of families. 30% of our families have the availability of follow-up after discharge. This follow-up visit may be utilized to obtain PKU's thereby assuring an accurately timed specimen. The standard for follow-up visits is within 48-72 hours of the infants age. Many hospitals have established or is in the process of establishing follow-up programs for their families. The two most prevalent means of follow-up programs are home health visits or hospital based clinics. Likewise, a growing number of insurance providers are seeking follow-up contracts to home health agencies to meet the needs of their prescribers.

Providing Informed Consent

Health care is of major concern and in reform today in America. As professionals in health care, our goal is to provide quality care at a reasonable cost. To do this we must educate the consumer and be accountable for the quality and frequency of testing and procedures.

In education of the consumer, we provide the following information prior to tests and/or procedures:

* What is the purpose of the test
* How is it done
* Are there risks, side effects or disadvantages
* How reliable or accurate are its results
* How will the information gained influence the management of care
* What steps follow a negative or positive result
* How much does it cost
* What are the consequences of not having it done
* Are there other methods to obtain similar information

When we ask all of these questions in regards to neonatal screening, One major fact is obvious: PKU screening done prior to 24 hours of age is only reliable 85% of the time.

Comments on the present law in the state of Kansas requiring PKU testing be done before discharge from a facility of birth.

Presented in Topeka, Kansas, February 8, 1995

My name is Laura Griggs. My husband and I have been residents of Olathe, Kansas, for eighteen months. We have six children. Three were born at birthing centers where discharge occurred less than twenty-four bours after birth. Two were born at hospitals where my stay, because the births occurred 8:30 PM, roughly, became longer than 24 hours. The PKU tests on the babies born at the birth centers were each done 48 hours after birth during a return visit to the birth centers. The hospital-born babies had tests done before discharge. The sixth child was born on December 31st, 1994, at 2:30 PM. We were discharged at 7:15 PM after four hours and 45 minutes. The PKU test was done on this newborn before we went home.

A week later, on January 7th, 1995, during the appointment with our pediatrician for the newborn's circumcision, the topic of the PKU test was discussed during which it was revealed that parts of the test were actually considered invalid and we would need to have the test redone. Because we understood the importance of this test, we immediately went to the hospital lab and had the test done. This unplanned extra appointment was inconvenient, and my husband and I both wondered why the first test had been required if it was known that parts of the results would be invalid and the entire test would have to be done again.

I appreciate the opportunity to ask this same question to you who make these requirements. Would it be possible to change the existing law to require the PKU test to be done within a certain time-frame which would then allow parents to return either to the institution of birth or an appropriate facility. Parents are the ones who need to be accountable for the health and care of their own children. As long as they are properly informed as to legal requirements, such as the PKU test requirements, and there is a mechanism in place to insure the requirements are met, why require an institution of birthing to do a test prematurely? Double and, in some cases triple, testing costs tax-payers money, causes unnecessary pain to infants, and doubling of efforts, i.e., loss of efficiency among health-care officials.

KANSAS MEDICAL SOCIETY
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February 8, 1995

To: House Health and Human Services Committee

From: C. Wheelen, KMS Director of Public Affairs CW

Subject: House Bill 2221; Tests for Genetic Diseases

Thank you for the opportunity to express reserved support for the provisions of HB2221. This bill would relieve hospital administrators of a statutory duty that is sometimes impractical because of contemporary practices regarding childbirth. The reason our support is somewhat reserved is because there is not total consensus within the medical profession. In addition, the bill needs a clarifying amendment.

Pathologists tell us that in order to obtain a reliable laboratory analysis of an infant's blood, the infant should be fed and allowed to digest its first meal or two. In other words, a blood sample should not be taken immediately after delivery. To reasonably assure reliable laboratory analysis, a sample should not be taken less than 24 hours after birth of the infant. Nowadays many new mothers and their infants are dismissed from the hospital within 24 hours of delivery.

Primary care physicians tell us that the hospital blood sample is unnecessary because they routinely perform the same test when the infant is brought to them for the first medical evaluation. On the other hand, a strong argument is made that some infants do not receive medical care subsequent to hospital dismissal and therefore might not be tested at all unless the hospital is required to do so. The consequence could be permanent disability or even death. Obviously this is a very serious matter.

This raises an important point. Some infants are not delivered in a hospital nor do they receive well baby check-ups by a physician. Consequently these blood tests for genetic disorders may never be performed. This Committee has already devoted a considerable amount of time discussing the merits of school attendance health assessments to assure that such children receive at least one thorough medical evaluation before attending school, but Representative Freeborn summed it all up when she said that by the time the child is five or six years old, it may be too late. She is absolutely correct. Many of these conditions that physicians test for are treatable but must be addressed at the earliest possible stage of the child's development. Otherwise, it will indeed be too late to prevent long-term disability.

Perhaps it would be beneficial to engage in an in-depth interim study of innovative ways that we can assure follow up after newborns are dismissed from the hospital or birthed elsewhere. Such a study could provide us the methods needed to assure that infants receive proper medical attention and the kind of treatment that can avoid disabilities. If we can achieve consensus on such methods, the school attendance health assessment would become unnecessary because we would be addressing the medical needs of Kansas children at a more appropriate age.

We also need to request an amendment to HB2221 which would define "attending physician." Otherwise it may not be clear what is meant by the Legislature. The amendment is attached to this statement. We respectfully request adoption of the attached amendment before you take action on the bill.

Thank you for considering our comments and recommendations.

KMS
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Chip Wheelen
Director of Public Affairs

3-9

Session of 1995

HOUSE BILL No. 2221

By Representative Snowbarger

1-27

AN ACT concerning tests for congenital hypothyroidism galactosemia, phenylketonuria and other genetic diseases; amending K.S.A. 1994 Supp. 65-181 and repealing the existing section.

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

Section 1. K.S.A. 1994 Supp. 65-181 is hereby amended to read as follows: 65-181. The ~~administrative officer or other person in charge of each institution or the~~ attending physician, caring for infants 28 days of age or younger, shall have administered to every such infant or child in ~~its or~~ such physician's care~~,~~ tests for congenital hypothyroidism, galactosemia, phenylketonuria and other genetic diseases which may be detected ~~with the same specimen~~ in accordance with rules and regulations adopted by the secretary of health and environment.

Sec. 2. K.S.A. 1994 Supp. 65-181 is hereby repealed.

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

cause to

by such tests

For purposes of this section, "attending physician" means a person licensed to practice medicine and surgery in this state who attends the birth of the child or who is selected by a parent of the child to assume primary responsibility for the medical care of the child.

KANSAS HOSPITAL ASSOCIATION

Memorandum

Donald A. Wilson
President

February 8, 1995

TO: House Health & Human Services Committee

FROM: Kansas Hospital Association

RE: **House Bill 2221**

The Kansas Hospital Association appreciates the opportunity to testify in support of House Bill 2221. This bill would put the attending physician in charge of administering certain genetic tests to newborns.

H.B. 2221 makes sense for two reasons. First, it recognizes that often newborns are discharged from the hospital before certain tests can be performed with accuracy. Second, it confirms that the attending physician, who is in charge of the patient's care, should also be in charge of the administration of these particular tests.

The current law is essentially obsolete. We request the amendments contained in H.B. 2221 be adopted.

Thank you for your consideration of our comments.

/cdc

HOUSE H&HS COMMITTEE
2 - 8 - 1995
Attachment 7

1263 Topeka Avenue • P.O. Box 2308 • Topeka, Kansas 66601 • (913) 233-7436 • FAX (913) 233-6955

Testimony presented to

House Health and Human Services Committee

by

The Kansas Department of Health and Environment

House Bill 2221

This statute is the second of four statutes (KSA 65-180 through 183) that define the newborn screening program for congenital hypothyroidism, galactosemia, phenylketonuria and other genetic diseases. Currently, the only "other genetic disease" for which Kansas screens is hemoglobinopathy. The amendment to this statute will remove hospitals from the responsibility of obtaining specimens for the newborn screening. We believe this change places infants at risk for not receiving the mandated newborn screening tests that were instituted to decrease the incidence of mental retardation and developmental disabilities.

Two of the four diseases identified above can be detected at birth. Galactosemia and hemoglobinopathies can readily be identified because the analytes are components of the red blood cell. During the past fiscal year, the first samples collected by the hospital led to the identification of:

-seven infants with sickle cell disease
-forty-five infants with sickle cell trait
-thirty-two infants with other hemoglobinopathies

-one infant with galactosemia

A significant number of infants with hypothyroidism are detected within the first day of life. In the past fiscal year, 5 of the 10 infants with hypothyroidism, specimens were collected at less than 30 hours of age and 2 of these infants' specimens were collected at less than 24 hours of age. During this same period, 3 of the 4 infants with phenylketonuria (PKU) had specimens collected within 48 hours of birth. The technology to detect PKU within the first four hours of life is currently being used in other states' newborn screening programs.

The current collection format is based on the recommendations of The American Academy of Pediatrics, Committee on Genetics. The goal of the newborn screening program is to identify and initiate treatment in the neonatal period; this is the first 28 days of life. This process includes the screening test, local physician notification, consultation with a medical specialist, definitive diagnosis, and initiation of treatment. Out of the pool of 38,000 live births in Kansas this past year, we narrowed the number to 657 infants who were identified as high risk for one of the conditions. Approximately 37,300 were identified at not being at risk; these infants required no follow-up.

The most recent infant with a confirmed diagnosis of hypothyroidism was born at Wesley Hospital in Wichita in January, 1995; the newborn screening test was collected at 28 hours of age, and this infant was on treatment in less than ten days. Without the hospital as a partner in obtaining the newborn screening specimen, it is anticipated that the time interval between birth and treatment will increase and in some instances, infants will not be identified before onset of sequelae. With this amendment, a new system will have to be designed which includes tracking and follow-up of the entire birth population. Hospitals and KDHE will have to devise new procedures to inform the KDHE Laboratory of all births in timely fashion.

In addition, physicians will have to develop their own processes for obtaining specimens. When there is no known arrangement for the medical care of the infant after leaving the hospital, the physician on call for that day is listed on the newborn screening specimen form. The physician has no knowledge of this infant and would need to be informed by the hospital that it is that physician's responsibility to assure that a specimen is obtained. Additionally, there are infants who do not see a physician for many months or years, and

infants are lost due to incorrect or change in address, name changes or no telephone access. KDHE will have to expand its program to provide technical assistance, develop partnerships with the physicians, and develop extensive follow-up procedures to complete the initial screening. The fiscal note further substantiates this.

KDHE has been entrusted to administered the newborn screening program beginning with the initial legislation in 1965. KDHE does not support the passage of HB 2221 because it places Kansas' youngest citizens at risk for mental retardation and developmental disabilities. Missing such conditions can cause substantial human and monetary costs such as expensive health care and educational services.

Testimony presented by: Cassie Lauver
Director
Bureau for Children, Youth and Families
February 8, 1995

TO: Rep. Carlos Mayans
Chairman

FROM: Sechin Cho, M.D.
Director, Genetic Services
Professor and Chairman, Department of Pediatrics, UKSM-W

SUBJECT: House Bill No. 2221

DATE: February 7, 1995

All newborns in Kansas are screened for four genetic disorders prior to their discharge from the hospital. These are Phenylketouria, Galactosemia, Hypothyroidism, and Hemoglobinopathies. Without early detection, individuals with these disorders would die or be mentally retarded.

