

Approved: 3-15-99
Date

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by Chairperson Sandy Praeger at 10:00 a.m. on March 8, 1999 in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Emalene Correll, Legislative Research Department
Norman Furse, Revisor of Statutes
JoAnn Bunten, Committee Secretary

Conferees appearing before the committee:

Gary Robbins, Executive Director, Kansas Optometric Association
Jerry Slaughter, Executive Director, Kansas Medical Society
Amy Campbell, Kansas State Ophthalmological Society
Mary Ellen Conlee, Via Christie "Team Vision"
Sherry R. DuPerier, Executive Director, Board of Hearing Aid Examiners
John Peterson, Kansas Speech, Language and Hearing Association

Others attending: See attached list

Hearing and Action on: HB 2117 - Optometrist therapeutic licensee authorized to prescribe, administer and dispense oral drugs

Gary Robbins, Executive Director, Kansas Optometric Association, testified before the Committee in support of **HB 2117**. Passage of the bill would amend the optometry laws to expand the scope of practice of optometry to include low vision rehabilitation services; the prescribing, administration, or dispensing of specified oral drugs; and the use of topical and oral drugs for the examination and diagnosis of insufficiencies or abnormal conditions of the eye. Mr. Robbins noted that the bill is the result of cooperation between the Kansas Optometric Association, Kansas Medical Society, Kansas State Ophthalmological Society, Via Christi Medical Center, Kansas Occupational Therapy Association, Kansas Physical Therapists Association, and the Kansas State Nurses Association. (Attachment 1)

Also testifying in support of the bill were Jerry Slaughter, KMS, (Attachment 2); Amy Campbell, Kansas State Ophthalmological Society, (Attachment 3); and Mary Ellen Conlee, Via Christie, (Attachment 4).

There were no opponents to **HB 2117**.

Senator Hardenburger made a motion the Committee recommend HB 2117 favorably for passage, seconded by Senator Bleeker. The motion carried.

Hearing and Action on: HB 2214 - Fees authorized to be charged by the Kansas board of Examiners in fitting and dispensing of hearing aids

Sherry DuPerier, Executive Director, Board of Hearing Aid Examiners, testified before the Committee in support of **HB 2214**. Passage of the bill would amend a statute in the act under which persons who fit and dispense hearing aids are licensed that sets out the maximum fees the Board of Examiners in Fitting and Dispensing Hearing Aids may establish by rules and regulations. The House Committee amendments added three additional statutes to the bill, all of which are a part of the laws governing the licensing and regulation of persons who fit and dispense hearing aids. Ms. DuPerier noted that the statutory fee limits have never been changed in 30 years. (Attachment 5)

John Peterson, representing the Kansas Speech, Language and Hearing Association, spoke in support of the bill and requested an amendment that would delete language on page 2, line 14, relating to the residency requirement. Mr. Peterson distributed a copy of a 1998 Attorney General's Opinion relating to non-resident persons receiving a license in order to engage in a business in Kansas. (Attachment 6)

The Revisor also called the Committee's attention to the need to strike language on page 2, lines 3 to 7 and insert transitional language that would phase in the fee structure. After Committee discussion, Senator Becker

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE, Room 526-S, Statehouse, at 10:00 a.m. on March 8, 1999.

made a motion to strike language on page 2, (c) and insert appropriate transitional language relating to the fee structure as noted by the Revisor, and to strike on page 2, line 14 (a) "Is a resident of this state", seconded by Senator Hardenburger. The motion carried.

Senator Langworthy made a motion that the Committee recommend **HB 2214 as amended** favorably for passage, seconded by Senator Jones. The motion carried.

Approval of Minutes

Senator Jones made a motion to approve the Committee minutes of March 3 and 4, 1999, seconded by Senator Langworthy. The motion carried.

Adjournment

The meeting was adjourned at 11:00 a.m.

The next meeting is scheduled for March 9, 1999.

