

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 11, 1998 in Room 423-S-of the State Capitol.

All members were present except: Representative Clark Shultz - excused

Committee staff present: Emalene Correll, Legislative Research Department
Robin Kempf, Legislative Research Department
Norman Furse, Revisor of Statutes
Lois Hedrick, Committee Secretary

Conferees appearing before the committee:

Lawrence Buening, Jr., Executive Director, Kansas Board of Healing Arts
Mark Stafford, General Counsel, Kansas Board of Healing Arts
Meg Draper, Director of Government Affairs, Kansas Medical Society
Kirk Lowry, Vice President, Kansas Trial Lawyers Association

Others attending: See Guest List ([Attachment 1](#))

Chairperson Mayans opened the hearing on **HB 2681** (actions against licensees under the healing arts act). Mark Stafford, General Counsel of the Kansas Board of Healing Arts, testified the bill (requested by the Board) clarifies two issues: (1) under what circumstances and under what procedures may the Board require a licensee to submit to a mental or physical examination or drug screen; and (2) should the Board be required to publish a standardized summary of recommended and alternative forms of treatments for breast cancer for physicians. He noted that with respect to the second issue, the American Cancer Society has requested an amendment to line 34 to delete the phrase "in the same or similar circumstances." The Board has no objection to that amendment.

Mr. Stafford noted that the requested amendments would improve the Board's ability to protect the public from impaired licensees; give procedural protection to licensees who appear to be impaired; and relieve the Board from publishing information that is available from other sources. (See [Attachment 2](#).)

Meg Draper, Director of Government Affairs, Kansas Medical Society, testified in support of **HB 2681**, and offered an amendment on page 5, line 31 of the bill, to authorize the Medical Advocacy Program (MAP) and others like it to conduct random screens with the consent of the licensee without requiring notice and hearing under the Kansas administrative procedure act. (See testimony, [Attachment 3](#).)

Emalene Correll questioned the amendment to page 5. Mr. Stafford explained there are times when a MAP representative may also be actually or by implication representing the Healing Arts Board. He said the Board has no objection to the amendment.

There being no others present to testify on the bill, Chairperson Mayans closed the hearing on **HB 2681**.

The Chairperson then opened the hearing on **HB 2670** (investigations and proceedings conducted by board of healing arts). Mark Stafford, noting the Board of Healing Arts had requested the bill, stated it clarifies the Board's investigatory authority to include all professions licensed or regulated by the Board; and clarifies that the Board may investigate imposters. The bill establishes the Board's subpoena power and its enforcement; it requires payment of witness fees and mileage to witnesses before the Board; and proposes additional language to maintain the confidentiality of records gathered in the course of investigations. Mr. Stafford suggested two amendments (which were suggested by the Kansas Trial Lawyers Association) to page 2, line 43 (delete the phrase "all others") and adding language to subsection (d), page 3, line 6, to maintain an appropriate boundary between regulatory, public and private interests. He stated the bill does not expand the Board's authority to investigate, nor make significant changes in public policy. Mr. Stafford stated the Kansas Medical Society is suggesting a further addition to the suggested amendment in line 39, on page 2 of the bill, and the Board has no difficulty with that change. (See testimony, [Attachment 4](#).)

Meg Draper, Kansas Medical Society (KMS), supported the bill and the suggested amendments put forth by Mr. Stafford except the proposed amendment to subsection (d), page 2, line 39. KMS strongly opposes that amendment unless language is also included to clarify that the law governing peer review records is not superceded by this law. (See testimony, [Attachment 5](#).)

CONTINUATION PAGE

MINUTES OF THE HOUSE COMMITTEE ON HEALTH AND HUMAN SERVICES, Room 423-S State Capitol, at 1:30 p.m. on February 11, 1998

Kirk Lowry, Vice President, Kansas Trial Lawyers Association, testified the association agrees to the amendments to **HB 2670** offered by Mr. Stafford. (See Attachment 6.)

The committee raised several questions about the effects of the amendments on the confidentiality of records. Mr. Buening replied that the Board also has concerns about the release of confidential records, and it would be of great help to the Board to have clear terms for such releases, and that is what the amendments seek. Chairperson Mayans stated since there has been considerable discussion about confidentiality of records and civil rights, the committee will take no action on **HB 2670** unless the Healing Arts Board, the Kansas Medical Society, and the Trial Lawyers Association come to an agreement on the amendments to the bill.

Chairperson Mayans also stated that action on **HB 2681** will be delayed until next week, as well as action on **HB 2669** (investigations of abuse, neglect or exploitation of certain persons).