Early hospital discharge (within 12 hours of birth) would reduce screening efficacy for PKU by 30% and early dismissal between 12-24 hours would miss only 10% of PKU patients. Early hospital discharge has very little or no impact on Galactosemia, Hypothyroidism, and Hemoglobinopathies screening.

If we abandon the current practice which screens all newborns prior to hospital dismissal, we will miss all children with four treatable genetic disorders when they do not return to the doctor's office within 14 days of life. I expect more than 20% of neonates will not come back to the doctor's office within 14 days. **PKU, Galactosemia, and Hypothyroidism must be treated as early as possible to avoid life threatening illness and mental retardation.**

FACTS

Name of the Disease	*Frequency*	*No. Of Patients Actively Followed In the Wichita Genetic Center*
PKU	1/12,000 births	36 patients
Galactosemia	1/34,000 births	10 patients
Hypothyroidism	1/4,000 births	15 patients
Hemoglobinopathies	1/400 births in Black Americans	12 patients

Please do not change the current law until a better scientific recommendation is forwarded.
Please share this information with your committee members.

Thank you for your attention.

HOUSE H&HS COMMITTEE
2 - 8 - 1995
Attachment 9

Genetic Services
Wesley Medical Center • University of Kansas School of Medicine-Wichita • 550 N. Hillside • Wichita, KS 67214 • (316) 688-2362 • FAX 688-7859

TESTIMONY IN SUPPORT OF

HB 2164

HEALTH AND HUMAN SERVICES COMMITTEE
FEBRUARY 8, 1995

JOHN J. FEDERICO
PETE MCGILL & ASSOCIATES

Mr. Chairman and members of the Committee, my name is John Federico of Pete McGill & Associates and I am grateful for the opportunity to speak in support of HB 2164.

I stand before you on behalf of our clients the Cole Vision ("Sears Optical" and "Montgomery Ward Optical") and Lenscrafters Corporations. With me today is Frank Rozak of the Cole Vision Corporation and at the conclusion of my testimony it will be my pleasure, with Mr. Rozak's assistance, to answer any questions that you may have.

I am pleased to support this piece of legislation which can best be described as a "pro-consumer" bill. Its sole purpose is to establish basic business parameters that are fair and equitable in relationship to lease agreements between optometrists and optical companies. The bill's intent is to allow for the expansion of our free market economy by removing the restrictions placed on optometrists and optical dispensers that hamstring a competitive market which will result in a more convenient eye care delivery system.

We have had the privilege of representing these two companies for the past several years. In 1990 we appeared before this very same committee to discuss the very same subjects relating to what was then HB 2630.

As a result of those hearings, the legislature approved HB 2630 which affirmed the right of optometrists to enter into lawful leases, agreements and other standard business arrangements now in section 65-1502(c) of the statutes which is enclosed in our handout to you.

We thought these issues were all resolved, but the Board of Optometry promulgated several rules and regulations applicable to advertising, direct or **indirect** control of professional judgement and **maintaining** an office. Those rules became effective on May 18, 1992.

On November 10, 1993, the Board notified several optometrists they were the object of an investigation for purported violations of the optometry law and several of its rules and regulations. Each of these optometrists practice in proximity to retail optical companies. They made what we believe to be unrealistic requests to produce

information and written documentation regarding how the signage above their office and the retail store was chosen. The Board also requested copies of all written agreements with their landlord regarding any matters relating to their practice including the lease of space, equipment and numerous other documents. We believe one of the other conferees here today will provide more detail on that subject.

We are not certain we understand the motive of the Board in singling out these particular optometrists but it would certainly appear the Board was attempting to put unwarranted pressure on the optometrists to terminate the lease agreements between the optometrists and the optical companies.

Mr. Chairman and members of the committee, HB 2164 is an effort to clean up some of these unreasonable restrictions and broad interpretations of what was intended by the statute passed in 1990. In lease agreements concerning rent, hours of operation, minimum insurance requirements, non-compete arrangements, utilities, equipment maintenance and the like are understood and accepted as being strictly business practices.

We know we have provided you more information than you may want, but we have provided you with a copy of the rules and regulations of the Board of Optometry. Although these are not in the statute, they have the same force and effect of law. We respectfully refer you to Article 4, section 5 and Article 10 and 11 of the rules and regulations. We believe any reasonable person would conclude some of them are very unrealistic, unfair and anti-consumer.

In the spirit of a less intrusive government and an end to over intrusive, unrealistic rules and regulations, we ask that Kansas join the other 47 states in the nation, including each of our border states of Colorado, Missouri, Nebraska and Oklahoma, and permit such landlord-tenant relationships. I would like to point out that in the vast majority of the other 47 states which allow similar lease arrangements, there is no dispute over what are **business** practices as opposed to the exercise of **professional** judgement or health related decisions made strictly by the practitioner. The Board of Optometry's effort to classify business practices into professional judgement issues is simply an attempt to eliminate or minimize competition, with the net result being that certain licensees will benefit to the detriment of other optometrists, --at the expense of the vision care customers! It is abundantly clear that professional judgement decisions such as: which patient the optometrist will see, when and what kind of examination protocol or treatment will be rendered, belongs exclusively and strictly to the licensed optometrist.

We have included in your packet a report from the Federal Trade Commission which commissioned a study of similar legislation in Massachusetts. I refer you to the paragraph marked on Page 4, and I apologize for taking the time to read this, but this was forwarded to us by the Consumer Affairs Division of the Federal Trade Commission, and I quote:

"Consumers do not always benefit from regulations that restrict the business aspects of professional practice. Studies have often found little relationship between restrictions on professionals' business practices and the quality of service or care they provide. Restrictions on their business practices can limit professionals' ability to compete effectively with each other and can also increase their costs. If restrictions diminish competition among professionals, or if they impose higher costs that are passed on in the form of higher prices or reduced services, then consumers can be harmed. These potential adverse effects of regulation should be considered along with its intended benefits."

Would you please refer to Page 6 of the same document marked and again I quote:

"Based on the evidence assembled in the rulemaking proceeding, the FTC concluded that restrictions on commercial practices by eye care providers have resulted in significant consumer injury, in the form of monetary losses and less frequent vision care, without providing consumer benefit. The Commission found that a substantial portion of the consumers' costs for eye examinations and eyewear was attributable to the inefficiencies of an industry protected from competition."

Now, would you please refer to Page 7, the paragraph marked for your convenience, and this section offers a succinct summary of the Federal Trade Commission's findings and I quote:

"We encourage the removal of provisions prohibiting eye care providers from working for lay persons or other professionals or entering into partnerships or other associations with them. Restrictions on these types of business formats may prevent the formation and development of forms of professional practice that may be innovative or more efficient, provide comparable or higher quality services, and offer competition to traditional providers. We also support efforts to remove restrictions on practicing in commercial locations. We question whether such restrictions serve any purpose other than inhibiting the formation of high-volume commercial practices."

Please refer to the conclusion on Page 8 of this document:

"The proposal to permit optometrists to locate within and lease space from optical goods stores or other mercantile establishments could lead to greater competition and to efficiencies in operation that could benefit consumers."

In conclusion we ask that you support HB 2164 which is representative of very simple business concepts and, more importantly, promotes fairness, consumer choice and a level playing field for all.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
CONSUMER AND
COMPETITION ADVOCACY

COMMISSION AUTHORIZED

April 20, 1993

James R. Anliot, Esq.
Board Counsel, Division of Registration
Leverett Saltonstall Building, Government Center
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Anliot:

The staff of the Federal Trade Commission[1] is pleased to respond to your request for comment on certain proposed changes to the regulations of the Massachusetts Board of Registration in Optometry. This comment will address the changes that affect commercial practice arrangements. The proposed changes would make it possible for an optometrist to locate within a mercantile establishment, such as an optical goods retailer, which could benefit consumers through increased competition and greater efficiencies of operation. However, it appears that restrictions on more closely integrated operations will remain in place, and those restrictions could make it difficult to achieve some efficiencies.

I. Interest and experience of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including the health care professions, to the maximum extent compatible with other state and federal goals. For several years, the FTC and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, physicians,

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[1] These comments are the views of the staff of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

[2] 15 U.S.C. § 41 *et seq.*

pharmacists, and other health care providers.[3] One of these cases resulted in an order against the Massachusetts Board of Registration in Optometry prohibiting certain restraints on discounts and advertising.[4] In addition, the staff has submitted comments about these issues to state legislatures and administrative agencies and others.[5] As one of the two federal agencies with principal responsibility for enforcing antitrust laws, the FTC is particularly interested in restrictions that may adversely affect the competitive process and raise prices (or decrease quality) to consumers. And as an agency charged with a broad responsibility for consumer protection, the FTC is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception.

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[3] *See, e.g., Iowa Chapter of American Physical Therapy Association*, 111 F.T.C. 199 (1988) (consent order); *Preferred Physicians, Inc.*, 110 F.T.C. 157 (1988) (consent order); *Wyoming State Board of Chiropractic Examiners*, 110 F.T.C. 145 (1988) (consent order); *Connecticut Chiropractic Association*, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg. 65,093 (December 13, 1991)); *Medical Staff of Holy Cross Hospital*, C-3345 (consent order issued September 10, 1991, 56 Fed. Reg. 49,184 (September 27, 1991)); *Southbank IPA, Inc.*, C-3355 (consent order issued December 20, 1991, 57 Fed. Reg. 2913 (January 24, 1992)); *Robert Fojo, MD.*, C-3373 (consent order issued March 2, 1992, 57 Fed. Reg. 9258, (March 17, 1992)); *Texas Board of Chiropractic Examiners*, C-3379 (order modified April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)).

[4] *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

[5] *See, e.g.*, Comments to Florida Office of the Auditor General, November 28, 1990 (Board of Pilot Commissioners and Board of Medicine); South Carolina Legislative Audit Council, February 26, 1992 (Boards of Pharmacy, Medical Examiners, Veterinary Medical Examiners, Nursing, and Chiropractic Examiners); same, January 8, 1993 (Boards of Optometry and Opticianry, Dentistry, Psychology, Speech and Audiology, Physical Therapy, Podiatry, and Occupational Therapy); Texas Sunset Advisory Commission, August 14, 1992 (Boards of Optometry, Dentistry, Medicine, Veterinary Medicine, Podiatry, and Pharmacy); *see also* testimony to the Maine House of Representatives, January 8, 1992 (optometry), and the Washington legislature's Joint Administrative Rules Review Committee, December 15, 1992 (opticians and optometrists).

II. Analysis of the proposed regulations.

This comment will focus on the proposed rules that affect the settings in which optometrists may practice.[6] Board regulations now prohibit employment of an optometrist by an optician or a mercantile establishment.[7] The proposed regulations would retain that prohibition.[8] On the other hand, current regulations permit optometrists to be employed by health maintenance organizations, nonprofit clinics, hospitals, schools and industrial establishments that provide health care to employees and their families.[9] The proposed regulations would permit optometrists to practice in such settings, but, unlike the present regulations, would not explicitly permit employment by such institutions.[10]

The principal proposed change that would affect restraints on commercial practices would permit practicing in mercantile locations where optical goods are sold, as long as no contract or other arrangement gave a non-professional control over matters requiring professional judgment, no referral fees were involved, and "separate facilities" requirements were met.[11] The

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[6] The proposed regulations would also expand the provisions concerning patient records, adding definitions of what must be included in prescriptions and establishing regulations about patient access to information. Proposed 246 CMR 5.02. New rules concerning contact lenses, under which a customer who wants the information from the eye examination that is necessary to have contact lenses made up could get it, on paying the bill for the examination, would parallel the Commission's prescription-release rule for eyeglasses. Proposed 246 CMR 5.02(6); *cf.* 16 C.F.R. §456.2. The Commission has not determined to extend its prescription release rule to contact lenses, and we have no views on this part of the proposal.

