

Approved: 3-25-97
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Senator Lana Oleen at 11:05 a.m. on March 20, 1997 in Room 254-E of the Capitol.

All members were present.

Committee staff present: Mary Galligan, Legislative Research Department
Theresa Kiernan, Revisor of Statutes
Midge Donohue, Committee Secretary

Conferees appearing before the committee:
Mr. Dale Finger, Associate Director of the Kansas Bureau of Investigation

Others attending: See attached list

Before opening the hearing on **HB 2484** concerning the Kansas Bureau of Investigation and its duties and functions, Senator Oleen called attention to the Supplemental Note prepared by the Legislative Research Department.

HB 2484: **An act concerning the Kansas Bureau of Investigation; relating to the powers, duties and functions thereof; authorizing acceptance of gifts and grants; background investigations; amending KSA 75-712 and repealing the existing section.**

Mr. Dale Finger, Associate Director of the Kansas Bureau of Investigation, appeared before the committee in support of **HB 2484 (Attachment #1)**. He explained the bill addressed two issues: authority of the agency to receive and accept grants and donations and clarification on disbursement of information obtained as a result of background investigations on gubernatorial appointments.

Mr. Finger noted that, unlike other state agencies, the KBI did not have general grant authority, and gubernatorial or legislative action was required to create a fund from which expenditures could be made from a grant. He said **HB 2484** would change the statute that spells out the authority and responsibilities of the KBI in this regard.

In regard to background investigations on gubernatorial appointments, Mr. Finger advised that the bill would clarify authority of the KBI by specifically authorizing sharing of criminal history information with the Governor's Office and would also allow for fingerprint submissions on the appointees to the Federal Bureau of Investigation for a national criminal history check.

Senator Oleen noted there were no opponents to the bill.

Senator Becker moved to report the bill favorably to the full senate and ask that it be placed on the Consent Calendar. Senator Schraad seconded the motion, and the motion carried.

Senator Oleen directed the committee's attention to **SB 234** in regard to partial-birth abortion, and advised that, in reviewing testimony, there appeared to be little opposition to the bill but an amendment had been suggested by a conferee. The chairman explained that she would like to offer some proposed language for the committee to consider, and a balloon of the bill was distributed (Attachment #2). She explained the language in the proposal would define partial-birth abortion and stated she did not believe this would be controversial. She pointed out that the balloon did have a policy issue in it which spoke to preserving the life of the pregnant woman which was not included in the original bill.

Discussion then began and Senator Gooch inquired why the balloon did not speak to the health of the woman. Senator Oleen advised she had purposely not included it, but the issue could be included in the discussion.

CONTINUATION SHEET

MINUTES OF THE SENATE FEDERAL & STATE AFFAIRS COMMITTEE, Room 254-E-Statehouse,
at 11:00 a.m. on March 20, 1997.

Senator Biggs moved to adopt the language in the proposed balloon and amend it into **SB 234**. Senator Gooch seconded the motion to allow for further discussion.

Senator Gooch indicated he would be more comfortable if health of the mother were included.

Senator Jones offered a substitute motion to include life or health of the pregnant woman and Senator Becker seconded the motion.

Senator Bleeker indicated she strongly opposed the motion. Senator Biggs agreed that including health in the measure would diminish the purpose of the bill.

A show of hands was requested on the vote on the substitute motion, and the substitute motion failed to pass.

The committee returned to the primary motion of Senator Biggs, and the motion passed.

Senator Biggs moved that the bill, as amended, be reported favorably to the full Senate. Senator Oleen seconded the motion, and the motion carried.

Senator Oleen told the committee she and Senator Harrington had discussed provisions of the bills following hearings on **SB 230** and **HB 2269** and staff had been asked to provide clarification, particularly in regard to penalties in current and proposed abortion laws. Staff prepared a memo that researched the penalties imposed in current law and those that would be imposed in proposed legislation and provided that information to the committee (Attachment #3)

Senator Harrington moved that, in the interest of time, the committee focus its attention on the medical provisions of **HB 2269** because she believed civil penalties had been addressed by the House by both Democrat and Republican lawyers.

Senator Oleen indicated she had no objection and had asked staff to present information on both measures, current law and the two bills, because Senator Harrington had requested that information.

Senator Bleeker seconded the motion that the committee focus on **HB 2269** at this time.