The Chairperson noted that the committee's subcommittee on dental practices (**HB 2724** and **HB 2725**) will meet at 1:30 p.m. in Room 423-S; and the subcommittee on mental health professionals (**HB 2630**) will meet at 1:30 p.m. in the Fifth Floor West Lounge. The full committee will meet on Monday, February 16, to hear subcommittee reports and possibly take action on these three bills.

The meeting was adjourned at 2:50 p.m.

The next meeting is scheduled for February 16, 1998.

**HOUSE COMMITTEE ON
HEALTH AND HUMAN SERVICES COMMITTEE
GUEST LIST
FEBRUARY 11, 1998**

NAME	REPRESENTING
Kirk W. Lowry	KTLA on 2670
Susan Anderson	Hein + Weir
Carol E. Riehm	KAOM
Tom Bell	KHA
Michelle Peterson	Peterson Public Affairs
Mark Skifford	Bd of Healing Arts
LARRY BUENINGA	BD OF HEALING ARTS -
John Foppendine	American Cancer Society
Cristina Miller	American Cancer Society
Dean Thomas	Sheridan Co Commissioner
Stanley Rogers	Sheridan County Commissioner
Carol Gunn	KDHE
JERRY SLAUGHTER	KMS
Mark Draper	KMS
Hans Becker	to Dental Ass
Alene M. Grall	KTLA
Doug Smith	KAPA

KANSAS BOARD OF HEALING ARTS

BILL GRAVES
Governor



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MEMORANDUM

To: House Committee on Health and Human Services
From: Mark W. Stafford, General Counsel
Date: February 11, 1998
Re: House Bill No. 2681

On behalf of the Kansas State Board of Healing Arts, thank you for the opportunity to appear before you today in support of House Bill No. 2681. This bill was requested by the Board.

The proposed amendments are necessary to clarify two issues. The first issue is under what circumstances and under what procedures may the Board require a licensee to submit to a mental or physical examination or drug screen. The second issue is whether the Board should continue to publish a standardized summary of treatment methods for breast cancer and to distribute the brochure to persons licensed to practice medicine and surgery.

Evaluations for Impairment

The Board has long had authority to revoke, suspend or limit the license of those who are a danger to the public because of mental impairment, including use of alcohol or drugs. This authority includes the ability to require evaluation and treatment. The statutory provisions regarding mental or physical evaluations or drug screens currently appears at K.S.A. 1997 Supp. 65-2836(i). That section allows the Board to order a licensee to submit to an appropriate evaluation when the Board finds reasonable suspicion to believe the licensee is a threat to the public.

In *Corder v. Kansas Bd. of Healing Arts*, 256 Kan. 638, 889 P.2d 1127 (1994), the Kansas Supreme Court considered a challenge to an order of the Board entered under this statute. Following emergency proceedings, the Board suspended the license of a physician based upon a belief that the physician was psychologically impaired and was a danger to his patients. Further, the Board ordered a mental examination. The physician refused to comply with the examination order, and requested a hearing on the suspension order. Based upon the current language of K.S.A. 65-2842, the Board declined to hold a hearing on the emergency suspension until the physician submitted to the evaluation. As the Court correctly noted, confusion reigned as to the application of this statute. Ultimately, the Court construed K.S.A. 65-2836(i) to require that a formal hearing be commenced before an order for examination is entered.

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The Court's decision is problematic for two reasons. Initially, most situations in which the Board finds reasonable suspicion of impairment occur during the investigative stage. Formal allegations of professional wrongdoing may even be premature at the time the impairment is observed. In that sense, the evaluation itself is an important investigative tool. Initial indicia of violations of the healing arts act may actually be mitigated because the licensee is impaired, and resolving the impairment resolves allegations which might otherwise result in a license revocation. Additionally, some investigations take many months to complete before disciplinary charges are possible. Leaving the public at the hands of a dangerous doctor while the investigation is being finalized is inconsistent with the Board's purpose of protecting the public.

Secondly, not all of the Board's proceedings are "formal" hearings under the administrative procedure act. The majority of the Board's hearings are "conference" hearings. The distinction between these two hearing types is found in the administrative procedure act. A conference hearing is appropriate when there are no material disputes of fact, leaving only questions of law and the application of discretion to resolve. A formal hearing is the method used to resolve disputed questions of material fact. The Board does not believe that orders for evaluations are appropriate only in formal proceedings.