SENATE PUBLIC HEALTH AND WELFARE COMMITTEE
GUEST LIST

DATE: 3-8-99

| NAME | REPRESENTING |
|------------------------|-------------------------------|
| GARY ROBBINS | Ks Optometric Ass'n |
| Gilan Cockrell, OD | President Ks Optometric Ass'n |
| Ron Hein | Ks Optometric Ass'n |
| SHERRY DUPEIER | Ks. Bd. of Hrg Aid Examiners |
| LARRY FROELICH | Board of Pharmacy |
| Kent Galley | Mebill, Cocher, & Associates |
| JW Philbrook | self |
| GARY NICKEL | KOA |
| Bob Nelson | Optometrist |
| Wes Garton | Optometrist |
| Andy Stephens | Optometrist |
| David Miles | Associated Press |
| Troy Maydew O.D. | optometrist / KOA |
| Laurie White, OD | Dodge City |
| Karen Aldridge | self |
| Wayne Hemphill OD | optometrist |
| Jay Blasts | Grand Wind Industries Inc. |
| Bob Conyell OD | Am Cancer Society |
| TAMMY ODIE GOERING, OD | Optometrist - McPherson |

Kansas Optometric Association

1266 SW Topeka Blvd., Topeka, KS 66612
785-232-0225

TESTIMONY
SENATE PUBLIC HEALTH & WELFARE COMMITTEE
MARCH 8, 1999

I am Gary Robbins, Executive Director of the Kansas Optometric Association. I appreciate the opportunity to appear in support of House Bill 2117. During the 1996 Legislature, Senate Bill 684 was enacted which authorized the creation of an Interprofessional Advisory Committee (IAC) under the State Board of Examiners in Optometry. This advisory committee was composed of three optometrists and three ophthalmologists with a member of the State Board of Examiners in Optometry serving as the non-voting chair of the committee. The Interprofessional Advisory Committee was given the responsibility to assist with the implementation of legislation authorizing optometrists to treat glaucoma and to study the advisability of allowing optometrists to prescribe oral drugs for the treatment of ocular conditions. In late December, the IAC Report was submitted by the State Board of Examiners in Optometry to the 1999 Legislature.

H.B. 2117 will allow us to update the optometry law to reflect changes in the training and education of optometrists over the last twenty years. Currently, thirty-four states allow optometrists to prescribe some oral drugs for the treatment of ocular conditions. I am pleased that Dr. Gilan Cockrell of Emporia, the President of the Kansas Optometric Association, could be available to answer technical questions about the bill or the negotiation process. I have prepared an explanation of the bill, which is attached to my testimony.

The 1996 update to the optometry law was negotiated between the Kansas Medical Society, Kansas Optometric Association and the Kansas State Ophthalmological Society. With the last two years of hard work and communication by the Interprofessional Advisory Committee serving as a foundation, all three professional organizations were again able to work out compromise legislation involving complex and difficult issues.

Healthcare professionals need to work together in order to achieve quality health care. Collaboration, not antagonism, between providers will help keep Kansas on the cutting edge of health care delivery. When providers work together on issues such as this, it is a win-win for the patients, the state policy makers, and the providers.

We wish to acknowledge the hard work and patience of KMS Executive Director Jerry Slaughter, KMS Lobbyist Meg Draper and KSOS Executive Director Amy Campbell in this two-year process along with their respective Boards of Directors and the State Board of Examiners in Optometry.

I also wish to acknowledge the cooperation of Via Christi Medical Center, Kansas Medical Society, Kansas Occupational Therapy Association, Kansas Physical Therapists Association and the Kansas State Nurses Association in preparing the low vision rehabilitation language. Finally, I want to thank Revisor of Statutes Norm Furse for his assistance in drafting the final low vision amendment. Thank you for your attention, and we would ask for your support of this compromise legislation.

Explanation of House Bill 2117

House Bill 2117 represents two years' of ongoing communication, discussion and negotiation between the Kansas Medical Society, Kansas Optometric Association, and the Kansas State Ophthalmological Society. The bill, a product of a difficult but positive process, is a compromise supported by the three organizations. This process was initiated by legislation enacted by the 1996 Kansas Legislature allowing optometrists to treat glaucoma. That legislation authorized the State Board of Examiners in Optometry to appoint an Interprofessional Advisory Committee of three optometrists and three ophthalmologists to assist and monitor the implementation of the glaucoma legislation and study the issue of optometrists prescribing oral drugs to treat ocular conditions. In late December, the IAC Report was submitted by the State Board of Examiners in Optometry to the 1999 Legislature.