Upon committee discussion, Senator Harrington withdrew her motion and Senator Bleeker withdrew her second.

Staff continued review of the memo focusing on **HB 2269**.

Senator Vidricksen noted there was division of the committee on this issue and that neither side was entirely pleased with what had been brought forward. He pointed out that compromise is a often required in such situations and offered a **Senate Substitute for HB 2269** (Attachment #4), which had been received in testimony when Mr. Graeber appeared for the Governor

Senator Vidricksen moved that **Senate Substitute for HB 2269** be adopted and reported favorably to the full Senate. Senator Becker seconded the motion and the motion carried.

Senator Oleen inquired if committee members had noon commitments. None indicated they had and she extended the meeting ten minutes to allow for discussion on **SB 179** and **SB 219** concerning English as the official language.

Senator Oleen pointed out that this particular issue had been before the committee in the past and a lot of information and interest on both sides of the issue had been received. She noted that thirty-three petitions were filed Friday in regard to the issue and it was her intent to take action on the bills today. She opened the floor for discussion.

Senator Gooch stated he did not believe either bill was needed. Senator Bleeker pointed out that twenty-one senators sponsored **SB 179**, and that should be a consideration.

Senator Bleeker moved that **SB 179** be reported favorably to the full Senate. Senator Harrington seconded the motion.

In discussion of the measure, Senator Jones said, in his opinion, the bill appears to be a slap in the face to some and creates cultural division. He stated he did not understand why the bill is needed.

CONTINUATION SHEET

MINUTES OF THE SENATE FEDERAL & STATE AFFAIRS COMMITTEE, Room 254-E-Statehouse,
at 11:00 a.m. on March 20, 1997.

Senator Jones offered a substitute motion that **SB 179** be reported unfavorably. Senator Biggs seconded the motion and requested a show of hands. The motion failed.

Senator Gooch offered another substitute motion that **SB 179** be passed without recommendation. Senator Jones seconded the motion. The motion did not pass.

Senator Bleeker's primary motion that **SB 179** be reported favorably to the full Senate passed on a show of hands by a five to four vote.

Senator Vidricksen moved that **SB 219** be reported unfavorably to the full Senate in order to clear it from the bill book. Senator Jones seconded the motion, and the motion carried.

The meeting adjourned at 12:07. The next meeting is scheduled for March 24, 1997.



Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

**TESTIMONY
BEFORE THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
DALE A. FINGER, ASSOCIATE DIRECTOR
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF HOUSE BILL 2484
MARCH 20, 1997**

Madam Chairman and Members of the Committee:

I am Dale Finger, Associate Director of the Kansas Bureau of Investigation (KBI) and appear today in support of HB 2484. I would first like to thank the Division of the Budget for their assistance in getting this legislation introduced. HB 2484 makes two changes in the statute that spells out the authority and responsibilities of the KBI.

Paragraph (c) grants the KBI general authority to receive and accept grants and donations. This issue came up in conversation with the Department of Administration and they noted that, unlike numerous other state agencies, the KBI did not have general grant authority, thus requiring gubernatorial or legislative action where a fund can be created and expenditures made from a grant. The KBI has aggressively pursued federal grants in carrying out its duties and this amendment would simplify the process and bring us in line with other state agencies who are regularly involved in the acquisition and administration of federal grants.

Paragraph (d) addresses a long-needed clarification in the authority of the KBI. The KBI has conducted background investigations on numerous appointments through the Governor's Office for many years. However, nowhere in the law does it explicitly provide

the authority to do so, and particularly the authority to share with the Governor's Office criminal history record information. Paragraph (d) clarifies that authority to specifically authorize the sharing of criminal history information with the Governor's Office and further allows fingerprint submissions of the appointees to the Federal Bureau of Investigation for a national criminal history record check.

I want to thank this committee for considering these issues and again acknowledge the Department of Administration in general, and the Budget Division in particular, in getting this legislation introduced once the problem was identified. I would be happy to stand for questions.