As a result of the *Corder* decision, the Board has struggled with balancing the public and private interests when a licensee appears before the Board exhibiting signs of impairment even though no formal hearing is pending. The proposed amendments contained in House Bill No. 2681 would protect both interests.

The current procedure for issuing an order for an evaluation would be removed from K.S.A. 65-2836(i). That statute would continue to state as grounds for discipline that the licensee is unable to safely practice due to chemical, mental or physical impairment.

The current language of K.S.A. 65-2842 which caused confusion in the *Corder* case would be deleted, and in its place the new procedure for issuing orders for evaluations. That section would now establish an implied consent to an evaluation, much like the holder of a driver's license is deemed to have consented to an evaluation for alcohol. The new language would make clear that a proceeding for an examination may be commenced as part of an investigation or as part of a disciplinary proceeding. The consent is implied only when certain conditions are met, however. The Board must make a finding of reasonable suspicion that the licensee is unable to practice safely.

The new language also includes procedural protection for the licensee. The licensee must be given notice and an opportunity for a hearing under the provisions of the administrative procedure act on the issue of the reasonableness of the suspicion. Any order would be reviewable by the District Court under the judicial review act. Finally, the new language provides that the proceeding and records would be confidential in the same manner as under the current statute.

In summary, the revisions to K.S.A. 1997 Supp. 65-2836(i) and to K.S.A. 65-2842 contained in House Bill No. 2681 are intended to allow the Board to carry out its function of protecting the public from dangerous practitioners of the healing arts. The Board requests that these amendments be adopted to clarify that licensees are subject to an order for an evaluation or drug screen when there is a suspicion based upon evidence of substance that the licensee is a danger to the public. The intrusiveness of such an order is balanced by the procedural mechanisms and the provisions for confidentiality. Adequate protection is provided to afford the

licensees all elements of due process.

Breast Cancer Information

The healing arts act contains numerous grounds for discipline against a licensee. Generally those provisions are found at K.S.A. 1997 Supp. 65-2836. Subsection (m) of that statute imposes a duty upon the Board to supply a standardized summary of recommended and alternative forms of treatment of breast tissue abnormalities. The purpose of the law was to address what was seen as the performance of many unnecessary radical mastectomies. Since 1984 when the law was adopted, the Board has developed a brochure which summarizes these treatment forms, and distributed it to persons licensed to practice medicine and surgery. On occasion the brochure has been updated to reflect current medical practices. A copy of the current brochure produced by the Board is attached to this memorandum.

Subsection (m) is a unique provision of the healing arts act. The Board does not doubt the value of providing information to patients. However, the Board is required to fulfill this function only for breast tissue abnormalities, not for other ailments.

Alternative materials are available which provide the information mandated by subsection (m). In a recent disciplinary case, a physician was alleged to have failed to provide the Board's brochure to a woman with a breast tissue abnormality. There was actually no dispute that the Board's brochure was not provided, and thus there was a violation of the healing arts act. The physician admitted his ignorance of subsection (m), and admitted he was unaware that the Board even provided a brochure. However, he was able to establish that he had provided a similar brochure prepared by the American Cancer Society. The physician believed that providing the information to the patient was necessary of a competent practitioner. The Society's brochure was reviewed by the Board, and the Board determined that the spirit of the law had been fulfilled. Seeing no point in punishing a technical violation resulting in no patient injury or threat to the public welfare, the allegation was dismissed. Thus, the standard of practice achieved the end sought by subsection (m).

In light of the availability of resources for providing information to patients, and in light of the standard of practice which satisfies the goals of subsection (m), the Board requests that it be relieved of the duty to publish and distribute the materials, as indicated by the stricken language on page 3 of the bill, lines 13-33. The added language on lines 33-35 makes clear that a physician continues to be obligated to provide information to the woman regarding recommended and alternative forms of treatment. This language establishes the negligence standard as the rule for determining what information should be provided.

In requesting this amendment, the Board has sought input from various organizations. The Kansas Medical Society assisted in drafting the language when it was first presented in a more comprehensive bill in 1995. We have discussed the issue with a representative of the American Cancer Society. We also understand that they neither oppose nor support the requested amendment, but do request that the phrase "in the same or similar communities" be deleted from line 34. The objection to that language arises out of concern that some communities with few resources may be held to a different standard of care. The Board does not object to deleting that phrase.

In conclusion, the amendments to the healing arts act which are requested by the Board would improve the Board's ability to protect the public from impaired licensees, would give procedural protection to those licensees who appear to be impaired, and would relieve the Board from the duty to publish information which is available from other sources. I urge your support for House Bill 2681, and ask that this Committee recommend the bill favorably for passage.