The key provisions of H.B. 2117 include the following:

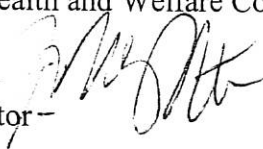
1. Therapeutic licensees can prescribe oral antibacterial drugs, oral antiviral drugs, oral antihistamines and oral analgesic drugs for ocular conditions. Oral steroids and oral antiglaucoma agents for ocular conditions must be prescribed in consultation with an ophthalmologist.
2. Optometrists could not prescribe oral drugs for children under 6 years of age. The Interprofessional Advisory Committee (IAC) must review this requirement for possible sunset, and submit a report to the legislature on this issue by January 1, 2002.
3. The continuing education requirements for optometrists increase from 20 hours annually to 24 hours annually, five of which should be in ocular pharmacology, therapeutics or related topics of study approved by the State Board of Examiners in Optometry. Therapeutic licensees must complete a 15-hour course on the use of oral drugs in ocular therapeutics before May 31, 2000.
4. Optometrists may give orders to a licensed professional nurse, licensed practical nurse, registered physical therapist and registered occupational therapist in the provision of low vision rehabilitation services. This section was added at the request of Via Christi who operates a low vision rehabilitation clinic in Wichita. This section will give them greater flexibility in offering low vision services to the patients of both optometrists and ophthalmologists.
5. The State Board of Examiners in Optometry requested several changes to this legislation which were agreeable to all parties involved. The major change requires all out-of-state optometrists seeking to practice in Kansas under reciprocity to be therapeutic licensees. Under the code of "unprofessional competence section," the Board seeks language defining the prescribing, purchasing, administering, selling or giving away prescription drugs for other than legal and legitimate purposes. This is similar language to the Healing Arts Act. The optometry law is also updated to reflect 1998 legislation permitting professionals to form limited liability companies. The final change gives the Board civil fining authority against licensees similar to other licensing boards, i.e. healing arts, dental board and board of pharmacy.
6. On page 12, the language sunsetting the Interprofessional Advisory Committee on January 1, 2001 is deleted to allow the IAC to continue its work.



KANSAS MEDICAL SOCIETY

March 8, 1999

To: Senate Public Health and Welfare Committee

From: Jerry Slaughter - 
Executive Director

Subject: **HB 2117; relating to the practice of Optometry**

The Kansas Medical Society appreciates the opportunity to appear in support of HB 2117, which amends the optometry act to allow optometrists to prescribe oral drugs under certain conditions.

This legislation is the result of several months of meetings between our organization, the Kansas State Ophthalmological Society, and the Kansas Optometric Association. I think it is safe to say that no one is completely happy with HB 2117. Each side made significant concessions during the discussions we had over the proposal. Undoubtedly you may hear from some physicians that the proposal goes too far, just as you may hear from some optometrists that the proposal does not go far enough. However, we do believe that, on balance, the bill is a reasonable compromise that is fairly consistent with the approach taken in many other states in addressing this issue.

I think the process we and the optometrists engaged in over the past year demonstrates that two health professions with some overlapping scopes of practice can work out their differences if both sides are reasonable and willing to listen to each other. I would like to especially note the contributions and work of Gary Robbins, KOA president Dr. Gilan Cockrell, and their committee. Everyone involved in the process worked hard and kept the discussions going forward, which was at times challenging.

We do support the bill before you, and would urge its favorable consideration without amendments. Thank you.

**TESTIMONY PRESENTED BY AMY A. CAMPBELL TO THE
SENATE PUBLIC HEALTH AND WELFARE COMMITTEE
ON BEHALF OF THE
KANSAS STATE OPHTHALMOLOGICAL SOCIETY**

March 8, 1999

Thank you, Madam Chair, for the opportunity to speak to you today on behalf of the Kansas State Ophthalmological Society (KSOS).