[7] 246 CMR 5.05(2).

[8] Proposed 246 CMR 5.03(2).

[9] 246 CMR 5.05(1).

[10] Proposed 246 CMR 5.03(1). The proposed regulations would also recognize explicitly that an optometrist might practice entirely through visiting patients at hospitals, nursing homes, or private residences. Proposed 246 CMR 5.04(2).

[11] Proposed 246 CMR 5.03(3). The proposed provisions concerning contract arrangements would replace provisions that now ban any "direct" sharing of fees with a non-professional. 246 CMR 5.06(1).

statutory "separate facilities" requirements permit setting up a practice in a "definite and distinct" space, with separate signs clearly indicating that the optometrist is independent.[12]

III. FTC studies and rulemaking proceedings concerning eye care.

Consumers do not always benefit from regulations that restrict the business aspects of professional practice. Studies have often found little relationship between restrictions on professionals' business practices and the quality of service or care they provide.[13] Restrictions on their business practices can limit professionals' ability to compete effectively with each other and can also increase their costs. If restrictions diminish competition among professionals, or if they impose higher costs that are passed on in the form of higher prices or reduced services, then consumers can be harmed. These potential adverse effects of regulation should be considered along with its intended benefits.

The FTC and its staff have considerable experience with the competitive impact of restraints on business practices in the eye care industry. Two kinds of practices, restraints on advertising and failures to release prescriptions, were examined in an FTC rulemaking proceeding in the 1970's.[14] That proceeding revealed

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[12] Mass. Gen. L., Ch. 112, §73B. The statute also forbids any lease or contract that results in direct or indirect sharing of "any" fees. These terms are broad enough to ban all leases or other commercial arrangements with non-professionals whatever. However, the law has been interpreted to permit percentage lease arrangements. *See Bronstein v. Board of Registration in Optometry*, 531 N.E.2d 593 (Mass. 1988).

[13] *See* C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation*, FTC Bureau of Economics Staff Report, October 1990 (reviewing studies reported in economics literature).

[14] Advertising of Ophthalmic Goods and Services, 16 CFR Part 456 ("Eyeglasses Rule"). The FTC found that prohibiting nondeceptive advertising by vision care providers and failing to release eyeglass lens prescriptions to the customer were unfair acts or practices in violation of section 5 of the FTC Act. The Eyeglasses Rule prohibited bans on nondeceptive advertising and required vision care providers to furnish copies of prescriptions to consumers after eye examinations. On appeal, the Eyeglasses Rule's prescription release requirement was upheld but the advertising portions were remanded for further consideration in

(continued...)

that other common restraints on eye care providers also appeared to limit competition unduly, increase prices, and reduce the quality of eye care provided to the public.

To examine the effects of restraints on business practices in the eye care industry, the staff of the FTC conducted two comprehensive studies. The first, published in 1980 by the FTC's Bureau of Economics, compared the price and quality of optometric goods and services in markets where commercial practices were subject to differing degrees of regulation.[15] This study, conducted with the help of two colleges of optometry and the Director of Optometric Services of the Veterans Administration, found that commercial practice restrictions in a market resulted in higher prices for eyeglasses and eye examinations but did not improve the overall quality of care in that market. The second study, published in 1983 by the Bureaus of Consumer Protection and Economics, compared the price and quality of the cosmetic contact lens fitting services of commercial optometrists and other provider groups.[16] It concluded that, on average, "commercial" optometrists (for example, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations) fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

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[14](...continued)
light of the Supreme Court decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (finding state supreme court rules against attorney advertising violated the First Amendment). *American Optometric Association* v. *FTC*, 626 F.2d 896 (D.C. Cir. 1980). Rather than reinstate the advertising portions of the Eyeglasses Rule, the FTC has addressed advertising restrictions through administrative litigation. *See, e.g., Massachusetts Bd. of Optometry*, 110 F.T.C. 549 (1988).

[15] Bureau of Economics, Federal Trade Commission, The Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) ("Bureau of Economics Study").

[16] Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983) ("Contact Lens Study").

During the 1980's, the FTC conducted a second rulemaking proceeding about restraints on commercial eye care practice.[17] Based on the evidence assembled in the rulemaking proceeding, the FTC concluded that restrictions on commercial practices by eye care providers have resulted in significant consumer injury, in the form of monetary losses and less frequent vision care, without providing consumer benefit.[18] The Commission found that a substantial portion of the consumers' costs for eye examinations and eyewear was attributable to the inefficiencies of an industry protected from competition.[19] The FTC thus adopted a rule[20] to prohibit state-imposed restrictions on four types of commercial arrangements: affiliating with non-optometrists, locating in commercial settings, operating branch offices, and using nondeceptive trade names.[21] Although the Eyeglasses II rule was vacated on appeal (on the ground that the FTC lacked the statutory authority to make rules declaring state statutes unfair), the FTC's substantive findings, that the restrictions harmed consumers, were not disturbed.[22] The evidence from the FTC's rulemaking record remains a compelling argument for eliminating restraints on commercial practice.

IV. Effects of location restrictions and regulation of employment relationships.

In general, restrictions on affiliations with non-professionals and on associations with other businesses prevent business corporations or non-professionals from employing

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[17] In the course of the "Eyeglasses II" rulemaking, the FTC received 287 comments and heard testimony from 94 witnesses. The commenters and witnesses included consumers and consumer groups, optometrists, sellers of ophthalmic goods, professional associations, federal, state and local government officials, and members of the academic community. *See* Ophthalmic Practice Rules ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10285, 10287 (March 13, 1989) ("Commission Statement").

[18] Commission Statement, *supra* n. 17, at 10285.

[19] Commission Statement, *supra* n. 17, at 10285-86.

[20] Commission Statement, *supra* n. 17, at 10285.

[21] In addition, the Commission decided to retain, with modifications, the prescription release requirement from the original Eyeglasses Rule.

[22] *California State Board of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), *reh'g denied*, January 8, 1991.

professionals and prevent partnerships and franchise agreements with non-professionals. Such restrictions may deny professionals access to sources of capital and thereby tend to inhibit the development of large-scale practices that can take advantage of volume purchase discounts and other economies of scale. The likely result of excluding high-volume practitioners from the market and preventing practitioners from operating at the most efficient level is higher prices for optometric goods and services.[23]

We encourage the removal of provisions prohibiting eye care providers from working for lay persons or other professionals or entering into partnerships or other associations with them. Restrictions on these types of business formats may prevent the formation and development of forms of professional practice that may be innovative or more efficient, provide comparable or higher quality services, and offer competition to traditional providers.[24] We also support efforts to remove restrictions on practicing in commercial locations. We question whether such restrictions serve any purpose other than inhibiting the formation of high-volume commercial practices.[25]

The present proposal, to permit optometrists to locate within and lease space from optical goods stores, represents a step toward eliminating a significant restriction on commercial forms of practice. But potentially significant constraints remain in place (some of which, we recognize, may be required by statute). The "separate facilities" requirements may continue to impose some unnecessary costs. The continuing ban on employment by non-professionals could prevent some potentially efficient forms of collaboration.[26] It is unclear whether the regulations (or the statute) would permit other forms of economic integration or collaboration. For example, the proposal to relax the constraints on financial relationships between optometrists and optical goods stores enough to permit leasing of space may still

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[23] Commission Statement, *supra*, n. 17 at 10288-10289.

[24] Commission Statement, *supra*, n. 17 at 10288-10289.

[25] For a general discussion of the effects of restricting locations in mercantile settings, see Commission Statement, *supra* n. 17, at 10289.

[26] This could be especially true if the new regulations repeal the present regulation's permission for optometrists to be employed by certain other kinds of institutions. *See* text at n. 10 *supra*.

not permit coordinated promotions or pricing that could benefit consumers.[27]

V. Conclusion.

The proposal to permit optometrists to locate within and lease space from optical goods stores or other mercantile establishments could lead to greater competition and to efficiencies in operation that could benefit consumers. Relaxing constraints on commercial practices is consistent with the direction the Commission took in its Eyeglasses II rulemaking. Some remaining restraints may still inhibit forms of providing services that might increase competition and benefit consumers, however.

Sincerely,

Michael O. Wise
Acting Director

[27] Board actions that affect promotions, and other actions, must be consistent with the requirements of the outstanding order, which deals with, among other things, restraints on advertising prices and discounts and on advertising the availability of optometric services. *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

Smith

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February 7, 1995

Chairman Mayans and Committee Members
House, Health, and Human Services Committee
State Capitol
Topeka, Kansas

Dear Committee Members:

I have been asked to address the following two questions:

(1) What does research suggest are the impacts of business practice restrictions on the price and availability of ophthalmic goods and services?

(2) What are the implications of this research for the legislative issues that are currently being debated in Kansas?

First, however, I will give you some background information about my qualifications to address these questions. I received my Ph.D. in Economics from the University of California at Berkeley in 1983. My Ph.D. dissertation, "Asymmetric Information, Regulation, and Quality-Adjusted Prices: The Case of Optometry," addressed the issue of the impacts of business practice restrictions on the prices and qualities of eyeglasses and eye examinations provided by optometrists. Since 1983, I have continued to work in this area and have published six articles on this topic in refereed journals.

With respect to the first question, my research results suggest that business practice restrictions (such as, restrictions on the employment of optometrists by nonprofessional

corporations, the permissible locations of optometrists' offices, the operation of multiple offices by optometrists, the use of trade names, etc.) increase the prices of ophthalmic goods and services, do not impact the quality of ophthalmic goods and services, and decrease the rate of entry of chain optical firms into the market.

My research results are based on data collected between 1970 and 1985. As was the case in the 1970s and 1980s, optometrists in Kansas and other states are still subject to these business practice restrictions. Further, the market conditions facing optometrists today are similar to the market conditions of the 1970s and 1980s. Thus, I am comfortable making the assertion that if I was to repeat my empirical analysis with data collected in the 1990s, I think I would find similar results.

Based on my reading of the Optometry Laws and Roster, State of Kansas, April 1, 1992, I would classify Kansas as a very restrictive state. It is my opinion that enactment of the proposed amendment to the K.S.A. 65-1502 (House Bill No. 2164) would be in the public interest.

Sincerely,

Deborah Haas-Wilson
Associate Professor of Economics

Agency 65

Kansas State Board of Examiners in Optometry

Articles

Article 4.—GENERAL PROVISIONS

65-4-1. Definitions. For the purpose of these rules and regulations the following terms shall have the meanings respectively ascribed to them.

(a) "Advertising" means all representations disseminated in any manner or by any means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of professional services or ophthalmic goods.

(b) "Biomicroscopy" means evaluation of the exterior and interior segments of the eye under highly magnified conditions by use of a biomicroscope.

(c) "Board" means the Kansas board of examiners in optometry.

(d) "Contact lens adaptation" means the period of time from the initial dispensing of contact lenses until a licensee exercising professional judgment determines by follow-up visits that the patient has achieved an acceptable level of wearing time with no indication of eye health- or vision-related problems.