KANSAS MEDICAL SOCIETY

February 11, 1998

TO: House Health and Human Services Committee

FROM: Meg Draper *M. Draper*
Director of Government Affairs

SUBJ: HB 2681: Actions Against Healing Arts Licensees

The Kansas Medical Society appreciates the opportunity to testify this afternoon on HB 2681, which relates to certain disciplinary provisions of the Healing Arts Act. KMS supports the proposed amendments and would also like to offer an amendment.

The bill amends K.S.A. 65-2836, which lists the categories of violations of the healing arts act for which a licensee (M.D., D.O., or D.C.) could have his or her license revoked, limited or suspended. Specifically, the bill changes the law governing consent to a physical or mental examination or a drug screen upon reasonable suspicion that the licensee might be impaired and the procedures that must be followed in such cases. As we understand, the board is proposing this change because of a Supreme Court decision holding the current provisions unconstitutional as a violation of a licensee's due process rights. We support the proposed amendments relating to this process, but would like to offer an amendment.

KMS contracts with the board of healing arts to administer the Medical Advocacy Program (MAP), which is the impaired provider program for physicians and physician assistants. When the board receives a report that a licensee could be impaired in some way, a KMS employee conducts an intervention and, if the licensee agrees to it, enters into a stipulation agreement to monitor the licensee. This monitoring could include the licensee's agreement to submit to random drug screens over a period of time. If the licensee is monitored and determined not to be in violation of the law, no formal proceedings are brought against that licensee. The current amendment would only allow the board to order a person to submit to an examination or drug screen after procedures had been instituted under the Kansas Administrative Procedures Act (KAPA).

Our proposed amendment would add language on page 5, line 31, which reads: "or unless the licensee has consented to such mental or physical examination or drug screen." This change would authorize the MAP program and others like it to conduct random screens with the consent of the licensee without requiring notice and hearing under KAPA.

Thank you very much for considering our comments.

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1 required by K.S.A. 40-3404 and amendments thereto.

2 (aa) The licensee has knowingly submitted any misleading, deceptive,
3 untrue or fraudulent representation on a claim form, bill or statement.

4 (bb) The licensee as the responsible physician for a physician's assist-
5 ant has failed to adequately direct and supervise the physician's assistant
6 in accordance with K.S.A. 65-2896 to 65-2897a, inclusive, and amend-
7 ments thereto, or rules and regulations adopted under such statutes.

8 Sec. 2. K.S.A. 65-2842 is hereby amended to read as follows: 65-
9 2842. ~~Whenever the board directs, pursuant to subsection (i) of K.S.A.~~
10 ~~65-2836 and amendments thereto, that a licensee submit to a mental or~~
11 ~~physical examination or drug screen, or any combination thereof, the time~~
12 ~~from the date of the board's directive until the submission to the board~~
13 ~~of the report of the examination or drug screen, or both, shall not be~~
14 ~~included in the computation of the time limit for hearing prescribed by~~
15 ~~the Kansas administrative procedure act. (a) Every person licensed to~~
16 ~~practice the healing arts, by so practicing or by filing an application for~~
17 ~~an original, renewal or reinstated license shall be deemed:~~

18 (1) *To have consented to submit to a mental or physical examination*
19 *or drug screen, or any combination thereof, when ordered by the board*
20 *upon a finding by the board of reasonable suspicion that such person has*
21 *the inability to practice the healing arts with reasonable skill and safety*
22 *because of physical or mental illness or condition, or use of alcohol or*
23 *drugs or any other chemicals or substances; and*

24 (2) *to have waived all claims to any privilege or objections to the*
25 *admissibility of the testimony, drug screen or examination report of the*
26 *person conducting such examination or drug screen at any proceeding or*
27 *hearing before the board.*

28 (b) *The board may order a person to submit to a mental or physical*
29 *examination or drug screen, or any combination thereof, only after giving*
30 *such person notice and an opportunity for hearing under the provisions*
31 *of the Kansas administrative procedure act. A proceeding for examination*
32 *or drug screen may be commenced as part of an investigation by the*
33 *board, during discovery in an administrative proceeding or in response*
34 *to an application for an original renewal or reinstated license. This section*
35 *shall not be construed to prohibit the board from taking such emergency*
36 *action as necessary to suspend or temporarily limit a license pursuant to*
37 *K.S.A. 65-2838 and amendments thereto.*