SENATE BILL No. 234

By Senators Harrington, Bleeker, Brownlee, Hardenburger and
Lawrence

2-10

10 AN ACT prohibiting partial-birth abortions; amending K.S.A. 1996 Supp.
11 65-6703 and repealing the existing section.

12
13 *Be it enacted by the Legislature of the State of Kansas*

14 Section 1. K.S.A. 1996 Supp. 65-6703 is hereby amended to read as
15 follows: 65-6703. (a) No person shall perform or induce an abortion when
16 the fetus is viable unless such person is a physician and has a documented
17 referral from another physician not financially associated with the phy-
18 sician performing or inducing the abortion and both physicians determine
19 that: (1) The abortion is necessary to preserve the life of the pregnant
20 woman, or (2) the fetus is affected by a severe or life threatening defor-
21 mity or abnormality.

22 ~~(b) (1) No person shall perform or induce a partial birth abortion~~
23 ~~(2) As used in this subsection, "partial birth abortion" means an abor-~~
24 ~~tion in which the physician performing the abortion partially vaginally~~
25 ~~delivers a living fetus before killing the fetus and completing the delivery~~

26 (3) Nothing in this section shall be construed to create a right to an
27 abortion. Notwithstanding any provision of this section, a person shall
28 not perform an abortion that is prohibited by law

29 (b) (c) Violation of this section is a class A person misdemeanor.

30 Sec. 2. K.S.A. 1996 Supp. 65-6703 is hereby repealed.

31 Sec. 3. This act shall take effect and be in force from and after its
32 publication in the Kansas register.

(b) (1) No person shall perform or induce a partial birth abortion unless the abortion is necessary to preserve the life of the pregnant woman.

(2) As used in this section, partial birth abortion means an abortion containing all of the following four elements: (a) deliberate dilatation of the cervix; (b) instrumental conversion of the fetus to a footling breech; (c) breech extraction of the body except the head; and (d) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of an otherwise intact fetus.

(1) No person shall perform or induce a partial birth abortion unless the abortion is necessary to preserve the life of the pregnant woman.

(2) As used in this section, partial birth abortion means an abortion containing all of the following four elements: (a) deliberate dilatation of the cervix; (b) instrumental conversion of the fetus to a footling breech; (c) breech extraction of the body except the head; and (d) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of an otherwise intact fetus.

March 20, 1997

To: Senate Committee on Federal and State Affairs
From: Mary Galligan, Principal Analyst
Re: Penalties in Current and Proposed Abortion Laws

The following principles of a physician's responsibilities to provide information to the patient have been articulated in case law. In general, physicians have a duty to make a reasonable disclosure to patients of pertinent facts within the physician's knowledge relating to proposed treatment in order for the patient to intelligently consent to or refuse treatment. What is reasonable disclosure of possible results of medical or surgical procedures upon which an informed consent may rest depends upon the facts and circumstances of each case. In order for there to be liability of a physician for nondisclosure, the unrevealed risk must materialize and there must be harm to the patient. There must be a causal relationship between the physician's failure to adequately divulge information and damage to the patient. Under Kansas law in order to prevail on a claim of medical malpractice, a patient must show that the medical staff was negligent and departed from the standard of reasonable and ordinary skill of care in treatment. Liability in medical malpractice actions under Kansas law does not arise merely from bad results.

Existing Law -- K.S.A. 65-6706

Criminal Penalty: Failure to obtain consent prior to a surgical procedure could constitute criminal battery which is a class B misdemeanor. And upon conviction, the physician would be subject to a maximum of six months in jail or a maximum \$1,000 fine, or both. Consent is only valid if it is informed. In the case of abortion, the statute specifically requires disclosure of certain information, but even in the absence of that statutory language, a physician has a duty to provide sufficient information to enable the patient to make an informed decision regarding her options.

Medical Malpractice: In addition to the general requirements for consent, the statute lists specific items of information that must be provided to a patient in order for her to give informed consent in the case of an abortion. If that specific information is not provided and if the patient is harmed by the failure to disclose risks, the physician can be sued for malpractice. If the court or the jury is convinced that harm resulted from the physician's action, the physician may have to pay damages to the patient.

Action Against a License: Failure to provide the required information could result in revocation, suspension, or limitation of a physician's license or the physician could be publicly or privately censured if the Board of Healing Arts finds that:

- The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency.

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Attachment: # 3

- Sanctions or disciplinary actions have been taken against the licensee by a peer review committee, health care facility, a governmental agency or department or a professional association or society for acts or conduct similar to acts or conduct which would constitute grounds for discipline under [the Healing Arts Act].
- There has been an adverse judgement, award or settlement against the licensee resulting from a medical liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under [the Healing Arts Act].