(e) "Contact lens evaluation" means measurement of the anatomical and physiological characteristics of the eyes and lids for designing or determining the fit and effect on the eyes and lids of a therapeutic or cosmetic contact lens, including a plano contact lens.

(f) "Coordination testing" means subjective and objective far and nearpoint balance test for the investigation of the binocular functions of accommodation and convergence.

(g) "External examination" means objective evaluation of the globe (cornea, aqueous, iris, pupil, conjunctiva), the lids, cilia and lacrimation by use of magnification instruments as required by the licensee.

(h) "License" means a license to practice optometry granted pursuant to the optometry law.

(i) "Licensee" means a person licensed pursuant to the optometry law to practice optometry.

(j) "Medical facility" shall have the meaning ascribed to that term in subsection (c) of K.S.A. 65-411 and amendments thereto.

(k) "Medical care facility" shall have the meaning ascribed to that term in K.S.A. 65-425 and amendments thereto.

(l) "National board examination" means all parts of the examination being then administered by the national board of examiners in optometry and any examination then being administered by the international association of boards on treatment and management of ocular disease.

(m) "Office or practice location" means that address, building, or location, including each location of a mobile facility, where any optometric services or the practice acts are performed and from which a licensee has, maintains, or derives a financial benefit or interest either directly or indirectly.

(n) "Ophthalmic goods" means any goods which are used, sold or supplied in conjunction with or as a result of optometric services including, but not limited to:

(1) spectacles;

(2) any component of spectacles;

(3) contact lenses; and

10 - 14

(3) Fee to obtain license renewal upon second and subsequent failure to renew license prior to expiration date ..... $ 300.00

(Authorized by K.S.A. 74-1504(a)(6); implementing K.S.A. 1991 Supp. 65-1505 and K.S.A. 1991 Supp. 65-1509; effective May 18, 1992.)

65-4-4. Notice to board. A licensee shall provide notice to the board in writing within 20 days of the following:

(a) the licensee's conviction of a felony, whether or not related to the practice of optometry;

(b) the revocation, suspension or limitation of a licensee's license to practice optometry in another state, territory, nation or the District of Columbia;

(c) the censure of the licensee by the proper licensing authority of another state, territory, nation or the District of Columbia;

(d) a finding by a court of competent jurisdiction that the licensee is mentally ill, disabled, not guilty by reason of insanity or incompetent to stand trial;

(e) sanctions or disciplinary actions taken against the licensee by a peer review committee, health care facility or professional association or society;

(f) adverse action for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under the optometry law taken against the licensee by another state or licensing jurisdiction, a peer review body, a health care facility, a professional association or society, a governmental agency, by a law enforcement agency or a court;

(g) surrender of the licensee's license or authorization to practice optometry in another state or jurisdiction or surrender of the licensee's membership on any professional staff or in any professional association or society;

(h) an adverse judgment, award or settlement against the licensee resulting from a medical liability claim; and

(i) cancellation of the licensee's policy of professional liability insurance or notice of failure to pay the annual premium therefor. (Authorized by K.S.A. 74-1504(a)(6); implementing K.S.A. 74-1504; effective May 18, 1992.)

65-4-5. Professional judgment. (a) No licensee shall allow any unlicensed person to:

(1) interfere with the licensee's professional judgment; or

(2) control, directly or indirectly, the licensee's professional judgment or practice.

(b) A licensee shall be deemed to have allowed an unlicensed person to improperly interfere with the licensee's professional judgment or control, directly or indirectly, the licensee's professional judgment or practice if the licensee enters into any agreement, arrangement or affiliation with any unlicensed person, other than those which occur as part of a practice authorized by the Kansas professional corporation act or through the lawful functioning of a professional partnership or association with other health care providers, which:

(1) provides for the referral of patients between the licensee and the unlicensed person or entity;

(2) provides for any type of compensation, rebate, commission or renumeration for the referral of patients between the licensee and the unlicensed person or entity;

(3) establishes quotas for the number of examinations performed or prescriptions written by a licensee;

(4) bases any type of compensation, rebate, commission or renumeration to a licensee based on the number of examinations performed or prescriptions written by the licensee;

(5) results in a practice situation which would indicate or imply that:

(A) the unlicensed person is engaged in or maintains an office for the practice of optometry; or

(B) the licensee's practice is being carried on as part of or in association with the business enterprise of the unlicensed person;

(6) prevents all patient prescription files and all records pertaining to the practice of optometry from being the sole property of the licensee and free from involvement with any unlicensed person, firm or corporation;

(7) permits an unlicensed person to directly or indirectly affect:

(A) the nature, scheduling, pricing or manner of performing optometric services;

(B) the licensee's decisions relating to advertising, patient records or patient communications regarding optometric services or ophthalmic goods.

(8) in the judgment of the board, otherwise constitutes improper interference.

(c) Non-profit benevolent referral services shall not be deemed to be improper interfer-

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(g) Each licensee who has obtained approval to use a trade or assumed name shall be personally responsible for compliance with K.A.R. 65-9-1, et seq. (Authorized by K.S.A. 74-1504(a)(6); implementing K.S.A. 1991 Supp. 65-1509; effective May 18, 1992.)

Article 10.—MAINTAINING AN OFFICE

65-10-1. Practice locations. (a) A licensee shall not derive any economic benefit from or maintain more than three offices or practice locations.

(b) Practice in a governmental institution shall not be considered an office or practice location, but practice in a medical facility or medical care facility shall be considered an office or practice location.

(c) Any licensee who intends to engage in the practice of optometry at any office or practice location in this state, other than one of which the licensee has previously given the board notice, shall give written notice to the secretary-treasurer of the new office or practice location prior to performing any optometric services at that new office or practice location.

(d) No licensee shall perform any optometric services at any office or practice location unless the licensee has displayed at that office or practice location an original license issued to the licensee by the board. A licensee shall display a separate original license at each office or practice location.

(e) No licensee shall maintain an office or practice location in a manner that indicates or implies that:

(1) An unlicensed person is engaged in or maintains an office for the practice of optometry; or

(2) The licensee's practice is being carried on as part of or in association with the business enterprise of the unlicensed person. (Authorized by K.S.A. 74-1504(a)(6); implementing K.S.A. 1991 Supp. 65-1502; effective May 18, 1992.)

65-10-2. Unlawfully maintaining an office. Except as authorized by the Kansas professional corporation act or through the lawful functioning of a professional partnership or association with other health care providers, an unlicensed person shall be deemed to be maintaining an office for the practice of optometry:

(a) by bearing an expense of such an office if the unlicensed person has entered into any rental arrangement, lease arrangement or debt arrangement with a licensee regarding the licensee's practice whereby the cost or terms allow the unlicensed person to exert influence on the professional judgment or practice of the licensee; or

(b) if the licensee's office, location or place of practice indicates or implies, by location, advertising or otherwise, that the licensee is practicing as a part of or in association with the business of an unlicensed person. (Authorized by K.S.A. 74-1504(a)(6); implementing K.S.A. 1991 Supp. 65-1502; effective May 18, 1992.)

65-10-3. Licensee ownership of franchised business of optical dispensing. (a) If a licensee obtains any beneficial interest in a franchise or equivalent relationship to engage in the business of marketing ophthalmic goods or contact lenses, all operations of that franchise or equivalent relationship shall be separate and apart from any and all offices or locations at which the licensee, or any entity in which the licensee has a beneficial interest, provides optometric services.

(b) For the purposes of this section, "separate and apart" shall include:

(1) being physically separated; and

(2) the totally independent functioning of the franchise business of optical dispensing and any optometric office or practice location. (Authorized by K.S.A. 74-1504(a)(6); implementing K.S.A. 1991 Supp. 65-1502; effective May 18, 1992.)

Article 11.—ADVERTISING

65-11-1. Responsibility. (a) Each licensee shall be responsible for any advertising which is designed to benefit the licensee, directly or indirectly, whether or not the licensee authored it or caused it to be published.

(b) Each licensee whose name, trade name, assumed name, office address, phone number or place of practice appears or is mentioned in any advertisement of any kind or character shall be presumed to have caused, allowed, permitted, approved, or sanctioned the advertisement and shall be personally and professionally responsible for its content and character. (Authorized by K.S.A. 74-1504(a)(6); implementing K.S.A. 1991 Supp. 65-1517; effective May 18, 1992.)

65-11-2. Fraudulent advertisement. Advertisements which will be deemed to be fraudulent shall include, but are not limited to, those which:

be subject to a civil action for damages as a result of reporting such information.

(b) Any state, regional or local association of licensed dentists and the individual members of any committee thereof, which in good faith investigates or communicates information pertaining to the alleged incidents of malpractice or the qualifications, fitness or character of any licensee to the Kansas dental board or to any committee or agent thereof, shall be immune from liability in any civil action, that is based upon such investigation or transmittal of information if the investigation and communication was made in good faith and did not represent as true any matter not reasonably believed to be true.

History: L. 1976, ch. 261, § 3; July 1.

Cross References to Related Sections:
Limited liability for certain associations of health care providers, review organizations and committee members thereof, see 65-4909.

Research and Practice Aids:
Physicians and Surgeons ⇐ 16.
C.J.S. Physicians, Surgeons, and Other Health-Care Providers §§ 70, 81 to 86, 97 to 102.

Law Review and Bar Journal References:
"Recent Legislation: The Kansas Approach to Medical Malpractice," Nancy Neal Scherer and Robert P. Scherer, 16 W.L.J. 395, 407 (1977).

65-1463. Kansas dental board directed to grant license to certain person; license subject to suspension or revocation. Notwithstanding the provisions of K.S.A. 65-1434 and amendments thereto to the contrary, the Kansas dental board shall grant a license to practice dentistry to the person who is employed by Larned state hospital to perform dental services for patients of such hospital and who has been licensed to practice dentistry in the states of Michigan and Kentucky. Such license shall be valid so long as such person is employed by Larned state hospital in that capacity and so long as the practice of dentistry by such person is limited to performing dental services for patients of Larned state hospital. The license issued pursuant to this subsection shall be subject to suspension or revocation by the Kansas dental board in the same manner and for the same grounds as any other dental license may be suspended or revoked by the board as provided by law and rules and regulations of the board adopted thereunder.

History: L. 1982, ch. 253, § 1; July 1.

65-1464. Citation of dental practices act. The acts contained in article 14 of chapter 65 and article 14 of chapter 74 of the Kansas Statutes Annotated and any acts amendatory thereof or made specifically supplemental thereto shall be construed together and may be cited as the dental practices act.

History: L. 1983, ch. 209, § 8; July 1.

65-1465. Denture or dental prosthesis to be marked with name or social security number, or both, of patient. (a) Every complete upper and lower denture or removable dental prosthesis fabricated by a practitioner of dentistry or fabricated pursuant to such practitioner's work order, shall be marked with the name or social security number, or both, of the patient for whom the prosthesis is intended. The markings shall be done during fabrication and shall be permanent, legible and cosmetically acceptable. The exact location of the markings and method used to apply or implant the markings shall be determined by the dentist or dental laboratory fabricating the prosthesis. If in the professional judgment of the dentist, this full identification is not possible, the name or social security number may be omitted.

(b) Any removable dental prosthesis in existence prior to the effective date of this act, which was not marked in accordance with subsection (a), shall be so marked at the time of any subsequent rebasing or duplication.

History: L. 1983, ch. 203, § 1; July 1.