38 (c) *The board shall hold any hearing under this section in closed ses-*
39 *sion, except that the board shall cause the proceeding to be recorded.*

40 (d) *All orders, reports, records, memoranda, pleadings, exhibits and*
41 *transcripts of proceedings related to an application for an order under*
42 *this section shall be privileged and confidential and shall not be subject*
43 *to discovery, subpoena or other means of legal compulsion for their release*

or unless the licensee has consented to such examination or drug screen

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KANSAS BOARD OF HEALING ARTS

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MEMORANDUM

To: House Committee on Health and Human Services
From: Mark W. Stafford, General Counsel
Date: February 11, 1998
Re: House Bill No. 2670

On behalf of the Kansas State Board of Healing Arts, thank you for the opportunity to appear before you today in support of House Bill No. 2670. This bill was requested by the Board. The Board believes the proposed amendments are necessary to clarify the Board's investigative authority, to help maintain confidentiality of private information disclosed to the Board while providing appropriate access to Board records, and to secure fairness to the public.

The Board licenses or registers 11 different professions, including those licensed under the healing arts act (M.D.s, D.O.s, D.C.s), those registered under the healing arts act (P.A.s), those licensed under the podiatry act (D.P.M.s), those registered under the respiratory therapy act (R.T.s), the occupational therapy act (O.T.s, O.T.A.s), physical therapy act (P.T.s, P.T.A.s), and athletic trainers act (A.T.s). Kansas has a rather unique board, in that the four different licensed professions are under the same board. Only two other states (Virginia and Illinois) license chiropractors, medical doctors and osteopaths under the same board. Kansans should be proud that our regulatory scheme views the broader health care picture.

Though the Board enforces different sets of statutes, its constitution, organization, and most of its powers and duties are established by the healing arts act. Specifically, the investigatory authority and subpoena power appear in the healing arts act at K.S.A. 65-2839a. The podiatry, physical therapy, occupational therapy, respiratory therapy and athletic trainers acts provide for discipline by the Board, yet there are no provisions for investigations or for subpoenas in those acts. This authority has always been implied.

This bill would amend K.S.A. 65-2839a which establishes the Board's investigatory authority and subpoena power. Subsection 1(a) addresses the Board's authority to investigate without resort to a subpoena. The present language is somewhat limiting in that it addresses such issues as *medical* incompetence. This would be changed to refer to *professional* incompetence. Language which addresses impairment of those licensed to practice the healing arts would be expanded to include all of the professions licensed or regulated by the Board. Likewise, amendments expressly provide that the Board can investigate complaints against all the persons it regulates. Additionally, the amendments clarify that the board may investigate imposters. This is

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EXECUTIVE DIRECTOR

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important because the Board is authorized by statute to commence a civil action to enforce the healing arts act against such imposters. Yet as with the professions not licensed or registered under the healing arts act, the investigatory power is left to implication. The amendment would make the Board's authority clear.

Subsection 1(b)(1) establishes the Board's subpoena power. Once again, the proposed amendments would clarify that the Board's investigatory authority extends beyond those with medical licenses, and includes all persons who practice the eleven licensed or registered professions, as well as those who are imposters. Cosmetic changes are also made. For example a party challenging a subpoena in a civil case does so by moving for a protective order. The Kansas administrative procedure act includes authority for a presiding officer to issue a protective order. Using consistent language in the healing arts act should assist those who are less experienced with Board procedures.

The prior section (1)(b)(3) containing the stricken language provides a procedure for enforcing or challenging a Board subpoena in the district court. That language is no longer necessary in light of the Kansas act for judicial review and civil enforcement of agency actions (KJRA), 77-601, *et seq.* The KJRA is the exclusive means of judicial review, and gives the district court broad authority for granting relief.

New subsection 1(b)(3) is intended to compensate persons who are not regulated by the Board, yet who are compelled to appear as witnesses before the Board. Requiring payment of witness fees and mileage, as in civil cases, is an appropriate means of placing the cost of regulation on the profession, not on the public. At the present time, no such payments are made.

Subsection 1(d) proposes additional language to maintain the confidentiality of records gathered by the Board in the course of its investigations. The Board's legal staff spend countless hours responding to subpoenas *duces tecum* issued in civil cases for Board investigative materials. Last year alone we have received subpoenas or similar discovery demands from federal district courts in Maryland, Missouri and California, as well as from state district courts in many Kansas counties. So far, the Board has successfully defended the current public policy that the materials are confidential. The requested language would assist the Board by clarifying that a subpoena would not be proper. This language parallels that used in the risk management and peer review statutes.