The 1996 Legislature passed Senate Bill 684 - relating to the practice of optometry. The bill emerged as a solution to the question of whether or not optometrists should be permitted to treat glaucoma, and was the result of a cooperative drafting process with the Kansas Medical Society, the Kansas Optometric Association, and the Kansas State Ophthalmological Society. Senate Bill 684 established the Interprofessional Advisory Committee (IAC) to implement the provisions of co-management for the treatment of adult open-angle glaucoma and to research and report to the Legislature on the advisability of expanding optometric scope of practice to include the use of oral pharmaceutical drugs. The bill set out the requirements to be met by applicants for glaucoma licensure, including evidence of professional liability insurance, completion of a prescribed course of instruction, and co-management with an ophthalmologist for a specified period and a specified minimum number of diagnoses.

Since 1996, the IAC has been meeting on a regular basis. These meetings have involved long hours of discussion, tedious review of reporting forms, and lively debate regarding the issue of oral drugs. You have each received a copy of the report issued by the IAC and the State Board of Examiners in Optometry. If you have any questions about the implementation of glaucoma co-management, you can probably find an answer in its pages.

A significant result of the Interprofessional Advisory Committee has been the open communication and cooperation of its members, a process which unites professionals toward a common goal, the implementation of glaucoma co-management to the benefit of Kansas eye care patients. This is not unlike the working relationships between most ophthalmologists and optometrists across the state of Kansas.

Although the IAC did not recommend expanding the scope of practice of optometrists to include prescribing oral drugs, the members of the IAC recognized the value of negotiating issues among professionals and avoiding potential political battle. Following the IAC summer meetings, representatives of the Kansas State Ophthalmological Society and Kansas Medical Society sat down with members of the Kansas Optometric Association to find a common ground on the issue of oral pharmaceuticals. This is the agreement before you. It is truly a major compromise on an extremely contentious issue.

Ophthalmologists take this issue very seriously. There are many ophthalmologists who are not supportive of this concept. Some have set aside their concerns in the interest of cooperation, others are holding their judgment until after its implementation. The KSOS has agreed to this compromise to avoid placing the Legislature in the middle of a scope of practice argument, and especially to encourage continued cooperation between these three professional organizations to the benefit of our patients.

Thank you for your consideration of HB 2117. We appreciate your understanding of the nature of this compromise and ask that you refrain from adding any amendments which might upset the current agreement. A list of our officers has been included on the back of this testimony for your information.

Senate Public Health and Welfare
Date: 3-8-99
Attachment No. 3

Please direct questions to any of the following individuals:

Amy A. Campbell, Executive Director - 785-234-9719

P.O. Box 4103, Topeka, KS 66604

Jemshed A. Khan, M.D., President - 816-931-4733 (Kansas City)

Bill Clifford, M.D., Vice President - 316-275-7248 (Garden City)

Michael G. Reynolds, M.D., Secretary Treasurer - 785-342-6989 (Emporia)

Joseph T. Philipp, M.D., Legislative Chair - 785-537-7373 (Manhattan)

Frank Griffith, M.D., Legislative Committee- 785-827-0488 (Salina)

Perry N. Schuetz, M.D., AAO Councillor - 316-793-8414 (Great Bend)

What is an Ophthalmologist?

An ophthalmologist is a physician (doctor of medicine, MD, or doctor of osteopathy, DO) who specializes in the medical and surgical care of the eyes and visual system and in the prevention of eye disease and injury.

An ophthalmologist has completed:

- four or more years of college premedical education,
- four or more years of medical school,
- one year of internship and
- three or more years of specialized medical and surgical and refractive training and experience in eye care.

An ophthalmologist is a specialist who is qualified by lengthy medical education, training and experience to diagnose, treat and manage all eye and visual systems and is licensed by a state regulatory board to practice medicine and surgery.

An ophthalmologist is a medically trained specialist who can deliver total eye care: primary, secondary and tertiary (i.e., vision services, contact lenses, eye examinations, medical eye care and surgical eye care), diagnose general diseases of the body and treat ocular manifestations of systemic diseases.