Article 15.—REGULATION OF OPTOMETRISTS

Cross References to Related Sections:
Board of examiners in optometry, see ch. 74, art. 15.

Law Review and Bar Journal References:
Right to review decisions of board hereunder provided by K.S.A. 60-2101, Kenton C. Granger, 14 K.L.R. 149 (1965).
Judicial review of administrative decisions, Kenton C. Granger, 33 J.B.A.K. 291, 337 (1964).
"Interference with Economic Relations of Attorneys," Martin E. Conrey and Lawrence M. Gurney, 23 W.L.J. 528, 529 (1984).

65-1501. Practice of optometry defined; standard of care in use of topical pharmaceutical drugs. (a) The practice of optometry means:

(1) The examination of the human eye and its adnexae and the employment of objective or subjective means or methods (including the administering, or dispensing, of topical pharmaceutical drugs) for the purpose of diagnosing the refractive, muscular, or pathological condition thereof;

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directions for use, the number of refills permitted, the date of issue and expiration date.

(h) "Topical pharmaceutical drugs" means drugs known generically as anesthetics, mydriatics, cycloplegics, anti-infectives and anti-inflammatory agents, which anti-inflammatory agents shall be limited to a fourteen-day supply, administered topically and not by other means for the examination, diagnosis and treatment of the human eye and its adnexae.

(i) "Dispense" means to deliver prescription-only medication or ophthalmic lenses to the ultimate user pursuant to the lawful prescription of a licensee and dispensing of prescription-only medication by a licensee shall be limited to a twenty-four-hour supply or minimal quantity necessary until a prescription can be filled by a licensed pharmacist.

(j) "Diagnostic licensee" means a person licensed under the optometry law and certified by the board to administer or dispense topical pharmaceutical drugs for diagnostic purposes.

(k) "Therapeutic licensee" means a person licensed under the optometry law and certified by the board to prescribe, administer or dispense topical pharmaceutical drugs for therapeutic purposes.

(l) "False advertisement" means any advertisement which is false, misleading or deceptive in a material respect. In determining whether any advertisement is misleading, there shall be taken into account not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations made.

(m) "Advertisement" means all representations disseminated in any manner or by any means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of professional services or ophthalmic goods.

(n) "Health care provider" shall have the meaning ascribed to that term in subsection (f) of K.S.A. 40-3401 and amendments thereto.

(o) "Medical facility" shall have the meaning ascribed to that term in subsection (c) of K.S.A. 65-411 and amendments thereto.

(p) "Medical care facility" shall have the meaning ascribed to that term in K.S.A. 65-425 and amendments thereto.

History: L. 1975, ch. 318, § 1; L. 1987, ch. 235, § 2; L. 1990, ch. 223, § 1; July 1.

65-1502. Who deemed practitioners. (a) Except as provided in K.S.A. 65-1508 and amendments thereto, a person shall be deemed to be practicing optometry within the meaning of the optometry law if such person in any manner:

(1) Holds oneself out to the public as being engaged in or who maintains an office for the practice of optometry as defined in K.S.A. 65-1501 and amendments thereto;

(2) makes a test or examination of the eye or eyes of another to ascertain the refractive, the muscular or the pathological condition thereof;

(3) adapts lenses to the human eye for any purpose, either directly or indirectly; or

(4) conducts or performs orthoptic exercises or visual training therapy for the correction, remedy or relief of any insufficiencies or abnormal conditions of the eyes.

(b) "Maintains an office for the practice of optometry" for the purposes of this section and the optometry law means:

(1) To directly or indirectly control or attempt to control the professional judgment or the practice of a licensee; or

(2) to bear any of the expenses of or to have, own or acquire any interest in the practice, books, records, files or materials of a licensee.

(c) Nothing herein contained shall be construed to prohibit a licensee from entering into leases, agreements, mortgages or other types of debt instruments not in violation of this section or any other section of the optometry law.

History: L. 1923, ch. 220, § 2; R.S. 1923, 65-1502; L. 1976, ch. 270, § 1; L. 1990, ch. 223, § 2; July 1.

CASE ANNOTATIONS

1. Corporation cannot engage directly or indirectly in practice of optometry. State, ex rel., v. Goldman Jewelry Co., 142 K. 881, 883, 884, 51 P.2d 995.

2. Corporation ousted in quo warranto proceedings from practice of optometry. State, ex rel., v. Zale Jewelry Co., 179 K. 628, 633, 298 P.2d 283.

3. Cited; fitting of contact lenses under prescription of physician does not constitute practice of optometry. State, ex rel., v. Doolin & Shaw, 209 K. 244, 256, 497 P.2d 138.

65-1503.

History: L. 1923, ch. 220, § 3; R.S. 1923, 65-1503; Repealed, L. 1975, ch. 318, § 11; July 1.

Source or prior law:
L. 1909, ch. 229, § 2.

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EXPLANATION OF THIRD PARTY PROGRAMS

With respect to subpart (2) (G) pertaining to agreements to participate in third-party agreements, we ask your indulgence for a few minutes more to explain this provision. Third-party agreements are commonly known as "managed care" contracts for vision care. Legislators, employers and unions are acutely aware of the rising costs of health care including vision benefits. Professional provider organizations ("PPOs") comprises the largest element of managed care and offers cost-containment to payors by enabling them to organize panels of providers who agree to render services and products at a fixed cost.

Managed care, whether an HMO or PPO, is the most cost-effective and efficient way to deliver health care services to eligible persons. In today's retail optical business environment, providers must participate in managed care or risk losing significant market share since former customers are now beneficiaries of these managed care networks.

The Vision Service Program ("VSP") is the largest optometric managed care vision network in the country. Its membership, which includes many Kansas solo-practicing optometrists, has agreed to accept reimbursement levels negotiated by VSP as a condition of participation.

Retail optical companies regularly compete with VSP and other provider networks for vision care contracts. This bill would enable the lessee to similarly participate in managed care programs based on a previously agreed-to level of reimbursement. Such provisions in lease agreements allow the optometrist to save the time and expense of reviewing individual contracts and completing the appropriate documents to certify them as network providers, thereby increasing the time they can devote to patient care.

KANSAS HOUSE OF REPRESENTATIVES
HEALTH AND HUMAN SERVICES COMMITTEE
ROOM 423-S

February 8, 1995

Testimony of Reid F. Holbrook
HB 2164

Chairman Mayans and Members of the Committee, Good Afternoon. My name is Reid Holbrook, I am a practicing attorney in Kansas City and my professional offices are located at 757 Armstrong, Kansas City, Kansas, 66101 (913-342-2500). I very much appreciate the opportunity to appear in support of House Bill 2164.

I represent six citizens of our State who are licensed health care providers (optometrists) and presently are being subjected to a witch hunt being conducted by the Kansas Board of Examiners in Optometry (KBEO). Hopefully, this bill will provide them and others badly needed relief.

The Board of Optometry, along with KOA and The American Optometry Association (AOA), has long harbored a dislike and participated in a feud with chain optical stores. I am telling you that this feud has been expressed in antagonism by this Board against not only these six (6) optometrists, but others who locate their practices adjacent to or in the immediate proximity of chain optical stores. Clearly the feud is economically motivated. The Federal Trade Commission (FTC) has on two separate occasions, 1980 and 1983, conducted studies that have found that commercial practice restrictions by State Optometry Boards result in higher prices, and not only no increase in quality but an actual decrease in quality.

DRS. PAGE, SMITH, ET AL.

The six (6) optometrists voluntarily chose not to engage in the sale of eyewear to their customers. Their reasons are several. Some view the merchandising of eyewear to be unseemly for a professional health care provider and potential ethical issues could arise. Another reason is simply many optometrists do not wish to make the financial investment for the equipment and inventory of eyewear necessary to proivde a reasonable range of choices for the optometrist's patients. Many ODs desire to locate their practice in areas where it is convenient for their patients to have access and choice of optical dispensers.

Some time in August of 1993, the KBEO employed an investigator/photographer who went to a variety of shopping centers throughout the state and took photographs of the storefront of my six (6) clients. This was followed by a letter dated November 10, 1993 wherein these six (6) optometrists, and presumably others, were asked to provide certain information to the KBEO because

it was ostensibly investigating "fraudulent advertising" by optometrists and perhaps other violations of the Optometry Act. Items requested were such things as copies of leases, checks from the optometrists to their respective landlords, and other documentation that describe the relationship between the optometrist and the landlord. In the letters the Board asserted the signs above these six (6) OD's offices potentially violated K.A.R. 65-11-2:

> **Fraudulent advertisement. Advertisements which will be deemed to be fraudulent shall include, but are not limited to, those which...**
>
> **(g) indicated or imply that the licensee is engaged in or maintains an office for the practice of optometry as part of, or in association with, the business of operation of an unlicensed person or entity, except as authorized by the Kansas professional corporation act or through lawful functioning of a professional partnership or association with other health care providers;**

Included in these letters from the Board's attorney were photographs of which we are circulating copies. They depict the entrances to Dr. Page's office and Dr. Abbott's office.

While our OD's clearly do not deny the Board has the power to investigate possible violations of Kansas Optometry laws, we did challenge the underlying purpose and motive for the investigation. Interestingly, the common denominator for my six clients was their practice location. Of further interest, an optometrist from Wichita who received one of the letters, a Dr. Turner, upon informing the KBEO he no longer practiced in a shopping center was excused from complying with the request and dropped from the investigation (see Exhibit "A" attached).

Notwithstanding that no individual had lodged or filed a complaint against any of our six (6) ODs and notwithstanding that the basis for proceeding to investigate our six (6) ODs was a "mere suspicion" (the Board admitted they have no complaint or objective evidence of a violation of any statute, rule or regulation), we agreed to produce each of the six (6) for an investigative interview in the offices of the Board's attorneys in Topeka, Kansas, on August 19, 1994. When we appeared, because the KBEO would not agree to any reasonable mechanism to memorialize the interrogation of our six (6) clients by the Board's attorney, and one or more of its members, we appeared with a Kansas Certified Shorthand Reporter. Upon entering the room with the first witness and the court reporter present, the Board's attorney refused to proceed. A sample of the Board's attitude, as exhibited by their attorney is as follows:

Mr. Forbes: **Dr. Williams, will you answer questions that I have without the court reporter being here?**

Dr. Williams: **No, I will not.**

Mr. Forbes: **Dr. Smith, will you answer questions I have without the court reporter being here?**

Dr. Smith: **No.**

Mr. Forbes: **Okay, we're not going to be going forward.**

One of the most fundamental due process guarantees that any individual is entitled to, when being investigated is the right to have an accurate and correct record of questions asked and answers given. You can see from the above that the KBEO desires to deny this fundamental right to its six (6) licensees. All of which is interesting in light of the fact there has never been a specific complaint by any Kansas consumer about any of these six (6) ODs and their professional competency. This is not an investigation about professional competency, but rather an inquiry about "signage" or, an investigation of the relationship between these six (6) ODs and optical dispensers.

Each of the six (6) ODs personally appeared with a court reporter and the KBEO refused to participate in the proceedings they had called themselves and ordered the doctors to be in attendance at. Not only was this costly to the doctors in terms of mileage, and travel expense, it was also costly to them in terms of time away from their practices and the loss of fee for service revenues that probably can never be recaptured.