The Board has conferred with representatives of the Kansas Trial Lawyers Association. Based upon their input, we suggest two amendments to the bill. The first amendment would delete the phrase "all other" appearing on page 2, line 43. Secondly, the Board recommends adding to the end of subsection (d), at page 3, line 6 the following:

"except that (1) the board may, upon proper written authorization of the patient and payment of reasonable expenses, release a copy of patient records in its possession to the person who is the patient identified in the patient records, or to the legal representative of the patient, without waiving the privilege provided by this section; (2) all records, documents and pleadings constituting the agency record in a disciplinary administrative proceeding shall be deemed open public records unless otherwise provided by law; and (3) this

section shall not be construed to make inadmissible in any action or proceeding any document lawfully obtained from the board as provided by this section."

This additional language maintains an appropriate boundary between regulatory, public, and individual interests.

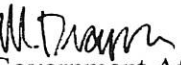
The issues which are contained in House Bill No. 2670 do not expand the Board's authority to investigate, nor do they represent significant changes in public policy. Rather, the requested amendments strengthen the Board's ability to carry out its duty to protect the public health, safety and welfare. I urge your favorable consideration of the bill, and ask that the committee recommend the bill be passed. Once again, thank you for the opportunity to appear before you.



KANSAS MEDICAL SOCIETY

February 11, 1998

TO: House Health and Human Services Committee

FROM: Meg Draper 
Director of Government Affairs

SUBJ: HB 2670: Investigations by the Healing Arts Board

The Kansas Medical Society appreciates the opportunity to testify this afternoon on HB 2670, relating to investigations and proceedings conducted by the Board of Healing Arts.

The bill makes several cosmetic changes, eliminating language that is duplicative and unnecessary and adding new language for consistency with other laws. We support these changes. However, we would like to offer some additional comments on the proposed changes to subsection (d), beginning on page 2, line 39 of the bill, which amends the confidentiality section of the law. The new language would help ensure that the records, reports and other information that is gathered by the Board as part of an investigation are privileged and not subject to discovery, subpoena or other means of legal compulsion, or admissible in a civil or administrative action other than a proceeding conducted by the Board.

We were informed late this morning that the board had been negotiating with the Kansas Trial Lawyers Association and would be presenting a balloon amendment to this bill. KMS strongly opposes this amendment unless additional clarifying language is also included. The board's amendment waives the confidentiality and privilege laws for "all records, documents and pleadings constituting the *agency record* in a disciplinary administrative proceeding" (emphasis added). In KMS' opinion, this "agency record" would include documents submitted to and generated by peer review committees, information that you as a committee passed a law to protect last year. SB 221, the peer review bill, amended the laws relating to the confidentiality and protection of peer review records. The debates on this issue were hard-fought and thorough, and the bill passed out of both chambers unanimously. We believe that by passing this language without our proposed amendments, you would be taking a huge step backwards from an issue that was resolved last year.

Our proposed amendment would be inserted after the words "agency record" and would read: "except those records deemed privileged pursuant to K.S.A. 65-4925", which is the peer review law. This would only clarify that the law governing peer review records is not superceded by this law.

Thank you very much for considering our comments.

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committee shall be required to testify, nor shall the testimony of such person be admitted into evidence, in any civil, criminal or administrative action, other than a disciplinary proceeding by the appropriate state licensing agency, as to any committee discussions or proceedings.

(d) Any person or committee performing any duty pursuant to this act shall be designated a peer review committee or officer pursuant to K.S.A. 65-4915 and amendments thereto.

(e) *A licensing agency in conducting a disciplinary proceeding in which admission of any peer review committee report, record or testimony is proposed shall hold the hearing in closed session when any such report, record or testimony is disclosed. Unless otherwise provided by law, a licensing agency conducting a disciplinary proceeding may close only that portion of the hearing in which disclosure of a report or record privileged under this section is proposed. In closing a portion of a hearing as provided by this section, the presiding officer may exclude any person from the hearing location except the licensee, the licensee's attorney, the agency's attorney, the witness, the court reporter and appropriate staff support for either counsel. The licensing agency shall make the portions of the agency record in which such report or record is disclosed subject to a protective order prohibiting further disclosure of such report or record. Such report or record shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity. No person in attendance at a closed portion of a disciplinary proceeding shall at a subsequent civil, criminal or administrative hearing, be required to testify regarding the existence or content of a report or record privileged under this section which was disclosed in a closed portion of a hearing, nor shall such testimony be admitted into evidence in any subsequent civil, criminal or administrative hearing. A licensing agency conducting a disciplinary proceeding may review peer review committee records, testimony or reports but must prove its findings with independently obtained testimony or records which shall be presented as part of the disciplinary proceeding in open meeting of the licensing agency. Offering such testimony or records in an open public hearing shall not be deemed a waiver of the peer review privilege relating to any peer review committee testimony, records or report.*

Sec. 3. K.S.A. 65-4925 and K.S.A. 1996 Supp. 65-4915 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the Kansas register.