An ophthalmologist is an Eye M.D.



ViaChristi
Health System

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TESTIMONY PRESENTED TO SENATE PUBLIC HEALTH

MARCH 8, 1999

RE: HB 2117

Senator Praeger, members of the committee, I am Mary Ellen Conlee, representing Team Vision, an eye care organization that is owned by Via Christi Health System. Team Vision provides surgical and clinical eye care to the community with 90% of its revenue from Medicare and Medicaid patients. As part of the clinical care, Team Vision operates a low vision rehabilitation center, where patients may learn how to continue with activities of daily living while dealing with the challenges of visual impairments. Trained professionals work with clients to help them learn to use their residual vision to their highest capability. As a result, many of the clients are able to stay in their own homes instead of being forced into a nursing home environment.

Our problem is a Medicare and Medicaid billing problem. While a trained nurse, occupational or physical therapist is both the most appropriate and most cost effective professional to work with low vision clients, Medicare continues to deny payment for such services. The direction from the medical billing intermediary requires that the optometrist actually provide the services. Yet, in some states and regions, the professionals listed above are paid under Medicare and Medicaid regulations. The difference seems to be whether or not the optometrist has the statutory authority to delegate low vision rehabilitation services to other trained health care professionals.

The proposed solution to our problem in HB 2117 would amend K.S.A. 65-1501 with the language proposed in (3). This language would allow our optometrist to give orders to a nurse, an occupational therapist or a physical therapist to assist in the delivery of low vision rehabilitation services. With this statutory change, we believe that Team Vision could then receive reimbursement from Medicare and Medicaid for the services provided.

Thank you for the opportunity to present this problem and proposed solution to you.

DuPerier, Chair
First
Wichita, KS., 67202
1-316-264-8870

Bill Graves, *Governor*

Wm. A. Bell
931 SW MacVicar
Topeka, KS., 66606
1-913-357-7033

Jack L. Blue, Vice-Chair
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Wichita, KS., 67214
1-316-682-9578

Clinton Acheson
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Topeka, KS., 66604
1-913-271-9420

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1930 S. Broadway
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1-316-264-2411

THE STATE OF KANSAS

KANSAS BOARD OF HEARING AID EXAMINERS

Box 252

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Testimony in Support of HB 2214
Senate Committee on Public Health and Welfare
Monday, March 8, 1999

Sherry R. DuPerier, M.S. CCC-A
Chair / Executive Director
Board of Hearing Aid Examiners

My name is Sherry DuPerier and I am the chairperson of the Board of Hearing Aid Examiners. The Board is responsible for enforcing the provisions of the act including licensure, renewal, examination, and regulating hearing aid dispensers in the state. Typically licensees number approximately 225 with changes occurring mainly due to retirement, transfers, and the addition new licensees.

The board was established in 1968. Licensure by examination and renewal of licenses has been handled in much the same manner until recent years when many procedural changes were implemented. In regard to advertising and consumer complaints, the consumer protection agency has functioned well with the dispensers and has been able to resolve the great majority of the complaints brought before the board through discussion as opposed to prosecutorial hearings. In the past few years the hearing aid industry has seen tremendous changes in technology and the board has made significant strides in adapting the licensing examination to reflect the changes.

In regard to the actual budget issues, in the past few years the board has made many changes in the general operations of the agency. This has resulted in a more efficient and responsible board, however with the limited funds available, this has also resulted in a negative cash flow. For the past 3 years the Department of the Budget and the Legislative Research Department have pointed to the negative trends and have suggested that we request an increase in our statutory

Senate Public Health and Welfare
Date: 3-8-99
Attachment No. 5

limitations. The actual fees set in the rules and regulations are at the maximum limits and have been at this maximum level for several years.

The statutory fee limits have never been raised. Currently the total fees charged a new applicant to obtain full licensure vary from \$100 to \$125 depending on the actual method of entry. Annual renewal remains at \$50. This compares to some of our neighboring states where fees are in the range of \$250 to \$500 for initial entry into the profession and \$150 to \$200 for annual renewal. A summary of our current and proposed limits, proposed fees and area comparisons is included in your packet. It is obvious from this summary that our fees do not reflect the norm. It is also clear that to provide the services necessary to the consumers of the state an increase is required.