CONCLUSION

My support and the support of my six (6) clients of HB 2461 is hinged on Section 1(g) of the Bill. It simply provides that when the phrase "independent doctor of optometry" or words of similar effect are used irrespective of the decor outside the optometrist office, then other Kansas optometrists presumably will be free of the abuses suffered by these six (6) ODs at the hands of the KBEO and its attorney. Not only does this Bill offer protection to individual optometrists, it is necessary to avoid others from being subjected to "fishing expeditions" by the Board as a means to harass ODs from doing business as lessees of shopping center space from optical dispensers. What the KBEO is doing to these optometrists is simply attempting to impose a commercial practice restriction that would have the effect of raising prices to consumers because the Board's purpose is to protect tone category of optometry providers from competition of high volume chain providers.

I thank you for this opportunity to speak and would be please to respond to any questions if you have them. In addition, the three optometrists who are with me today are also willing to respond to any questions you might have.

LAW OFFICES OF
FRIEDEN, HAYNES & FORBES
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TELEPHONE
(913) 232-7266
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(913) 232-5841

November 17, 1993

Michael E. Turner, O.D.
7500 E. Kellogg, #376
Wichita, KS 67207

Dear Dr. Turner:

On November 10, 1993, we sent you a letter regarding your office space adjacent to LensCrafters. I have been advised that you have since left that space. Therefore, you need not comply at this time with the requests being made in my previous letter. Notwithstanding, I would like to speak with you when you have an opportunity regarding your experience in the location next to LensCrafters.

Thank you for your consideration.

Sincerely,

Randall J. Forbes
FRIEDEN, HAYNES & FORBES

RJF:lk
cc: Board Members

11-4 EXHIBIT A

From: Richard Homeier, ABOM
Manhattan, Kansas 913-539-5105

To: Health and Human Services Committee

Re: House Bill No. 2164

Honorable Committee Members,

I am a native Kansan and one of 4 Certified Master Opticians in the State. I began in the eyewear production and dispensing business 31 years ago in Salina. I presently own and operate an independent, retail optical laboratory / dispensary in Manhattan. Over 20 opticians in this state have been prepared for their certification examination through courses I have taught. More than half of those work for optometrists. I am a past president of the Opticians Association of Kansas.

For several years I have been aware of the conflict of interest between the State Board and a growing portion of optometrists regarding the proper definition of "professional" practice. It appears that the KSBEO continues to make rulings which will preserve the historical practice of optometry while most of the nation has changed to reflect the desire of the consumer for freedom of choice and various levels of services.

The present laws regarding the types of optometric practice is not only restrictive of trade (under the guise of professionalism) but also may be unconstitutional. It is also restrictive for the professional him/her self. It would appear that the board is more concerned about market

for its "licensees" than it is about welfare of their "patients", the consumers of Kansas.

For instance, it is common knowledge in the optical industry in Kansas that any optometrist who chooses not to be a merchant and sell eyewear in their offices and also chooses to locate near an optician or optical company will come under more intense scrutiny than one who chooses a "traditional" practice. Though it may not be easily documented, it is nevertheless the truth. It has come up in many conversations I have personally had with optometrists on these and other non-related subjects.

I have regularly attended the Kansas State Board of Examiners in Optometry meeting over the past year and have minutes of the previous year. The board is made up of three optometrists who are selected by Kansas Optometric Association, which is a kind of trade organization and one is an appointed public member. To my knowledge, there has never been an optometrist appointed to the board who was outside KOA or one who practiced in close proximity to an optical company or optician. If they are representative of the State of Kansas, this seems to be a questionable practice.

The really interesting thing to me is why a profession allows itself to be so controlled by only two or three of their peers. For most of the last two years when decisions were made to investigate certain possible violations, the board consisted of the legal quorum of three (3). It seems that the meeting dates were so arranged that the public member was usually unable to attend. I hope this was not on purpose, but

nevertheless, two (2) became the majority. I have knowledge of several optometrists who might like to practice near an optician but who are simply afraid they would be subjected to the seemingly biased investigations for which the board has become notorious.

Some practitioners I know, would consider it ideal to not have to be involved in retail merchandising and the selection and fitting of eyewear. One optometrist, a partner in one of the larger practices in this state, stated to me privately, "this dispensing is a thorn in our side". In context, I understood him to say, "I just want to practice optometry. I'd rather not be bothered with all the problems of opticianry." I think there a many optometrists in the state who feel this way but would be afraid even to admit it, let alone make any attempts to correct the situation.

This is not to say that it should be impossible for optometrists to dispense but they should be given the option of associating with or locating near a competent optician if they so choose; much as pharmacies locate near medical complexes.

Finally, I believe the public would best be served in choice, economy and professionalism if this clarification of the law, House Bill No. 2164 were passed. If any of the honorable legislators would like to discuss this matter more fully, I make myself available.

Thank you for listening to my opinion.

Richard Homeier, ABOM

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732

HB 2164

February 8, 1995

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony before the

House Committee on Health & Human Services
by Bob Corkins, Director of Taxation

by
Bob Corkins
Director of Taxation

Honorable Chair and members of the Committee:

My name is Bob Corkins, director of taxation and small business development for the Kansas Chamber of Commerce and Industry, and I appreciate the opportunity to express our members support for HB 2164 regarding the acknowledgment of legality of lease practices involving optometrists.

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

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

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

KCCI is a staunch advocate of free enterprise, including the principle of freedom of contract which has common law roots dating back centuries. However, it is not uncommon for one to find legislative exceptions to this principle. Lawmakers often have to weigh conflicting priorities of their diverse constituencies, but the political pressures of election, reelection and majority rule have a

of forcing them to consider the broad public interest before such freedoms are limited. Today's debate addresses circumstances in which this freedom was curtailed not by a legislative body, but instead by a regulatory agency.

Kansas statutes do not preclude non-optometrists from leasing business space to optometrists. In basic terms, the statutory prohibitions are against those who wrongly represent themselves as optometrists, and those who interfere with the professional judgment of optometrists. Only through regulation have some office lease arrangements been interpreted to violate these provisions. HB 2164 would merely clarify that the legislature never intended to curb such unrelated business dealings in the first place.

KCCI finds it difficult to believe this policy debate has anything to do with an optometrist's professional integrity and responsibility as a trusted provider of health care. We instead contend that consumers would benefit from passage of HB 2164. A study conducted by an economics professor at Smith College in Massachusetts concluded that commercial practice limitations for optometrists "have a positive and statistically significant impact on the prices of eyecare and have a statistically insignificant impact on the quality of eyecare" -- meaning Kansas' current regulatory policy is driving up health care costs without increasing quality. In fact, when the state optometrists' association informed us of their strong dislike for HB 2164, they said nothing about the matter of professional standards. Their stated opposition focused only on an alleged loss of business that the bill would cause for independent optometrists.

Furthermore, KCCI is confident that independent optometrists will find other ways to compete successfully in the marketplace. One of their strengths, as with other small businesses, is their adaptability and resourcefulness. Independent optometrists have not become a thing of the past in the 47 other states which have already enacted legislation similar to HB 2164. We believe that the cry of unfair trade practice which led to the regulatory limits on lease arrangements was motivated largely by the "sour grapes" of those unable to acquire the prime office space in their communities.

Consequently, we are compelled to defend the free market forces which would be officially sanctioned by HB 2164. Its provisions would apply safeguards to ensure the public will not be misled by these lease agreements and that they would not impair optometrists' professional judgment -- the same objectives encompassed by our current statute. We therefore urge you to recommend HB 2164 favorably for passage. Thank you for your time and consideration.

Kansas Optometric Association

1266 SW Topeka Blvd., Topeka, KS 66612
913-232-0225

TESTIMONY ON HOUSE BILL 2164
HOUSE HEALTH AND HUMAN SERVICES COMMITTEE
FEBRUARY 8, 1995

I am Gary Robbins, Executive Director of the Kansas Optometric Association. I appreciate the opportunity to appear and share our concerns about House Bill 2164. Briefly, I want to review the educational training and background of optometrists for the committee because it is directly related to our concerns about this bill. After receiving their undergraduate degree (with an emphasis in biological science and math) and passing a national entrance examination, students receive four years of clinical education in optometry school (in the diagnosis and treatment of ocular disease, pharmacology, anatomy, physiology, optics, etc.). Optometry students are required to pass national boards and state board examinations before entering practice.

It is vital that the committee understand that the primary objective of an eye examination is to ascertain the health of the patient's eyes not to sell a pair of glasses. A thorough clinical eye examination can detect a number of serious health problems (including cataracts, diabetes, glaucoma, hypertension, brain tumors, among others). There could be underlying clinical or systemic reasons for headaches, blurred vision or other symptoms which don't require the expense of eyewear. **In some instances, an eye exam may be a patient's first contact with the health care delivery system over an extended period of time.** Depending on the diagnosis, the optometrist may be referring the patient to their primary care physician, an ophthalmologist,

neurologist, or cardiologist. An eye exam affords an opportunity for the early detection and treatment of serious health problems like hypertension and diabetes which can prevent more expensive health care later. **Some conditions and medications can result in changes in vision which require clinical care and medication, not a prescription change in their glasses.**

Federal law requires optometrists and ophthalmologists upon completion of an eye examination to give patients their eyeglass prescription to be filled by whomever the patient chooses.

During the 1990 Legislature, the optometry law was updated and revised. In that process the proponents of H.B. 2164 raised some of the same issues we are discussing today. **We reached a compromise with the optical chains indicating that optometrists could lease space next door to an optical shop, but that it must be separate and apart from the optometric practice. The language in lines 28, 29, 30 31, 32 and 33 was agreed to in writing and signed by representatives of the Kansas Optometric Association, Pete McGill and Associates and the Kansas State Board of Examiners in Optometry.** This was included along with lines 34-37 regarding leasing. In 1990, they agreed to the language on maintaining an office and stated that they didn't want to control or interfere with the professional judgment of an optometrist. The amendments in House Bill 2164 represent a disguised attempt to turn a lease into an employment contract. At the least, it represents the potential to influence the judgment of an optometrist.

Indicating that leases can influence professional judgment may seem like an exaggerated or unrealistic claim. However, I have attached to my testimony an article from the Review of Optometry which indicates that **the Florida Board of Optometry has been in the process of proposing regulations which would limit non-compete clauses and lease provisions that have given landlords control of OD patient records, offices, advertising and liability insurance.** This has been an ongoing problem which has a direct relationship to the quality of care delivered by an optometrist in this setting and may result in pressure to over prescribe. If leases are used by unlicensed persons or optical companies to gain control over patient records, **it raises serious questions about the confidentiality of patient records (i.e. AIDS, etc.) and continuity of care.**

The Kansas Optometric Association is extremely concerned about the flawed language and undefined terms in this bill. Our Legal Counsel will address these matters in a moment.

My final concern regarding H.B. 2164 is that it represents a challenge to the corporate practice prohibition of dentistry, medicine and optometry. The prohibition on the corporate practice of all three professions has been a long-standing public policy of the State of Kansas. There is nothing in the optometry law which prevents the proponents of this law from operating their retail optical operations in Kansas. Do the concerns raised by the optical companies in this bill outweigh the state's responsibility to protect the public health of all Kansans? It is vitally important to remember the distinction between eyewear and eyecare. We respectfully ask the committee to oppose the passage of House Bill 2164.

NEWS REVIEW

FLORIDA O.D.s, CHAINS CLASH OVER LEASES

Lease agreements and the way they control optometric practices are at the heart of both a new set of rules proposed by the Florida Board of Optometry, and a legal dispute between an O.D. and an optical chain.