Approved April 24, 1997.

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"except that (1) the board may, upon proper written authorization of the patient and payment of reasonable expenses, release a copy of patient records in its possession to the person who is the patient identified in the patient records, or to the legal representative of the patient, without waiving the privilege provided by this section; (2) all records, documents and pleadings constituting the agency records in a disciplinary administrative proceeding shall be deemed open public records unless otherwise provided by law; and (3) this section shall not be construed to make inadmissible in any action or proceeding any document lawfully obtained from the board as provided by this section."

, except those records deemed privileged pursuant to K.S.A. 65-4925,

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Testimony on HB 2670

The Kansas Trial Lawyers Association supports HB 2670 with amendments that have been worked out with Mark W. Stafford, General Counsel for the Kansas Board of Healing Arts.

Over the last several weeks I have met with Mark Stafford personally and have conferred with him numerous times to work out compromise language. We have no opposition to any of the changes other than those in K.S.A. 65-2839a(d). The Board's intent is to clarify this section so they will hopefully not have to spend as much time responding to records subpoenas. Patients need access to as much factual information as they can obtain in order to fully investigate and evaluate what happened. Patients would like to have any and all materials gathered by the Board other than peer review documents. In the spirit of compromise we have reached the following agreement with the Board and hope that this Committee will accept these amendments and pass this Bill out of Committee as amended. Our agreement with the Board is as follows:

1. Page 2, ln. 30: strike the words "all other."
2. Ln. 35: add the words "except that" after the word "board."
3. Add the following language as new Sections (d)(1), (2) and (3) that read:

(1) The Board may, upon proper written authorization of the patient and payment of reasonable expenses, release a copy of patient records in its

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possession to the person who is the patient identified in the patient records, or to the legal representative of the patient, without waiving the privilege provided by this section;

(2) All records, documents and pleadings constituting the agency record in a disciplinary administrative proceeding shall be deemed open public records unless otherwise provided by law; and

(3) This section shall not be construed to make inadmissible in any action or proceeding any document lawfully obtained from the board as provided by this section.

As a result of these changes the Board has the protection it needs to investigate and patients will have clear access to records that will help them figure out what occurred in their individual situations.

Thank you for consideration of this bill and our proposed agreed amendments.

Respectfully submitted,



KIRK W. LOWRY

Session of 1998

HOUSE BILL No. 2670

By Committee on Health and Human Services

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9 AN ACT concerning the Kansas healing arts act; investigations and pro-
10 ceedings conducted by the board; amending K.S.A. 65-2839a and re-
11 pealing the existing section.

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

14 Section 1. K.S.A. 65-2839a is hereby amended to read as follows: 65-
15 2839a. (a) In connection with any investigation by the board, the board
16 or its duly authorized agents or employees shall at all reasonable times
17 have access to, for the purpose of examination, and the right to copy any
18 document, report, record or other physical evidence of any person being
19 investigated, or any document, report, record or other evidence main-
20 tained by and in possession of any clinic, office of a practitioner of the
21 healing arts, laboratory, pharmacy, medical care facility or other public
22 or private agency or office if such document, report, record or evidence
23 relates to ~~;~~ ~~medical professional~~ competence, unprofessional conduct, *au-*
24 *thority to engage in the practice of the healing arts* or the mental or
25 physical ability of a ~~licensee~~ ~~safely~~ person to practice ~~;~~ ~~(tri-stars)~~ ~~healing arts safely~~
26 *any profession for which an individual is licensed or registered by the*
27 *board.*

28 (b) For the purpose of all investigations and proceedings conducted
29 by the board:

30 (1) The board may issue subpoenas compelling the attendance and
31 sworn testimony of witnesses or the production for examination or cop-
32 ying of documents or any other physical evidence if such evidence relates
33 to ~~;~~ ~~medical professional~~ competence, unprofessional conduct, *authority to*
34 *engage in practice* or the mental or physical ability of a ~~licensee~~ ~~safely~~
35 *person to practice* ~~;~~ ~~(tri-stars)~~ ~~healing arts safely~~ *any profession for which an*
36 *individual is licensed or registered by the board.* Within five days after
37 the service of the subpoena on any person requiring the production of
38 any evidence in the person's possession or under the person's control or
39 *compelling the attendance and sworn testimony of any person*, such per-
40 son may petition the board ~~;~~ ~~to revoke, limit or modify the subpoena for a~~
41 *protective order.* The board ~~shall revoke, limit or modify~~ *may issue a*
42 *protective order revoking, limiting or modifying* such subpoena if in its
43 opinion the evidence required ~~does not relate to practices which may be~~

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1 ~~grounds for disciplinary action is not within the authority of the board as~~
2 ~~provided by this section, is not relevant to the charge which is the subject~~
3 ~~matter of the proceeding or investigation, or does not describe with suf-~~
4 ~~ficient particularity the physical evidence which is required to be pro-~~
5 ~~duced. Any member of the board, or any agent designated by the board,~~
6 ~~may administer oaths or affirmations, examine witnesses and receive such~~
7 ~~evidence.~~

8 (2) Any person appearing before the board shall have the right to be
9 represented by counsel.

10 ~~(3) The district court, upon application by the board or by the person~~
11 ~~subpoenaed, shall have jurisdiction to issue an order:~~

12 ~~—(A) Requiring such person to appear before the board or the boards~~
13 ~~duly authorized agent to produce evidence relating to the matter under~~
14 ~~investigation; or~~

15 ~~—(B) revoking, limiting or modifying the subpoena if in the court's~~
16 ~~opinion the evidence demanded does not relate to practices which may~~
17 ~~be grounds for disciplinary action, is not relevant to the charge which is~~
18 ~~the subject matter of the hearing or investigation or does not describe~~
19 ~~with sufficient particularity the evidence which is required to be pro-~~
20 ~~duced.~~

21 (3) A subpoena pursuant to this section to compel the testimony of
22 any person not licensed, registered or seeking to be licensed or registered
23 shall be accompanied by witness and mileage fees as established by K.S.A.
24 28-125 and amendments thereto.

25 (c) The board may receive from the Kansas bureau of investigation
26 or other criminal justice agencies such criminal history record information
27 (including arrest and nonconviction data), criminal intelligence informa-
28 tion and information relating to criminal and background investigations
29 as necessary for the purpose of determining initial and continuing qual-
30 ifications of licensees and registrants of and applicants for licensure and
31 registration by the board. Disclosure or use of any such information re-
32 ceived by the board or of any record containing such information, for any
33 purpose other than that provided by this subsection is a class A misde-
34 meanor and shall constitute grounds for removal from office, termination
35 of employment or denial, revocation or suspension of any license or reg-
36 istration issued under this act. Nothing in this subsection shall be con-
37 strued to make unlawful the *lawful* disclosure of any such information by
38 the board in *the course of or at* a hearing held pursuant to this act.

39 (d) Patient records, including clinical records, medical reports, lab-
40 oratory statements and reports, files, films, other reports or oral state-
41 ments relating to diagnostic findings or treatment of patients, information
42 from which a patient or a patient's family might be identified, peer review
43 or risk management records or information received and ~~all other~~ records

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1 kept by the board as a result of the investigation procedure outlined in
2 this section shall be confidential *and privileged* and shall not be disclosed
3 *and shall not be subject to discovery, subpoena or other means of legal*
4 *compulsion for their release to any person or entity and shall not be*
5 *admissible in any civil or administrative action other than a proceeding*
6 *by the board.*

7 (e) Nothing in this section or any other provision of law making com-
8 munications between a physician and the physician's patient a privileged
9 communication shall apply to investigations or proceedings conducted
10 pursuant to this section. The board and its employees, agents and rep-
11 resentatives shall keep in confidence the names of any patients whose
12 records are reviewed during the course of investigations and proceedings
13 pursuant to this section.

14 Sec. 2. K.S.A. 65-2839a is hereby repealed.

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

17

except that:

- 1) the board may, upon proper written authorization of the patient and payment of reasonable expenses, release a copy of patient records in its possession to the person who is the patient identified in the patient records, or to the legal representative of the patient, without waiving the privilege provided by this section;
- 2) all records, documents and pleadings constituting the agency record in a disciplinary administrative proceeding shall be deemed open public records unless otherwise provided by law; and
- 3) this section shall not be construed to make inadmissible in any action or proceeding any document lawfully obtained from the board as provided by this section.

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