- Passage of the bill will allow the board to continue to function at the current level while still maintaining an adequate carry forward balance.
- In addition it will allow the board to fund necessary items such as rent, copier and computer use, and a private phone line. To date these items have been absorbed by the executive director's personal business.
- The bill will allow the board to more adequately carry out the statutory responsibilities in the time frames set forth in the budget outcome measures.
- Additional funding will also make it possible for the board to more thoroughly review and investigate consumer complaints. Currently this aspect of the agency's work is difficult to control as the number and seriousness of complaints fluctuates significantly. Additional secretarial hours and additional investigative funds could substantially improve this situation.

Let me spend a few minutes clarifying the fee structure that is being proposed. Relatively high fee limits have been requested to maintain the board administration for several years into the future. Fees, of course, will not be raised to these maximum levels at this time or at any time in the foreseeable future but to eliminate the need for additional revisions, these adjustments are necessary. K.S.A. 74-5810(a) sets fee limits, however the fees are actually set in the rules and regulations. The summary spreadsheet lists the requested fee limits and the proposed fee structure. Most of the fees categories are currently in effect, however some new fees have been added. These new fees include examination, licensure verification with other state agencies, certificate replacement, change of sponsor, and insufficient funds fees.

To clarify, it is not the boards plan to raise fees to the requested limits, rather a moderate fee increase will be requested through amendments to the rules and regulations to allow the board to more adequately carry out the statutory responsibilities.

Subsequent to the original draft of the bill we have amended the bill with changes that reflect current practice and KAPA based changes. The amendments are as follows:

- the addition of a non-refundable clause for all fees
- eliminate K.S.A. 74-5811(d) which states that an applicant for a license must be free of infectious disease, as the requirement is not being addressed and the board has been advised to eliminate it
- amend K.S.A. 74-5811(b) to read is 21 years of age or older instead of 18 years as it is more in line with other licensed professions and with the age limits of other states hearing aid licensing requirements
- revise K.S.A. 74-5818 to include denial of a license or certificate and amend any other statutes that need be to reflect the denial clause
- revise K.S.A. 74-5824 to reflect appropriate penalties according to KAPA or other statutes as the penalty amounts have not been amended since the drafting of the bill

These amendments will reflect changes that will bring the statutes in line with current practices within the licensing law and other Kansas statutes. All amendments are felt to be in the best interest of the consumer and are considered to be non-controversial.

54

| | A | B | C | D | E | F | G | H |
|----|--------------------------------|---|------------------|------------------|---|----------------------|----------------------|-------------------|
| | | CURRENT CAPS | PROPOSED CAPS | PROPOSED FEES | | STATE OF NEBRASKA | STATE OF MISSOURI | STATE OF TEXAS |
| 3 | APPLICATIONS | *50 | 150 | *75 | | *500 | *150 | *100 |
| 4 | TEMP LICENSE | *25 | 150 | *75 | | *200 | *150 | *200 |
| 5 | TEMP RENEW | 100 | 175 | 135 | | ? | 75 | ? |
| 6 | PERMANENT LICENSE | *50 | 150 | *75 | | *400 | *125 | *200 |
| 7 | LICENSE RENEWAL | 50 | 150 | 75 | | 400 | 125 | 200 |
| 8 | LATE FEE | 100 | 200 | 150 | | ? | 100 | ? |
| 9 | EXTENDED LATE FEE | 200 | 300 | 250 | | ? | 250 | ? |
| 10 | | | | | | | | |
| 11 | | ANNUALLY | NA | ANNUALLY | | BIANNUALLY | ANNUALLY | ANNUALLY |
| 12 | | | | | | | | |
| 13 | | | | | | | | |
| 14 | TYPICAL FEES FOR NEW LICENSEE* | 125 | | 225 | | 550 | 425 | 500 |
| 15 | SUBSEQUENT ANNUAL FEES | 50 | | 75 | | 200 | 125 | 200 |
| 16 | | | | | | ADJ TO 1 YR | | |
| 17 | | | | | | | | |
| 18 | EXAM/WRITTEN | NA | 50 | 25 | | | 45 | 100 |
| 19 | EXAM/PRACTICAL | NA | 35 | 15 | | | 125 | 150 |
| 20 | STATE VERIFICATION | NA | 25 | 10 | | 25 | 35 | |
| 21 | REPLACEMENT | NA | 25 | 10 | | 10 | 15 | |
| 22 | APPRENTICE FEE | NA | NA | NA | | | | 200 |
| 23 | INSUFFICIENT FUNDS | NA | 35 | 15 | | | 50 | |
| 24 | REGISTER BUSINESS | NA | NA | NA | | | 25 | |
| 25 | CEU'S REQUIRED | YES | (YES) | (YES) | | YES | YES/12 | YES** |
| 26 | | **MUST HAVE 25 CEU IN 2 YEAR PERIOD WITH NO MORE THAN 5 FROM MANUFACTURER | | | | | | |