Information for Other Medical Procedures

The general rule that necessitates a patient's consent prior to surgery is not statutory. However, in addition to specific information that must be provided prior to an abortion, the Healing Arts Act requires certain information to be provided when a patient suffers from abnormality of the breast tissue. This information is not statutorily an element of informed consent. Failure to provide that information could lead to action against a physician's license. In the context of the proposed Woman's Right to Know Acts, one should note that the requirement in the Healing Arts Act is only to provide specific information regarding alternative forms of treatment. The physician's responsibility under Kansas law to provide information regarding risks of various procedures and treatments and other information necessary for the patient to decide among available options is not changed by this requirement. That provision is in K.S.A. 65-2836(m).

[Grounds may exist for action against a license if a] licensee, licensed to practice medicine and surgery, has failed to inform a patient suffering from any form of abnormality of the breast tissue for which surgery is a recommended form of treatment, of alternative methods of treatment specified in the standardized summary supplied by the board. The standardized summary shall be given to each patient specified herein as soon as practicable and medically indicated following diagnosis, and this shall constitute compliance with the requirements of this subsection. The board shall develop and distribute to persons licensed to practice medicine and surgery a standardized summary of the alternative methods of treatment known to the board at the time of distribution of the standardized summary, including surgical, radiological or chemotherapeutic treatments or combinations of treatments and the risks associated with each of these methods. Nothing in this subsection shall be construed or operate to empower or authorize the board to restrict in any manner the right of a person licensed to practice medicine and surgery to recommend a method of treatment or to restrict in any manner a patient's right to select a method of treatment. The standardized summary shall not be construed as a recommendation by the board of any method of treatment. The preceding sentence or words having the same meaning shall be printed as a part of the standardized summary. The provisions of this subsection shall not be effective until the standardized written summary provided for in this subsection is developed and printed and made available by the board to persons licensed by the board to practice medicine and surgery. (Emphasis added.)

Senate Bill 230

In addition to penalties and causes of action available under current law, the bill would create new crimes and civil causes of action. (§7)

Criminal Penalty: Intentional, knowing or reckless violation of the Act would be a class A misdemeanor. That penalty would apply to anyone who is required to provide information to a woman prior to an abortion and to anyone who coerces a minor to have an abortion. (§6(a)) Under current law, coercion of a minor to have an abortion is not a specific crime. Such an action might be prosecuted as child abuse or neglect.

To avoid conviction in a criminal prosecution, a physician would have to demonstrate by a preponderance of the evidence that the physician reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the pregnant woman. That defense is a higher standard than the reasonable doubt generally necessary for the defense in a criminal case. (§6(b))

A criminal conviction for violation of the Act would be a class A misdemeanor. Conviction of any class A misdemeanor would be grounds for action against the physician's license under current law. (K.S.A. 65-2836(c))

Medical Malpractice: The bill would provide a specific basis for a malpractice action that would not be related to the physician's professional duty, but only to compliance with the informed consent statute. That provision would appear to relieve the plaintiff of the burden of producing evidence that the information provided by the physician was insufficient to meet medical standards as is the case under current Kansas law. An intentional violation of the Act would be *prima facie* evidence of failure to obtain informed consent in the malpractice action. (§7(a)) It is unclear whether harm would have to be shown if intentional violation of the Act was established. If damages were awarded, the total amount recoverable by each party from all defendants for all claims for noneconomic loss could not exceed \$250,000. (K.S.A. 60-19a02)

Wrongful Death: Under current case law a wrongful death action cannot be brought to recover damages for the death of a nonviable fetus. Likewise no recovery can be made by the survivors of that fetus for pain and suffering.

This bill would create statutory law that would specifically permit recovery for the death of a fetus whether or not it was viable at the time of the abortion and regardless of whether it was born alive. (§7(c))

Defense: It appears that the defense in a civil action that is provided by the bill would apply only to emergency abortions. (§8)

Action Against the Physician's License: The bill would make violation of the Woman's Right To Know Act a basis for professional disciplinary action under the Healing Arts Act. (§7(b)) A criminal conviction for violation of the Woman's Right to Know Act, which would be a class A misdemeanor, would result in action against the physician's license. (K.S.A. 65-2836(c)) Under current law, failure to obtain informed consent could result in action against a physician's license.