The proposed rules, which were officially filed last month, would limit non-compete clauses and lease provisions that give landlords control of O.D.s' patient records, office hours, advertising and liability insurance.

The proposed rules are—at least in part—a response to a suit filed in Lee County Circuit Court by William K. Ramsay, O.D., against Atlanta-based Opti-World.

After the state board issued a declaratory statement last year that Opti-World violated rules in its lease agreement with Ramsay, the Fort Myers O.D. terminated his lease before its expiration date.

In January 1991, with 19 days remaining on the lease, Ramsay began removing patient files from the office. Within hours, he says, Opti-World posted a security guard to block Ramsay from entering the store.

Jan. 13: A security guard blocks Ramsay's wife.

Although he was ultimately allowed back in, Ramsay is suing Opti-World for unspecified damages. The suit states that Opti-World:

- Changed the locks and alarm code without Ramsay's knowledge.
- Attempted to persuade patients to see another O.D. who would be moving into the store, even after Ramsay resumed practice at the location.
- Used Ramsay's patient information to solicit business for the new O.D. without Ramsay's permission.
- Told patients who called after February 1, 1991—when Ramsay's lease formally ended—that Ramsay left town and could not be contacted.

Ramsay says he began thinking about leaving Opti-World shortly after he signed a new lease agreement in October 1990. He says the chain began trying to dictate various aspects of his practice, such as fees and hours.

Ramsay says he is confident about his case because his agreement with Opti-World stated that any provision of the contract that violates state board regulations would be voided.

Opti-World President Donald Chapman declined to comment on the specifics of the suit, but called it "groundless." Chapman says Opti-World will also follow the progress of the board's proposed rules. "If we feel they impair us in any way, we will take aggressive action," he says.

It could be two years for the case to go to trial, Ramsay says. And, the board's rule changes could take at least a year to move through Florida's complex administrative process, according to Dan Banasko of the state's Department of Legal Affairs. ■

IN THE NEWS: CLINIC OFFERS HIV EYE CARE

Whitman-Walker Clinic in Washington, D.C., will open the first comprehensive eye health center in the United States for people with HIV and AIDS. The 9,000-square-foot facility, which should be completed by the end of the year, will offer free eye care to anyone with HIV and is expected to serve up to 2,000 patients a year. It was funded by a $200,000 grant from Astra Pharmaceutical Products Inc.

□

Bausch & Lomb's net income rose 15 percent in the third quarter to $5 million. Contact lens sales increased 18 percent worldwide, led by a 50 percent rise in sales of Medalist frequent replacement and SeeQuence disposable contact lenses. Also, sales of contact lens care products rose 20 percent and ophthalmic drug sales increased 30 percent.

□

SSH is now PBH. Sola Barnes Hind changed its name last month to Pilkington Barnes Hind. ■

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TESTIMONY ON HOUSE BILL 2164
CHARLES T. ENGEL

Mr. Chairman and members of the committee, I am Charles Engel, Legal Counsel to the Kansas Optometric Association. There are three arguments against H.B. 2164 which I would like to make.

The first obvious problem is the bill's failure to define the following terms: "Optical Company" on Line 39, "Optical Shop" on Line 17, Page 2; "Landlord" on Lines 8 and 14, Page 2; "Independent Doctor of Optometry" on Lines 14 and 15, Page 2; and "Office Setting" on Line 16, Page 2. These terms must be defined here, since they are not defined in the existing optometry statutes.

Further, the bill appears to create a legislature-approved "lease". However, "lease" is also not defined in the bill. You can call an employment contract a lease, but the title isn't important. Rather, it is the content of the agreement which counts. Not all leases need to be in writing to be enforceable. H.B. 2164 does not appear to require a written lease. Only on Line 8, Page 2, does the requirement that "such lease" contain a written statement appear. Therefore, all of the provisions of the bill regarding method of payment of rent, hours of operation, insurance requirements, non-competition clauses, leases of equipment and furnishing, provision for utilities and participation in third-party programs can be oral.

Quite frankly, this bill as currently drafted is a lawyer's dream. It will spawn numerous lawsuits and force courts to interpret these statutory terms as well as the oral agreements between the parties disguised as "leases."

The second major problem is that this bill challenges the prohibition against the practice of medicine by a general corporation or a corporation acting through a licensed practitioner. This prohibition is founded on the overriding need for the state to protect the public health and welfare. All optometrists are licensed, must pass examinations, are required to continue their education and are governed by a state board. If an optometrist violates the law or rules or regulations, or poses a danger to the public, the State Board of Examiners in Optometry can discipline, reprimand or revoke the license of the optometrist. On the other hand, general corporations are not licensed, do not pass examinations and are not governed by the State Board of Examiners in Optometry and, therefore, don't face any disciplinary action should they violate the law or pose a threat to the public health.

This corporate practice prohibition act has been the subject of Supreme Court decisions in 1991 and 1993. In both cases, our Supreme Court found the prohibition to be valid. In the later case, the court allowed hospital corporations to employ physicians, because hospitals are, first, licensed by numerous state boards who can ensure the public's right to safe medical care, and second, formed for the purpose of providing health care to the public which requires the hiring of physicians to fulfill the hospital's purpose. Corporations, on the other hand, are neither licensed by state agencies nor formed to provide health care to the public. Rather, they are formed to earn a profit for their shareholders.

It is well-settled Kansas law that the right to control and direct when, where and how a person conducts business renders the person performing the services, an employee.

If an optometrist enters into a lease with provisions as provided in this bill, it is my opinion that the optometrist becomes an employee of the landlord–optical company–optical shop.

Whether a doctor was an employee of a corporation was the issue in the two Supreme Court cases mentioned earlier. That same issue is often litigated in income tax disputes. I attach the Internal Revenue Service memorandum enumerating the twenty factors or elements of the employer/employee relationship. Many of the terms stated on Page 2 of this bill appear on the IRS list. They include: instructions about when and where the optometrist is to work; integration of the optometrist's services into the business of the landlord; set hours of work; full time required, including non-compete clauses; the optometrist performing services on the landlord's premises; the landlord leasing equipment to the optometrist; and the optometrist's lack of significant investment. All of these provisions indicate sufficient control by the optical company over the optometrist to render the optometrist to be an employee of the optical company and in violation of the prohibition against the corporate practice of optometry.

While it is obvious that the lease terms contemplated in this bill give the landlord–optical company–optical shop control over the optometrist, the term "Independent Doctor of Optometry" contradicts those terms.

Finally, the particular "lease" provisions of the bill are woefully devoid of typical terms found in "leases" of space. Most true leases provide: the lessee with the covenant of quiet enjoyment of the premises without restrictions of when and how the space is used; for the payment of taxes; for the payment to the lessor for tenant finish, fixtures and

furnishings over the term of the lease; removal of business fixtures at the end of the lease; as well as provisions for termination and damages. If this bill aims to get legislative approval for some terms of these leases, why aren't typical lease terms included?

In conclusion, the current statute allows optometrists to enter into leases. All leases, just like all contracts, should be arms length transactions between the parties. I do not believe the legislature should be dictating the terms of commercial leases.

INTERNAL REVENUE SERVICE

MANUAL

9/10/91

PART V - Collection Activity

CHAPTER:
Exhibit 5(10)00-4 Employer-Employee Relationship (Reference: IRM 5(10)43)

TEXT:

Introduction
For FICA, FUTA, and income tax withholding purposes the term "employee" (Secs. 3121(d), 3306(i), and 3401(c)) includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.
The Common Law Rules-Factors
Under the common law test, a worker is an employee if the person for whom he works has the right to direct and control him in the way he works both as to the final results and as to the details of when, where, and how the work is to be done. The employer need not actually exercise control. It is sufficient that he has the right to do so.
If the relationship of employer and employee exists, it is of no consequence whether the employee is designated as a partner, coadventurer, agent, independent contractor, or the like. Furthermore, all classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees.
The factors or elements that show control are described below in the following 20 items. Any single fact or small group of facts is not conclusive evidence of the presence or absence of control.
These common law factors are not always present in every case. Some factors do not apply to certain occupations. The weight to be given each factor is not always constant. The degree of importance of each factor may vary depending on the occupation and the reason for existence. Therefore, in each case the agent will have two things to consider: First, does the factor exist; and second, what is the reason for or importance of its existence or nonexistence.
Instructions. A person who is required to comply with instructions about when, where, and how he is to work is ordinarily an employee. Some employees may work without receiving instructions because they are highly proficient and conscientious workers. However, the control factor is present if the employer has the right to require compliance with the instructions. The instructions which show how to reach the desired result may be oral or written (manuals or procedures).
Training. Training a person by an experienced employee working with him, by correspondence, by required attendance at meetings, and by other methods indicates that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent contractor ordinarily uses his own methods and receives no training from the purchaser of his services. In fact, it is usually his methods which bring him to the attention of the purchaser.
Integration. Integration of the person's services into the business operations generally shows that he is subject to direction and control. In

Exhibit 5(10)00-4 Employer-Employee Relationship (Reference: IRM 5(10)43

applying the integration test, first determine the scope and function of the business and then whether the services of the individual are merged into it. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the people who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

Services Rendered Personally. If the services must be rendered personally, presumably the employer is interested in the methods as well as the results. He is interested in not only the result but also the worker.

Hiring, Supervising, and Paying Assistants. Hiring, supervising, and paying assistants by the employer generally shows control over the men on the job. Sometimes one worker may hire, supervise, and pay the other workmen. He may do so as the result of a contract under which he agrees to provide materials and labor and under which he is responsible for only the attainment of a result. In this case he is an independent contractor. On the other hand, if he hires, supervises, and pays workmen at the direction of the employer, he may be an employee acting in the capacity of a foreman for or representative of the employer (Rev. Rul. 70-440, 1970-2 C.B. 209).

Continuing Relationship. A continuing relationship between an individual and the person for whom he performs services is a factor which indicates that an employer-employee relationship exists. Continuing services may include work performed at frequently recurring though somewhat irregular intervals either on call of the employer or whenever the work is available. If the arrangement contemplates continuing or recurring work, the relationship is considered permanent even if the services are part-time, seasonal, or of short duration.

Set Hours of Work. The establishment of set hours of work by the employer is a factor indicating control. This condition bars the worker from being master of his own time, which is the right of the independent contractor. If the nature of the occupation makes fixed hours impractical, a requirement that the worker work at certain times is an element of control.

Full Time Required. If the worker must devote his full time to the business of the employer, the employer has control over the amount of time the worker spends working and impliedly restricts him from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he chooses. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation, and customs in the locality. These conditions should be considered in defining "full time."

Full-time service may be required even though not specified in writing or orally. For example, to produce a required minimum volume of business may compel a person to devote all of his working time to that business; or he may not be permitted to work for anyone else, and to earn a living he necessarily must work full time.

Doing Work on Employer's Premises. Doing the work on the employer's premises in itself is not control. However, it does imply that the employer has control, especially when the work is the kind that could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The use of desk space and telephone and stenographic services provided by an employer places the worker within the employer's direction and supervision. Work done off the premises indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. Control over the place of work is indicated when the employer has the right to compel a person to travel a designated route, to canvass a territory within a certain time, or to work at specific places as

Exhibit 5(10)00-4 Employer-Employee Relationship (Reference: IRM 5(10)43

required. In some occupations services must be performed away from the premises of the employer; for example, employees of construction contractors or taxicab drivers.