1-3



State of Kansas

Office of the Attorney General

301 S.W. 10th Avenue, Topeka 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

September 15, 1998

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ATTORNEY GENERAL OPINION NO. 98-44

The Honorable Doug Mays
State Representative, 54th District
1920 S.W. Damon Court
Topeka, Kansas 66611

Re: United States Constitution--Article IV, States' Relations--Section 2, Citizenship; Privileges and Immunities; Residency Requirement for Pawnbrokers and Precious Metal Dealers

Synopsis: The pursuit of a "common calling," the right to practice one's chosen profession, is a fundamental privilege protected by of Article IV, Section 2 of the United States Constitution, commonly referred to as the Privileges and Immunities Clause. The ability to engage in business as a pawnbroker or precious metal dealer is as much a "common calling" as any other occupation or profession and is thus a protected privilege under the Clause. In the absence of any known substantial rationale to justify Kansas residency for persons who wish to engage in business as a pawnbroker or precious metal dealer, the Kansas statutory provisions which establish such a requirement are found to violate Article IV, Section 2 of the United States Constitution. Cited herein: K.S.A. 16-708. U.S. Const., Art. 4, § 8.

*

*

*

Dear Representative Mays:

Within the Kansas act regulating pawnbrokers and precious metal dealers, K.S.A. 16-708 disqualifies non-resident persons, partnerships comprised of non-residents, and corporations controlled and owned by non-residents from receiving a license to engage in business as a pawnbroker or precious metal dealer. The applicable provisions of that statute provide that a license shall be granted or renewed to:

Senate Public Health & Welfare
Date: 3-8-99
Attachment No. 6

"(b) Any person who has not been an actual resident of the state of Kansas for at least two (2) years immediately preceding the date of his application;

....

"(i) Any partnership, unless all of the partners shall be eligible to receive a license as an individual; and

"(j) A corporation, if any officer, manager, director or stockholder would be ineligible to receive a license as an individual."

As representative for the 54th district, you ask whether this residency requirement is constitutional under the Commerce Clause (Article 1, Section 8), the Equal Protection Clause (Amendment XIV) and/or the Privileges and Immunities Clause (Article IV, Section 2) of the United States Constitution. Because we conclude that this residency requirement is unconstitutional under the Privileges and Immunities Clause, we need not address its constitutionality in relation to the Commerce Clause or the Equal Protection Clause.

The first sentence of Article IV, Section 2 of the United States Constitution, commonly referred to as the Privileges and Immunities Clause, states:

"The Citizens of each State shall be entitled to all the Privileges and Immunities of the Citizens of the several states."

This Clause was intended to "fuse into one Nation a collection of independent, sovereign States."¹ To determine whether a state statute runs afoul of the Privileges and Immunities Clause, courts have developed a two part inquiry. Because not all forms of discrimination against citizens of other states are constitutionally infirm, the initial inquiry is whether the statute burdens one of those privileges and immunities protected by the Clause.²

"Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."³

¹*Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 92 L.Ed.2d 1460 (1948).