HB 2269

In addition to penalties and causes of action available under current law, the bill would create new crimes and civil causes of action. If the aggrieved party prevails in whole or in part in any action under the Act, the court would have to award to the aggrieved party reasonable attorney fees, expenses and costs, including those on appeal. (§8(a)(2)) There is no provision in existing law for the award of attorney's fees.

Criminal Penalty: Intentional, knowing or reckless violation of the Act would be a class A misdemeanor. That penalty would apply to anyone who is required to provide information to a woman prior to an abortion. (§7(a)) In addition, a criminal conviction for violation of the Act, a class A misdemeanor, would be grounds for action against the physician's license. (K.S.A. 65-2836 (c))

The physician's level of proof to avoid conviction would be the same as in 1997 SB 230. (§7(b))

Civil Action Other than Wrongful Death: The bill would provide a specific civil cause of action for failure to comply with the requirements of the Act. An intentional or negligent failure to comply with the Act would result in a civil penalty of \$1,000 to \$250,000 awarded to the aggrieved party as that term is defined in the bill. (§8(a)(1)) (Aggrieved party would be any woman who obtains, seeks to obtain, or believes she has obtained, an abortion, and includes her personal representative. (§3(n)) It appears that if the plaintiff proves that the physician's actions caused harm, damages also could be awarded.

A medical malpractice suit also could be filed. The total amount recoverable by each party from all defendants for all claims for noneconomic loss could not exceed \$250,000. (K.S.A. 60-19a02)

Wrongful Death: Under current case law a wrongful death action cannot be brought to recover damages for the death of a nonviable fetus. Likewise no recovery can be made by the survivors of that fetus for pain and suffering.

This bill would create statutory law that would specifically permit recovery for the death of a fetus whether or not it was viable at the time of the abortion and regardless of whether it was born alive. (§8(b))

Defense: It appears that the defense in a civil action that is provided by the bill would apply only to emergency abortions. (§9)

Action Against the Physician's License: The bill would amend the Healing Arts Act to make violation of the Woman's Right To Know Act specific grounds for professional disciplinary action under the Healing Arts Act. (§13(cc)) Under current law, failure to obtain informed consent could result in action against a physician's license. (K.S.A. 65-2836)

SENATE SUBSTITUTE FOR HOUSE BILL NO. 2269

By

AN ACT concerning abortion; relating to certain requirements before the performance thereof; amending K.S.A. 65-6706 and repealing the existing section.

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

Section 1. K.S.A. 65-6706 is hereby amended to read as follows: 65-6706. (a) No abortion shall be performed or induced unless:

(1) The woman upon whom the abortion is to be performed or induced gives her informed consent; or

(2) a medical emergency compels the performance or inducement of the abortion.

(b) Consent to an abortion is informed only if the physician who is to perform or induce the abortion or another health care provider informs the woman, orally and in writing not-less-than eight-hours-before-the-abortion, of the right of such woman to request a meeting with the physician who is to perform the abortion. If a meeting is requested, the meeting shall be held not less than eight hours before the abortion. At such meeting, pregnancy and counseling information shall be provided. Such information and counseling shall include:

(1) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion;

(2) the gestational age of the fetus at the time the abortion is to be performed;

(3) the medical risks, if any, associated with terminating the pregnancy or carrying the pregnancy to term; and

(4) community resources, if any, available to support the woman's decision to carry the pregnancy to term.

A woman may waive, in writing, the right to meet with the physician who is to perform the abortion. If a woman waives the right to a meeting, written materials containing the information specified in paragraphs (1) through (4) of this subsection shall be provided to the woman not less than eight hours before the abortion.

A woman shall certify in writing on a form provided by the department of health and environment, prior to the abortion, that the information required to be provided by paragraphs (1) through (4) of this subsection has been provided.

A woman may withdraw consent to an abortion at any time prior to the abortion.

(c) If a medical emergency compels the performance or inducement of an abortion, the attending physician shall inform the woman, prior to the abortion, if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert the woman's death or to avert substantial and irreversible impairment of the woman's major bodily functions.

(d) A physician shall be held to the same duties and responsibilities and standard of care in the performance of an abortion as in the performance of any other medical procedure. Nothing in this section shall be construed as imposing any liability in addition to the liability for which a physician would otherwise be liable for any other medical procedure.

Sec. 2. K.S.A. 65-6706 is hereby repealed.

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