Order or Sequence Set. If a person must perform services in the order or sequence set for him by the employer, it shows that the worker is not free to follow his own pattern of work but must follow the established routines and schedules of the employer. Often, because of the nature of an occupation, the employer either does not set the order of the services or sets them infrequently. It is sufficient to show control, however, if he retains the right to do so. The outside commission salesman, for example, usually is permitted latitude in mapping out his activities and may work "on his own" to a considerable degree. In many cases, however, at the direction of the employer he must report to the office at specified times, follow up on leads, and perform certain tasks at certain times. Such directions interfere with and take preference over the sales

man's own routines or plans; this fact indicates control.

Oral or Written Reports. Another element of control is the requirement of submitting regular oral or written reports to the employer. This action shows that the person is compelled to account for his actions. Such reports are useful to the employer for present controls or future supervision; that is, they enable him to determine whether his instructions are being followed or, if the person has been "on his own," whether instructions should be issued.

Payment by Hour, Week, Month. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of doing a job. The payment by a firm of regular amounts at stated intervals to a worker strongly indicates an employer-employee relationship. (The fact that payments are received from a third party, e.g., tips or fees, is irrelevant in determining whether an employment relationship exists.) The firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the worker. It is also assumed in absence of evidence to the contrary that the worker, by accepting payment upon such basis, has agreed that the firm shall have such right of control. Obviously, the firm expects the worker to give a day's work for a day's pay. Generally, a person is an employee if he is guaranteed a minimum salary or is given a drawing account of a specified amount at stated intervals and is not required to repay any excess drawn over commissions earned.

Payment made by the job or on a straight commission generally indicates that the person is an independent contractor. Payment by the job includes a lump sum computed by the number of hours required to do the job at a fixed rate per hour. Such a payment should not be confused with payment by the hour.

Payment of Business and/or Traveling Expense. If the employer pays the person's business and/or traveling expenses, the persons is ordinarily an employee. The employer, to be able to control expenses, must retain the right to regulate and direct the person's business activities.

Conversely, a person who is paid on a job basis and who has to take care of all incidental expenses is generally an independent contractor. Since he is accountable only to himself for his expenses, he is free to work according to his own methods and means.

Furnishing of Tools, Materials. The fact that an employer furnishes tools, materials, etc., tends to show the existence of an employer-employee relationship. Such an employer can determine which tools the person is to use

Exhibit 5(10)00-4 Employer-Employee Relationship (Reference: IRM 5(10)43

and, to some extent, in what order and how they shall be used.

An independent contractor ordinarily furnishes his own tools. However, in some occupational fields, e.g., skilled workmen, workers customarily furnish their own tools. They are usually small hand tools. Such a practice does not necessarily indicate a lack of control over the services of the worker.

Significant Investment. Investment by a person in facilities he uses in performing services for another is a factor which tends to establish an independent contractor status. On the other hand, lack of investment indicates dependence on the employer for such facilities and, accordingly, the existence of an employer-employee relationship.

In general, facilities include equipment or premises necessary for the work, such as office furniture, machinery, etc. This term does not include tools, instruments, clothing, etc., commonly provided by employees in their trade, nor does it include education, experience or training.

In order for an investment to be a significant factor in establishing that an employer-employee relationship does not exist, it must be real, it must be essential, and it must be adequate.

Is investment real? Little weight can be accorded to a worker's investment in equipment if he buys it on time from the person for whom he does the work and if his equity in the equipment is small. The same is true if the worker purchases equipment from his employer on a time basis but the employer retains title to the equipment, has the option of retaining legal ownership by paying the worker the amount of his equity in the equipment at any time before the equipment is fully paid for, requires its exclusive use in the operation of his business, and directs the worker in its use. Such investments are not "real."

Is investment essential? An investment in equipment or premises not required to perform the services in question is not essential. For example, a photographers' model may have a large investment in a wardrobe; however, if she poses for a photographer who ordinarily requires that his models wear clothing he furnishes, her investment is not essential even though the photographer lets her use her own wardrobe as a matter of indulgence. The photographer hires her only for her photogenic qualities and her ability to pose; it is not required that she furnish her own wardrobe.

Is investment adequate? Ownership by an individual of facilities adequate for the work and independent of the facilities of another points to an independent contractor relationship. Ownership of such facilities is an influential factor in letting the contract of service. The important point is the value of the investment compared to the total value of all the facilities for doing the work. An investment in facilities is not adequate if the worker must rely appreciably on the facilities of others to perform the services. For instance, an individual who is engaged to perform a machine operation on his own premises and who furnishes his own equipment of substantial value may be a self-employed subcontractor instead of an employee of the manufacturer.

Significant in determining the weight of the investment factor is ascertaining who has the right to control the facilities. Ownership of equipment or premises points toward an independent contractor status because it is inferred that the owner has the right to control their use. However, if the owner, as part of the agreement, surrenders complete dominion over the equipment or premises and the right to decide how they shall be used, "ownership" loses its significance.

Suppose an individual who owns a truck is hired by a trucking company to deliver goods and materials to business firms. The fact that he uses his own truck to perform these services is not significant if, in general, the firm uses it like its own trucks. For example, the firm sets the order and time of deliveries; pays for all upkeep and repair of the individual's truck while

Exhibit 5(10)00-4 Employer-Employee Relationship (Reference: IRM 5(10)43

used in its business or otherwise compensates the individual for these costs; restricts him from using the truck to perform services for others, etc.

Realization of Profit or Loss. The man who can realize a profit or suffer a loss as a result of his services is generally an independent contractor, but the individual who cannot is an employee.

"Profit or loss" implies the use of capital by the individual in an independent business of his own. Thus, opportunity for higher earnings, such as from pay on a piecework basis or the possibility of gain or loss from a commission arrangement is not considered profit or loss.

Whether a profit is realized or loss suffered generally depends upon management decisions; that is, the one responsible for a profit or loss can use his own ingenuity, initiative, and judgment in conducting his business or enterprise. Opportunity for profit or loss may be established by one or more of a variety of circumstances, e.g.:

1. The individual hires, directs, and pays assistants.
2. He has his own office, equipment, materials, or other work facilities.
3. He has continuing and recurring liabilities or obligations, and his success or failure depends on the relation of his receipts to his expenditures.
4. He agrees to perform specific jobs for prices agreed upon in advance and pay expenses incurred in connection with the work.
5. His services and/or those of his assistants establish or affect his business reputation and not the reputation of those who purchase the services.

Working for More Than One Firm at a Time. A person who works for a number of persons or firms at the same time is generally an independent contractor because he is usually free from control by any of the firms. It is possible, however, for a person to work for a number of people or firms and be an employee of one or all of them.

Making Service Available to General Public. The fact that a person makes his services available to the general public usually indicates an independent contractor relationship. An individual may hold his services out to the public in a number of ways: he may have his own office and assistants; he may hang out a "shingle" in front of his home or office; he may hold business licenses; he may be listed in business directories or maintain business listings in telephone directories; or he may advertise in newspapers, trade journals, magazines, etc.

Right to Discharge. The right to discharge is an important factor in indicating that the person possessing the right is an employer. He exercises control through the ever-present threat of dismissal, which causes the worker to obey his instructions. An independent contractor, on the other hand, cannot be fired so long as he produces a result which meets his contract specifications.

Right to Terminate. An employee has the right to end his relationship with his employer at any time he wishes without incurring liability. An independent contractor usually agrees to complete a specific job; he is responsible for its satisfactory completion or legally obligated to make good for failure to complete the job.

We have now covered the 20 factors; i.e., does the factor exist. We will now consider the second point: what is the reason for or importance of its existence or nonexistence.

All facts must be weighed, and the conclusion must be based on a careful evaluation of all the facts, IRS published rulings, and the presence or absence of factors which point to an employer-employee relationship or to an independent contractor status.

Take the example of a barbershop. The shop owner may say that he does not

Exhibit 5(10)00-4 Employer-Employee Relationship (Reference: IRM 5(10)43

control the hours, fix the amount charged for a haircut, or control the barber's cleanliness. However, in determining the weight of each of these factors, the agent should consider the reason for their nonexistence. He may find that the union in effect controls the hours and sets the price for haircuts and that the State Barber Board of Examiners controls the cleanliness of the shop. He correctly concludes, then, that the weight to be given each of these three factors is nothing.

In the case of salesmen, it might be found that the employer does not control the hours of work because, to make a sale, the saleman may have to arrange his hours to fit the customers' hours, such as calling in the evening when the husband and wife are at home. This may be true of other occupations. The important thing is to weigh any factor being considered according to its reason for existence or nonexistence.

2.03

FICA Statutory Employee Rules

In addition to common law employees, the FICA provides for statutory employees, which include (1) agent drivers and commission drivers, (2) full-time life insurance salesmen, (3) home workers, and (4) traveling or city salesmen.

DR. LARRY E. HARRIS
OPTOMETRIST

TESTIMONY ON H.B. 2164
BY DR. LARRY HARRIS
February 8, 1995

Mr. Chairman and members of the committee, I am Dr. Larry Harris. I am a practicing optometrist in Topeka and served on the Kansas State Board of Examiners in Optometry from July of 1991 until July of 1994. Although a former State Board member, I do not now speak for the Board. I appreciate the opportunity to share some of my concerns about House Bill 2164 and its potential impact on the practice of optometry. While serving as Secretary-Treasurer of the State Board of Examiners in Optometry, I had the dubious privilege of appearing in U.S. District Court as a defendant in regards to the lawsuit which may have precipitated this proposed legislation. The lawsuit attempted to prevent the State Board of Examiners in Optometry from even investigating for possible violations of the Optometry Law! The Board had simply asked for information from several doctors and made no allegations of wrongdoing by anyone. Examples called to our attention included storefronts and color schemes so similar that it was impossible to see where the optical company left off and the optometrist's office began, and an optical company's copyrighted logo being placed directly above the "Optometrist" sign next door to the optical company. Information that was requested were copies of leases and financial records of any transactions between lessor optical companies and the lessee optometrists within the last three years. It was interesting that the six optometrists who were asked to provide records were practicing in locations next

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door to three optical establishments and in three different cities but all were represented by the same attorney. The result of the lawsuit was U. S. District Court Judge Kathryn H. Vratil ruled that the Board of Optometry was within its scope of authority to pursue such issues. The attempt in House Bill 2164 to define in Kansas law the provisions of leases is inappropriate and has the practical effect of an employment contract. Leases which require hours of operation can have a direct relationship on the quality of patient care. The language on non-competition in the sale of optical products would seem to be more appropriate for an employment or franchise contract, not a lease. It raises questions about continuity of care and patient records. If the non-competition clause is for a significant geographic area, there may be no value to the records for the optometrist after the term of the lease. The selection of equipment which is available on the lease premises by the landlord can also severely limit the extent of patient care or require referral to a fully equipped office of an optometrist or ophthalmologist. The reference to participation in third party programs would seem inappropriate for a lease. The language which indicates that simply using the phrase "Independent Doctor of Optometry" can negate potential abuse and violations of the law is particularly odious.

Attempting to circumvent a disciplinary proceeding by a state agency by seeking legislation sets a dangerous precedent. In conclusion, I would say that this bill is simply an attempt to limit reasonable oversight by a state agency created by the legislature to protect the public and to make it easier for non-licensed persons to influence licensed professionals. I respectfully request the defeat of House Bill 2164.

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