²*Helminski v. Supreme Court of Colorado*, 603 F.Supp. 401 (D.C. Colo. 1985).

³*Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 383, 98 S.Ct. 11852, 1860, 56 L.Ed.2d 354 (1978).

A state may discriminate on the basis of residency, for example, with respect to the right to vote⁴ and the right to hold public office.⁵ However, the pursuit of a "common calling," the right to practice one's chosen profession, is one of the most fundamental of those privileges protected by the Clause.⁶ The United States Supreme Court has repeatedly found that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that state."⁷ Whether the discriminatory burden on nonresidents takes the form of unequal licensing fees⁸ or employment preferences granted only to residents,⁹ the Clause has operated to make the burden unconstitutional. In our opinion, the ability to engage in business as a pawnbroker or precious metal dealer is as much a "common calling" as any other occupation or profession and is thus a protected privilege under the Clause.

However, as the court in *Helminski* continued:

"The conclusion that the disputed regulation discriminates against a protected privilege is only the first step of the inquiry. The privilege is not absolute and does not preclude discrimination where there is a "substantial reason" for difference in treatment. The inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."¹⁰

Within recent years the United States Supreme Court addressed this issue in the context of an attorney residing in Vermont who was prohibited from practicing law in New Hampshire.¹¹ The justifications offered on behalf of New Hampshire for the residency requirement were that a nonresident attorney would be less likely to become, and remain, familiar with local rules and procedures; to behave ethically; to be available for court proceedings; and to do pro bono and other volunteer work in the state. The Court, however, determined that New Hampshire had neither advanced a substantial reason for its discrimination against nonresident applicants to the bar, nor demonstrated that the discrimination practiced bore a close relationship to its proffered objectives. Having initially found that the nonresident's interest in practicing law was a protected privilege, the

⁴*Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 169, 42 L.Ed.2d 136 (1972).

⁵*Kanapaus v. Ellisor*, 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed.2d 136 (1974).

⁶*Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).

⁷*Toomer*, 334 U.S. at 396, 68 S.Ct. at 1156.

⁸*Toomer*, *supra*.

⁹*Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978).

¹⁰*Helminski*, 603 F.Supp. at 406 (Citations omitted.)

¹¹*Supreme Court of New Hampshire v. Piper*, 470 U.S. 271, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985).

Court concluded that New Hampshire's bar residency requirement violated the Privileges and Immunities Clause.

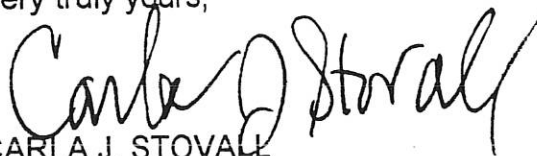
In the absence of any known substantial and closely tied rationale to justify Kansas residency for persons who wish to engage in business as a pawnbroker or precious metal dealer, we must likewise conclude that K.S.A. 16-708(b), (i) and (j), which establish such a requirement, violate Article IV, Section 8 of the United States Constitution.

We hasten to add, however, that where parts of a statute or a section of a statute can be readily separated, then the part which is constitutional may stand while the unconstitutional part is rejected.

"Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that the act would have been passed without the objectional portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand. Whether the legislature had provided for a severability clause is of no importance. This court will assume severability if the unconstitutional part can be severed without doing violence to legislative intent."¹²

There is no reason to think that the Regulation of Pawnbrokers and Precious Metal Dealers Act,¹³ would not have been passed without the residency requirements found in K.S.A. 16-708(b), (i) and (j). Additionally, absent such a residency requirement, the act still effectively operates to regulate pawnbrokers and precious metal dealers who engage in business in Kansas. Consequently, in our opinion the remaining parts of K.S.A. 16-708 may stand while the unconstitutional provisions are rejected.

Very truly yours,



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CJS:JLM:CN:jm

¹²*State, ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City*, 264 Kan. 293, 317 (1998), quoting *Felton Truck Line v. State Board of Tax Appeals*, 183 Kan. 287 (1958).

¹³K.S.A. 16-706 *et seq.*